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HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10-28 July 2006

DECISION

Communication No. 1229/2003

Submitted by:	Noel Léopold Dumont de Chassart (represented by counsel, the Studio Legale Associato de Montis, at the time of the initial submission)
Alleged victim:	Noel Léopold Dumont de Chassart
State party:	Italy
Date of communication:	25 March 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 November 2003 (not issued in document form)
Date of adoption of decision:	25 July 2006
Subject matter:	Right to protection of the family by the State

* Made public by decision of the Human Rights Committee.

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Procedural issues:	Lack of substantiation; article 1 of the Optional Protocol; article 3 of the Optional Protocol
Substantive issues:	Effective remedy; arbitrary or unlawful interference with privacy, family and home; right to protection of the family by the State; steps taken to guarantee requisite protection of children
Articles of the Covenant:	2, paragraphs 1 and 3 (a) and (c); 17; 23, paragraphs 1 and 4; 24, paragraph 1
Articles of the Optional Protocol:	1, 2 and 3

[ANNEX]

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-seventh session

concerning

Communication No. 1229/2003*

Submitted by:	Noel Léopold Dumont de Chassart (represented by counsel, the Studio Legale Associato de Montis, at the time of the initial submission)
Alleged victim:	Noel Léopold Dumont de Chassart
State party:	Italy
Date of communication:	25 March 2003 (initial submission)

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

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author is Mr. Noel Léopold Dumont de Chassart, a Belgian citizen born in Uccle, Belgium, on 20 June 1942, and currently residing in Italy. He claims to have been a victim of violations by Italy of articles 2, paragraphs 1 and 3 (a) and (c), 17, 23, paragraphs 1 and 4, and 24, paragraph 1, of the International Covenant on Civil and Political Rights. At the time of the initial submission, the author was represented by the Studio Legale Associato de Montis, in Cagliari, Italy. The Covenant and the Optional Protocol entered into force for Italy on 30 April 1976 and 15 September 1978 respectively.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Mr. Rafael Rivas Posada is appended to the present document.

The facts as presented

2.1 On 27 October 1998, the author's wife, of Austrian origin, applied to the Italian courts at their place of residence for a separation from her husband. On 2 March 1999, the Civil Court of Cagliari granted the separation, temporarily assigned custody of the couple's three children to the mother and set out provisions governing the author's right of access and custody. The ruling also bound the two parents to take any decision of major concern to the children in a consensual manner. According to the author and the State party, this was equivalent to a ban on leaving Italian territory while the procedure continued. On 25 March 1999, the author lodged an appeal in the above-mentioned Court, complaining of the considerable difficulties he was experiencing in maintaining a relationship with his children, owing to the mother's "obstructionist behaviour". On 9 June 1999, the mother left Italy for Austria with the three children, aged 11, 8 and 5; according to the author, this took place in spite of his request to the local police to intervene. On 6 August 1999, the examining magistrate amended the interim arrangements for the custody of the children and entrusted them to the author, while ordering the immediate return of the children to Italy. He noted that the mother had violated the Court's ruling of 2 March 1999, particularly as regards the parents' duty to take decisions of major concern to the children in a consensual manner, which was not done in connection with a medical operation on one of the children and the transfer of the other children abroad. According to the author, the Court suggested that he should allow a reasonable period for the order to be complied with. Between 3 and 12 August 1999, the mother reportedly returned to the author's home and ransacked it. The author indicates that the police took no action in this regard, and rejected a report of burglary.

2.2 On 2 November 1999, considering that the reasonable period had elapsed, the Civil Court of Cagliari confirmed the decision to give the author custody of the children, granting him the effective exercise of parental authority. The Court reaffirmed that the children should be returned to Italy immediately and ruled that the mother of the children had violated article 574 of the Criminal Code on the abduction of minors. On the basis of the court decision, the author lodged with the Italian Central Authority - on 24 September 1999 according to the author and on 22 November 1999 according to the State party - an application for the return of the three children by Austria, in accordance with the Hague Convention of 25 October 1980. On 21 January 2000, the Langenlois District Court in Austria rejected the application for their return on the basis of articles 3,[1] 5[2] and 13[3] of the Hague Convention: (a) the mother was the sole guardian of the children at the time of the alleged abduction; (b) the three minors were opposed to returning to Italy; and (c) the eldest of the three children might have suffered physical harm on returning to Italy, since he was undergoing treatment in Austria in a specialist institution. The court's decision to refuse the application was upheld by the Krems/Donau Court of Appeal in Austria on 4 April 2000 and by the Austrian Court of Cassation on 29 May 2000. Subsequently, the author lodged a further application with the Italian Central Authority seeking action by the Austrian judicial authorities to regulate his right of access, in accordance with the procedure laid down in the Hague Convention. The application was accepted, and the Austrian courts recognized the author's right of access on 11 October 2000.

2.3 Meanwhile, in February 2000, the Cagliari Juvenile Court shelved the case on the grounds that, as the children were no longer on Italian soil, the matter was no longer within its jurisdiction. In May 2000, the Italian Central Authority lodged a request for enforcement and the

restoration of custody, in accordance with the Luxembourg Convention of 20 May 1980. The request was rejected by Austria in June 2000. Finally, on 17 October 2000, the Italian Court granted the separation of the spouses and confirmed its earlier rulings. On 5 December 2000, the Court initiated criminal proceedings against the mother on charges of abduction. On 30 March 2001, the Cagliari Court of Appeal (civil division) denied the mother's appeal against the ruling of 17 October 2000, inter alia because it was lodged after the legal deadline.

2.4 The author indicates that on 3 September 2001 he began an extensive correspondence with the President of Italy, the Prime Minister, the President of the Senate, the Constitutional Court and all the ministers concerned - the Ministers of Justice, the Interior, Foreign Affairs, Finance, etc. - as well as with the Italian Human Rights League and the Chairman of the special human rights commission. On 20 April 2001, the President of Italy stated that he had no authority in the matter. In December 2002 and on 20 March 2003 respectively, the Minister of Justice and the Minister for Foreign Affairs shelved the case, on the grounds that the decisions of the Austrian courts were final. The author indicates that at the beginning of 2002 he also lodged an appeal with the European Ombudsman, who asked a question in the European Parliament concerning the recognition and enforcement of judicial decisions relating to the custody of children. Lastly, a request for an investigation addressed to the Italian Constitutional Court went unanswered. The author points out that, at the end of four years of applications and court hearings, which have all produced no result or no significant result, the only possible remedy lies with the Committee, as domestic remedies are ineffective and unreasonably prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

2.5 The author indicates that the refusal of the Austrian authorities to return the children was the subject of an application to the European Court of Human Rights in respect of Austria (No. 63933/00 of 2 June 2000). This application was declared inadmissible on 23 January 2004, on the grounds that no apparent violation of the rights and freedoms guaranteed under the European Convention on Human Rights and the Protocols thereto had been identified.

The complaint

3.1 The author points out that the State party did not ensure proper follow-up to the decisions of the Italian courts, and violated articles 2, paragraphs 1 and 3 (a) and (c), 17, 23, paragraphs 1 and 4, and 24, paragraph 1, of the Covenant.

3.2 The author maintains that the allegation concerning a violation of article 2, paragraph 3 (c), arises from the total failure of the local police authority to protect the children on the day of the abduction. The violation was all the more serious since the appeals to the ministers concerned produced no response and no action. Moreover, the complete absence of cooperation on the part of the competent authorities (the Ministry of Juvenile Justice and the Central Authority) in order to ensure proper follow-up to the decisions of the courts gave rise to a violation. In the author's view, this violation was all the more serious since the appeal to the Ministry of Justice was fruitless, the information that had been communicated to him by its staff being incomplete and biased. The decision of various offices in the Ministry of Justice to shelve the children's case was also a violation of that article.

3.3 Concerning the violation of article 2, paragraph 1, of the Covenant, the author states that the fact that he is not an Italian citizen suggests a violation of the right to respect for the individual on the grounds of his national origin. However, according to the author, there are no elements which would enable him to claim a violation of this article, aside from the refusal to allow consular visits to the abducted children, as planned by the Ministry of Foreign Affairs.

3.4 Concerning the violation of article 2, paragraph 3 (a), of the Covenant, the author claims that the refusal by the Minister of Defence to intervene (through the Ministry of the Interior) in connection with the offences committed by the local police at the time of the abduction constitutes a violation of this article. The violation was said to be more serious owing to the lack of a report on the intervention.

3.5 Concerning the violation of article 17, paragraph 1, of the Covenant, the author maintains that the police's refusal to intervene when his home was burgled (according to the author, the police were called in and were present at the scene) by the mother between 3 and 12 August 1999 constituted arbitrary interference with the author's privacy and his home. In addition, the courts' refusal to acknowledge the unlawful nature of this interference constitutes a violation of article 17, paragraph 2, of the Covenant.

3.6 Concerning the violation of article 23 of the Covenant, the author points out that the State party failed to protect his family (art. 23, para. 1) in all the above-mentioned situations and when the marriage was being dissolved. Steps to provide the children with the necessary protection were not taken either in order to prevent their abduction or during the international procedures to secure their return (art. 23, para. 2).

3.7 Concerning the violation of article 24, paragraph 1, of the Covenant, the author maintains that the State party did not take the measures of protection required under the article, by refusing to send a communication to the Committee concerning Austria's many violations of the United Nations Convention on the Rights of the Child of 20 November 1989, and refusing to intervene in the procedure initiated in the European Court of Human Rights.

The State party's observations on the communication

4.1 In a note verbale dated 24 May 2004, the State party indicates that the allegation of a violation of article 2, paragraph 1, of the Covenant, has no legal basis whatsoever, as the author's many judicial and administrative initiatives against Austria received the necessary administrative and judicial support, in keeping with the provisions of the international conventions to which Italy is a party. In particular, the State party indicates that, following the application lodged by the author with the Italian Central Authority, the Austrian judicial authorities acknowledged the author's right of access to the children and drew up a programme of visits. The author had forgone his visits owing to professional commitments which could not be rescheduled, and felt that he "could not agree to a right of access which was subject to strict surveillance and unpredictable timings".

4.2 The State party presents the facts and indicates that the Court had provisionally awarded custody of the children to the mother with the injunction that she was not to remove them from Italy, and regulating the author's right of access and custody. However, in an appeal lodged on 25 March 1999, the author complained of the considerable difficulties he was experiencing in

maintaining a good relationship with his children owing to his wife's alleged obstructionist behaviour, and on 11 June 1999 he indicated that his wife had settled in Austria, having taken the minor children with her without his consent. Moreover, the State party explains that on 23 November 2000 the Italian Central Authority shelved the case because the request had been dealt with by means of the steps taken with regard to the author's right of access in Austria. However, on 23 May 2000, the author decided to lodge a new application, this time under the Luxembourg Convention of 20 May 1980, seeking recognition and enforcement of the Cagliari Court's ruling of 2 November 1999 in the Austrian system. This request was duly forwarded to the Austrian Central Authority, despite the fact that the deadline of six months from the date of the abduction, laid down in article 8 of the Luxembourg Convention, had passed. The request was denied on 27 June 2000 on the basis of articles 8, 9 and 10 of the Convention, since (a) the request had been submitted late; (b) if the request had been accepted, the children's return to Italy would have been against their interests, in view of the time that they had spent in Austria; and (c) accepting the request would have been inconsistent with the Krems/Donau Court of Appeal decision of 4 April 2000. For those reasons, the case was shelved by the two central authorities. The State party indicates that, on 23 November 2000, the author forwarded the Cagliari Court's ruling of 17 October 2000 to the Italian Central Authority for the purpose of securing its recognition by Austria. The State party explains that the ruling of 17 October 2000 merely confirmed the ruling of 2 November 1999, to which the Austrian courts had already responded negatively.

4.3 The State party explains that on several occasions it advised the author to agree to the terms of access proposed by the Austrian authorities, and that it requested the International Social Service to provide the author with full assistance in facilitating the visits. However, the International Social Service informed the State party that a meeting with the author had had a basically negative outcome, as he was concerned only with the refusal of his requests for the restoration of custody. Similarly, a meeting on 30 January 2001 between the author and the official of the Italian Central Authority dealing with the case produced no result. It was only on 11 June 2001, at the formal request of the two central authorities, that the author lodged with the Italian Central Authority an application for the recognition of his right of access over the entire school year. However, although the application was forwarded to the Langenlois District Court in Austria by the Austrian Central Authority on 19 June 2001, the Court took no action.

4.4 Concerning the claim that the authorities of the State party did not protect the children from probable abduction by their mother, the State party emphasizes that the Ministry of the Interior and the border police had taken all the customary measures in this type of case, bearing in mind that travel between Italy and Austria is now governed by the Schengen Treaty. This convention provides for the abolition of borders, and therefore no specific action, apart from the activities that are normally carried out, could have been taken at the border in connection with a ban on leaving the country. The State party emphasizes that the Cagliari Court's ruling, while prohibiting the removal of the minors from the country, did not instruct the border police to conduct checks on the border, and therefore such checks continued to be subject to the Schengen Treaty. In addition, the Court's ruling contained no provision for continuous police monitoring of the movements of the mother and the children. Hence there are no grounds for any charge of negligence against the State party.

The author's comments

5.1 In his comments of 20 November 2004, the author reiterates that he received no administrative or legal support from the State party in relation to the return of his children. He points out that the State party should have complied with its obligations regarding cooperation set out in the Hague and Luxembourg conventions. Concerning the visits which had been organized in Austria, he explains that, in the case of the first visit, which was scheduled to take place from 16 to 23 April 2000, the Court's decision had in the meantime been suspended, since the mother had appealed against that decision. The author was informed of the second visit (from 28 July to 6 August 2000) by fax from the Italian Central Authority on 14 August 2000. He was informed by fax of the third visit on the same day, whereas it was supposed to take place from 12 to 19 August. Even if he had been able to find a flight, he would not have been able to see his children because the mother had appealed against the decision on 11 August. Lastly, the author acknowledges that he refused his right of access from 26 December 2000 to 1 January 2001 because the conditions imposed were "inhuman" and he had no assurance that he would see his children, as the terms of access were set non-negotiably by the mother.

5.2 The author points out that the State party should have opposed Austria's decisions regarding the application of the Luxembourg Convention (see paragraph 4.2). First, it is not true that the deadline had passed since, according to the author, the period had begun on 21 December 1999, when the mother had indicated that she was going to return the children to the author. Secondly, as far as the children's interests were concerned, the author refers to the decisions of the Italian courts, which indicate that it was the abduction and the mother's behaviour which were the source of major risks. Lastly, it was in fact the Austrian decisions which ran counter to the Italian decisions. The author adds that he received no help from the International Social Service, which said that it had no competence to assist, but acknowledges having said that he did not wish to agree to the right of access on just any terms. He refers to the report prepared by the Austrian social service, which considered that seven days' access per year was in keeping with article 9, paragraph 3, of the Convention on the Rights of the Child.

5.3 In response to the State party's argument concerning the Schengen Treaty, the author points out that the Treaty did not abolish the obligations imposed by the Convention on the Rights of the Child or the fundamental principles of the Universal Declaration that relate to the duty to protect children. The author emphasizes that the State party does not indicate that, on 9 June 1999, he contacted the police in order to prevent the children from leaving, and points out that the Court was opposed to their departure. In contrast to the assertions of the State party, the author claims that all the competent Italian authorities, including the police, have a duty to enforce the decisions of the courts, and that the departure of the children violated his right of access and conflicted with the mother's obligation to appear before the Court a few days later. Lastly, the author points out that, under the Schengen Treaty, the authorities of a State member of the European Union have the right to take action against persons responsible for abductions beyond national frontiers whereas, as far as he knew, there had been no contacts between the Italian and Austrian authorities.

5.4 Concerning article 2, paragraph 3 (a), of the Covenant, the author indicates that the negligence of the Italian police, which made possible the abduction of his children, had never been acknowledged by the ministries concerned, thus denying him any recourse. Concerning article 2, paragraph 3 (b), of the Covenant, the author indicates that the Government did nothing

to follow up the decisions of the Italian courts. Concerning article 23, paragraph 4, of the Covenant, the author expresses surprise that the provisions of the Schengen Treaty should be sufficient to nullify international rules for the protection of minors. Lastly, concerning article 24, paragraph 1, the author maintains that the indifference of the Italian Government stemmed from his Belgian nationality and that of the children. The author points out that, on 7 June 2004, several hundred victims of child abductions had demonstrated in front of the Ministry of Foreign Affairs in Rome to protest against the Italian Government's inertia in the face of over 600 abductions of children, which made a laughing stock of Italian court decisions on child custody and violated article 2, paragraph 3, of the Covenant.

Additional observations by the State party concerning the author's comments

6.1 On 14 July 2005, the State party contested the entirety of the legal and factual circumstances which the author complained of in his additional comments. Concerning the allegation that the Italian Government failed to lodge an objection with the Austrian Government in order to prompt it to recognize the violations of the fundamental rights set out in the Luxembourg and Hague conventions, the State party indicates that the complaints have no legal basis whatsoever. All the author's judicial and administrative initiatives against Austria received the administrative and judicial support provided for in the conventions signed by the State party. In this regard, the State party refers to its earlier comments.

6.2 Concerning the merits, the State party indicates that the author acknowledges that the conduct of the Italian authorities did not cause any direct violation of the rights of the minors; such violations are to be ascribed exclusively to the decisions of the Austrian Government. The omissions of which the State party is accused do not constitute situations in law which enjoy protection under the mechanism established by the Covenant and protected by the Optional Protocol. The Preamble of the Optional Protocol defines the protection accorded by the Committee to the rights expressly recognized by the Covenant.

6.3 Concerning the author's arguments based on the United Nations Convention on the Rights of the Child, it is clear that the Committee is not competent to rule in that regard, under article 1 of the Optional Protocol.

The author's replies

7. In his response of 10 October 2005, the author reaffirms that the State party confined itself to forwarding his demands to Austria, and failed to take a stand on the abduction of the children or on the protection which Austria granted to the mother. The Italian Embassy in Austria had never been instructed to enquire into the situation of the abducted children, as provided for in Italian legislation. The State party caused irreparable harm to the children by declaring in writing that the children's fate was a matter for the Austrian courts alone. Lastly, the author indicates that it is highly unlikely that the Committee should not be entitled to take a position on the violation of children's rights. In any event, his rights as a father had been flouted because no steps had been taken by the Italian Government to enforce the many decisions of the Italian courts: recognition and enforcement of the decisions concerning child custody, restoration of custody of the children and immediate return of the children to their legal place of residence.

Issues and proceedings concerning admissibility

8.1 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 the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has raised an objection as to the admissibility of the part of the communication relating to the Convention on the Rights of the Child, under article 1 of the Optional Protocol. While noting the legally imprecise language that the State party uses in its replies, the Committee interprets its objection of inadmissibility as pertaining to the entire communication. It is therefore up to the Committee to decide whether the admissibility criteria set out in the Optional Protocol have been met. Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee is not authorized to examine a communication if the same matter is already being examined under another procedure of international investigation or settlement. The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 Concerning the alleged violation of article 2, paragraph 1, of the Covenant, the author states that the fact that he is not an Italian citizen suggests a violation of the right to respect for the individual on the grounds of his national origin. The Committee notes that the author acknowledges that he has no proof of this allegation of discrimination on the grounds of his nationality and which concerns the enjoyment of the rights contained in the Covenant. This allegation has thus not been substantiated for purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

8.4 Concerning the alleged violation of article 24 of the Covenant, the Committee notes that this violation should have been the subject of a complaint in the name of the author's children, but that the communication was not submitted in their name.[4] The Committee concludes that it is inadmissible under article 1 of the Optional Protocol.

8.5 Concerning the author's request that the State party institute proceedings against Austria before the Committee, the Committee notes that the procedure provided for in article 41 of the Covenant is quite distinct from the procedure laid down by the Optional Protocol, and that the author's complaints in this regard are therefore inadmissible because they are incompatible with the Covenant, under article 3 of the Optional Protocol.

8.6 The author refers to the State party's obligations under the Convention on the Rights of the Child, the Universal Declaration of Human Rights, the Schengen Treaty and the Hague and Luxembourg conventions. Under article 1 of the Optional Protocol, which empowers the Committee to receive and rule on communications from individuals who claim to be victims of a violation of any of the rights set out in the Covenant, the author's complaints in this regard are inadmissible.

8.7 Concerning the allegation of a violation of article 17 of the Covenant owing to the police's refusal to intervene when the author's home was burgled and the courts' refusal to acknowledge the unlawful nature of this interference, the Committee considers that none of these

allegations has been sufficiently substantiated for the purposes of admissibility. Consequently, the complaints raised by the author in this regard are inadmissible, under article 2 of the Optional Protocol.

8.8 Concerning the complaints under article 23, the Committee considers that the author has not supplied sufficient information or arguments to substantiate his allegations under this provision for purposes of admissibility. The Committee therefore decides that the complaints raised by the author in this regard are inadmissible, under article 2 of the Optional Protocol.

8.9 The Committee recalls that article 2 of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant, and notes that article 2, paragraph 3 (a), stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as … recognized [in the Covenant] are violated shall have an effective remedy". Article 2, paragraph 3 (b), provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. A State party cannot be reasonably required, on the basis of article 2, paragraph 3 (b), to make such procedures available no matter how unmeritorious such claims may be.[5] Considering that the author of the present communication has not substantiated his complaints for the purposes of admissibility under articles 17 and 23, his allegation of a violation of article 2 of the Covenant is also inadmissible, under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and the State party.

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

Notes

[1] "The removal or the retention of a child is to be considered wrongful where:

"(*a*) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

"(*b*) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

"The rights of custody mentioned in subparagraph (*a*) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

[2] "For the purposes of this Convention:

"(*a*) 'Rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

"(*b*) 'Rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

[3] "Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

"(*a*) The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

"(*b*) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

"In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or any other competent authority of the child's habitual residence."

[4] See communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 5.2.

[5] Communications No. 972/2001, *Kazantzis v. Cyprus*, decision adopted on 7 August 2003, para. 6.6; No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 7.2.

Appendix

DISSENTING OPINION BY MR. RAFAEL RIVAS POSADA

On 25 July 2006, the Humans Rights Committee decided that communication No. 1229/2003 (*Dumont de Chassart v. Italy*) was inadmissible owing to the author's failure to substantiate his allegations concerning violations of various articles of the Covenant (2, paras. 1 and 3 (a) and (c); 17; 23, paras. 1 and 4; and 24, para. 1).

I disagree with the Committee's conclusion, except with regard to article 24 of the Covenant, since the communication was not submitted on behalf of the author's children, which makes it inadmissible under article 1 of the Optional Protocol.

The grounds for admissibility of communications submitted to the Committee often pose interpretation problems of varying degrees of difficulty. Some, such as the exhaustion of domestic remedies, the fact that the same matter is not being examined under another procedure of international investigation or settlement, and the fact that the communication is not anonymous, are relatively clear and explicit and do not pose serious obstacles to their interpretation. Others, however, require the Committee to apply interpretation criteria that are generally debatable. This category includes the abuse of the right to submit communications, possible incompatibility with the provisions of the Covenant and, above all, failure to substantiate allegations, as grounds for inadmissibility.

In the present case, the Committee has, in my opinion, again resorted to the much too frequent use of the grounds of failure to substantiate complaints in order to conclude that the communication is inadmissible. I believe that it is unacceptable that, when a complaint does not prima facie appear to violate the articles of the Covenant, the argument is used that it is not substantiated for the purposes of admissibility. The legal substantiation of the facts, which should lead to the consideration of the merits of the case in order to determine whether or not there has been a violation, is one concern; another, very different, matter is the seriousness and substantiation of complaints, which is the necessary condition that enables the Committee to examine a communication, without prejudging the merits of the case.

I do not agree with the Committee's statement in paragraph 8.2 of the Decision that, in spite of the legally imprecise language that the State party uses in its replies, it (the Committee) considers the State party's objection of inadmissibility with respect to the Convention on the Rights of the Child as pertaining to the entire communication. I do not find anywhere in the State party's replies any opposition to the admissibility of the communication. What the State party is saying (paragraph 4.1 of the Decision) is that the author's allegation of a violation of article 2, paragraph 1, of the Covenant has no legal basis whatsoever. In other words, it considers that the facts as presented by the author do not constitute a violation of the article, which is very different from stating that the author has not substantiated his allegations, in order to be able to consider whether or not the allegations involve a violation.

The State party itself considered that the facts as presented by the author were sufficiently substantiated to militate in his favour. Far from considering his complaints as groundless, the State party, according to its own statements, provided the author with the necessary judicial and administrative support, "in keeping with the provisions of the international

conventions to which Italy is a party" (para. 4.1). On various occasions, the authorities of the State party have intervened to defend the author's interests, which indicates that they have always considered that the facts as presented merited due consideration, and that only the attitude of the Austrian authorities prevented the author from obtaining the treatment to which he believed he was entitled.

To sum up, I consider that the author has sufficiently substantiated his claims for the purposes of the admissibility of the communication under articles 2, 17 and 23 of the Covenant, without prejudging whether or not there was a violation of those articles.

Bogotá, 15 August 2006

(*Signed*): Rafael Rivas Posada

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