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International Covenant on Civil and Political Rights

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Views

Communication No. 1758/2008

Submitted by:	Emelysifa Jessop (represented by counsels, Tony Ellis and Alison Wills)
Alleged victim:	The author
State party:	New Zealand
Date of communication:	16 October 2007 (initial submission)
Document references:	Special Rapporteur's rule 97, transmitted to the State party on 7 February 2008 (not issued in document form)
Date of adoption of Views:	29 March 2011

* Made public by decision of the Human Rights Committee.

Subject matter:	Arrest, trial and conviction of a juvenile offender.
Procedural issues:	Non-substantiation of claims; non-exhaustion of domestic remedies; victim standing; inadmissibility *ratione materiae.*
Substantive issues:	Right to an effective remedy; arbitrary detention; right of persons deprived of their liberty to be treated with humanity and respect; right of juvenile persons to be tried as speedily as possible; right to a fair hearing; right to a defence; impartiality of judges; equality of arms; right to examine witnesses; expeditious proceedings; presumption of innocence; right not to be compelled to testify against oneself; juvenile persons; right to review of conviction and sentence; right to recognition as a person before the law; right to privacy; children's right to measures of protection; prohibition of discrimination.
Articles of the Covenant:	2, paragraph 3; 9, paragraph 1 and 3; 10, paragraph 2(b) and paragraph 3; 14, paragraph 1, 2, 3(a), 3(b), 3(c), 3(d), 3(e), 3(g), paragraph 4, paragraph 5; 16; 17; 24; and 26
Articles of the Optional Protocol:	1; 2; 3; 5(2)(b)

On 29 March 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1758/2008.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (one hundredth and first session)

concerning

Communication No. 1758/2008**

Submitted by:	Emelysifa Jessop (represented by counsels, Tony Ellis and Alison Wills)
Alleged victim:	The author
State Party:	New Zealand
Date of communication:	16 October 2007 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2011,

Having concluded its consideration of communication No. 1758/2008, submitted to the Human Rights Committee on behalf of Ms. Emelysifa Jessop under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. Emelysifa Jessop, born in 1983, who was aged 15 when she was convicted and sentenced to 4 years imprisonment for aggravated robbery. She claims that her rights under the following articles of the Covenant were violated by the State party: article 2, paragraph 3; article 9, paragraph 1 and 3; article 10, paragraph 2(b) and paragraph 3; article 14 paragraph 1, paragraph 2, paragraph 3(a), 3(b), 3(c), 3(d), 3(e), 3(g), paragraph 4 and paragraph 5; article 16; article 17; article 24; and article 26. The Optional Protocol entered into force for New Zealand on 26 May 1989. The author is represented by counsels Tony Ellis and Alison Wills.

** The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The facts as presented by the author

2.1 The author is an immigrant to New Zealand, born in 1983 of Niuean parents[1], with whom she came to New Zealand at the age of two months. She was charged with aggravated robbery on 2 June 1998, which involved a violent attack and robbery of an 87-year-old man, in his home, which took place on the same day. Around 3:00 pm., the author and her cousin, aged 15, had visited a friend of the latter, drank and became intoxicated. The author's cousin later left the author with her friend, and exited the apartment. Around 6:00 pm., the victim was attacked and robbed. Shortly after, a neighbour reported to the police having seen two girls outside his apartment. He could describe their clothing but not their faces. The author and co-accused were arrested around 7:30 pm.

2.2 The crime of attack and robbery was later admitted by the author's cousin (the co-offender), whose evidence at trial stated that the author was not present when the offence was committed[2]. This coincides with the victim's initial statement that one girl robbed him[3]. After the author was arrested, together with her cousin, the victim alleged that he was robbed by two girls. Due to his ill-health, he could not testify at trial.

2.3 The author, who was aged 14 years and nine months at the time of the offence, has always proclaimed her innocence. She claims that she was detained arbitrarily upon arrest, while she was intoxicated, for the purpose of a police identity parade, shortly after the crime had taken place. The neighbour who witnessed the crime identified the author and co-offender as perpetrators.

2.4 A few hours later at the police station, the author initially denied the offence, in a recorded interview[4]. Compelled by the pressure of both the police and her mother, she however entered a second "confession"[5] of the crime, which began with the words "I am going to lie now", spoken in the author's native Niuean language, and recorded on a video tape. Immediately after this confession, the author was formally arrested and charged.

2.5 A family conference was convened on 15 June 1998 and did not reach agreement on the appropriate jurisdiction for trial. On 30 June 1998, the Otahuhu Youth Court Judge delivered a judgment on jurisdiction[6], but remanded the case to the High Court of New Zealand, which sentenced the author and the co-offender to four years' imprisonment on 22 July 1998[7]. The author, who was then aged 14 years and 10 months, contends that this jurisdiction does not apply child-friendly procedures.

2.6 On 2 March 1999, the Court of Appeal of New Zealand allowed the author's appeal, as it found that the Youth Court proceedings were not held in conformity with the Summary

[1] The author specifies that Niue is a remote Polynesian island in the Pacific Ocean with 2,166 inhabitants. It is self-governing, in free association with New Zealand, with Niue being fully responsible for its internal affairs. New Zealand retains control over the country's external affairs and defence.

[2] It appears from the file, however, that upon arrest, the co-offender did initially implicate the author

[3] It however appears from the file that the victim entered a subsequent statement, in which he affirmed having been assaulted by two attackers.

[4] It appears from the file that she initially admitted to the detective, before the video commenced, her involvement in the offence, and having hit the victim (*see* the Court of Appeal of New Zealand judgement of 19 December 2005, para. 29). She thereafter provided different information during the first interview, denying her participation in the crime, followed by a new admission of involvement in the second recorded interview.

[5] The quotation marks are the author's.

[6] Oral Judgment of Judge R.N. Gilbert, 30 June 1998, District Court, held at Otahuhu.

[7] High Court of New Zealand, Sentence of Justice Potter, Auckland Registry S.27/98, 22 July 1998.

Proceedings Act,[8] which provides that the charge to which the defendant is required to plead shall be read to him and s/he shall then be called upon to plead either guilty or not guilty. As this was not done by the Youth Court, the Court of Appeal set aside the conviction and sentence imposed by the High Court, and remitted the matter to the Youth Court for a plea to be taken by the author according to the law.[9]

2.7 On 24 June 1999, the author entered a not-guilty plea in the Youth Court, and established a *prima facie* case. The Youth Court recommitted the case to the High Court of New Zealand for trial. The author elected trial by jury.

2.8 On 8 October 1999[10], the High Court adopted a pre-trial ruling, in which it declared the videotaped police interview to be admissible evidence. The Court found the confession of guilt entered by the author during the second interview to be a true and voluntary one under the Evidence Act[11], as it did not result from any inducement, pressure, and was not tainted by unfairness[12].

2.9 After a second pre-trial ruling rejecting the author's application for discharge, the trial Judge, Justice Potter, instructed the jury on 14 October 1999, and the latter found the author guilty of the charge of aggravated robbery. The High Court delivered its judgement on 14 December 1999, in which it sentenced the author to 4 years and 8 months imprisonment. She was then aged 16 years, and was 6 months pregnant.

2.10 On 14 December 1999, the same day she received the High Court sentence, the author appealed before the Court of Appeal of New Zealand, on the ground that her confession was not a genuine one, and should not have been presented as evidence to the jury.

2.11 On 1 February 2000, legal aid was declined, and this decision was confirmed upon review on 3 March 2000. Reasons for dismissal of legal aid were provided to the author's trial Counsel, but not to her. On 30 March 2000, the Court of Appeal dismissed the appeal against conviction in an *ex parte* decision.

2.12 On 26 March 2000, the author gave birth to her son, being handcuffed for several hours whilst in labour, the handcuffs being finally removed for the actual birth only. Immediately after the birth, the author had to accept the presence of a prison officer observing her while taking a shower. Her baby was then taken away from her after 24 hours.[13]

2.13 In January 2002, the author completed her sentence and was released.

2.14 On 19 March 2002, in *R.* v. *Taito,*[14] the Privy Council considered applications made by a number of unsuccessful appellants before the Court of Appeal of New Zealand, including the author. The Privy Council found the process of *ex- parte* dismissal of appeals

[8] Section 153A(4) of the Summary Proceedings Act (1957)

[9] *The Queen* v. *Emelysifa Jessop*, Court of Appeal of New Zealand, CA 404/98, 2 March 1999

[10] *The Queen* v. *Emelysifa Jessop*, High Court of New Zealand, T.1411/99, 8 October 1999

[11] Section 20 of the Evidence Act (1908)

[12] The author's contention is that she was pressured into confessing her guilt, and that pressure came from the concerted disbelief of her mother and the police, coupled with the advice to her that the co-offender had implicated her

[13] The author annexes a letter from her to her lawyer, dated 24 March 2000, in which she describes her being in labour while handcuffed, and the efforts of her family to have the handcuffs removed, to no avail. She also annexes a letter from her father to the manager of the Mt Eden Women's Prison, complaining against the same issue (letter dated 27 March 2000).

[14] [2003] 2 NZLR 577. The Privy Council was then New Zealand's highest jurisdictional instance. Since 1 July 2004, it is the Supreme Court of New Zealand.

to be illegal, including the author's appeal of March 2000. As a result of this decision, the author's case was remitted back to the Court of Appeal of New Zealand.

2.15 On 19 December 2005, the Court of Appeal dismissed the appeal against conviction and sentence.

2.16 On 27 March 2006, the author's application for leave to appeal to the Supreme Court was dismissed without an oral hearing.[15] Both the author's grievances, and the Supreme Court reasons for dismissing them, were similar to the Court of Appeal's earlier decision.

2.17 On 16 August 2007, the author filed a subsequent application before the Supreme Court, to set aside its dismissal of leave to appeal (decision of 27 March 2006), on the ground that the Court had not acted impartially, based on its composition.[16]

The complaint

3.1 The author alleges several breaches of the Covenant by the State party in her regard, vis-à-vis the following events and substantive rights:

Police identification parade and transporting to the police station

3.2 The author alleges that she was arbitrarily detained by the State party's police authorities for the purpose of unlawful criminal investigations, in breach of article 9, paragraph 1 of the Covenant, up until the time she was formally charged and arrested. She could not have "consented" to attend the police identification parade as a 14 year-old child under the influence of alcohol. Her parents were not contacted by the police to provide consent on her behalf for the police parade.

The interview at the police station

3.3 The author claims that once in the police station, and despite the police's claim that they advised her of her right to a lawyer, the police failed to ensure that she adequately understood her right and need to consult with a lawyer, in breach of article 9, paragraph 1, article 10, paragraph 1, article 14, paragraph 3 (b) and paragraph 4 of the Covenant.

3.4 The author further alleges that the State party failed to ensure that the "support person", nominated under the Children, Young Persons and their Families Act (1989), who was her mother in the circumstances, acted in her best interests.

Right not to be compelled to testify against oneself or to confess guilt

3.5 The author contends that she was compelled to confess guilt to a crime she did not commit, due to pressure exerted by the police, her mother acting as support person, and the lack of safeguards in respect to her vulnerability as a child. She initially adamantly denied her involvement in the offence, but was later implicated by the co-offender during a statement to the police. Her statement, prior to the confession, "I am going to lie now" was ignored by the police and her own mother, who was scared of the police. Consequently, the admission of her confession in the trial was in violation of her rights under article 14, paragraph 3 (g) of the Covenant.

[15] [2006] NZSC 14, 27 March 2006.

[16] The author invoked, *inter alia*, the fact that one of the Supreme Court judges who denied leave to appeal was sitting on the Court of Appeal's bench at the time of the author's *ex parte* hearing of 30 March 2000 (*see supra*, para 2.13)

Breach of the right to the presumption of innocence and right to an effective remedy

3.6 The author claims that her right to the presumption of innocence was breached by the State party when she was sentenced to 4 years imprisonment without entering a guilty plea. Despite the fact that her case was remitted back to the Youth Court for a new trial because of this initial defect, her sentence was upheld. By so doing, the State party breached article 14, paragraph 2, read in conjunction with article 2, paragraph 3 of the Covenant, as it failed to ensure an effective remedy for breach of her right to the presumption of innocence.

Committal of the Case to the High Court and fair hearing

3.7 The author contends that the committal of her case to the High Court on 30 June 1998 and 24 June 1999 by the Youth Court was in breach of her right to a fair trial. Without application by either party, the Youth Court should have exercised its discretion to assess whether this was in the author's best interest, and analyze the ensuing consequences of proceedings in the High Court for her.[17]

3.8 The author adds that no attempt was made to ensure that she could participate effectively in the criminal proceedings, in respect to her specific status as a child and corresponding ability, in psychological terms, to comprehend and participate in the proceedings. Through this omission, the author claims that the State party acted in breach of article 14 paragraph 2, paragraph 3(d), paragraph 4, article 16, article 24 and article 26 of the Covenant.

Delays in proceedings

3.9 The author contends that the re-committal of her case to the High Court entailed an undue total trial delay of 16 months, which is attributable to the substantive error made in the relation to the author's plea, her subsequent appeal to the Court of Appeal, and the decision of the Youth Court to remit the case to the High Court jurisdiction. This significant delay was aggravated by the fact that she had been detained for one year at the time before her trial.

3.10 She adds that a further two-year undue delay was imposed on her from the date of the *ex parte* decision in her second appeal, on 30 March 2000, to the date of the Privy Council decision of 19 March 2002 in *R.* v. *Taito.*

3.11 Furthermore, the author contends that she was then exposed to yet an additional delay of 3 years between the Privy Council decision in March 2002 and her subsequent case before the Court of Appeal on 19 December 2005, at least one year of which can be attributed to the Court for lack of proper Court documentation such as the summing up, sentencing notes, and a complete case on appeal. The author adds that as a whole, from the date of her second appeal in March 2000, to the date of her fifth appeal, filed in August 2007 with the Supreme Court, 6.5 years elapsed, 4.5 years of which were undue delay. For these reasons, she contends that the State party breached article 9, paragraph 3, article 10, paragraph 2 (b), and article 14 paragraph 3 (c), paragraph 4 and paragraph 5 of the Covenant in her regard. The author adds that such violations were exacerbated in that she was detained throughout the Court of Appeal proceedings, from March 2000 to January 2002. She had already served her sentence by the time her third domestic appeal took place.

[17] The author refers, *inter alia*, to the Guidelines for Action on Children in the Criminal Justice System.

Judicial bias

(i) High Court

3.12 The author alleges that Justice Potter who had previously sentenced her to 4 years in the High Court later presided her jury trial for the same offence.[18] While her Counsel at the time did not request that this Judge recuse herself, the author herself was not consulted, and did not provide any informed waiver. This amounted to a breach of article 14, paragraph 1 and paragraph 5 of the Covenant in her regard. She also states that Justice Robertson was unfit to sit on the High Court pre-trial application for discharge of October 1999, as she was a member of the Court of Appeal proceedings in March 1999.

(ii) Court of Appeal

3.13 The author further contends that the Court of Appeal comprised of two permanent Judges of the Court, and one Judge of the High Court, (Justice Panckhurst), who was nominated by the Chief Justice. The author requested a copy of the appointment warrant, but this was rejected. Her challenge to this decision was also dismissed. She thereafter requested the Acting President of the Court of Appeal, Justice Glazebrook, to recuse herself in relation to the nomination of the Justice Panckhurst, on the ground that she was *parti pris* and displayed apparent bias, but the Judge declined to do so. The Court also declined the author's request that the appeal be referred to a full Court, and heard the appeal. By doing so, and in the circumstances described above, the author claims that the Court was hostile[19].

(ii) Supreme Court

3.14 The author also claims that her appeal before the Supreme Court, which was heard in March 2006, also suffered from defects under article 14 of the Covenant. She claims that Justices Elias and Tipping were *parti pris.* To support her allegation, the author explains that the Supreme Court Chief Justice Elias was a member of the Court of Appeal upon overturning of her sentence on 2 March 1999. Also, Justice Tipping was one of those who declined her appeal *ex parte* in March 2000, and who had, among other Judges, provided evidence to a parliamentary law reform Committee in respect of the reform of criminal appellate procedure considered in the *Taito* decision. According to the author, these elements amounted to a further violation of article 14, paragraph 1 and paragraph 5 of the Covenant in her regard.

Inability to examine witnesses

3.15 The author claims that the State party failed to ensure that the victim of the crime, Mr. K., was available to be cross-examined at her trial. This had grave consequences for the author in light of the two inconsistent statements made by Mr. K. In the first statement, made on 3 June 1998, Mr. K. said that he was almost blind but had heard only one girl yelling at him. In his second statement he said that two girls had come to his flat and both were yelling at him. Mr. K was considered unfit to give evidence at trial due to health problems. Requests made to the prosecutor by defence counsel that Mr. K. be interviewed by an independent counsel were rejected. The prosecutor held that the author and her co-accused had admitted that they had both been present in Mr. K's flat. Even if Mr. K. was to say that he was now unsure, that would be understandable given the nature of the assault upon him, the lapse of time and his poor eye sight. Similarly, an application under section

[18] The author refers to the Committee's General Comment No.32 (on article 14), para. 21, and to Principle 2 of the Bangalore Draft Code of Judicial Conduct (2001)

[19] The author refers to General Comment No.32, para 25.

347 of the Crimes Act (1961) for discharge of the author based on the injustice that would result from Mr. K's absence from trial was dismissed by the Court. The latter should have canvassed whether Mr. K. could have given his evidence from home or adjourned the trial until such time as he could. It did not and, thereby, prevented any possibility of a fair trial. These facts constitute a violation of article 14, paragraph 3 (e) of the Covenant.

Penalty imposed

3.16 The sentencing Judge failed to deduct the 11 months of detention she had spent, on the ground that pre-trial detention spent in Youth Justice Detention facilities could not be taken into account, as a matter of statutory law.[20] She also contends that the 4 year and 8 months sentence is strictly punitive, as opposed to rehabilitative, disproportionate to the circumstances and gravity of the offence, and in contradiction with the principle that deprivation of liberty of juveniles should be a measure of last resort. According to the author, this amounted to a breach of her rights under article 9 paragraph 3, article 10 paragraph 3, article14 paragraph 4, and article 24 of the Covenant.

Right to review sentence and conviction by a higher tribunal

3.17 The author argues that she was denied her right to review of her conviction by a higher tribunal according to the law, in breach of article 14, paragraph 3 (d), paragraph 3 (e), paragraph 5 and article 26 of the Covenant when her appeal was declined *ex parte*, without hearing, by the Court of Appeal. Reasons for this denial were only communicated to her Counsel.

3.18 The author also alleges that the dismissal, by the Supreme Court, of her appeal on 27 March 2006 was also in breach of article 14, as it consisted in four paragraphs only, and was devoid of an oral hearing.

Right to privacy

3.19 The author's name was published since the first sentencing in the High Court in July 1998, overturned by the Court of Appeal in March 1999, then reaffirmed in the jury trial in October 1999 and in her March 2000, October 2005 appeals, and subsequent leave to appeal to the Supreme Court in March 2006. Should she have been tried by the Youth Court, her name would not have been disclosed, given the application of special protection to juvenile litigants. Therefore, the committal of the case to the High Court entailed a breach of article 14, paragraph 4, and of article 17 of the Covenant for the author.

Absence of opportunities for educational and cultural activities in detention

3.20 The author stresses the impact of a full-time custodial sentence on a 16-year-old child, particularly on her right to education and development. During her pre-trial detention in a youth facility, she was preparing to take School certificate. However, being placed in an adult prison after her sentencing, she was unable to meaningfully continue her education. The author also stresses her distress in losing her Niuean culture while being detained,

Author's supplementary submissions

4.1 On 18 March 2008, the author informs the Committee, *inter alia*, that her application of 16 August 2007, for review of the Supreme Court's decision of 27 March

[20] Section 81 of the Criminal Justice Act (1985) [repealed in 2002], cited in *R.* v. *Emelysifa Jessop*, High Court of New Zealand 14 December 1999, para. 11.

2006, declining leave to appeal, was dismissed on 30 November 2007. The author therefore exhausted domestic remedies at her disposal in New Zealand.

4.2 The author claims that the quorum of the Supreme Court in this last decision consisted of two of the very same Judges who had already dismissed her application in March 2006 (Justices Elias and Blanchard). She claims that the involvement of Justice Elias (who also sat in her 1999 appeal), went beyond technical issues, and resulted in a breach of her rights under article 14, paragraph 1 of the Covenant. She also challenges the participation of Justice Tipping in the Supreme Court decision of 27 March 2006, who had previously been involved in the author's appeal in 2000, and also in parliamentary lobbying regarding the question of *ex parte* appeal decisions. As Supreme Court Judges did not disclose their involvement in the lobbying, full recusal applications could not be made. The Supreme Court rejected the author's allegations related to bias, on the ground that there was no objective and real ground for questioning the ability of Judges to hear the case.

4.3 In the same submission, the author informs the Committee that on 11 March 2008, she had submitted a complaint to the United Nations Special Rapporteur on the Independence of Judges and Lawyers. The submission reiterates her initial allegations.

4.4 On 28 October 2009, the author submits additional information, in which it drew the Committee's attention to the Committee on the Rights of the Child's General Comment No.10, and Concluding Observations pertaining to the administration of juvenile justice. She reiterates that her right to the presumption of innocence, her right to be heard, and her right to privacy were breached by the State party.

State party's observations on admissibility and merits

5.1 On 7 August 2008, the State party submits that the Communication should be declared inadmissible, mainly on the ground that several allegations raised were already remedied by domestic Courts, and considering the principle that the Committee cannot act as a "fourth instance".

5.2 The State party is of the view that the failure to obtain a formal plea in the author's first appearance before the Youth Court, and the invalid procedure which followed were remedied by the first Court of Appeal decision, which remitted the case back to the Youth Court for a plea to be entered. Similarly, the author's subsequent substantive appeal to the Court of Appeal in March 2000, which was determined *ex parte*, was held invalid in March 2002, following an appeal by the author and eleven others to the Privy Council. As a result, a rehearing of her substantive appeal before the Court of Appeal was directed. As such, these two parts of the communication should also be declared inadmissible under article 1 of the Optional Protocol, as the author lacks the standing of a victim to the extent of these allegations.

Complaint regarding the police identity parade

5.3 The State party considers that the author's allegations, that she did not consent to the identity parade as she was intoxicated, that she could not consult with a lawyer, was forced to compel against herself and was arbitrarily detained should be declared inadmissible by the Committee. The Court of Appeal determined that there was no evidential basis for the proposition that the author was arrested or detained before the identification process took place. That conclusion was reiterated by the Supreme Court. No evidence was presented in the author's trial in support of the claim that she was intoxicated, or that she did not agree to the identification parade.

5.4 The State party further submits, on the merits, that no issues arise under articles 14, paragraph 3 (b) and (g), as the author was not subject to any criminal charge.

Transporting to the police station

5.5 Regarding the author's allegations under articles 9, paragraph 1, 14, paragraph 3 (b) and (g), and 14, paragraph 4, contending that she had been arbitrarily detained, the State party provides that they should be declared inadmissible, having thoroughly been determined by domestic courts, and being unsubstantiated. This complaint was raised in the Court of Appeal, which rejected it on the facts, on the basis that there was no evidential basis for the assertion that she had been unlawfully arrested. The Supreme Court confirmed this finding.

Interview at the police station

5.6 The State party rejects the author's allegations, under articles 14, paragraph 3(b) and (g) and article 10, paragraph 1 as inadmissible, in so far as they do not substantiate that she was exposed to pressure to confess guilt from her mother, the police and the co-accused, or that she did not understand her right to have a lawyer present. The facts show that she willingly went to the police station, and properly understood her rights as communicated to her by the police, including her right to have a lawyer, and her right to leave at any moment. Her mother was nominated as a support person, in conformity with the law. She was again informed of her rights in the presence of her mother, and was only interviewed in the latter's presence. No suggestion was made, at any time in the hearings, that she did not, in fact, understand this. In so far as the author also invoked article 10 paragraph 1, the State party contends that this provision is not engaged, as she was not detained. The High Court, considering all relevant elements, found on the facts that the author was treated appropriately during the investigation in light of her age.

Admissibility of the confession of guilt

5.7 On the issue of the confession of guilt, the State party further notes that a pre-trial hearing was specifically devoted to the question of the admissibility of this confession as evidence. The Judge took into account the author's vulnerability as a child, and her initial statement in Niuean language, but ruled that the police had taken appropriate precautions, and evidence did not reveal that she was overborne or overwhelmed as a result of any pressure. As such, the Judge found that the second interview was voluntarily made. Both the Court of Appeal and the Supreme Court also found that the author's mother had properly understood her role as nominated person, and there is no reason to challenge this determination. The State party also notes that the author failed to challenge the admissibility of the confession under the CYPF Act before the High Court, or in the first or second appeals to the Court of Appeal. It is only in the third appeal before the Court of Appeal, and later before the Supreme Court, that these allegations were made, and dismissed.

Committal of the case to the High Court

5.8 The State party, referring to the Court of Appeal judgement of 19 December 2005, notes that the author never applied to forego trial by jury, or otherwise challenge the referral of the case to the High Court by way of judicial review, although this option was available to her at the time. Nor was there any suggestion later made, before the Court of Appeal, that there was any flaw in the processes adopted by the High Court during the jury trial. As a result, the State party is of the view that the author failed to exhaust domestic remedies on this count. Regarding the author's allegations under articles 2, paragraph 3 (a) and 14, paragraph 2, the State party observes that the author consented, in a memorandum, to the appeal being allowed, and the matter remitted back to the Youth Court for the author's plea to be properly taken. The author should have reasonably anticipated that the

matter, being too serious to be dealt with by the Youth Court, would be again referred to the High Court once the plea was taken.

Determination of Charge

5.9 The State party recalls the author's criminal background, noting that she had previously been convicted of two counts of aggravated robbery in 1997 for incidents involving knives. This case had at the time been considered by the Youth Court, which had imposed its maximum penalty of three months' residence order, followed by a three-month supervision order. In light of this background, and the seriousness of the offence at stake, the author was referred to the High Court, and charged with aggravated robbery under section 235 of the Crimes Act (1961), an indictable offence with a penalty of up to 14 years imprisonment. As the author was under the age of 15 at the time of the offence, the only options available to the Youth Court were (a) to impose the maximum penalty of 3 months residence followed by three months supervision; or (b) refer the case to the High Court which could impose a more substantial sentence. The Court of Appeal rejected the suggestion that the Youth Court may have been an appropriate jurisdiction for trial, in light of the gravity of the offence.

Sentencing

5.10 The State party notes that the Court of Appeal upheld the sentence imposed by the High Court. The initial sentence took account of sentencing principles applicable to children, and the Court of Appeal determined that there was nothing inappropriate for the sentencing Judge in the High Court to have given little weight to the age of the author at the time of the offence as a rehabilitative factor, given her past criminal record.

Failure to take into account time spent by the author in youth justice facilities

5.11 The author's contention that by imposing in December 1999 a second sentence of four years and eight months, the High Court failed to take into account the 11 months she spent in youth justice facilities was never presented before domestic courts and is, as such, inadmissible according to the State party. Furthermore, the State party brings the following clarifications: The author was in CYPF care after her arrest on 3 June 1998, and until her sentencing on 22 July 1998. By law at that time, the time spent in a youth justice residential facility prior to sentencing did not count as time served toward the final sentence, but that was a matter which could be taken into account by the sentencing Judge in setting the term of imprisonment. This is what happened in the author's case, as the High Court Judge gave her a four-month credit.

5.12 From 22 July to 4 August 1998 the author commenced serving her sentence at Mt Eden Prison in Auckland. This period counted toward time served on her sentence. On 5 August 1998, she was transferred to a youth justice facility in Christchurch pursuant to s. 142A of the Criminal Justice Act (detention of young persons serving a sentence of imprisonment), and continued to serve her sentence in that youth justice residential facility until her successful appeal to the Court of Appeal in March 1999. This period counted towards her time served.

5.13 When her conviction and sentence were overturned by the Court of Appeal on 2 March 1999, the author remained in the youth justice facility, pursuant to s.142A of the Criminal Justice Act, although she was moved from the secure unit to the open unit on 8 March 1999. This period from 2 March to 7 April 1999 would in theory not necessarily count towards time served, but was in fact counted in the Department of Corrections as time served on remand in the calculation of her release date.

5.14 On 7 April 1999, she was transferred back to Mt Eden prison in Auckland to appear before the Youth Court to enter her plea. On 13 April 1999, she applied for bail, and was released on bail on 15 April 1999. The period of 7 to 15 April counted as time served on remand in the calculation of her release date.

5.15 The author remained on bail until her conviction in the High Court in October 1999, when she was remanded to Mt Eden prison in Auckland pending sentencing on 14 December 1999. This period on remand counted in the calculation of her release date. She then continued to serve her sentence of four years and eight months, until her release on parole in January 2002, i.e. two years and one month after her second sentencing, and three years six months after her first sentence was imposed, five months of which was spent on bail. In total, she served a sentence of 37 months, representing two thirds of her final sentence in accordance with usual practice at this time, taking into account days of loss of remission for disciplinary offences committed in prison.

5.16 The author's final release date was calculated from the date of her initial sentencing on 22 July 1998, and all time since that date spent in any facility, including the Youth Justice residential facility, are in fact taken into account in calculating her time served. She therefore spent only a maximum of 49 days (from charge to sentencing) in a youth justice facility that was not counted as time served toward her sentence. This is significantly less than the 11 months claimed in the author's communication. Further, the sentencing Judge allowed a reduction of four months in the sentence for the Youth Court processes.

Undue delay

5.17 Referring to the Committee's jurisprudence and General Comment No.32 on article 14, the State Party rejects the author's allegations. In respect of allegations of delay during the High Court jury trial, it was open for the author to apply to have the charges against her stayed or dismissed because of delay by the Youth Court (under s. 322 of the CYPF Act) or by the High Court (under s. 347 of the Crimes Act or s. 25(b) of the Bill of Rights Act). No such application was made, hence the author failed to exhaust domestic remedies on that count.

5.18 Regarding her claim on the 16-month-period from the offence to the High Court jury trial, the State party reviews the chronology of the judicial process, noting that she had been sentenced in July 1998, i.e. less than one month after being remitted to the High Court for sentencing. The author did not appeal until four months later (24 November 1998), and her Counsel accepted responsibility for that delay, having been approached to lodge an appeal in August 1998. After the appeal was filed, a consent memorandum was signed on 27 February 1999, and the Court of Appeal entered a judgement in the author's favour two working days later, on 2 March 1999.

5.19 The author was then released on bail pending trial. The Case was called in the Youth Court on various occasions in April, May and June 1999 while evidential depositions were taken. A formal plea was entered on 24 June 1999, and the case was referred to the High Court for trial on the same day. The author elected trial by jury in August 1999, two pre-trial applications were heard, and the trial took place in October 1999.

5.20 The author's claim of undue delay was rejected by the Court of Appeal in 2005, which ruled that, on the facts, seven months from the first appeal (March 1999) to the High Court jury trial (October 1999) could not be qualified as undue delay.

5.21 The State party rejects the author's factual allegation that she was detained for 1 year before her trial, which aggravated the delay suffered, in breach of article 10, paragraph 2 (b), of the Covenant. She was detained, under sentence, from her conviction in July 1998 until her first (successful) appeal in March 1999. From that appeal to the trial, the author was in custody for a total of one month and 11 days, which she spent in a youth justice

residential institution. Only six days of that period were spent in a secure unit. She was otherwise released on bail (on 2 March 1999) pending trial.

5.22 The author's (second) appeal was rejected *ex parte* in March 2000. In June 2000, the author filed an application for judicial review in the High Court. In approximately November 2000, she proposed to pursue the same issue by joining an existing application for leave to appeal by appellant Fa'afete Taito. The application was considered by the Privy Council in February 2001, and judgement was given in March 2002. The period between the leave decision and the substantive hearing allowed for the preparation of the record and submissions in respect of all twelve appellants.

5.23 The rehearing directed by the Privy Council was not heard by the Court of Appeal for over three years. The author's Counsel accepted responsibility for two-thirds of that period (two years and nine months). Her allegations that the remaining one-year delay must be attributed to the Court for systemic delay and failure to provide proper documentation are not correct. During the 11 months before the hearing, the Court was actively seeking progress in the case. Several letters were sent from the Court to Counsel between May 2004 and January 2005, but the author's Counsel repeatedly requested material from the Court, and sought to adjourn the case. On 23 June 2005, the Court allocated a hearing date of 27 October 2005. On 26 October 2005 (the day before the hearing as scheduled), Counsel for the author requested that the meeting be adjourned, reallocated, or referred to a Court of five judges (rather than the usual three) to allow issues relating to the appointment of the judiciary to be further considered. The hearing proceeded on 27 October 2005.

5.24 On 17 August 2007, i.e. 17 months after the Supreme Court declined to grant the author leave to appeal, the author filed an application to set aside this decision. Further sets of applications were submitted until 14 November 2007. The Supreme Court determined the application in a written decision on 30 November 2007, i.e. two weeks after the filing of the final set of submissions.

5.25 The State party further underlines the author's lack of standing as a victim under article 1 of the Optional Protocol, as the time taken for each appeal did ultimately not change her conviction, and corollary imprisonment. A faster trial or appeals process would not have resulted in her release.

Judicial bias

5.26 Regarding author's allegation concerning Justice Robertson, that he was unfit to sit on the High Court pre-trial application for discharge in October 1999, as he was a member of the Court of Appeal who overturned the author's sentence in March 1999, the State party affirms that it is inadmissible as it was never raised before domestic courts. Subsidiarily, it is without merit: The decision of the Court of Appeal of 2 March 1999 only involved agreement by the Court with the submissions of both Prosecution and the defence, that a formal guilty plea had not been properly entered. The Court did not make a determination of any aspect of the charge against the author.

5.27 Concerning the alleged bias of Justice Potter as presiding Judge in the High Court jury trial in 1999, when she had sentenced the author in July 1998, the State party notes that this issue was not raised by the author in the High Court. To the contrary, the author's then-Counsel had specifically requested that Potter J. be the Judge to sentence the author after the jury delivered its guilty verdict. While this claim was raised in the substantive Court of Appeal hearing, it was rejected as unfounded. The Supreme Court also discussed the issue in its decision declining to review its refusal to grant leave. According to the State party, this part of the communication is therefore inadmissible for non-exhaustion of domestic remedies and lack of substantiation. It is also devoid of merit.

5.28 The State party also considered the author's challenge of the statutorily-governed procedure, under the Judicature Act (1908), under which Justice Panckhurst was appointed to sit in the Court of Appeal. When her request to see the nomination warrant was denied, the author sought the Acting President of the Court of Appeal, Justice Glazebrook, to recuse herself on the basis that she had been involved in the decision appointing Justice Panckhurst. Justice Glazebrook declined to recuse herself, as her involvement on the nominating warrant had no bearing on the merits of the case. The Court of Appeal determined that the Judicature Act did not contemplate for a formal nomination procedure of Judges with warrants, but was instead part of routine judicial administration. There was, consequently, no basis for the author's request.

5.29 The State party equally denied the allegations of the author's Counsel, that the Court of Appeal was "hostile" in his regard, noting that it was rather the latter who acted obstructively and discourteously, by refusing to make oral submissions before the Court.

5.30 The State party rejects the author's allegation that Chief Justice Elias, who was a member of the Court of Appeal who set aside the author's conviction and sentence in March 1999, was subject to bias. This was examined and dismissed by the Supreme Court, in its decision of 30 November 2007, as lacking proper basis for a qualification of reasonable apprehension of bias, considering the fact that the appeal at stake involved the examination of a new trial, as opposed to the procedural defect considered by the Court of Appeal in 1999.

5.31 The State party further notes that Justice Tipping recused himself in the Supreme Court on the 2007 author's application for review of that Court's decision to decline leave to appeal. He was replaced in the reconsideration the author's appeal, even though the Court noted that it was doubtful whether this would give rise to a bias issue.

5.32 The author challenged the fact that three senior Judges provided evidence to members of the New Zealand Parliament in respect of the Crimes (Criminal Appeals) Amendment Bill in late 2000 and mid-2001, which dealt, *inter alia*, with the issue of *ex parte* criminal appeals, which would be subsequently invalidated by the Privy Council in 2002. The State party observes that providing evidence before Parliamentary Committees on matters of court procedure and other aspects of judicial administration is an accepted practice, and that such evidence was not secret. The evidence in question included a statement of opinion of the then President of the Court of Appeal, which was a proposition of a general nature, not related in any manner to the author's case. According to the State party, it follows that there is no basis for the author's claim under 14, paragraph 1 in that respect.

Requirements for leave to appeal to the Supreme Court

5.33 The State party rejects the author's argument that the requirements for leave to appeal to the Supreme Court breach article 14, paragraph 5, on the ground that it is unsubstantiated. The right to appeal to the Court of Appeal against conviction or sentence is provided for in the Crimes Act (1961). Grounds for appeal are extensive, and include an ability to review the factual and legal basis of the conviction. The Supreme Court is a third instance court with constitutional responsibilities, which justifies the fact that appeals are taken by leave on legal issues of sufficient significance under the Supreme Court Act (2003).

Author's right to privacy

5.34 The State party rejects this allegation, noting that the author never, before any jurisdiction, requested that her name be suppressed. As such, she failed to exhaust domestic remedies on that count.

Unavailability of the victim at trial

5.35 The State party rejects the author's claim, under article 14, paragraph 3 (e), arising from the fact that the High Court refused, at a pre-trial application, to dismiss the charge and acquit the author as the victim was not available to give evidence. This allegation failed on the facts in domestic courts, and is unsubstantiated. The unavailability of the victim at trial was the subject of a pre-trial application heard by Justice Robertson, and was further argued again in the Court of Appeal. The High Court determined that on the facts of this case, and in particular the confession where the author had demonstrated personal knowledge of the offence, it would not cause an injustice for the trial to proceed without the presence of the victim and that the defence could elect to have all or none of his statements produced. The author declined this offer. The author was not convicted on the evidence of the victim. The victim's statements were not read to the jury, even with their apparent contradictions. The author's counsel had the option to bring these statements in and decided not to. The primary evidence against the author was her own confession. The victim's presence or absence did not determine the charge. This claim is therefore unsubstantiated.

The author's experience in giving birth

5.36 The State party claims that this allegation, for which the author does not rely on any Covenant provision, should be declared inadmissible, as she never lodged a complaint in this regard before domestic courts.

5.37 The State party clarifies that in March 2000, the author was a high- medium risk security prisoner, with a history of violent offending and proven drug use. Prison authorities were obliged to put in place appropriate restrictions for her stay in public hospital. The direction to prison staff for the author's delivery were that handcuffs were to be carried and used "if necessary", and that the author had to remain in constant visual observation by female prison officer, except when in delivery. She was admitted to the hospital, handcuffed by one wrist to a female prison officer, and the handcuff was removed when she was in early stage of labour. She remained in the hospital for three days, and her baby was placed in the care of her parents, with her consent, when she returned to prison. Arrangements were made for her to remain at Mt Eden prison, close to her parents, in order to have daily visits. The author however transferred away from Auckland at her own request in May 2000.

Lack of educational and cultural opportunities in prison

5.38 The State party also rejects the author's allegation that she did not have any provision for rehabilitation and that she could not pursue her education when placed in an adult prison after sentencing. It claims that she was in fact transferred from prison back to a youth justice facility within two weeks of her sentence of 8 August 1998, and continued to have access to the same rehabilitative and educational facilities as she had pre-sentence.

5.39 After her first appeal in March 1999, she was released on bail. Following her conviction, she was remanded to Mt Eden Prison, where she remained after being sentenced in December 1999, pending and after the birth of her child. At the age of 17 years, she was transferred to Arohata Women's prison, where she had access to extensive rehabilitative and educational facilities, and could have continued with her formal education had she wished to do so. The State party therefore concludes that this allegation is unsubstantiated.

Author's comments on the State party's observations

6.1 On 19 December 2008, the author contested the fact that the State party relied on, and referred to the findings of domestic courts. It claimed that the State party's observations

failed to respond to her central contention, that proceedings against her were not child-friendly and not consistent with the Covenant. Regarding the allegations under articles 14, paragraph 4, and 24 of the Covenant, and with respect to the High Court trial, the author contends that she, as opposed to her Counsel, was not asked whether she accepted Justice Potter as trial Judge. There should be a legal presumption that a child facing criminal charges does not understand trial proceedings. She also clarifies that, she did challenge the admissibility of her confession under both applicable common law and the Bill of Rights (1990) in her third appeal before the Court of Appeal and before the Supreme Court. She claims that she made extensive references, before the Court of Appeal, to relevant doctrinal references, which deal with the issues of the CYPF Act.

6.2 With respect to the sentencing by the High Court, the author reiterates that she should have been tried by the Youth Court and sentenced by another Court, preferably the District Court. It objects to the State party's argument that as she was under 15 years' old, she could only be dealt with in the Youth Court of the High Court. A Youth Court trial, with a referral to the District Court for sentencing would only have been possible for an older defendant. The author finds this result is that fewer rights are granted to a person aged less than 15 years' old.

6.3 Concerning the absence of a properly-entered guilty plea by the author, and her related claims under article 2, paragraph 3(a), article 14, paragraph 2 and article 14, paragraph 5 of the Covenant, the author contests the State party's argument that the issue was remedied by ordering a retrial, as she was not offered an effective remedy and faced undue delays in the proceedings. Regarding the consent memorandum referred to by the State party, which allowed the matter to be sent back to the Youth Court for a proper plea to be entered, the author claims that the Court should not have accepted such memorandum. She also stresses that she was not consulted by her lawyer in this regard, and did not understand fundamental aspects of her trial.

6.4 Regarding the author's claims under article 9, paragraph 3, article 10, paragraph 2 (b), and article 14, paragraph 3 (c), and the issue of the duration of the sentence, the author contests the State party's argument, and reiterates that the period she spent in Social Welfare custody was not taken into account. She also reiterates her contention that she suffered undue appellate delay, and adds that upon determining whether there had been undue delay, the State party failed to apply Covenant principles.

6.5 The author also reaffirms the claims, under articles 14, paragraph 1 and paragraph 5, that her proceedings were tainted by the lack of institutional independence of judges in New Zealand, and specific appearance of bias in the author's specific case, noting specifically that the Court of Appeal was not independent, or did not have that appearance, as it was not possible to know the method of appointment of Justice Panckhurst in the Court of Appeal.

6.6 The author also reiterates that she continues to be ignorant about the exact situation of Judges lobbying Parliament. She also stresses that a secret meeting took place between Judges and members of Parliament, which was an important issue with an impact on the fairness of her trial, since she could not know which Judge was of the opinion that there was no miscarriage of justice in the *Taito* case, resulting from the *ex parte* appeal procedure.

6.7 With respect to a number of specific factual allegations, the author reiterates that she was intoxicated upon the police identification parade, and that it was improper for the State party to require a 14 year-old girl in such condition to participate, and stressed that she failed to understand her rights.

6.8 With regard to the author' s assertions in respect to her pre-trial detention, the birth of her son, and the lack of educational services and opportunities while serving her

sentence, she only mentioned these issues by way of background and does not expect the Committee to consider the potential issues they would raise under the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee observes that two of the author's claims were remedied by domestic Courts. It notes, in particular, the author's allegation under article 14, paragraph 2, of the Covenant, invoked in connection with article 2, paragraph 3, of the Covenant, regarding the failure to ensure the entry of a formal plea in her first appearance before the Youth Court, which resulted in the adoption of a defective sentencing decision by the High Court on 22 July 2007. The Committee notes that this conviction was overturned by the Court of Appeal on 2 March 1999. As such, this initial defect was remedied, and, to that extent, the Committee declares this part of the communication inadmissible under article 1 of the Optional Protocol.

7.4 Similarly, with respect to the author's allegation pertaining to the illegality of her *ex parte* appeal in March 2000 under articles 14, paragraph 3(d), paragraph 3(e) and paragraph 5, and article 26 of the Covenant, the Committee observes that this decision was held invalid in March 2002, following an appeal to the Privy Council, and the author was accordingly granted a new appeal in October 2005. The Committee recalls that a person may not claim to be a victim within the meaning of article 1 of the Optional Protocol unless his or her rights have actually been violated. As such, it declares these two allegations inadmissible under article 1 of the Optional Protocol.

7.5 The Committee also considers that the author failed to substantiate, for purposes of admissibility, her two allegations under article 26 of the Covenant, invoked in connection with the committal of her case to the High Court, and the rejection of her appeal *ex parte* in March 2000. It thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.6 The Committee similarly finds that the author failed to substantiate, for purposes of admissibility, her allegation under article 9, paragraph 3, and under article 10, paragraph 2 (b), which she invoked in connection with the delay in judicial proceedings. As such, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.7 In the same manner, the Committee finds that the author failed to substantiate, for purposes of admissibility, her allegation under article 16, which she invoked in connection with the second committal of the case to the High Court. Accordingly, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.8 Similarly, the Committee is of the view that the author failed to substantiate her allegation under article 14, paragraph 3(d), invoked in relation to the second committal of her case to the High Court. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.9 With respect to the participation of the author in the police identification parade, her transportation to the police station, and her interview by the police, for which the author invokes articles 9, paragraph 1, 10, paragraph 1, 14 paragraph 3 (b) and (g), and paragraph 4 of the Covenant, the Committee observes that from the moment of the identification parade, until the end of the second video interview, in which she confessed guilt, the author was neither formally arrested, nor detained. It appears from the file that after the identification, by a witness, of the author and co-offender, the author was transported to the police station, and was informed of her right not to accompany the detective, her right to leave at any time, and her right to a lawyer. Her rights were again explained to her upon the arrival of her mother at the police station, and at the commencement of each of the two interviews.

7.10 It is only at the end of the second interview, in which the author confessed guilt, that she was formally charged with aggravated robbery. It therefore cannot be sustained, within the meaning of article 9, paragraph 1 of the Covenant, that the author was arrested, detained, or otherwise deprived of her liberty. Nor, *a fortiori*, can it be maintained that she was subjected to criminal proceedings at this time, as she had not been charged yet at this point. Consequently, the author's claims under articles 9, paragraph 1, article 10, paragraph 1, article 14, paragraph 3 (b) and (g) and paragraph 4, in so far as they relate to the time period covering the police identification parade, the transportation to the police station and her interview by the police, are inadmissible, *ratione materiae* under article 3 of the Optional Protocol.

7.11 The Committee observes that most of the author's remaining claims relate to the evaluation of facts and evidence by the State party's courts. It notes, firstly, that the admissibility of the author's confession as trial evidence, presented under article 14, paragraph 3(g), was thoroughly discussed, and dismissed in fact and in law, in particular by the Court of Appeal in its judgement of 19 December 2005, and by the Supreme Court on 30 November 2007. The Committee recalls [21] that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[22] The material before the Committee does not reveal elements susceptible of demonstrating that the court examination of this issue suffered from any such defect. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.12 Similarly, with respect to the author's participation in the High Court trial as a child, the Committee observes that this issue was considered by the High Court and the Court of Appeal. The material before the Committee does not reveal any element susceptible of demonstrating, under article 14, paragraph 4, and under article 24 of the Covenant, that the court examination of the case suffered from any procedural defect, or otherwise resulted in a denial of justice for the author as a child. Accordingly, the Committee considers that the latter failed to substantiate this claim, for purposes of admissibility, under article 2 of the Optional Protocol.

7.13 The author claims that the 4 year and 8 month sentence was strictly punitive, as opposed to rehabilitative, disproportionate to the circumstances and gravity of the offence and in contradiction with the principle that deprivation of liberty of juveniles should be a measure of last resort, and would amount to a breach of her rights under article 10, paragraph 3, article 14, paragraph 4 and article 24. However, in view of the State Party's

[21] *See* the Committee's General Comment No. 32 (article 14 ICCPR), CCPR/C/GC/32, 2August 2007, para 39.

[22] *See*, *inter alia*, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

observations regarding the determination of charge, sentencing and the author's access to rehabilitative and educational facilities, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers it inadmissible under article 2 of the Optional Protocol.

7.14 The author alleges that, by imposing a sentence of 4 years and 8 months on 14 December 1999, the High Court failed to take into account the 11 months she spent in youth justice facilities prior to her second sentence. The Committee took note of the State party's contention that the author never brought such allegations before its domestic jurisdictions. The author did not adduce evidence to the contrary. Presenting this allegation before the State party's jurisdictions would have clarified the facts, which are in dispute in relation to the calculation of the time spent in youth justice facilities. Accordingly, the Committee declares this part of the communication inadmissible under article 5(2)(b) of the Optional Protocol.

7.15 Furthermore, the Committee notes the author's claims, that her right to privacy was breached when her name was published since the first sentencing in the High Court in July 1998, and throughout the duration of the proceedings, in violation of articles 14, paragraph 4, and 17 of the Covenant. It appears, however, that the author failed to request, before domestic jurisdictions, that her name be kept confidential, which it appears would have been feasible. The author did not contest this. The committee thus declares this part of the communication inadmissible under article 5(2)(b) of the Optional Protocol.

7.16 The Committee further observes that the author's allegation, under article 14, paragraph 1 and paragraph 5, that Justice Potter, who had previously sentenced her to 4 years jail in the High Court, later presided her jury trial for the same offence, was not challenged by way of an application for recusal. While expressing doubts about the propriety of having the same Judge sentencing the accused on two occasions, and for the same offence, the Committee refers to the express request of author's then-Counsel, that Justice Potter preside the jury trial, which is available in the file. In these circumstances, it declares this part of the communication inadmissible under articles 1 and article 5, paragraph 2 (b) of the Optional Protocol.

7.17 With respect to the author's contention concerning Justice Robertson, that he was unfit to sit on the High Court pre-trial application for discharge in October 1999, as he was a member of the Court of Appeal who overturned the author's sentence in March 1999, it appears that the author did not raise this issue at any moment in the procedure. Accordingly, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

7.18 As far as the author's allegation concerning Judges sitting in the Court of Appeal during the March 2005 proceedings is concerned, the Committee observes that the author contests the nomination of the High Court Justice Panckhurst in the Court of Appeal. She requested access to the nomination warrant but this was rejected. As a result, she asked that the Acting President of the Court of Appeal, Justice Glazebrook recuse herself. The Committee observes that the nomination of High Court judges to sit before the Court of Appeal is contemplated by statute under the State party's law. It notes that the author has not substantiated her allegation that this nomination affected the fairness of her appeal under article 14, paragraph 1 or paragraph 5. Nor did she successfully demonstrate that the failure to produce the nomination warrant of Justice Panckhurst in turn generated any reasonable apprehension of bias vis-à-vis the Acting President of the Court of Appeal. The Committee equally considers that the author failed to demonstrate, for purposes of admissibility, her allegation that the Court of Appeal was "hostile" in her regard. Accordingly, the Committee finds these parts of the communication inadmissible under article 2 of the Optional Protocol.

7.19 In the same manner, the Committee finds that the author could not demonstrate how the contribution, by Justice Tipping - along with other Judges - of evidence to members of Parliament in respect of amendments to the criminal appeal system, which would subsequently be invalidated by a decision of the Privy Council, had any bearing on the consideration of the merits of her case. Accordingly, the Committee also finds this allegation inadmissible under article 2 of the Optional Protocol.

7.20 Similarly, the Committee is of the view that the author's allegation under article 14, paragraphs 1 and paragraph 5, of the Covenant, vis-à-vis the participation of Chief Justice Elias in the Supreme Court proceedings of March 2006, is insufficiently substantiated for purposes of admissibility. The Committee notes that Chief Justice Elias was a member of the Court of Appeal, which set aside the author's conviction and sentence in March 1999 on the basis of a procedural defect. The trial thus started *de novo*. The author failed to demonstrate, for purposes of admissibility, that Chief Justice Elias, upon consideration of the author's application for judicial review in this new trial, was not impartial or otherwise harboured preconceptions about the case. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.21 With regard to the author's contention, that the second committal of the case to the High Court on 24 June 1999 breached articles 14, paragraph 2 and paragraph 4, and article 24 of the Covenant, the Committee makes the following observations: It appears from the file that she raised this issue before the Court of Appeal, but that it was outside the Court's statutory attributions to consider it. No earlier request was made by the author for the Youth Court Judge to exercise his discretion under the CYPF Act to give the author the opportunity to forego her right to trial by jury and elect to have the case heard in the Youth Court. The Committee is not persuaded by the author's argument, that the Youth Court should have unilaterally assessed that this was in the author's best interest that her case remain within this jurisdiction. Being represented by Counsel, and having failed to take advantage of an effective remedy which would have allowed her to forego her right to trial by jury, or to challenge, by way of judicial review, the committal of the case to the High Court, the Committee is of the view that the author is precluded from presenting this issue before the Committee for non-exhaustion of domestic remedies. It thus declares this part of the communication inadmissible under article 5, paragraph 2(b) of the Optional Protocol.

7.22 Regarding the author's allegation of judicial bias, with respect to the participation of Justice Tipping in the Supreme Court in March 2006, the Committee notes that Justice Tipping did not participate in the decision of the Supreme Court adopted on 30 November 2007. Accordingly, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers it inadmissible under article 2 of the Optional Protocol.

7.23 Regarding the author's allegation that the delay in the proceedings constituted a violation of article 9, paragraph 3 and article 10, paragraph 2 (b) of the Covenant, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers it inadmissible under article 2 of the Optional Protocol.

7.24 Finally, the Committee took note of the author's assertion that she only addressed the issue of the birth of her son, and the lack of educational services and opportunities while serving her sentence by way of background, and does not expect the Committee to consider the potential issues they would raise under the Covenant

7.25 The Committee considers that the remaining issues have been sufficiently substantiated. It therefore proceeds to the examination, on the merits, of the following parts of the communication: The author's allegation of delay in the proceedings under article 14, paragraph 3(c), paragraph 4 and paragraph 5; the inability of the author to interrogate the

victim at trial, under article 14, paragraph 3 (e); and the dismissal of her appeal by the Supreme Court, under article 14, paragraph 1 of the Covenant.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 With respect to the author's allegation of delay in the proceedings under article 9 paragraph 3, article 10 paragraph 2 (b), and article 14, paragraph 3(c), paragraph 4 and paragraph 5, the Committee recalls that juveniles are to enjoy at least the same guarantees and protection as those accorded to adults under article 14 of the Covenant. [23] The Committee took note of the author's contention that the second committal of her case to the High Court resulted in undue delay, as the Youth Court would have proceeded faster. The Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay.[24] The issue of delay must be assessed against the overall circumstances of the case, including an assessment of the factual and legal complexity of the case.

8.3 The Committee notes, in this respect, that after the case was committed for trial in the High Court on 24 June 1999, the author was sentenced on 14 December 1999, following two pre-trial applications and jury trial. The duration of these initial High Court proceedings was therefore less than six months from the time of the second committal of the case by the Youth Court. Upon rejection of the author's appeal *ex parte* in March 2000 by the Court of Appeal, the author immediately filed an application for judicial review, which her lawyer decided to merge with existing applications in November 2000. These applications were considered by the Privy Council in February 2001, and judgment was eventually rendered in March 2002. The State party attributes this time lapse to the preparation of records and submissions in respect of the 12 appellants in the case.

8.4 The Committee observes that following the decision of the Privy Council of 19 March 2002, ordering the rehearing of the author's case, the Court of Appeal hearing only took place in October 2005. The Committee notes that the author's lawyer accepted responsibility for two years and nine months out of this delay, i.e. around two-thirds of this period, as he was overseas. The Committee also notes the efforts of the Court of Appeal to fix a date for the hearing, and the repeated requests from the author, for documentation, as well as requests on her part for the adjournment of the case.

8.5 Regarding the Supreme Court hearing, it transpires from the file that after the dismissal of her case by the Court of Appeal in December 2005, the author sought leave to appeal before the Supreme Court in January 2006, which was rejected on 27 March 2006. It is only in August 2007, i.e. 17 months after the Supreme Court decision, that she filed an application to set aside that decision. The Supreme Court rendered its decision on 30 November 2007. In the specific circumstances of the case, the Committee considers that the delay in determining the author's appeal does not amount to a violation of article 14, paragraphs 3(c), paragraph 4 or paragraph 5 of the Covenant.

[23] General Comment No.32, para 42, and communications No. 1209/2003, 1231/2003 and 1241/2004, *Sharifova, Safarov and Burkhonov* v. *Tajikistan*, Views adopted on 1 April 2008, para 6.6

[24] *Muñoz Hermoza* v *Peru*, communication No. 203/1986, Views adopted on 4 November 1988, para 11.3; *Fei* v *Colombia*, communication No.514/1992, Views adopted on 4 April 1995, para 8.4, and *González del Río* v *Peru*, communication No. 263/1987, Views adopted on 28 October 1992, para 5.2.

8.6 Regarding the author's contention, that she was unable to interrogate the victim during the High Court trial, which resulted in a breach of her rights under article 14, paragraph 3 (e), the Committee observes that the victim, who was nearly 89 years' old at the time of the High Court trial in 1999, was found unable to attend the hearing for health reasons. The Committee observes the importance of the evidence of the victim for the trial, magnified by the fact that he had provided contradictory statements, initially claiming that there was only one assailant when the robbery occurred, while later stating that there were two, thereby implicating the author. The Committee recalls that article 14, paragraph 3 (e), guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them[25]. The Committee observes that a reading of the victim's statement to the jury could have fallen short of the requirement, under article 14, paragraph 3 (e), to be given a proper opportunity to question and challenge witnesses, *a fortiori* where their evidence is of direct relevance for the resolution of the case, and where the charges faced are of such serious nature. However, in the particular circumstances of the case, the fact that the author, as claimed by the State party and uncontested by the author, was convicted based on her own confession and without the victim's statement having been read to the jury, does not support a finding of violation of the principle of equality of arms under article 14, paragraph 3(e).

8.7 The author also alleges that the dismissal, by the Supreme Court, of her appeal on 27 March 2006 was in breach of article 14, paragraph 1, as it consisted of four paragraphs only, and was without an oral hearing. The Committee observes that it is not disputed that the author's trial and appeal were openly and publicly conducted, and recalls its previous jurisprudence that the disposition of an appeal does not necessarily require an oral hearing.[26] Accordingly, the Committee is of the view that the Supreme Court proceedings of March 2006 do not disclose a violation of article 14, paragraph 1, of the Covenant for the author.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[25] *See* the Committee's General Comment No. 32, *supra*, note 86, para 39.

[26] Communication No.1347/2005, *Dudko* v. *Australia*, Views adopted on 23 July 2007, para 7.2, No. 301/1988, *R.M. v. Finland*, para. 6.4 and No. 819/1998, *Kavanagh* v. *Ireland*, para. 10.4.