United Nations CRC/C/81/D/19/2017

Convention on the Rights of the Child

Distr.: General
2 September 2019
English
Original: Spanish

Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 19/2017*, **, ***

Submitted by:	Fermín Navarro Presentación and Juana Medina Pascual (represented by counsel, Enrique Jesús Vila Torres)
Alleged victim:	The authors' son
State party:	Spain
Date of communication:	22 March 2017
Date of adoption of decision:	31 May 2019
Subject matter:	Theft of a newborn baby at a private clinic
Procedural issues:	Compatibility *ratione temporis*; substantiation of claims
Articles of the Convention:	7, 8, 9, 21 and 35
Articles of the Optional Protocol on the sale of children:	1, 2, 3 and 6
Articles of the Optional Protocol:	7 (c) and (f) and 20

1. The authors of the communication are Fermín Navarro Presentación and Juana Medina Pascual, both of whom are Spanish citizens. They submit the communication on behalf of their son, allegedly born on 8 April 1985. They claim that he is a victim of a violation of his rights under articles 7, 8, 9, 21 and 35 of the Convention and articles 1, 2, 3 and 6 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The authors are represented by counsel. The Optional Protocol on a communications procedure entered into force for the State party on 14 April 2014.

* Adopted by the Committee at its eighty-first session (13–31 May 2019).

** The following members of the Committee participated in the consideration of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffe, Olga A. Khazova, Cephas Lumina, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aissatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.

*** The texts of individual opinions (dissenting) by three Committee members, Olga A. Khazova, Luis Ernesto Pedernera Reyna and José Ángel Rodríguez Reyes, are appended to the present decision.

GE.19-14957 (E) 181019 211019
1914957

The facts as presented by the authors

2.1 The female author gave birth to a baby girl on 8 April 1985 at the San Francisco Javier Clinic in Pamplona. The authors submit that, on the basis of a number of irregularities that occurred in medical and birth registration procedures during pregnancy and delivery, the multiple nature of the female author's pregnancy was concealed, and one of the babies was taken from her immediately after birth. The authors point in particular to the following irregularities: (a) the female author gained 30 kg during pregnancy, but no medical reason was given for the increase; further, the attending obstetrician stopped recording the female author's weight gain and uterine growth during the final months of pregnancy; (b) only two ultrasound scans were performed throughout the entire pregnancy, and no copies of the images were made available to the female author; (c) no mention was made in the female author's medical record of a family history of twins and no chronological record of the pregnant woman's medical visits was kept; (d) the electrocardiogram contained in the medical file, which showed only one fetal heartbeat, bore a date that did not correspond to that of the test actually performed on the female author; (e) the female author was called in for an obstetric consultation five times in the last 21 days of her pregnancy, with no apparent justification; (f) at the final visit, on 8 April 1988, the birth was induced, again without justification;[1] (g) the female author was given a general anaesthetic, but no mention was made of that fact in the medical record of the birth; (h) after giving birth, the female author, although still under the effects of the anaesthetic, saw someone taking a baby out of the delivery room, something that was repeatedly denied by those involved in the delivery (the obstetrician, the midwife and a nun); (i) the male author was not allowed in the delivery room and, while he was waiting, he had the impression that he was being constantly watched by a member of the Civil Guard in plain clothes who claimed to be a patient at the clinic; (j) the attending midwife filled out a declaration of birth form for the civil registry office, noting the birth of a male child; the word "male" was subsequently crossed out and replaced with "female"; and (k) the declaration was accepted at the civil registry office with the crossing out and with no amendment.

2.2 On 1 February 2015, the authors filed a complaint with Pamplona Investigating Court No. 5 for "false declaration of birth", alteration of paternity and falsification of public documents against the obstetrician, the auxiliary personnel attending the birth and the San Francisco Javier Clinic. In a decision of 17 July 2015, the Court declared the complaint inadmissible and ordered the case dismissed without prejudice. The Court considered that the facts as presented by the authors did not constitute circumstantial evidence and that the ultrasound report confirmed a single pregnancy; it therefore dismissed the case for failure to properly establish the commission of the offence complained of.

2.3 The authors appealed the dismissal decision to the Navarra Provincial High Court, which rejected the appeal on 25 January 2016. The Court held that the Investigating Court's decision was reasoned; that the facts alleged by the authors did not constitute sufficient evidence for the complaint to be admitted, since they amounted to "suppositions, intuitions or even mere hunches"; that neither the excessive weight gain during the pregnancy nor the occasional inaccuracies in the documentation were grounds for admission of the complaint; and that the conduct of the female author, who was attended by the same gynaecologist until 2009 – 25 years after the birth – did not suggest a lack of trust in the work of the gynaecologist or the staff at the clinic.

2.4 The authors lodged an appeal in *amparo* to the Constitutional Court, alleging a violation of their right to effective judicial protection. On 15 June 2016, the Constitutional Court dismissed the appeal on grounds of manifest absence of violation of any fundamental right.

[1] According to the undated obstetric report provided, which was prepared by the obstetrician attending the birth, the delivery was normal: on 4 April 1985, at 41 weeks and 5 days of gestation, an examination of the female author revealed that the cervix was soft, 2 to 3 cm dilated, that contractions had started and that the Bishop Score was approximately eight; it was therefore decided to induce labour, with a normal live birth occurring a few hours later under anaesthetic.

2.5 The authors submit that the abduction of their baby took place against a backdrop of thefts carried out by a baby trafficking network that operated in Spain both during the dictatorship of General Francisco Franco, with the support of the Government, and subsequently from 1975 until the 1990s, with the acquiescence of the State. It is estimated that 3,000 complaints of baby theft have been filed with Spanish courts; to date, only one person has been charged and nobody has been convicted. The authors state that these complaints were submitted only from January 2011 onward, when the first complaint was filed with the Attorney General's Office, an event that "brought the issue to light".

The complaint

3.1 The authors claim a violation by the State party of articles 7 and 9 of the Convention because their son was forcibly separated from his parents in order to be put up for adoption or to be registered fraudulently as a biological child, thus depriving him of the opportunity to know and be cared for by his biological parents.

3.2 They further claim a violation of article 8 of the Convention because their son was denied the right to maintain family relations, without the State party taking any action to remedy the harm caused.

3.3 They add that the sale of their son for adoption was done fraudulently and in violation of article 21 of the Convention.

3.4 The authors claim a violation of article 35 of the Convention, on account of the inaction of the Spanish courts; owing to this inaction the harm caused in 1985 continues to have effects today.

3.5 The authors also claim a violation of articles 1, 2 and 6, read together with article 3 of the Optional Protocol to the Convention on the sale of children, because the State party has not fulfilled its obligation to prohibit the sale of children or to provide the greatest measure of assistance with the investigation and criminal proceedings instituted following the authors' complaint of child trafficking aimed at shedding light on the matter.

State party's observations on admissibility and the merits

4.1 In its observations of 2 July 2018, the State party submits that the communication is inadmissible *ratione materiae* because the claim relates not to the alleged abduction of a child but to the failure to investigate the alleged abduction offence. This right is not recognized in the Convention but rather has its basis in article 14 (1) of the International Covenant on Civil and Political Rights. In addition, in order to demonstrate a failure to conduct an investigation, it must be shown that the person exists; this has not been done in the present case.

4.2 The State party submits that the communication is inadmissible *ratione temporis* because the facts concern an event alleged to have taken place in 1985. However, Spain ratified the Convention on 30 November 1990 and the Optional Protocol on a communications procedure on 19 December 2011, with the latter entering into force on 14 April 2014. The argument that the claim deals with an act with continuing effects is not admissible because the act complained of is not the alleged abduction but the failure to conduct an investigation, which relates to a right not recognized in the Convention. In any event, such a child, if born at all, would now be more than 30 years old.

4.3 The State party further submits that the communication is inadmissible under article 7 (f) of the Optional Protocol on the grounds that it is not sufficiently substantiated. According to the Human Rights Committee's jurisprudence, it is generally for the courts of States parties to evaluate facts and evidence unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[2]

4.4 Regarding the facts alleged by the authors in support of their claims, the State party points out that: (a) the female author's alleged weight gain has not been substantiated; (b) in

[2] The State party cites the decisions of the Human Rights Committee concerning the cases *X v. Netherlands* (CCPR/C/117/D/2729/2016) and *J.P.D. v. France* (CCPR/C/115/D/2621/2015).

1985, it was standard practice for two ultrasound scans to be performed during a pregnancy (one at the beginning and one at the end) and no copies of scans to be made; (c) the authors provide no evidence of a family history of twins, and even if information to that effect had been communicated to the attending obstetrician, its non-inclusion in the medical record would not conclusively prove the record to be inaccurate – at most, it would be incomplete; (d) there is no record of the female author being anaesthetized a few minutes before giving birth; further, the medical file contains an electrocardiogram performed before the birth showing only one heartbeat; (e) a simple error in recording by hand the date of the electrocardiogram cannot constitute clear proof of document fraud. If the aim had been to fraudulently replace the test performed on the female author with that of another patient, it would have been possible simply to obtain a test performed on the same date as the female author's test, with no need to alter the date; (f) the female author's assertion that, even under the effects of the anaesthetic, she saw someone take a baby out of the delivery room is subjective and not credible; (g) the authors provide no evidence that the midwife who attended the delivery attended another delivery an hour later, and, in any event, such a fact would prove nothing; (h) the alleged "retention" of the male author by a member of the Civil Guard presupposes the involvement of this institution in an alleged abduction ring – a ring about which there have been no reports in the Autonomous Community of Navarra; and (i) the fact that the declaration of birth form for the civil registry office indicated the birth of a male child and that the word "male" had been crossed out and replaced with "female" proves nothing, given that only one birth was recorded, not two.

4.5 As to the merits, the State party observes that the facts as submitted by the authors are based on mere conjecture and are not sufficiently substantiated to require the national judicial authorities to initiate a criminal investigation. The State party points out that the criminal principle of in *dubio pro reo* and the presumption of innocence prevent an investigation from being initiated into an alleged offence in the absence of a minimum of evidence, it being for the court to determine the credibility of the allegations, with the possibility for it to close the case in the light of counter-evidence. It is for each investigating court to determine in each specific case whether sufficient evidence exists to initiate an investigation into an alleged offence. In the present case, the facts and evidence submitted by the authors were analysed not only by the investigating judge but also by a higher collegial judicial body, the Navarra Provincial High Court. Furthermore, the Constitutional Court held that the case lacked constitutional significance given the manifest absence of a violation of the right to judicial protection.

4.6 The evidence adduced by the authors before the criminal courts was not sufficient to disprove the counter-evidence, which suggests that the facts were fabricated. On the basis of the counter-evidence, the investigating judge closed the case on a temporary basis, leaving open the possibility of its being reopened in the event of "reliable evidence" being brought in support of the complaint. On appeal, the Navarra Provincial High Court thoroughly analysed the evidence and concluded that no further investigation was called for.

4.7 The State party notes the following points as counter-evidence to the facts as presented by the authors: (a) the very long lapse of time (30 years) between the alleged abduction and the filing of the complaint by the authors; (b) the two ultrasound reports confirming the presence of a single embryo; (c) the absence of any medical evidence or indications to suggest a twin pregnancy; (d) the "purely subjective nature of the account"; (e) the striking fact that, following the birth, the mother continued for 25 years to visit the gynaecologist allegedly involved in the abduction; and (f) the absence of a single case of baby abduction in the Autonomous Community of Navarra.

4.8 It appears from the authors' account of the facts that several persons were involved in some kind of plot to abduct the alleged baby: the obstetrician, the anaesthetist, the midwife and a member of the Civil Guard in plain clothes. However, Ministry of Justice statistics show that, unlike other autonomous communities in Spain, the Community of Navarra has never recorded a single case of baby theft; there is therefore nothing to suggest that the abduction was carried out by an organized, mafia-style baby abduction and trafficking ring operating in the region. This would rule out the hypothesis that there was a preconceived plan requiring concerted action by various doctors and members of the State security forces.

4.9 The State party submits that it has taken the issue of the abduction of newborn babies in Spain very seriously – as demonstrated for example by the publication in 2014 of an appraisal report by a government information service established to support persons affected by the possible abduction of newborn babies – ever since it ascertained the existence of mafia-style groups in various autonomous communities operating against a background of institutional corruption and systematically targeting specific hospitals. As further counter-evidence, the State party submits that the present case is unrelated to this institutional context and would seem to be an isolated incident. It also points out that investigations into such cases are prioritized, with the investigation phase generally lasting no more than six months, after which time the prosecutorial authorities must prosecute the case if there is evidence that an offence has been committed or, in the absence of such evidence, order the case closed.

4.10 The State party submits that the abduction of newborn babies is punishable under Spanish criminal law as a child abduction offence (subsequently replaced by the offence of unlawful detention) and, in some instances, as offences of false declaration of birth, forgery of a public document of an official nature and illegal adoption. The statutory limitation period in such cases begins to run when the victim becomes aware of the change in his or her filiation.

4.11 The State party points out that the first criminal prosecution has recently been brought in a baby abduction case. This shows that the State takes a responsible approach, instituting serious legal proceedings when sufficient, plausible evidence is adduced. The State party also points to other initiatives such as the establishment of an information service to support persons affected by the possible abduction of newborn babies and a register of genetic profiles of such persons. In addition, Act No. 19/2015 on administrative reform measures in the field of the administration of justice and the civil registry was enacted to facilitate the registration of newborn babies in health centres. Additionally, checks have been increased in the event of newborn deaths in health centres.

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

5.1 In their comments of 20 October 2018, the authors state that, when the State party ratified the Convention, their son was 5 years old; accordingly, the State party had assumed its obligations thereunder and was fully bound to protect the rights of their son. Furthermore, the offences committed against the child continue to have effects today because the illegal detention and forced separation have not been remedied and nor have they ceased; although the then child is now more than 30 years old, he was the victim of the offence when he was a child and, as such, should have been protected. It cannot be said that the rights protected under the Convention should be "forgotten" when a person attains the age of 18 even though the effects of the rights violations continue throughout the person's life. The authors add that their son was denied the right to grow up within his biological family, a situation that persists today, since the authors do not know the whereabouts of their son, even though the abduction took place in 1985, namely before the entry into force of the Convention and the Optional Protocol.

5.2 The authors submit that the shortcomings in the investigation of their complaint violated the rights of their child and reflect the general ineffectiveness of the State in investigating and remedying the situation. They add that their claim is not limited exclusively to effective judicial measures but that it relates also to administrative and legislative measures to address and remedy their son's abduction. They contend that under any criminal system the investigating judge is required to collect a minimum amount of evidence in order to ascertain whether the allegations are true and whether they concern acts that constitute an offence. The State party cannot discredit their account of the facts by describing them as mere suppositions since, in line with that view, all complainants would be required to adduce very specific, virtually inculpatory, evidence – a task for the courts, not litigants. In the present case, the courts did not even initiate an investigation. Although more than 3,000 complaints have been lodged in the State party, most have been dismissed. However, it has been shown that a child theft scheme existed in Spain, a fact that gives greater weight to complaints, no matter how slight the evidence. The authors recall that the European Parliament and the United Nations Committee on Enforced Disappearances have

both issued recommendations calling for effective investigations into cases of "stolen babies". The Attorney General of Spain issued Circular No. 2/2012, of 26 December, setting out standard guidelines for proceedings concerning the abduction of newborn children, under which provincial prosecutor's offices are required to receive and examine all complaints lodged with them concerning stolen babies, regardless of any statutory limitation on criminal responsibility. In the present case, as part of the investigative process, the Public Prosecution Service requested that: (a) the authors should be required to provide original copies of the full medical record of Ms. Medina's pregnancy and delivery; and (b) the record should be forwarded to a forensic doctor or physician specializing in gynaecology and obstetrics in order to establish whether the medical record contained anything to suggest irregularities in the pregnancy and delivery or the possibility of a twin pregnancy. In addition, the Public Prosecution Service joined the appeal lodged by the authors with the Navarra Provincial High Court. The authors submit that the evidence requested by the Public Prosecution Service was not taken, despite the importance of the verification by medical experts of the record.

5.3 The authors submit that the State party places the burden of proof on the victims of baby abduction cases and treats complaints as "mere conjecture"; this has led to the mass dismissal of such cases by the prosecutorial authorities and courts, with hardly any investigation, leaving victims helpless. The authors emphasize that it is for the courts to conduct criminal investigations and that they can only be required to produce circumstantial evidence. The authors point out that the State party is "subjective and biased" and that it refuses to conduct thorough investigations into cases involving the abduction of newborn babies.

5.4 The authors contend that they are unable to provide evidence of the female author's disproportionate weight gain, the lack of copies of the ultrasound scans or the family history of twins and that this lack of evidence is attributable to the State party, which should have ordered a review of the medical record by a forensic doctor. Regarding the error in the declaration of birth form, the authors point out that, in cases involving the abduction of newborn twins, the adoptive parents were given the possibility of choosing the sex of the baby and that this could explain the crossing out. It would mean that a baby boy and a baby girl had been born and that it was decided to abduct the boy. There could not have been two birth certificates precisely because only one baby was registered. The individual pieces of evidence produced might not be sufficient when considered in isolation, but together they are sufficient to warrant an investigation.

5.5 The authors observe that it has been shown that baby theft cases in the State party continued until the 1990s and that the particular circumstances and modus operandi varied from case to case. The facts as related, considered together with the existence of a scheme affecting more than 300,000 persons during the Franco regime and the transition, warrant an investigation. However, despite the action taken by the Public Prosecution Service, the Spanish courts have done nothing to elucidate the facts and provide victims with redress. In the present case, the authors emphasize that no steps have been taken to investigate and remedy the forced separation of their son from his biological parents. They point out that the State party dismisses their version of events as "conjecture" but considers clinical errors to be normal.

5.6 Both the investigating judge and the Provincial High Court dismissed the case without prejudice for failure to properly establish the commission of the offence. According to the authors, the decision is contradictory since it is not possible to substantiate an offence without taking evidence. They further submit that, if the facts were not credible and there was no prima facie case, the case should have been dismissed with prejudice in accordance with article 637 of the Criminal Procedure Act.

5.7 The authors point out that, following the filing of the first complaint concerning the abduction of a newborn baby in Spain in 2011, thousands of other cases came to light. It was only then that others overcame their fear and decided to bring complaints. With regard to the fact that the female author continued for 25 years after the birth to visit the same gynaecologist, the authors state that their suspicions grew over the years and that each person reacts differently; this should not be regarded as sufficient counter-evidence to rule out an investigation.

5.8 The authors submit that Navarra is one of the autonomous communities with most recorded cases of baby theft. Although none of those cases has been resolved or resulted in a conviction, this does not mean that there have been no cases. Further, the Parliament of Navarra was the first to adopt a law on such thefts and to recognize the children involved as victims of the Franco regime.

5.9 The authors maintain that the right to presumption of innocence is a rule of law that comes into play once criminal charges have been laid against a person and that, according to Spanish constitutional case law, this right must not be violated by decisions other than a judgment.

5.10 The authors state that, following its visit to Spain in May 2017, the Committee on Petitions of the European Parliament recommended, among other things, that the State party should: (a) acknowledge that, during the Franco dictatorship, the State was implicated in, and/or stood idly by during, the systematic theft and illegal adoption of babies, as a first step towards ensuring the victims' right to truth, justice and redress, as a guarantee of non-repetition; and (b) develop a public and dedicated national DNA bank specifically accessible for these cases to enable information about the victims to be cross-checked to help them find their real families. In addition, the Committee on Petitions expressed regret at the limited progress made by the Spanish Government in implementing the recommendations made in the 2014 report of the United Nations Working Group on Enforced or Involuntary Disappearances.

5.11 The authors further state that in 2017 the Working Group expressed concern at the failure to act on the recommendations contained in its 2014 report, including the failure to adopt a national plan on the search for disappeared persons and at the persistent obstruction of the judicial proceedings opened in Argentina to investigate crimes committed during the Franco regime and the Civil War as alleged crimes against humanity and/or genocide.

5.12 The authors note that the State party acknowledges the existence of mafia-style criminal gangs involved in the buying and selling of babies, even though that it has failed to conduct a thorough investigation of the matter. The only judgment handed down to date is that delivered by the Madrid Provincial High Court on 8 October 2018, which found that facts had been established; the defendant was acquitted on the grounds that the offences were time-barred. The authors add that complaints have been lodged in relation to hospitals in practically all Spanish provinces. It is therefore not possible to speak of an isolated case; rather, the case must be seen against a general background of organized baby thefts throughout the State party at the time. A total of 99 per cent of cases opened by the prosecutorial authorities are systematically closed without any effective investigation.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes the State party's argument that the communication is inadmissible *ratione temporis* because the facts that are the subject of the communication occurred prior to the entry into force of both the Convention and the Optional Protocol for the State party. The Committee considers that the abduction of a newborn baby has lifelong effects and that the passage of time should not constitute a procedural bar to requests for an appropriate and thorough investigation, even if the passage of time makes such an investigation more difficult. In particular, the Committee observes that the authors filed a complaint concerning the alleged abduction of their newborn son with a Spanish criminal court and subsequently lodged an appeal in *amparo* and that all the judicial decisions in the case, namely the decisions of Pamplona Investigating Court No. 5, the Navarra Provincial High Court and the Constitutional Court, were handed down after 14 April 2014, the date of entry into force of the Optional Protocol for the State party. Accordingly, the Committee finds that articles 7 (c) and 20 of the Optional Protocol do not constitute an obstacle to the

admissibility *ratione temporis* of the present communication, particularly with respect to the authors' claims under article 35 of the Convention.

6.3 The Committee takes note of the State party's argument that the communication is incompatible *ratione materiae* with the Convention, given that, first, the failure to conduct an investigation into the alleged offence of abduction does not relate to a right recognized in the Convention and, second, in order to demonstrate the failure to investigate, it should first be shown that the person in question exists. With respect to the first point, the Committee rejects the assertion that the failure to investigate the abduction would not violate any right under the Convention. Article 35 of the Convention requires States parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. The Committee considers that, in general, a failure or refusal to investigate a case of child abduction can constitute a violation of that article. In the light of the foregoing, the Committee considers that the communication is compatible *ratione materiae* with the provisions of the Convention and declares it admissible under article 7 (c) of the Optional Protocol.

6.4 The Committee takes note of the authors' allegations that the investigating judge's decision to dismiss the case, which was confirmed on appeal, without opening a criminal investigation, violated the rights of their alleged son under the Convention. The Committee recalls that, as a general rule, it comes under the jurisdiction of the national courts 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.[3] In the present case, the Committee notes that both the investigating judge and the Navarra Provincial High Court examined the facts and evidence presented by the authors but found that they were not sufficient to constitute a prima facie case. In particular, the investigating judge and Provincial High Court were of the view that it was not possible to infer the commission of an offence from the authors' account, that the ultrasound report adduced by the authors confirmed a single pregnancy, that neither the female author's excessive weight gain nor the occasional inaccuracies in the medical record were sufficient grounds for admission of the complaint, and that the fact that the female author continued for 25 years following the events to visit the same gynaecologist did not suggest a lack of trust in the work of the gynaecologist or the staff at the clinic who attended the delivery.

6.5 The Committee is aware of the difficulties faced by victims of baby abductions in producing conclusive evidence. The Committee is also aware of the context of abductions in the State party during the period in question, as has been documented.[4] However, the Committee notes that the information before it does not allow it to conclude that, in the light of the facts submitted by the authors and the evidence produced, the decisions of the Spanish courts were, in the circumstances of the particular case, clearly arbitrary or amounted to a denial of justice.

6.6 Accordingly, the Committee considers that the communication has not been sufficiently substantiated and declares it inadmissible under article 7 (f) of the Optional Protocol.

7. The Committee on the Rights of the Child decides:

(a) That the communication is inadmissible under article 7 (f) of the Optional Protocol; and

(b) That this decision shall be transmitted to the female author of the communication and, for information, to the State party.

[3] See in this regard the Committee's inadmissibility decision in the case *A.A.A. v. Spain* (CRC/C/73/D/2/2015), para. 4.2.

[4] A/HRC/27/49/Add.1, paras. 8, 35 and 47; CRC/C/VAT/CO/2, paras. 58 and 59; and A/HRC/34/55, para. 39.

Annex I

[*Original: English*]

Individual opinion of Committee member Olga A. Khazova (dissenting)

Admissibility

1. I dissent from the majority decision that the communication was not sufficiently substantiated and, therefore, is inadmissible under article 7 (f) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (para 6.6).

2. The Committee notes that the information before it does not allow it to conclude that, in the light of the facts submitted by the authors and the evidence produced, the decisions of the Spanish courts were clearly arbitrary or amounted to a denial of justice.

3. In the present case, both the investigating judge and the Navarra Provincial High Court examined the facts and evidence presented by the authors but found that they were not sufficient to constitute a prima facie case, and the investigating judge refused to open a criminal investigation and decided to dismiss the case, a decision which was confirmed on appeal. However, although the pieces of evidence presented by the authors are circumstantial and each of them, if taken separately, indeed did not seem sufficient to constitute a prima facie case, they nevertheless should have been evaluated in their entirety and, especially, in the context of a baby trafficking network operating in Spain both during the dictatorship of General Francisco Franco and subsequently from 1975 until the 1990s, i.e., during the time when the boy was allegedly born. In such a situation, the authors' communication and the evidence they presented, although circumstantial, should have been treated with more scrutiny. Therefore, I believe, particularly in view of the nature of the violations claimed and the prevalence of similar violations in the State party during the period in question, that the communication is sufficiently substantiated for the purpose of admissibility and should have been declared admissible by the Committee under article 7 (f) of the Optional Protocol.

Merits

4. If the Committee had declared the communication admissible, it would have to determine whether, in the circumstances of the present case, by failing to investigate the alleged abduction of the authors' son the State party violated the latter's right under article 35 of the Convention, which requires that States parties take all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form.

5. In the present case, according to the facts as presented by the authors (para. 2.5), the female author gave birth to a baby girl on 8 April 1985 at the San Francisco Javier Clinic in Pamplona. The authors submit that, on the basis of a number of irregularities that occurred in medical and birth registration procedures during the pregnancy and delivery, the multiple nature of the female author's pregnancy was concealed and she, in fact, gave birth to twins; one of the babies (allegedly a male) was taken from her immediately after birth. As has been noted, the birth of the alleged boy and subsequent abduction took place against a backdrop of abductions carried out by a baby trafficking network that, with the acquiescence of the State party, operated in Spain during that time. It is estimated that 3,000 complaints of baby abduction have been filed with Spanish courts and, as the authors state, these complaints only started to be submitted in January 2011, when the first complaint was filed with the Attorney General's Office, an event that "brought the issue to light" (para. 2.5). According to the authors, Navarra is one of the autonomous communities with the most recorded cases of baby theft.

6. In 2015, the authors filed a complaint with the Pamplona Investigating Court for "false declaration of birth", alteration of paternity and falsification of public documents. The Pamplona Investigating Court ordered the case dismissed without prejudice on a single

legal ground, stating that the facts as submitted by the authors did not constitute circumstantial evidence and that the ultrasound report had confirmed a single pregnancy. The Court made no other assessment of the evidence and did not identify any other possible inconsistencies in the authors' account of the facts; in particular, it did not rule on the authors' claim contesting the validity of the ultrasound report. For its part, the Navarra Provincial High Court considered that the investigating judge's decision was duly reasoned. Although the Public Prosecution Service joined the authors' appeal lodged with the Navarra Provincial High Court, the evidence requested by the Public Prosecution Service was not taken, despite the importance of the verification by medical experts of the record.

7. The State party submits that it has taken the issue of the abduction of newborn babies in Spain very seriously and that the present case is unrelated to this institutional context and would seem to be an isolated incident (para. 4.9).

8. Thus, the investigating judge closed the case without investigation and with minimal basis for his decision and the decision was upheld on appeal, again with no investigation, despite a request from the Public Prosecution Service for forensic medical evidence to be taken. In my opinion, a refusal to conduct even a minimal investigation into the alleged abduction of the authors' son, bearing in mind the nature of the alleged violations, the difficulty for the victims to obtain evidence and the general context of baby theft and abduction in the State party during the period in question, which has been amply documented, amounted to a breach of article 35 of the Convention.

Annex II

[*Original: Spanish*]

Joint opinion of Committee members José Ángel Rodríguez Reyes and Luis Ernesto Pedernera Reyna (dissenting)

1. In the present case, we feel obliged to dissent from the Committee's majority decision that communication No. 19/2017 was not sufficiently substantiated and, therefore, is inadmissible under article 7 (f) of the Optional Protocol.

2. We agree with the rejection of the State party's arguments regarding the inadmissibility of the communication *ratione temporis* and *ratione materiae*.

3. However, in our view it is contradictory for the Committee to recognize the difficulties that victims of abductions of newborn babies face in producing conclusive evidence and the context of abductions in the State party during the historical period in question, and then to assert that, in the light of the facts submitted by the authors and the evidence produced, it is unable to conclude that the decisions of the Spanish courts were, in the circumstances of the particular case, clearly arbitrary or amounted to a denial of justice.

4. As we must take as the context the type of violation claimed and the existence of similar violations during the historical period indicated, we are of the view that the authors did present sufficient material to substantiate their claim for purposes of admissibility, in accordance with article 10 (1) of the Optional Protocol, and for a ruling on the merits, as we indicate in the following paragraphs.

5. In its consideration of the arguments presented in the case, the majority did not take into account the decision of 17 July 2015 of Pamplona Investigating Court No. 5, which ordered the case dismissed without prejudice on a single legal ground, stating that the facts as submitted by the authors did not constitute circumstantial evidence and that the ultrasound report indicated a single pregnancy. In its decision, the Court made no other assessment of the evidence and it did not identify any other possible inconsistencies in the authors' account of the facts; in particular, it did not rule on the authors' claim contesting the very validity of that ultrasound report.

6. In our view, there is one fact that is key, and that is that the Public Prosecution Service joined the appeal lodged by the authors with the Navarra Provincial High Court, requesting as part of the investigative process that: (1) the authors should be required to provide original copies of the full medical record of Ms. Medina's pregnancy and delivery; and (b) the record should be forwarded to a forensic doctor or physician specializing in gynaecology and obstetrics in order to establish whether the medical record contained anything to suggest irregularities in the pregnancy and delivery or the possibility of a twin pregnancy.

7. It is essential to note that the authors submit that the evidence requested by the Public Prosecution Service was not taken, despite the importance of the verification by medical experts of the record.

8. We consider that the State party, by failing to undertake even a minimal investigation of the alleged abduction of the authors' son and to make use of its ability to access evidence and information not available to the parties, violated rights recognized in the Convention, particularly those set forth in articles 7, 8 and 9.

9. We also note that, although the State party is aware of the context in which the events occurred and their resemblance to similar cases of abductions of newborn babies, it characterizes the authors' complaint as a fabrication of facts and plots, and purely subjective opinions, which suggests that, instead of undertaking the necessary investigations, it is seeking to discredit the complainants.

10. Furthermore, the majority did not take into account resolutions and recommendations of other United Nations bodies that provide appropriate guidance for the resolution of this case, including the Views of the Human Rights Committee in *Edriss El*

Hassy v. Libyan Arab Jamahiriya,[1] which applied the same reasoning as in *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), among other cases. The Committee also failed to consider its own jurisprudence as set out in *A.A.A. v. Spain*[2] and, in particular, the report of the Special Rapporteur on the sale of children, child prostitution and child pornography.[3]

11. In conclusion, as the communication was sufficiently substantiated, the majority should have:

(a) Affirmed that it is unreasonable to require proof of a person's existence as a prerequisite for initiating an investigation into his or her alleged abduction at birth, since the very purpose of any such investigation is to identify and locate the person concerned;

(b) Taken into account the nature of the violations claimed and the prevalence of similar violations in the State party during the period in question;

(c) Considered the communication compatible *ratione materiae* with the provisions of the Convention;

(d) Declared the communication admissible under article 7 (c) of the Optional Protocol.

12. Similarly, upon consideration of the merits, the Committee should have held, under article 10 (5) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, that the facts disclosed a violation of articles 7, 8 and 9 of the Convention, and requested the State party to initiate a prompt and thorough investigation into the alleged abduction of the authors' son.

---

[1] CCPR/C/91/D/1422/2005, para. 6.7: "The Committee notes that the State party has provided no response to the author's allegations regarding the forced disappearance of his brother. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party."

[2] CRC/C/73/D/2/2015, para. 4.2: "The Committee is of the view that, as a general rule, it comes under the jurisdiction of the national courts to examine the facts and evidence, unless such examination is clearly arbitrary or amounts to a denial of justice."

[3] A/HRC/34/55, para. 39: "The above-mentioned motivations for carrying out illegal adoptions often overlapped, as was notably the case in Spain throughout the Franco regime and during the first decades of democracy. Indeed, the practice of illegally adopting children for ideological and religious reasons soon morphed into a profit-driven criminal activity. Thousands of newborn babies were reportedly abducted from their parents by criminal networks involved in large-scale illegal adoptions. Medical personnel and clergy members actively participated in the abduction of children. Newborn babies were abducted from hospitals and subsequently told that their parents had died. The children were then given to other parents following the falsification of documents and, in certain cases, payments."