



**International covenant
on civil and
political rights**

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Human Rights Committee
Ninety-fifth session
16 March-3 April 2009

VIEWS

Communication No. 1407/2005

Submitted by: Juan Asensi Martínez (represented by counsel,
Adolfo Alonso Carvajal)

Alleged victim: The author and his minor children, Liz-Valeria and
Lorena-Fabiana Asensi Mendoza

State party: Paraguay

Date of the communication: 26 April 2005 (initial submission)

Documentation references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 9 June 2005 (not issued in document form)

Date of present decision: 27 March 2009

Subject matter: Removal of author's minor daughters abroad
without author's consent

Procedural issues: Failure to substantiate claim

* Made public by decision of the Human Rights Committee

Substantive issues: Family's right to State protection; every child's right to such measures of protection as are required by their status as minor

Articles of the Covenant: 23, paragraph 1; 24, paragraph 1

Articles of the Optional Protocol: 2

On 27 March 2009 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1407/2005.

[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**

Ninety-fifth session

concerning

Communication No. 1407/2005**

Submitted by: Juan Asensi Martínez (represented by counsel,
Adolfo Alonso Carvajal)

Alleged victim: The author and his minor children, Liz-Valeria and
Lorena-Fabiana Asensi Mendoza

State party: Paraguay

Date of the communication: 26 April 2005 (initial submission)

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

Meeting on 27 March 2009,

Having concluded its consideration of communication No. 1407/2005, submitted to the
Human Rights Committee by the authors 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 authors 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, dated 30 April 2005, is Juan Asensi Martínez, a Spanish
national. He claims to be the victim, together with his minor daughters Liz-Valeria and

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati,
Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller,
Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez
Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli,
Mr. Krister Thelin and Ms. Ruth Wedgwood.

Lorena-Fabiana Asensi Mendoza,¹ of a violation by Paraguay of articles 23, paragraph 1, 24, paragraph 1, and 26 of the Covenant. The Optional Protocol entered into force for the State party on 11 April 1995. The author is represented by counsel.

Facts as submitted by the author

2.1 The author, an industrial engineer, married Dionisia Mendoza Rabugueti, a Paraguayan national, in Paraguay on 16 August 1997. The couple had two children, Liz-Valeria and Lorena-Fabiana, who were born in Asunción on 12 April 1997 and 5 April 1999 respectively. By reason of the author's work, the family, which included a child of Ms. Mendoza from a previous relationship, moved to Barcelona on 13 September 1999. The author's wife took the children to Paraguay on holiday from June to November 2000. On 14 January 2001, taking advantage of a business trip by the author, she left their home in Barcelona for good and moved to Paraguay with the three children. The move was made without the author's consent and he filed a complaint in that regard alleging an offence of abduction of minors under article 225 of the Spanish Criminal Code.

2.2 The author states that since their return to Paraguay the children have been living with their mother and her boyfriend, an administrator at the Itaguá national hospital, in run-down accommodation in a marginal and dangerous district of the city of Ita. This way of life was very different from the one they had enjoyed when they were living with the author.² Relatives and neighbours reported that they were not being fed properly and looked neglected and ill - most notably, they were not being treated for a chronic bronchial condition³ - and were not in school. They frequently witnessed violent scenes between the mother and her boyfriend. The mother was engaging in prostitution in her own home and there were fears that the older girl had been subjected to sexual abuse. The mother allows the girls no contact with the author or her own family. According to the case file, the maternal grandmother approached the court in 2002 to alert the authorities to the unsafe situation the girls found themselves in and to ask that, if they could not be handed over to their father, she at least could be granted care and custody.

2.3 In 2001 and 2002 the author made several trips to Paraguay to see his daughters, even leaving his job in Spain. He was able to see them a number of times and give them things they needed, either in secret or with a social worker, by court order. On 10 February 2002, when the author was visiting the girls and in front of other family members, Ms. Mendoza threatened to kill him and attacked him with an iron chair and a kitchen knife, causing injuries that required

¹ In view of the girls' ages and the difficulties in communication between the author and his ex-wife, the Committee agrees to consider them as part of the present communication.

² The author submits a number of documents attesting to the unsafe conditions in which the children were living.

³ The author's communication includes a doctor's certificate from 12 January 2002 addressed to the juvenile court and stating that the children were suffering from "obstructive bronchitis syndrome". Subsequent certificates show that they recovered once the author had managed to get them treated.

hospital treatment.⁴ The author took criminal proceedings with the Asunción Public Prosecutor's Office.⁵ As a result Ms. Mendoza was placed under house arrest but she failed to comply with this order. At the same time, the Ita justice of the peace dismissed a complaint of domestic violence brought by Ms. Mendoza against the author, for failure to substantiate her accusations.

2.4 On 27 March 2002, the author obtained court authorization for the girls to spend some days with him. Ms. Mendoza refused to hand them over, however. The author also asked the Spanish Embassy in Asunción to mediate his contacts with Ms. Mendoza. The Embassy made various fruitless attempts to do so and then alerted the Child Protection Department of the Paraguayan Ministry of Justice and Labour.

2.5 The author states that he has attempted various judicial remedies in Paraguay and in Spain to get his daughters back.⁶ On 11 April 2001, for example, he applied to the Juvenile Protection and Correctional Court (First Roster) for international return. In its ruling of 26 June 2001, the Court pointed out the importance of settling claims of this kind as quickly as possible in order to avoid "one of the serious consequences that can arise in cases such as this, namely the uprooting of the children and the negative influence of the person holding them, who naturally tends to try to turn them against the absent parent". Among other things, the Court found that, according to the case file, the children's effective place of residence was their father's home in Spain and that the proceedings taken by Ms. Mendoza in the Paraguayan courts were evidence of her intention to remove them from the guardianship and parental authority of their father. In accordance with domestic law and the 1980 Hague Convention on the Civil Aspects of International Child Abduction,⁷ the Court pronounced the children's removal to Paraguay wrongful and ordered that

⁴ The case file contains a copy of the medical certificate.

⁵ According to the author, there were other complaints against Ms. Mendoza, brought by members of her own family, notably criminal proceedings for bodily harm brought by her sister in June 2002; a complaint for theft brought by her uncle; and a complaint for uttering death threats, lodged with the police by her brother in April 2002. The case file contains copies of the relevant documents.

⁶ As regards the proceedings in Spain, the author submits documents showing that he received assistance from the Ministry of Justice, through the Department of International Legal Cooperation, Spain's central authority for the application of the Hague Convention. The Spanish authority contacted the Paraguayan central authority.

⁷ Under article 3 of the Convention, "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".

they should be returned to the author immediately. It also pointed out that, under the Convention, the question of custody should be settled by the courts in the children's effective place of residence, that is to say their place of residence in Spain.

2.6 On 20 August 2001 the Asunción Juvenile Appeal Court quashed the lower court's sentence. The author challenged the Appeal Court's decision on constitutional grounds but the Supreme Court rejected his application in a ruling of 15 March 2005.

2.7 While he was awaiting a final decision on the issue of return, a process that took several years, the author submitted an application for access arrangements.⁸ He also lodged a complaint with the Ita Juvenile Court in 2002, over the neglect of the children and the situation of risk they were in, and sought temporary custody pending the Supreme Court's decision on his constitutional challenge. The author claims that no action was ever taken on this request.

2.8 In parallel with this the author applied in Spain for legal separation, on 19 March 2002, with Court No. 4 in Martorell. In a sentence dated 29 November 2002 the Court pronounced the separation and awarded the author care and custody of the children and Ms. Mendoza visiting rights. Parental authority was to be shared.⁹

2.9 Applying Spanish law on the abduction of minors and the Hague Convention, Trial and Investigating Court No. 2 in Villafranca del Penedés, Spain, sentenced Ms. Mendoza on 2 November 2005 to pretrial detention for evading Spanish justice and absconding. The Court also ordered the girls to be returned to the author and requested extradition proceedings to be taken against Ms. Mendoza for the offence of abduction of minors. On 30 November 2005 the Court asked the Ministry of Justice to request the Paraguayan central authority responsible for applying the Hague Convention to execute the order for the return of the children to their father.

Complaint

3.1 In the author's view, the events described violate his rights and those of his daughters under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. He claims that the mother is not providing adequate protection to the children and that he himself is unable to protect them, owing to the lack of action on the part of the State party's authorities, a failing reflected most clearly in the poorly substantiated Supreme Court sentence and the unreasonably long time taken by the Paraguayan courts to reach their verdicts. He says that, notwithstanding the mother's criminal history, the girls' unsafe situation and the delays in settling his appeals - nearly four years in the case of the constitutional challenge - the courts took no steps to protect his daughters.

⁸ From the file it appears that this request was not dealt with separately but simply added to the file on the application for return.

⁹ Ms. Mendoza did not contest the application and was therefore declared to be in default; the proceedings continued with no further reference to her.

3.2 The author states that the mother's Paraguayan nationality was a key factor in the domestic court's decision to deny the girls' return. In that regard he invokes article 26, alleging that he received unfair and discriminatory treatment from the State party's courts on the grounds of his nationality.

State party's observations on admissibility and the merits

4.1 On 4 May 2006 the State party submitted comments on the admissibility and merits of the communication. It stated that the case had been adjudicated in three courts and that domestic remedies had therefore been exhausted.

4.2 In its ruling of 15 March 2005, the Supreme Court pointed out that the author and his wife had lived together since 1996 in Paraguay, where they got married and where their two daughters were born. The children can be presumed to have lived in Spain only for some nine months between September 1999 and June 2000, which cannot give rise to any claim that Spain is the family's habitual place of residence.

4.3 One key point considered by the Supreme Court has to do with article 13 of the Hague Convention, which provides that the requested State is not bound to order the return of the child if there are substantiated grounds for opposing it. The Court found that the children's mother opposed their return on the grounds that there was a serious danger of them being exposed to physical or mental risk, which could place them in an intolerable situation. The Paraguayan Court also found, under article 3 of the Convention on the Rights of the Child, that there was every justification for keeping the girls on Paraguayan territory and that, considering their age, moving to Spain would have been an upheaval that would not be in their best interests.

4.4 In the State party's view the author did not demonstrate in the course of the proceedings what physical or psychological risk the children would run if they remained with their mother. Moreover, under both Paraguayan and Spanish law parental authority is equally shared by both parents. There is thus nothing to stop the author availing himself of a visiting and access arrangement.

4.5 Under the regime established in the Hague Convention, the court competent to rule on return is the court in the place where the requested child is. In this case the children were in Paraguay from the time proceedings were initiated up to the time the Supreme Court handed down its ruling. The State party argues that the Supreme Court settled the case on the basis of the Hague Convention. Technically and legally speaking, the rights protected by the Covenant are also protected by the Convention, and in a more precise, systematic and methodical fashion. The Supreme Court ruling represents a strict application both of the Convention and of the Covenant in respect of the issues addressed in article 23.

4.6 The State party also argues that the author was not denied the right of access to the courts and that his arguments were properly addressed. He cannot therefore claim a denial of justice or discrimination in the handling of his request.

4.7 The State party provided the Committee with copies of the domestic court rulings. The Appeal Court sentence questions whether the author has any right to custody of his daughters and whether the marital home was in Spain, given that Spain had denied Ms. Mendoza

permanent residence. The Court argued that, if the marital home was not legally in Spain then clearly the daughters could not have legal residence in Spain, and the mother could not be required to reside in Spain or stopped from leaving Spain with her children under her own parental authority. The Court took the view that, given their young age, it was in the children's best interests to remain in Paraguay and for the issue of custody to be resolved there; conversely, their best interests would not be served by the upheaval of travelling to Spain and settling there.

4.8 The Supreme Court ruling on the author's constitutional challenge to the Appeal Court sentence points out that the couple lived in Paraguay from 1996 - they married in Paraguay and their daughters were born in Paraguay - until they decided to move to Spain in September 1999. Ms. Mendoza returned to Paraguay with their daughters in mid-June 2000, with the author's consent, but the author took them back to Spain on 8 October 2000, without warning and without the mother's consent. Ms. Mendoza therefore filed a request to trace the children on 9 October 2000 and then went to Spain to take them back to Paraguay, the children's habitual residence. The girls had lived uninterruptedly in Spain for only around nine months, from September 1999 to June 2000. The Supreme Court found that the Appeal Court had based its judgement on the Hague Convention and the Convention on the Rights of the Child, which provide that actions concerning children shall be determined in accordance with the child's best interests. The Appeal Court had also found that return was not appropriate in view of the children's ages (one was 4 and the other was 2), since the move to Spain would put them at unacceptable mental risk. The Supreme Court found that the Appeal Court judgement had taken due account of the Constitution and was based on the children's best interests.

Author's comments on the State party's submission

5.1 On 19 November 2007 the author replied to the State party's comments. He pointed out that he has legal custody of his daughters by virtue of the judgements of Court No. 4 in Martorell and of the Barcelona Provincial Court. The proceedings in those courts had been conducted with all judicial safeguards and the author had even offered to pay Ms. Mendoza's fare to Spain to attend the hearing. He goes on to state that the Spanish courts issued a warrant for Ms. Mendoza's arrest and sought the cooperation of the State party's authorities in ensuring that she returned the children, based on the court decision awarding the author custody.¹⁰ He recalls that Ms. Mendoza had attempted to kill him and he therefore fears for his life if he goes to Paraguay; and she is preventing him from staying in touch with his daughters.

5.2 The author notes that the State party's observations fail to mention the children's living conditions in Paraguay, which should be viewed in the context of the poverty to be found there. The Supreme Court accepted Ms. Mendoza's contentions without really looking into the situation. It failed to take into account the fact that Ms. Mendoza left Spain to be with someone she was having a relationship with and lived with until 2004; the criminal complaints brought against Ms. Mendoza by members of her family; the request by the children's maternal grandmother to be granted care and custody given the risks involved in remaining with their

¹⁰ In a decision dated 20 May 2008 a lower court in the State party rejected the request for return submitted by the Martorell court, on the basis of the Supreme Court judgement of 15 March 2005.

mother; Ms. Mendoza's alleged prostitution; and her disregard for judicial instructions such as the court requests, obtained on application by the author, for the children to undergo a psychological examination or to be allowed to spend some days with the author in 2002. It also failed to take into account that the girls were living off the material support provided by the author and the Spanish Consulate.

5.3 The author claims that the Supreme Court judgement was reached by three judges, one of whom was in favour of a finding of unconstitutionality in respect of the Appeal Court ruling. In that judge's view, the Appeal Court had exceeded its competence, which was limited to determining the children's habitual residence and not whether the father had the right of custody.

5.4 The Supreme Court judgement contains errors of fact in respect of the children's place of residence. The author argues that the family was officially resident in Spain¹¹ between 19 September 1999 and 14 January 2001, notwithstanding Ms. Mendoza's trip to Paraguay during that time, i.e., between June and October 2000. During this period the mother, the mother's older son and the daughters were registered in Spain and the children were enrolled in school. They were all covered by social security. The author recalls that the daughters were removed from Spain without a passport and with the direct intervention of the Paraguayan Consulate in Barcelona, which issued the mother with a safe conduct without the author's knowledge. Lastly he argues that the Supreme Court's assessment of the child's best interests is not compatible with the Covenant. He also notes the failure on the part of the State party's judicial authorities to deal with the issue as a matter of urgency.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The author claims that he received discriminatory treatment from the State party's authorities, in violation of article 26 of the Covenant, because he was not a Paraguayan national, and that the fact that the children's mother was Paraguayan was a key factor in the domestic

¹¹ The author submitted documentary evidence of the family's official residence in Spain, including documentary evidence of the granting of a visa to Ms. Mendoza and her older son on grounds of family reunification and certificates from the children's school and from the hospital they attended. A letter from the Director-General of Legislative Policy and International Legal Cooperation of the Spanish Ministry of Justice to the Deputy Minister of Justice of Paraguay states that Spain was the country of habitual residence.

courts' decision to deny their return. In the Committee's view, however, the author fails to present sufficient evidence in support of his claims. Consequently it considers that this part of the communication has not been sufficiently substantiated and is inadmissible under article 2 of the Optional Protocol.

6.4 As to the author's claims under articles 23 and 24 of the Covenant, the Committee takes note of the State party's argument that domestic remedies have been exhausted and finds these claims sufficiently substantiated for the purposes of admissibility. Finding no impediment to admissibility, the Committee declares the communication admissible insofar as it appears to raise issues under articles 23 and 24, paragraph 1, of the Covenant.

Consideration on the merits

7.1 The Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must determine whether, in the course of the author's efforts to maintain contact with his minor daughters and exercise his right of custody, a right granted by the Spanish courts, the State party violated the right of the author and his daughters, as a family, to the protection of the State under article 23, paragraph 1, of the Covenant. The Committee notes that the author and his ex-wife were married in August 1997 and that his daughters were born in 1997 and 1999 respectively. The family first lived in Paraguay and in September 1999 moved to Spain, where the author was working. Starting in January 2001, when his ex-wife left Spain for good with their daughters, the author made numerous attempts to keep in contact with the children, obtain their return and meet their material and emotional needs. On the legal front, his efforts took the form of administrative and judicial action of various kinds, both in Spain, the last place the family lived, and in the State party. The remedies invoked in the Spanish courts gave rise to a separation order in November 2002 granting the author care and custody of the girls. In addition, the Spanish authorities made approaches to the State party with a view to protecting the author's rights under the Hague Convention on the Civil Aspects of International Child Abduction, to which both States are party.

7.3 With regard to the measures taken in the State party, the Committee notes that the author applied to the courts in proceedings of two kinds: (a) to obtain the return of the children and (b) to obtain effective access to his children and assert his right of custody. The former gave rise to judgements in three courts, of which the Appeal Court and Supreme Court rulings found against the return of the children. Both the Appeal Court and the Supreme Court state that they have taken account of the children's best interests and that taking them to Spain would in their view have put them at psychological risk given their young age. Yet the judgements do not explain what either court understands by "best interests" and "psychological risk" or what evidence was considered in reaching the conclusion that there was in fact such a risk. There is also nothing to show that the author's complaints concerning the children's unsafe living conditions in Paraguay were duly examined. The Committee also notes that the lower court judgement emphasized the need for speedy settlement of the issue of return, despite which the Supreme Court took nearly four years to hand down its ruling, too long for a case such as this.

7.4 As to the remedies invoked by the author in the State party with a view to making contact with his daughters and obtaining custody, the Committee notes that the author applied to the courts on these matters. The file shows, for example, that in March 2002 the author obtained court authorization for the girls to spend a few days with him but that the authorization could not be implemented because the mother refused to comply. The authorities did nothing to ensure that the author's ex-wife complied with the court order. The Committee also notes that, while his constitutional challenge was still pending, the author complained to the court about the neglect of the children and the situation of risk they were in, and sought temporary custody, yet he never received a reply to his application. The Committee also notes the statements by the Appeal Court and the State party to the effect that the issues relating to custody of the children should be settled in Paraguay and that denial of return did not stop the author availing himself of a visiting and access arrangement. Despite these statements, however, there has been no decision by the State party authorities on custody rights or visiting arrangements for the author.

7.5 In light of the foregoing, the Committee finds that the State party has not taken the necessary steps to guarantee the family's right to protection under article 23 of the Covenant, in respect of the author and his daughters, or the daughters' right, as minors, to protection under article 24, paragraph 1, of the Covenant.

8. 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 disclose a violation of articles 23 and 24, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the facilitation of contact between the author and his daughters. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish 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.]
