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Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 121/2020*, **

Communication submitted by:	N.E.R.Á. (represented by counsel, Yohana Cornejo García)
Alleged victim:	J.M. (the author's son)
State party:	Chile
Date of communication:	9 July 2020 (initial submission)
Date of adoption of Views:	1 June 2022
Subject matter:	Return to Spain of a child with autism under the Hague Convention on the Civil Aspects of International Child Abduction
Procedural issues:	Abuse of the right of submission; admissibility – manifestly unfounded; interim measures
Substantive issues:	Protection measures; family rights; best interests of the child
Articles of the Convention:	3, 9, 11 and 23
Articles of the Optional Protocol:	6 and 7 (c) and (f)

* Adopted by the Committee at its ninetieth session (3 May–3 June 2022).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aïssatou Alassane Sidikou, Ann Skelton, Velina Todorova and Benoit Van Keirsbilck and Ratou Zara.

1.1 The author of the communication is N.E.R.Á., a national of Chile born on 10 September 1977. She submits the present communication on behalf of her son, J.M., a dual national of Chile and Spain born in Chile on 14 January 2016. The author claims that her son's rights under articles 3, 9, 11 and 23 of the Convention have been violated. The Optional Protocol entered into force for the State party on 1 December 2015.

1.2 On 21 July 2020, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to adopt interim measures to suspend the removal of J.M. to Spain pending consideration of the case by the Committee. At the request of the State party, on 5 November 2020, the Committee decided to withdraw its request for the adoption of interim measures, on the condition that the State party ensured that the transfer of J.M. to Spain was carried out in such a way as to avoid causing him irreparable harm, to ensure the continuity of his treatment and to allow his mother to accompany him. On 27 November 2020, the Committee rejected the author's new request for the adoption of further interim measures consisting in ordering that he remain in the custody of his mother when returned to Spain. On 29 June 2021, the Committee rejected the State party's request for the admissibility of the communication to be considered separately from the merits, and rejected a further request from the author for the adoption of interim measures. At the time of her last submission, the author was in hiding in the State party after not having complied with the State party's order to return to Spain.

Facts as submitted by the author

2.1 On 9 May 2015, the author married O.S.F. (J.M.'s father), a national of Spain, in Chile. On 14 January 2016, her son J.M. was born in Chile. On 9 May 2016, on account of his frequent business trips, the father granted the author and her son authorization by public deed to relocate to and reside in a place of their choosing. In June 2016, the father relocated to Israel for work. The author and her son joined him in August 2016. However, because the apartment they were living in was in poor condition, the couple decided that the author and her son should move to Spain, which is closer to Israel than Chile, allowing the father to visit them regularly. The author and her son moved to Spain in November 2016, where the father visited them. Soon after, he was demoted at work and was transferred to Spain. The author alleges that their relationship gradually deteriorated and that the father became psychologically abusive. During that time, the author discovered that the father was addicted to cybersex and spent much of the day chatting with strangers online.[1]

2.2 In April 2017, a paediatrician informed the couple that he suspected that J.M. had a language delay and a form of autism. Shortly thereafter, the couple decided to travel to Chile to work on their relationship. The author claims, however, that a few days before the trip, the father decided he would not travel with her and would instead join her at a later date. On 27 July 2017, the author and the father signed an authorization for her and her son to travel to Chile on 9 August 2017 and return to Spain on 7 September 2017. The author explains that, once in Chile, she arranged for J.M. to receive support for his autism and they decided to stay in the country for at least two years, which was the time that it would take to treat the father's addiction in Spain. In March 2018, after the author had spent seven months in the State party, the father received authorization from his doctors in Spain to travel to Chile to visit his family, a trip which had been denied to him three months earlier. The author claims that the father did not express any disapproval, either prior to or during his visit, of the fact that the author and J.M. were living in the State party.

2.3 On 26 July 2018, the father filed a complaint with the Ministry of Justice of Spain against the author for the abduction and unlawful retention of J.M., under the procedure established in the Hague Convention on the Civil Aspects of International Child Abduction. He claimed that J.M. should reside in Ávila, Spain (at the home of the child's paternal grandparents), where J.M. was enrolled in the population register, and requested that he be returned to Spain. The father's lawyers eventually dropped the kidnapping charge, but a trial

[1] In section 5, paragraph 6, of its ruling (see para. 2.6 below), the Supreme Court found that this claim had not been substantiated by the lower courts.

was held before the First Family Court of Viña del Mar in relation to the charge of unlawful retention.

2.4 On 10 January 2019, the First Family Court of Viña del Mar rejected the father's claim on the grounds that the author "also had the tacit, even explicit, consent of the party to remain in Chile, which, moreover, has been the child's place of habitual residence since birth". The Court found that the condition established in article 13 (a) of the Hague Convention on the Civil Aspects of International Child Abduction[2] had been met. In addition to its findings regarding the Hague Convention, the Court found that it was "obliged to anticipate the possible effects of the measure in question, taking into account the best interests of the child, since such effects would necessarily – if [the return] took place – involve a drastic and sudden alteration of the life that J.M. currently leads, which, given his amply proven and undisputed condition, would create a detrimental and harmful environment for him, not to mention that once returned to Spain he could even be separated from his mother – in accordance with Spanish law – which would undermine his stability and deprive him of the highest possible level of protection".[3] Lastly, the Court added that, in line with the provisions of the Convention, "due consideration must be given to the welfare of the minor during the decision-making process, with respect for his individual rights, given his age, condition and personal circumstances, all of which this judge has taken into consideration in the final decision".[4] On 5 March 2019, the Court of Appeal of Valparaíso upheld the ruling of the lower court. In response, the father filed a remedy of complaint.

2.5 On 26 March 2019, the Court of Appeal of Valparaíso submitted a report to the Supreme Court of the State party, indicating, inter alia: (a) that it had not been definitively proven that J.M. had resided exclusively and continuously in Spain, and that his place of habitual residence should therefore be considered to be his country of origin; (b) that it had been fully established that J.M. had travelled to the State party with his father's authorization and that later, at the end of the period stipulated for that trip, his father had consented to and authorized J.M.'s continued stay in his country of origin, which, given his health condition, was expected to be a long-term stay; (c) that it had been proven that J.M. had fully integrated into his new environment and that transferring him to Spain would entail breaking his current routines and would therefore seriously affect his stereotyped and repetitive behaviours, which required measures of protection and support; (d) that the unlawful conduct described in article 3 of the Hague Convention on the Civil Aspects of International Child Abduction had not been committed and that article 13 (a) of the Convention applied to the case; and (e) that it was obliged to anticipate the possible effects of J.M.'s return, taking into account his best interests, and that in that regard it seconded the findings of the lower court.

2.6 On 3 September 2019, the Supreme Court upheld the complaint and granted the father's request, reversing the rulings of the court of first instance and the Court of Appeal and ordering the immediate return of J.M. to Spain. The author notes that the Supreme Court's decision did not indicate the conditions under which J.M.'s return should take place, in whose company he should travel or where and with whom he would ultimately reside and in what circumstances. The author decided to disregard the ruling of the Supreme Court, which resulted in her being declared in contempt of court.

Complaint

3.1 The author claims that, by deciding that J.M. should be returned to Spain, the State party violated his rights under articles 3, 9, 11 and 23 of the Convention. With regard to article 3, the author recalls that the concept of the best interests of the child is a substantive right, an interpretative legal principle and a rule of procedure. She adds that the assessment of such interests should be undertaken in each individual case and in the light of the specific circumstances of each child, especially the different kinds and degrees of vulnerability of

[2] Article 13: " … 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 … had consented to or subsequently acquiesced in the removal or retention".

[3] RIT C-2505-2018, p. 28, preambular para. 10.

[4] Ibid.

each child. She emphasizes that if, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result, all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained.[5] The author stresses that her son, who has been diagnosed with autism, is particularly vulnerable. She argues that, in his individual case, the Supreme Court did not consider or give due weight to the circumstances of J.M.'s best interests given that, as stated in its ruling, it based its decision solely on the Hague Convention on the Civil Aspects of International Child Abduction, rather than on strict adherence to the principle enshrined in article 3 of the Convention in form and in substance.

3.2 In relation to article 9 of the Convention, the author argues that separating J.M. from her would have serious and potentially irreversible effects on his mental health because of his autism. She argues that the separation of a child from his or her parents should be a last resort and that the Supreme Court did not take this into account. The author therefore claims that the return of J.M. to Spain would violate his rights under article 9 of the Convention.

3.3 With regard to article 11 of the Convention, the author argues that a State party should not remove a child to a country where there are reasonable grounds to believe that he or she would be at a real risk of irreparable harm. She reiterates that J.M. is particularly vulnerable as a result of his autism, that she is his primary caregiver, that his father has had limited involvement in his life and treatment, that J.M. was born in the State party and is receiving medical support there and that he was not subjected to wrongful removal or retention. The author therefore claims that her son's removal to Spain would constitute a violation of article 11 of the Convention.

3.4 The author argues that, in violation of article 23 of the Convention, the Supreme Court did not adequately consider the condition of J.M., who was diagnosed with autism at a very young age and is receiving medical support in Chile. She adds that his transfer to Spain would lead, in practice, to his separation from his mother, who is his primary caregiver and the person with whom he feels safe and has created the strongest emotional bonds. She claims that this would seriously undermine his physical and emotional integrity, since J.M. has not developed the necessary bond of affection and trust with his father that would allow him, at his young age and in his condition, to be fully happy.

3.5 The author asks that the Committee recommend that the ruling of the Supreme Court should be set aside; that J.M. should remain in the State party and not be separated from her; that all coercive measures taken against her as a consequence of her being declared in contempt of court should cease; that she should remain J.M.'s personal caregiver; and that the father's parental powers should be determined by a judge of the State party.

State party's observations on admissibility

4.1 In its observations on admissibility, of 20 November 2020, the State party argues that the communication should be declared inadmissible under article 7 (c) and (f) of the Optional Protocol.

4.2 With regard to article 7 (c) of the Optional Protocol, the State party argues that its highest court based the legal reasoning in its ruling on the State party's obligation to comply with the provisions of the Hague Convention on the Civil Aspects of International Child Abduction in respect of the irregular situation of J.M., whose legal domicile is in Spain, and his and his father's rights. It claims that the author's intention is to treat the Committee as an appellate body whose purpose is to correct hypothetical errors of law allegedly made by the domestic courts in interpreting and applying the domestic and international law in force for the State party. It adds that the author is asking the Committee to reconsider the facts that gave rise to the legal proceedings and to rule in her favour, which would imply acting as an appellate body. The State party argues that reconsideration of the facts does not fall within the remit of the Committee, which must limit itself to assessing the State's conduct with respect to its obligations under the Convention and the Optional Protocols on the basis of the facts that have already been established by the State party's courts. In the light of the

[5] The author cites Committee on the Rights of the Child general comment No. 14 (2013) extensively.

foregoing, the State party is of the view that the Committee does not have the jurisdictional powers to grant the author's requests.

4.3 With regard to article 7 (f) of the Optional Protocol, the State party argues that the author has not provided sufficient arguments to establish a prima facie case for violations of the Convention or the first and second Optional Protocols by the domestic courts. It claims that the author has based her communication on an alleged violation of J.M.'s rights arising from the legal reasoning of the Supreme Court, and reiterates that the Committee is not competent to reinterpret domestic law or the legal reasoning underlying domestic rulings.[6] The State party claims that the author's arguments (see para. 3.1 above) imply that the fact that the Supreme Court based its judgment only on the Hague Convention on the Civil Aspects of International Child Abduction necessarily signifies that it disregarded the general principle of the best interests of the child as enshrined in article 3 of the Convention. However, this is false, since the preamble of the Hague Convention provides that "the interests of children are of paramount importance in matters relating to their custody". This means that the two international treaties are aligned in their aim to protect the best interests of children, in keeping with the Supreme Court's findings in its ruling. The State party adds that the Supreme Court found that J.M.'s presence in the State party was irregular and that, in accordance with its obligations under the Hague Convention, which takes due account of the best interests of the child, ordered that he be returned to Spain. It claims that the custody and visitation arrangements, the parental powers of the parties and all other aspects related to J.M.'s care should be determined through independent judicial proceedings in the State where he has his habitual residence.

State party's observations on the merits

5.1 In its observations on the merits of the communication, of 22 March 2021, the State party requested that the Committee reject the author's requests, on the grounds that the claims on which they were based were untrue and did not constitute a violation of the rights established in the Convention. It argues that, contrary to the author's claims, all decisions and measures adopted by the State party have been aimed at ensuring compliance with its obligations under the Convention.

5.2 The State party argues that the author's claims concerning the custody of J.M. are based on a false assumption regarding the content of the dispute that is the subject of the communication. It notes that the author repeatedly stated that she would be separated from J.M. if he were returned to Spain. It explains that child custody is not determined on the basis of the application of the Hague Convention on the Civil Aspects of International Child Abduction, the purpose of which is not to protect factual situations altered by the wrongful removal of a child or adolescent to another State or by their failure to return to their State of habitual residence. The intended objective of the Hague Convention is that, once a child has been returned, parties seeking to claim custody of the child should do so before the competent authorities of the State where the child had his or her habitual residence before being removed, which is why it provides, in article 16, for the suspension of custody proceedings in the State in which the child is being wrongfully retained.[7] The State party explains that the Supreme Court decided that there was sufficient evidence to prove that: (a) J.M.'s place of habitual residence was in Spain; and (b) the fact that J.M.'s father was fulfilling his obligations towards him could not be interpreted as an agreement to make the State party J.M.'s place of permanent residence. In view of the above, the Supreme Court found that J.M. was residing in the State party irregularly and decided, in accordance with the Hague Convention, to order him to be returned to his country of habitual residence, without determining who should have custody over him or be responsible for his personal care, since such issues were not the subject of the litigation.

[6] The State party cites *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; and *A.R.G. v. Spain* (CRC/C/85/D/92/2019), para. 4.2.

[7] The State party extensively cites the report on the Hague Convention prepared by the Hague Convention rapporteur, Elisa Pérez-Vera, entitled "Convention on the civil aspects of international child abduction: explanatory report", Madrid, April 1981, paras. 11–19, available from https://www.hcch.net/en/publications-and-studies/details4/?pid=2779.

5.3 With regard to J.M.'s best interests, the State party claims that it is fully aware of and complies with its obligation under article 3 (1) of the Convention.[8] It claims that the domestic courts, including the Supreme Court, took J.M.'s best interests into account throughout the proceedings. According to the State party, the proceedings demonstrate that measures were adopted to ensure that J.M.'s best interests were taken into consideration, in keeping with Committee on the Rights of the Child general comment No. 12 (2009).[9] The State party indicates that various safeguards were in place, for example trained professionals participated extensively in the proceedings at the invitation of both parties and the court itself,[10] that decisions were taken in the shortest time possible, in accordance with the simplified procedure under the Hague Convention on the Civil Aspects of International Child Abduction,[11] that the decisions of the court of first instance, the Court of Appeal and the Supreme Court were duly substantiated and motivated[12] and that the author had access to mechanisms allowing her to appeal or request a review of all such decisions.[13]

5.4 In response to the author's claim that the Supreme Court did not consider the principle of the best interests of the child as established in article 3 of the Convention on the Rights of the Child but rather based its decision solely on the Hague Convention on the Civil Aspects of International Child Abduction, the State party explains that the application of the Hague Convention is directly intended to ensure compliance with the obligation under the Convention on the Rights of the Child to take the best interests of the child into account.[14] It emphasizes that it is clear from article 11 of the Convention on the Rights of the Child and the preamble of the Hague Convention that the two treaties are aligned in their aim to protect the best interests of minors. It argues that article 11 (2) of the Convention on the Rights of the Child refers precisely to agreements such as the Hague Convention, and that the Committee itself, in its general comment No. 5 (2003), encourages States parties to ratify the Hague Convention.[15] The State party argues that it is therefore untenable to claim that the Supreme Court did not consider J.M.'s best interests.

5.5 With regard to the need for the best interests of the child to be considered throughout the proceedings, the State party refers to the interlocutory hearing on the enforcement of the Supreme Court's decision, which had not taken place at the time of submission of the communication. The State party argues that this stage is essential, as it is intended for the parties to collaboratively determine a way to ensure the safe return of the child to his or her country of habitual residence, thus ensuring that his or her best interests are considered at all times and avoiding the possibility of irreparable harm. The State party argues that the claims made by the author based solely on the Supreme Court's decision are reductionist, since, generally speaking, its national law provides for procedural mechanisms that allow judges to ensure that the best interests of children are taken into account and that their other rights are protected at all times.

5.6 The State party indicates that the Family Court of Viña del Mar held the above-mentioned hearing, which was attended by the author, on 6 November 2020. At the hearing, it was decided that: (a) J.M.'s trip to Spain would be made in the company of the author, who

[8] The State party cites various provisions of national law that reflect this principle and various Supreme Court rulings in which it was applied.

[9] See para. 70.

[10] The State party cites Committee on the Rights of the Child general comment No. 14 (2013), para. 92.

[11] Ibid., para. 93.

[12] Ibid., para. 97.

[13] Ibid., para. 98.

[14] The State party again cites the explanatory report of the Hague Convention rapporteur, paragraph 23 of which indicates that "the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'."

[15] See annex I.

is his support figure, and would be paid for by his father; (b) the arrest warrant issued against the author in the State party as a result of her being declared in contempt of court would be suspended; (c) the liaison judge in the State party would be asked to contact the liaison judge in Spain to ensure that the arrest warrant issued in that country against the author was not executed if she complied with the decision to transfer J.M. to Spain; and (d) J.M. should make the return trip as a single direct trip, in the company of his mother, who is his support figure (in accordance with the recommendation made by Asociación Alanda, an institution specializing in autism spectrum disorder). It adds that the author was entitled to take any other measures of a personal nature that she deemed appropriate, such as providing food or toys or taking other steps to facilitate J.M.'s transfer. The trip was scheduled for 30 November 2020, however the State party explains that it did not take place, because the author did not show up at the airport with J.M. at the agreed time. It stresses that the author's failure to comply with the agreements reached makes cooperation among the parties involved more difficult and hinders the safe return of J.M. in line with his best interests and in such a way as to avoid causing him irreversible harm.

Author's comments on the State party's observations on admissibility and the merits

6.1 On 31 March 2021 and 4 January 2022, the author submitted comments on the State party's observations on admissibility and the merits. Firstly, the author argues that the Supreme Court's decision disregarded the Convention and thus prioritized the Hague Convention on the Civil Aspects of International Child Abduction over such important principles as the best interests of the child. She adds that the decision was based exclusively on the argument that Spain is J.M.'s country of habitual residence, without due consideration as to whether any of the grounds established in the Hague Convention for opposing his return applied.

6.2 Secondly, the author argues that it is untrue that she is seeking to resolve the question of J.M.'s custody by means of the present communication, and claims that it should be a court in Chile, the country in which J.M. has lived for most of his life, that determines each parent's parental powers. She claims that she was asked to hand J.M. over to his father and then return to the State party, or else fully comply with whatever decisions the State party took with regard to her and her son. She adds that the father is a complete stranger to J.M. and lacks the necessary knowledge to provide the support that J.M. needs in view of his condition, because he has never participated in his upbringing or care, beyond providing economic support.

6.3 Thirdly, the author claims that the commitments made by the State party as a precondition for the Committee's withdrawal of its request for protection measures necessarily implied that she would remain by J.M.'s side, in accordance with his doctors' recommendations. However, she points out that her aeroplane ticket indicated her return date as the following day, and that the trip was to be made in accordance with the recommendations of an institution that had never provided care to J.M., recommendations that did not cater to his real needs. She adds that the State party's claim that she was not obliged to hand J.M. over to his father and that she would be allowed to remain with J.M. after the trip is false, since the liaison judge himself informed her that he could not guarantee that there were no pending proceedings against her in Spain. The author concludes by arguing that the Supreme Court should have considered that her separation from J.M. could have serious repercussions for his stability, and that it did not weigh up the circumstances of the case with a view to ordering her separation from J.M. only as a last resort. She stresses that the return request was inadmissible insofar as there had been no violation of the right to custody, since Chile has always been J.M.'s country of habitual residence and is the place where he has lived for most of his life and where he has emotional ties, attends a social centre, receives medical support and has his family.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the communication is admissible under the Optional Protocol.

7.2 The Committee notes that the author is challenging the Supreme Court's decision to order the return of J.M., which is final. Accordingly, and since the State party has not raised any objections in this regard, the Committee considers that all available domestic remedies must be deemed to have been exhausted and concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

7.3 The Committee notes the State party's arguments that the author's communication should be declared inadmissible under article 7 (c) and (f) of the Convention (see para. 4.1 above). In particular, it notes the State party's argument that the Committee cannot establish itself as an appellate body to correct errors of law in the interpretation and application of the domestic and international law in force for the State party or in the legal reasoning underlying a particular domestic judgment (see paras. 4.2 and 4.3 above). The Committee also notes the State party's argument that the application of the Hague Convention on the Civil Aspects of International Child Abduction is intended to protect the best interests of the child in accordance with the Convention, and that the present communication does not establish a prima facie case for violations of the Convention (see para. 4.3 above).

7.4 The Committee recalls that, as a general rule, it is for national bodies to examine the facts and evidence and to interpret domestic law, unless such examination or interpretation is clearly arbitrary or amounts to a denial of justice.[16] The Committee is of the view that, in cases of the international return of children and adolescents, it is not the Committee's role to decide whether the Hague Convention on the Civil Aspects of International Child Abduction was correctly interpreted or applied by national courts,[17] but rather to ensure that such an interpretation or application is in accordance with the obligations established by the Convention. In the present case, the Committee notes the author's argument that, in its decision, the Supreme Court did not correctly apply the concept of the best interests of the child, either in form or in substance (see para. 3.1 above). Firstly, the Committee is of the view that examining this allegation would not entail establishing itself as an appellate body or reviewing the domestic courts' interpretation of the national law in force in the State party but rather reviewing the compatibility of domestic decisions with the State party's obligations under the Convention, in accordance with article 5 of the Optional Protocol. Secondly, the Committee notes that, since the principle of the best interests of the child enshrined in article 3 of the Convention imposes both procedural and substantive obligations, the Committee is competent to review whether the reasoning underlying decisions made by the domestic courts complies with those obligations.[18] Thirdly, the Committee believes that the very substance of the author's allegations lies in determining the scope of the State party's obligations under the Convention with regard to decisions taken on the basis of the Hague Convention; this has been sufficiently substantiated for the purposes of admissibility, especially since the Committee has so far made no pronouncements on this matter. The Committee therefore takes the view that paragraphs (c) and (f) of article 7 of the Optional Protocol do not constitute an obstacle to the admissibility of the communication.

7.5 The Committee also notes the author's argument that the decision to return J.M. to Spain violates articles 9 and 23 of the Convention (see paras. 3.2 and 3.4 above), because his return would have serious and potentially irreversible effects on his mental health, particularly in view of his autism, since it would entail his separation from his mother, who

[16] See, inter alia, the Committee's decisions of inadmissibility in *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; *Navarro Presentación and Medina Pascual v. Spain* (CRC/C/81/D/19/2017), para. 6.4; and *A.R.G. v. Spain* (CRC/C/85/D/92/2019), para. 4.2.

[17] Inter-American Commission on Human Rights, *X and Z v. Argentina*, case No. 11.676, report No. 71/00, para. 43.

[18] See the Committee's general comment No. 14 (2013), paras. 14 (b) and 97. See also *A.B. v. Finland* (CRC/C/86/D/51/2018), para. 12.4.

is his primary caregiver and the person with whom he has established the strongest emotional bonds (ibid.). The Committee notes that these allegations are based on the factual premise that J.M.'s return would effectively entail his separation from his mother. The Committee again recalls that it is not its role, generally speaking, to establish or review questions of fact determined by domestic courts. However, as the author claims that the Supreme Court did not give due consideration to her potential separation from J.M. and the impact that such a separation would have on him in view of his particular vulnerability, the Committee considers that these allegations have been sufficiently substantiated for the purposes of admissibility, insofar as they might be tantamount to violations of article 3 of the Convention read in conjunction with articles 9 and 23.

7.6 With regard to the claims presented under article 11 of the Convention, the Committee is of the view that the author has not sufficiently substantiated her claim that J.M.'s rights under this article have been violated by the decision to return him to Spain. The Committee therefore finds that these claims have not been sufficiently substantiated and declares them inadmissible under article 7 (f) of the Optional Protocol.

7.7 Accordingly, the Committee declares admissible the author's claims under article 3 of the Convention, read in conjunction with articles 9 and 23, insofar as J.M.'s best interests may not have been duly considered, in particular in view of his potential separation from his mother and the effect this would have on his mental health given his autism, and proceeds to examine them on their merits.

Consideration of the merits

8.1 In accordance with article 10 (1) of the Optional Protocol, the Committee has considered the communication in the light of all the information submitted to it by the parties.

8.2 The Committee recalls that, according to article 3 (1) of the Convention, States parties must ensure that the best interests of the child are a primary consideration in all actions undertaken concerning children by public institutions. The Committee also recalls that a decision on the international return of a child is an "action" within the meaning of article 3 of the Convention. The Committee further recalls that the best interests of the child should be "adjusted and defined on an individual basis, according to the specific situation of the child … taking into consideration their personal context, situation and needs".[19] The Committee must therefore determine whether, in accordance with article 3 of the Convention, the best interests of the child were a primary consideration in the Supreme Court's decision to order the return of J.M. in application of the Hague Convention on the Civil Aspects of International Child Abduction.

8.3 Firstly, the Committee notes the State party's argument that the application of the Hague Convention on the Civil Aspects of International Child Abduction is directly intended to ensure compliance with its obligation to take the best interests of the child into consideration, in accordance with the Convention on the Rights of the Child, and that it therefore cannot be claimed that the Supreme Court did not consider J.M.'s best interests (see para. 5.4 above). In this regard, the Committee notes that the Convention on the Rights of the Child must be interpreted in accordance with the general principles of international law. In any such interpretation, due account must be taken of the context in which the Convention is applied, which, according to article 31 (3) (c) of the Vienna Convention on the Law of Treaties, includes "any relevant rules of international law applicable in the relations between the parties", and, in particular, rules concerning the international protection of human rights. Thus, as far as international child abduction is concerned, the Convention on the Rights of the Child must be interpreted taking into consideration States parties' obligations under the Hague Convention, particularly since – as acknowledged by the State party (see para. 5.4 above) – article 11 of the Convention on the Rights of the Child calls upon States parties to take measures against the illicit removal and retention of children abroad, including by acceding to agreements such as the Hague Convention.[20]

[19] See the Committee's general comment No. 14 (2013), paras. 17 and 32.

[20] See the Committee's general comment No. 5 (2003), annex I.

8.4 In this regard, the Committee recognizes the complexity and diversity of circumstances that may arise in each specific case, and that the objectives of the Hague Convention on the Civil Aspects of International Child Abduction – prevention and immediate return – seek to protect the best interests of the child.[21] The Committee notes that the Hague Convention establishes a strong presumption that the best interests of the child require that he or she be immediately returned. This presumption, however, can be rebutted by the exceptions established in articles 12, 13 and 20 of the Hague Convention, which require that it be determined, on a case-by-case basis, whether such a return would in fact clearly be contrary to the best interests of the child. In such cases, the best interests of the child, within the meaning of article 3 of the Convention on the Rights of the Child, are a primary consideration in deciding whether the return should be carried out. The Committee notes, however, that the foregoing does not mean that a decision on the international return of a child made by a domestic court exclusively on the basis of the Hague Convention necessarily ensures compliance with the State party's obligations under the Convention on the Rights of the Child. In particular, since the right of the child to have his or her best interests be a primary consideration entails the application of procedural safeguards and interpretative standards, it cannot simply be stated that all domestic court decisions made solely on the basis of the Hague Convention will inevitably result in compliance with article 3 of the Convention on the Rights of the Child. It is up to the domestic courts to ensure compliance with the standards of article 3 of the Convention in every decision in which the exceptions provided for in articles 12, 13 and 20 of the Hague Convention apply or have been invoked.

8.5 In the light of the above, the Committee is of the view that, when deciding on international child abduction cases, national courts must, first, effectively assess the factors that may constitute an exception to the duty to immediately return the child (under articles 12, 13 and 20 of the Hague Convention on the Civil Aspects of International Child Abduction), in particular when such factors are raised by one of the parties to the proceedings, and make a sufficiently reasoned decision on this point.[22] Secondly, these factors must be evaluated in the light of the best interests of the child. The Committee emphasizes that this second condition is dependent, to a large extent, on factual determinations that, as a general rule, fall under the jurisdiction of domestic courts. The Committee also notes that, given that the Hague Convention is designed to strike a fair balance between the standard establishing a presumption in favour of the international return of the child and the factors that may make such a return contrary to the child's best interests in certain cases, it seems unlikely that adequate respect for the procedural safeguards mentioned above would result in a substantive violation of article 3 of the Convention.

8.6 The Committee is aware that the objective of the Hague Convention on the Civil Aspects of International Child Abduction is the return of children to their countries of habitual residence so that custody and child protection issues can be resolved, if necessary, in that jurisdiction. It is also aware that decisions on return must be taken in an especially prompt manner in order to ensure that the child's normal situation is duly restored and that the feasibility of the return is not undermined in practice, that is, that the purpose and object of the Hague Convention is not distorted.[23] It is therefore of the view that, in line with the principle of the best interests of the child, the exceptions to the duty to return the child established in the Hague Convention must be interpreted strictly.[24] The national judge called upon to apply the Hague Convention cannot be required to carry out the same level of

[21] Among other things, the Hague Convention seeks to protect the right of children not to be wrongfully removed or retained, to have a decision on custody or guardianship adjudicated before a judge of their place of habitual residence, to maintain regular contact with both parents and their families and to obtain a prompt resolution of the return request. See the explanatory report of the Hague Convention rapporteur, paras. 11 and 24–25.

[22] See, in this regard, European Court of Human Rights, *X v. Latvia* (application No. 27853/09), para. 106. This is consistent with the procedural safeguards referred to in the Committee's general comment No. 14 (2013), in particular those related to legal reasoning and to child-rights impact assessments – see paras. 97 and 99 respectively.

[23] Explanatory report of the Hague Convention rapporteur, para. 22.

[24] Ibid., para. 34; *X v. Latvia*, para. 107; and European Court of Human Rights, *Maumousseau and Washington v. France* (application No. 39388/05), para. 73.

examination of the best interests of the child as the courts called upon to decide on custody, visitation arrangements or other related issues, especially when the former does not have access to the same evidence and information as the judge of the country of habitual residence. Nonetheless, the judge ruling on the return must assess, in light of the narrow exceptions established in the Hague Convention, and as required under article 3 of the Convention on the Rights of the Child, the extent to which the return would expose him or her to physical or psychological harm or otherwise be clearly against his or her best interests.

8.7 Having addressed the initial issue of the standard applicable under article 3 of the Convention on the Rights of the Child to cases of the international return of children (see para. 8.2 above), the Committee must now determine whether, in the specific case of J.M., the decision of the Supreme Court respected this standard. The Committee notes the State party's argument that all decisions were duly substantiated and motivated (see para. 5.3 above). It also notes that, after a thorough analysis of the evidence and the applicable standards, the First Family Court of Viña del Mar, whose ruling was later upheld on appeal, dismissed the request for return on the grounds (under article 13 (a) of the Hague Convention on the Civil Aspects of International Child Abduction) that the father had consented to J.M.'s stay in the State party (see para. 2.4 above). The Family Court also added that due consideration should be given to the fact that the return of J.M. would create a "detrimental and harmful environment" for him, particularly in the light of his particular vulnerability and his potential separation from his mother, whose role in J.M.'s life was especially important given his condition (see para. 2.4 above). These findings formed part of an analysis of the best interests of the child within the meaning of the Convention on the Rights of the Child (see para. 2.4 above). The Committee also notes that the decision of the Supreme Court repealed the ruling of the Family Court instance on the grounds that the proven facts could not be interpreted as an agreement on the part of the father to make Chile J.M.'s place of permanent residence (see para. 5.2 above). The Committee notes, lastly, that the Supreme Court stated in its decision that the author had not proven the existence of a grave risk arising from the requested return.[25]

8.8 The Committee considers that the Supreme Court's decision does not adequately refute several elements established by and included in the judgment of the court of first instance – and affirmed by the Court of Appeal – which were relevant to determining whether J.M. should be returned to Spain, especially his particular vulnerability on account of his autism, and his potential separation from his mother, who is especially important to him in view of his condition. The above is all the more important as the decision in question reversed the conclusion of the lower courts with regard to the exception established in article 13 (a) of the Hague Convention on the Civil Aspects of International Child Abduction. Although it has been understood that separation, however difficult for the child, does not automatically meet the grave risk test, as required, for example, under article 13 (b) of the Hague Convention,[26] the real possibility for the parent to return to the country of habitual residence and maintain contact with the child must be duly considered,[27] especially in a case such as that of J.M., given the circumstances described above. In particular, special attention should have been given to his young age at the time of the Supreme Court's decision (3 years), the fact that the author had been a special figure for J.M. during his autism treatment in the State party for the previous two years, and that an arrest warrant had been issued against the author in Spain (para. 5.6). The Committee notes that the Supreme Court's decision refers only to the rights of the father and makes no mention of J.M.'s rights or best interests. Accordingly, and without entering into a discussion of the Supreme Court's assessment of the facts and applicable standards, the Committee is of the view that the lack of sufficient reasoning in the Supreme Court's decision does not allow it to confirm that the Court effectively assessed the factors described above.

[25] In preambular para. 9 of the Supreme Court decision. This is related to the fact that the author had invoked the exception provided for under article 13 (b) of the Hague Convention on the Civil Aspects of International Child Abduction, on the grounds that the father's alleged addiction could endanger J.M., a claim that the Court found to be unproven.

[26] European Court of Human Rights, *K.J. v. Poland* (application No. 30813/14), para. 67; and European Court of Human Rights, *G.S. v. Georgia* (application No. 2361/13), para. 56.

[27] *X v. Latvia*, para. 117.

8.9 The Committee notes the State party's argument that the scope of the communication cannot be reduced to the decision of the Supreme Court, since an interlocutory hearing for the enforcement of the return order was held in order to ensure the safe return of the child to his country of habitual residence and thus ensure that his best interests were taken into account and avoid the possibility of causing him irreparable harm (see para. 5.5 above). The Committee finds, however, that the Supreme Court's decision ordered the immediate return of J.M. to Spain without any indication of the conditions under which his return should take place (see para. 2.6 above). Furthermore, the Committee observes that the interlocutory hearing held on 6 November 2020 was limited to the enforcement of the return order and could not therefore remedy the Supreme Court's failure to effectively assess the factors that may constitute an exception to the duty to immediately return the child. In this regard, the Committee considers that the court ordering the return of a child must be satisfied, at the time of issuing the return order, that all necessary steps will be taken for the safe return of the child. The Committee therefore finds that the decision to return J.M. to Spain did not meet the condition entailed by his right to have his best interests be a primary consideration, in violation of article 3 (1) of the Convention, read alone and in conjunction with articles 9 and 23.

8.10 The Committee, acting under article 10 (5) of the Optional Protocol on a communications procedure, finds that the facts of which it has been apprised amount to a violation of article 3 (1) of the Convention, read alone and in conjunction with articles 9 and 23.

9. Consequently, the State party should conduct a new assessment of the request to return J.M. to Spain, taking into account the time that has elapsed and the extent of J.M.'s integration in the State party. The State party should also grant J.M. effective reparation for the violations suffered, including adequate compensation. The State party is also obliged to prevent the recurrence of such violations by ensuring that the best interests of the child are a primary consideration in decisions concerning their international return, in accordance with standards expounded in the present decision (see para. 8.6 above).

10. Pursuant to article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the steps it has taken to give effect to the Committee's Views. The State party is also requested to include information about any such measures in the reports it submits to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish the present Views and to disseminate them widely.