



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2944/2017*, **

<i>Communication submitted by:</i>	J.Y. (represented by counsel, Vincent Berger)
<i>Alleged victims:</i>	The author and T.N., her son
<i>State party:</i>	France
<i>Date of communication:</i>	31 October 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 February 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	5 March 2021
<i>Subject matter:</i>	Protection of the family; best interests of the child
<i>Procedural issues:</i>	Consideration of the same matter under another international procedure; non-substantiation of claims
<i>Substantive issues:</i>	Right not to be subjected to arbitrary or unlawful interference with the family; right of children to protection; protection of the family
<i>Articles of the Covenant:</i>	17, 23 (1) and 24 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (a)

1.1 The author of the communication is J.Y., a French-Israeli dual national born in 1982. She presents the communication on her own behalf and on behalf of her minor son, T.N., born in 2012. The author claims that the State party has violated her and her son's rights under articles 17, 23 (1) and 24 (1) of the Covenant. France acceded to the Optional Protocol on 17 February 1984. The author is represented by counsel, Vincent Berger.

* Adopted by the Committee at its 131st session (1–26 March 2021).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Kobauyah Tchamdja Kpatcha, Imeru Tamerat Yigezu and Gentian Zyberi. Pursuant to rule 108 of the Committee's rules of procedure, Hélène Tigroudja did not participate in the examination of the communication.



1.2 On 3 July 2017, the Committee, acting through the Special Rapporteur on new communications and interim measures, rejected the State party's request that the admissibility of the communication be considered separately from its merits.

The facts as submitted by the author

2.1 The author states that, in June 2008, she moved to the Republic of Korea for professional reasons. There, she met her partner, a British-Israeli dual national. In 2009, a professional leave of absence gave her the opportunity to move to Israel to be with her partner. That same year, she acquired Israeli nationality while retaining her French nationality. She married her partner in 2011. On 11 November 2011, when the author was four months pregnant, her husband had a serious car accident. On 5 April 2012, she gave birth to a child, T.N., who acquired French nationality on 30 November 2012.

2.2 After his accident, the author's husband underwent a lengthy operation, on 6 December 2011, before being put into an induced coma and placed on breathing support in the neurosurgery intensive care unit for at least three weeks. From 21 December 2011 to 27 March 2012, he was treated for the head injuries sustained in the accident. From mid-January 2012, the author's husband was allowed out on weekends, including to visit his parents at their home in Tel Aviv. From early March to 27 March 2012, he was allowed out between 1 p.m. and 8 p.m. and was able to visit his wife. From 1 May 2012, he received day hospital care.

2.3 In May 2013, the author's husband began treatment in Tel Aviv. Following an examination in July 2013, it was recommended that he should continue receiving cognitive and psychological care. He was certified as having a permanent incapacity for work. He lost his employment and was exempted from military service. His driving licence was also revoked.

2.4 On 5 August 2012, four days after obtaining her master's degree, the author visited her parents in Marseille with her child and with the agreement of her husband, who had not wanted to travel to France. The author hoped that the trip would provide a period of rest after the ordeal that she had endured as a result of her husband's accident, her son's birth, the completion of her master's degree and three successive moves. The author and her son had been scheduled to stay in France for 10 days. However, on the recommendation of her doctors, who diagnosed her with generalized fatigue due to anaemia and a viral infection involving a high fever and flu-like symptoms, which necessitated a chest X-ray, the author, who was breastfeeding her 4-month-old son, had to postpone her departure for Israel by one month. The author also had mastitis from breastfeeding her child. These health complications forced the author to postpone her departure once again, until 14 September 2012. On 5 September 2012, she sent a copy of the new airline tickets to her husband.

2.5 On 13 September 2012, on the eve of her departure for Israel, the author found out that her husband had obtained an order from an Israeli court banning her from leaving Israel with her child until the child had reached the age of majority. More specifically, the author's husband had filed an application with the central authority of Israel for the return of the child under the Convention on the Civil Aspects of International Child Abduction.¹ The author then decided to stay in France until the situation became clearer. On 4 November 2012, the central authority of Israel referred the matter to the central authority of France.

2.6 On 9 January 2013, following receipt of the request from the central authority of Israel, the author was heard by an officer from the Marseille police force. On 15 January 2013, the State prosecutor of Marseille summoned the author to appear before the Marseille *Tribunal de Grande Instance* (court of major jurisdiction) so that the family court judge could order the prompt return of the child to Israel. In a ruling of 11 April 2013, the court found that the author was wrongfully retaining the child in France and ordered his prompt return to his place of habitual residence, in Israel. On 14 May 2013, the complainant appealed against the decision. On 29 May 2013, she was again heard by an officer from the Marseille police force. In an interlocutory judgment of 26 September 2013, the Aix-en-Provence Court of Appeal

¹ The Convention on the Civil Aspects of International Child Abduction was ratified by France on 16 September 1982 and entered into force on 1 December 1983.

ordered the author's husband to provide official evidence of undertakings given at a hearing held on 10 September 2013. These undertakings included: written evidence that the decision barring the child from leaving Israel had been withdrawn, written evidence that he had waived the right to apply "in future" for an order barring the child and his mother from leaving the country, written evidence that he had waived all rights to further coercive criminal or civil proceedings against the author in relation to the wrongful removal procedure and, lastly, written proof of the undertaking to provide housing and financial assistance for the author and the child for at least four months on their return to Israel. In a judgment of 30 January 2014 on the merits, the Aix-en-Provence Court of Appeal in the main upheld the ruling issued by the Marseille court of major jurisdiction on 11 April 2013.

2.7 On 15 October 2013, the author's husband filed an affidavit in compliance with the interlocutory judgment of the Aix-en-Provence Court of Appeal of 26 September 2013. On 12 November 2013, the Petah-Tiqwa family court set aside the order barring the couple's child from leaving Israel. On 8 December 2014, the author's husband applied to the court for custody of the child after the child's return to Israel. In a ruling of 15 December 2014, the court decided that the parents would share custody of the child.

2.8 Meanwhile, on 4 July 2013, the Marseille family court judge had rejected the application filed by the author's husband to bar the child from leaving France. On 14 March 2014, the author filed an appeal in cassation against the judgment of the Aix-en-Provence Court of Appeal on the merits. In a judgment of 4 March 2015, the first civil division of the Court of Cassation dismissed the appeal. On 14 September 2015, the author filed an application with the Aix-en-Provence Court of Appeal for review of the judgment of 30 January 2014 on the merits. The author alleged that her husband had still not submitted the medical expert's report that the Israeli insurance company requested as a requirement for covering the injuries that he had sustained as a result of his traffic accident, thereby disguising the fact that he had not been physically able to actually exercise custody over the child at the time of the child's departure for France. In this regard, the author provided an investigation report by an Israeli private detective agency, dated 21 February 2015, on her husband's health. In a judgment of 4 May 2016, the Court of Appeal declared the application for review inadmissible.

2.9 On 12 August 2015, the author and her child lodged an application with the European Court of Human Rights, citing a violation of their rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).² On 15 October 2015, the author and her son received a letter informing them that a single judge had declared their application inadmissible on the ground that the admissibility criteria set out in articles 34 and 35 of the Convention had not been met. The author stresses that this letter contained no indication of the reasons for which these criteria had not been met and that there was nothing in the letter to suggest that the single judge had examined the case on the merits.

2.10 The author considers that their case was not "examined" by the European Court of Human Rights. She also considers that the Committee is not in a position to know whether the single judge examined the application on the merits, even if only summarily. She refers to the case of *Achabal Puertas v. Spain*,³ in which the Committee rejected a preliminary objection by the Government of Spain, which had invoked a reservation to the Optional Protocol, entered by Spain, formulated in the same terms as that entered by France. The author is of the view that the new system introduced by Protocol No. 14 to the European Convention on Human Rights, on 1 June 2010, offers even fewer safeguards than the one examined by the Committee in the case of *Achabal Puertas v. Spain* and that Protocol No. 14 thus empowers a single judge to declare an application inadmissible "where such a decision can be taken without further examination".⁴ However, the author recalls that, on the date of submission of the present communication, the new system had not yet been implemented. In fact, its implementation is proving to be extremely difficult and uncertain.

² Article 8 of the European Convention on Human Rights concerns the right to respect for private and family life.

³ CCPR/C/107/D/1945/2010 and CCPR/C/107/D/1945/2010/Corr.1.

⁴ European Convention on Human Rights, art. 27 (1).

The complaint

3.1 The author maintains that she and her son are victims of a violation of their rights under articles 17, 23 (1) and 24 (1) of the Covenant. She considers that the non-return of her son to Israel is not wrongful under article 3 of the Convention on the Civil Aspects of International Child Abduction based on the fact that her husband was not actually exercising custody rights. The author argues that, at the time of the events, her husband was hospitalized and spent only a few hours a day with his wife and son, who was an infant. She also argues that two factors prevented her return to Israel with the child: on the one hand, the father's health and, on the other, the father's application to an Israeli court for an order barring the child from leaving Israel, even before the child's return to the country, which had been scheduled for 14 September 2012, without any prior attempt at conciliation or mediation. The author maintains that a further reason for extending the duration of her stay with her son was her own health, which had deteriorated as a result of the ordeal of her husband's hospitalization, her master's studies, her pregnancy and three successive moves. She also maintains that, although the national courts did not challenge the medical certificates submitted in this regard, they did not seek to examine this ground on the merits. The author argues that the French courts were in breach of the prohibition against arbitrary interference with her family and its right to protection by the State, in violation of articles 17 and 23 (1) of the Covenant.

3.2 The author states that the French courts did not take into account the exceptions provided for in the Convention on the Civil Aspects of International Child Abduction to the requirement for the prompt return of a child. She considers that her claims under article 13 (b) of the Convention were not properly examined and that the decisions rendered did not include statements of specific reasons. The author therefore considers that the French courts did not ascertain either the state of her husband's health following his accident or the consequences of the child's return to Israel. In failing to do so, the French courts breached the child's right to protection by the State guaranteed under article 24 (1) of the Covenant.

State party's observations on admissibility

4.1 On 3 April 2017, the State party submitted its observations on the admissibility of the communication. Its view is that the Committee should declare the communication inadmissible under article 5 (2) of the Optional Protocol. The State party argues that, in the present case, the author has already submitted an application to the European Court of Human Rights that was based on the same facts as those put before the Committee. Before the Court, the author maintained that article 8 of the European Convention on Human Rights, read in conjunction with articles 3 and 13 (b) of the Convention on the Civil Aspects of International Child Abduction, had been violated, arguing that the decisions of the French courts had disproportionately impaired her right to respect for her family life. Before the Committee, the author alleges a violation of the prohibition of arbitrary interference with the family (Covenant, art. 17 (1)), the right of the family to protection by the State (art. 23 (1)) and the right of the child to protection by the State (art. 24 (1)) on the ground that the French courts ordered the return of the child to Israel in violation of articles 3 and 13 (b) of the Convention on the Civil Aspects of International Child Abduction.

4.2 With regard to the inadmissibility of the application under articles 34 and 35 of the European Convention on Human Rights, the State party recalls the reservation that it entered at the time of its ratification of the Optional Protocol, concerning article 5 (2) (a). It recalls the Committee's practice that an issue may not be considered "examined" under another international procedure if the case was rejected solely on procedural grounds. Conversely, an inadmissibility decision based on even a limited consideration of the merits of a case constitutes an examination within the meaning of article 5 (2) (a) of the Optional Protocol.⁵

4.3 The State party emphasizes that, in the decision addressed to the author in the present case, in which her application was declared inadmissible, the European Court of Human Rights did not state the grounds on which it was found inadmissible. However, article 35 of the European Convention on Human Rights sets out six grounds for inadmissibility: (a) the

⁵ *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3.

application was submitted more than six months after the date on which the final domestic decision was taken; (b) the application is anonymous; (c) the matter has already been submitted to another procedure of international investigation or settlement; (d) domestic remedies have not been exhausted; (e) the application is manifestly ill-founded or an abuse of the right of individual application; and (f) the applicant has not suffered a significant disadvantage.

4.4 In the light of the fact that the application was submitted within six months, exclusively and not anonymously to the European Court of Human Rights, and also that the alleged disadvantage was significant according to the meaning outlined in article 35 of the European Convention on Human Rights,⁶ the State party considers that it follows implicitly, but also necessarily, that the application could be rejected by the Court only for a failure to exhaust domestic remedies or because it was considered to be manifestly ill-founded or an abuse of the right of individual application. However, the Court may not reject an application as manifestly ill-founded without first carrying out an examination of the claims made by the applicants, which means an examination on the merits.

4.5 With regard to the author's allegations that the European Court of Human Rights cannot be said to have carried out an examination on the merits, and with reference to the case of *Achabal Puertas v. Spain*, the State party notes that, in the case in question, the Committee had issued its Views in the light of the specific circumstances of the case and had not taken the same position in subsequent cases. For example, in a set of Views adopted in 2014, the Committee held that a letter from the Registry of the Court informing the applicant that a single-judge formation had declared his application inadmissible on the ground that it did not disclose any violation of the rights and freedoms set out in the European Convention on Human Rights was such as to indicate that the case had been examined on the merits by the Court.⁷ Consequently, the State party is of the view that the letter sent by the Registry of the Court necessarily demonstrates that the Court has already examined the merits of the matter that the author has submitted to the Committee and requests the Committee to declare the communication inadmissible under article 5 (2) (a) of the Optional Protocol on account of the reservation entered by France.

Author's comments on the State party's observations

5.1 On 12 June 2017, the author submitted her comments on the State party's observations on the admissibility of the communication. She reiterates her arguments and recalls that the letter of the European Court of Human Rights of 15 October 2015 provided no explanation for the inadmissibility decision and that the State party itself had acknowledged as much. The author maintains that the lack of an explanation for this decision does not support the conclusion that the matter has already been examined.

5.2 The author rejects the argument advanced by the State party that, in view of the grounds for inadmissibility established under articles 34 and 35 of the European Convention on Human Rights, the judge must have rejected the application because it was manifestly ill-founded or an abuse of the right of individual application. The author describes this reasoning as speculative and based on a presumption that the European Court of Human Rights never makes mistakes. On the basis of the *Achabal Puertas v. Spain* case, the author recalls that the Committee has noted that the Court could sometimes err in its evaluation of the facts. The author maintains that it is unclear why the Court did not indicate its grounds for finding the communication inadmissible or whether the judge had undertaken even a limited consideration of the merits.⁸ The author maintains that the State party's general reference to articles 34 and 35 of the European Convention on Human Rights, without any explanation,

⁶ The European Court of Human Rights has in fact already ruled on the merits of other cases concerning return decisions taken on the basis of the Convention on the Civil Aspects of International Child Abduction in which the applicants were parents who had wrongfully removed a child. See, for example, *Phostira Efthymiou and Ribeiro Fernandes v. Portugal*, application No. 66775/11, judgment of 5 February 2015; and *Neulinger and Shuruk v. Switzerland*, application No. 41615/07, judgment of 6 July 2010.

⁷ *Aarrass v. Spain* (CCPR/C/111/D/2008/2010), paras. 9.3 and 9.6.

⁸ *Mahabir v. Austria*, para. 8.3.

provides no basis for the Committee to conclude that the communication has been considered on the merits. While stressing that transparency of legal reasoning is crucial to the credibility of justice, the author recalls that this case raises serious legal difficulties with regard to her right to respect for family life, in particular the manner in which the State party must reconcile its obligations under the Covenant with those that it has assumed under the Convention on the Civil Aspects of International Child Abduction. She maintains that the single-judge formation of the Court did not examine the communication within the meaning of the reservation entered by the State party and that the communication must be considered admissible.

State party's additional observations on the merits

6.1 In its observations of 24 July 2017, the State party argues that the application of the Convention on the Civil Aspects of International Child Abduction is itself intended to achieve the aims and objectives of the Covenant. It maintains that, when a case of abduction by a parent residing abroad is referred to the French authorities, they are required to apply the Convention to put as swift a stop as possible to any breach of custody rights in the State of the child's habitual residence. The State party maintains that the application of the Convention is consistent with the objectives of articles 17, 23 (1) and 24 (1) of the Covenant, which deal with the effective protection of family ties and children, as the Committee implicitly recognized in the case of *Asensi Martínez v. Paraguay*.⁹ The State party recalls that, in general, articles 17 and 23 of the Covenant guarantee effective protection of the right of every parent to have regular contact with his or her minor children, both at the dissolution of the marriage, save in exceptional circumstances,¹⁰ and if the marriage has not been dissolved.

6.2 The State party argues that, like the European Court of Human Rights, the Committee should endeavour to verify that the domestic courts examined the claims made by the author to challenge the applicability of the Convention on the Civil Aspects of International Child Abduction in the present case and that their decisions were sufficiently reasoned in this regard, including by establishing that the authorities struck a fair balance between the competing interests at stake: those of the child, those of the two parents and those of public order, taking into account that the interests of the child must be a primary consideration.¹¹ This examination does not imply an in-depth assessment of the entire family situation, as the procedure in question is an urgent one that is not intended to decide the matter of custody rights on the merits.¹²

6.3 The State party maintains that, in the present case, the national courts complied with the Covenant in their implementation of the Convention on the Civil Aspects of International Child Abduction. In this regard, it is of the view that the application of the Convention by the national courts was in accordance with the provisions of articles 17, 23 (1) and 24 (1) of the Covenant. The State party emphasizes that, according to the Committee's general comment No. 16 (1988) on article 17 of the Covenant, interference with a person's family life is compatible with the Covenant if it is provided for by law, in accordance with the aims and objectives of the Covenant, and is reasonable in the particular circumstances. The State party considers that these conditions were all met in the present case, as the implementation of the return decision, which was provided for by law,¹³ was in accordance with the aims and objectives of the Covenant and was intended not to remove the child from his mother, but to protect the rights and freedoms of the child and the father. The State party also considers that the decision was reasonable in view of the circumstances of the case. In this regard, it argues that the non-return of the child to Israel was wrongful within the meaning of article 3 of the Convention on the Civil Aspects of International Child Abduction, as the author unilaterally

⁹ CCPR/C/95/D/1407/2005.

¹⁰ See, for example, *L.P. v. Czech Republic* (CCPR/C/75/D/946/2000); *Fei v. Colombia* (CCPR/C/53/D/514/1992); and *Lippmann v. France* (CCPR/C/55/D/472/1991).

¹¹ See the European Court of Human Rights, *Maumousseau and Washington v. France*, application No. 39388/05, judgment of 6 December 2007.

¹² See the European Court of Human Rights, *X v. Latvia*, application No. 27853/09, judgment of 26 November 2013, paras. 106 and 107.

¹³ See the Court of Cassation of France, first civil division, appeal No. 16-20.858, 7 December 2016.

changed the child's place of habitual residence from his country of origin. The State party recalls that, in its ruling of 11 April 2013, the Marseille court of major jurisdiction held that "it was demonstrated in the proceedings that the child's place of habitual residence was indeed in Israel, where he had resided with his father and mother since his birth", and that, in Israel, "in accordance with articles 14 and 15 of the Israeli Legal Competency and Guardianship Law of 1962, the parents are the joint guardians of their minor children, which includes custody rights and the right to determine the child's place of residence". The State party maintains that, contrary to the author's contention, the mere fact that the father had been hospitalized since the child's birth and could not care for him to the same extent as his wife did not mean that he was not actually exercising custody rights.

6.4 The State party maintains that the situation that the author put before the national courts did not bring to light any of the exceptions provided for under article 13 of the Convention on the Civil Aspects of International Child Abduction. It rejects the author's allegation that, as a result of her husband's reduced intellectual and physical capacities since the accident and the violent outbursts to which he is prone, the child would face a grave risk if returned to Israel. The State party maintains that, while the author complains that the Marseille court of major jurisdiction did not carry out additional investigations into her husband's health, the court in fact acted fully in accordance with the Convention, article 13 of which requires the parent who opposes the return to establish the existence of a grave risk. The State party also argues that, while the Aix-en-Provence Court of Appeal did not actually adjudicate on the specific allegation of a grave risk, in its judgment of 30 January 2014, it did not do so because the author had not repeated this allegation before it. The Court of Cassation, to which the Court of Appeal's judgment was referred, was not required to examine this allegation either. Consequently, the State party considers that the author's first allegation, under article 13 (b) of the Convention, has been properly examined by the national courts.

6.5 The State party rejects the author's allegation that the return of the child to Israel would place him in an intolerable situation by separating him from his mother, with whom he has lived alone since early childhood, and placing him in the care of a parent who has never looked after him. The State party notes, however, that the author incorrectly assumes that the French authorities wanted to separate the child from his mother, when their aim was to ensure that the custody that she exercised jointly with the father was maintained and to preserve its actual exercise by the father by returning the child to his former residence in Israel. The State party notes that, as the author herself points out, in a ruling of 15 December 2014, the Petah-Tiqwa family court, to which the matter had been referred by the father, decided that the two parents would share custody of the child. The State party emphasizes that, in its judgment of 30 January 2014 on the merits, the Aix-en-Provence Court of Appeal stated that its decision was based on the fact the author's husband had given the undertakings requested of him in the interlocutory judgment of 26 September 2013. In this regard, the State party recalls that, on the basis of information obtained from the Israeli authorities,¹⁴ the French judicial authorities noted that the author, who is also a national of Israel, was not the subject of any criminal complaint regarding the return of the child and that the decision barring the child from leaving Israel had been annulled.

6.6 The State party also rejects the author's argument that the French authorities did not comply with articles 7 and 10 of the Convention on the Civil Aspects of International Child Abduction, which provide that the central authority of the State where the child is must secure the voluntary return of the child or bring about an amicable resolution of the issues. In the State party's view, the author is ill-placed to advance this argument, as she never participated in efforts to return the child voluntarily and, moreover, continues to obstruct the decision of the Aix-en-Provence Court of Appeal.

6.7 According to the State party, the author's argument that the retention of the child is justified by her health is not a circumstance provided for in articles 3 and 13 of the Convention on the Civil Aspects of International Child Abduction. It recalls that, regardless of the criteria set out in the Convention, the author's health is hardly likely to entail a violation of articles 17 and 23 (1) of the Covenant. The State party emphasizes that the author has

¹⁴ See the decision of the Aix-en-Provence Court of Appeal of 26 September 2013.

failed to demonstrate that she was completely unable to travel and subsequently rest and seek medical treatment in Israel or that her health justified the child's prolonged absence in spite of the father's application. Ultimately, the State party requests the Committee, principally, to declare the communication inadmissible or, in the alternative, to dismiss it as unfounded.

Author's comments on the State party's additional observations

7.1 In her comments of 13 September 2018, the author requests the Committee to consider the matter of full reparation for the violation that she and her son have suffered, as part of the proceedings before the Committee. She maintains her arguments regarding the admissibility and merits of the communication, as set out above. She continues to contend that she and her son are victims of a violation of their rights under articles 17, 23 (1) and 24 (1) of the Covenant as a result of the decisions of the French courts ordering the return of her son to Israel.

7.2 The author reiterates her argument that her husband was not actually exercising custody rights. She argues that the Aix-en-Provence Court of Appeal and the Marseille court of major jurisdiction wrongly concluded that her husband was actually exercising custody rights, which are specifically defined in article 5 (a) of the Convention on the Civil Aspects of International Child Abduction as relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. The author states that such a conclusion is at odds with the facts, since her husband has never been able to care for the child as a result of the after-effects of his accident. The author clarifies that, contrary to the State party's assertion, she was not seeking to deprive her husband of custody rights, but only to show that the rights in question were not actually being exercised by her husband at the time of her departure.

7.3 The author maintains that her health was the direct cause of the extension of her and her child's stay in France until 14 September 2012. She stresses that her health status was duly certified by doctors who diagnosed her with generalized fatigue due to anaemia, a viral infection involving a high fever and flu-like symptoms, which necessitated a chest X-ray, and mastitis. The author points out that neither of the courts in question referred to her health problems, which had required her to rest and take care of herself, let alone cast doubt on the medical certificates provided in this regard. The author also points out that the courts in question overlooked the health and well-being of the infant, which depended above all on the health and well-being of the mother.

7.4 The author recalls that, having made no attempt at conciliation or mediation, her husband took a particularly drastic approach, one that amounted to depriving the child of any possibility of travelling abroad and visiting his maternal family in France for almost 18 years.

7.5 The author considers that, in its judgment on the merits, the Aix-en-Provence Court of Appeal inaccurately concluded that her husband had given the undertakings sought in the interlocutory judgment of 26 September 2013, in particular the undertaking to waive the right to apply "in future" for an order barring the child and the author from leaving the country. The author points out that, in the affidavit that he filed in Israel on 15 October 2013, her husband did not use the words "in future", which leaves open a very serious threat to the author's freedom of movement. She believes that, at any time, her husband could bring a new action before the Israeli courts to have the child and his mother barred from leaving Israel. Lastly, the author is of the view that she has been falsely accused of wrongful removal within the meaning of article 3 of the Convention on the Civil Aspects of International Child Abduction, that the French courts did not establish that custody rights were actually being exercised by her husband and that they took no account of his health.

7.6 The author avails herself of the exceptions to the prompt return of the child provided for in article 13 (b) of the Convention on the Civil Aspects of International Child Abduction. She reiterates that the child would face a grave risk if returned to Israel, as the father has not regained his full intellectual and physical capacities since his traffic accident and is prone to violent outbursts. The father also lives with his parents in Tel Aviv and is not independent.

7.7 The author argues that, by finding in its ruling of 11 April 2013 that no recent medical evidence had been provided by her husband, who noted that he had been unable to request a copy of such evidence during a Jewish holiday period, the Marseille court of major

jurisdiction dispensed with the requirement to provide recent medical evidence. The author notes that the court failed to consider whether any expert assessments had been conducted on behalf of her husband's insurance company following the accident. In addition, the court did not ascertain the neurological effects of the head injury that he had suffered. It therefore made no attempt to determine whether there would be a grave risk of harm to the child if he returned to Israel under his father's custody. The author also argues that, in its judgment of 30 January 2014 on the merits, the Aix-en-Provence Court of Appeal did nothing to fill the gaps left by its interlocutory judgment, as it did not address the matter of the physical and psychological problems that her husband would continue to experience and did not take into account any medical evidence that might justify an exception to the return of the child. The author considers that, by refusing to ascertain the state of her husband's neurological and psychological health following his head injury, the French courts placed the child at a "grave risk" of physical or psychological harm within the meaning of article 13 (b) of the Convention on the Civil Aspects of International Child Abduction. The author further rejects the State party's argument that the Court of Appeal did not adjudicate on the allegation of a grave risk, made at first instance, for the reason that author was said not to have repeated this allegation before that court. On the contrary, the author states that she had requested the Court of Appeal to order an expert psychological examination of her husband precisely in order to determine whether he posed a risk to the child.

7.8 The author is of the view that, by refusing to consider the actual conditions of the child's care in Israel, the French courts placed him in an "intolerable situation" within the meaning of article 13 (b) of the Convention on the Civil Aspects of International Child Abduction.

7.9 It is also the author's view that the French courts have not taken into account the risk that she might face criminal penalties in Israel. This risk is far from theoretical, since the Penal Law 5737/1977 provides for heavy prison sentences in the event of abduction, even in family matters, and has been applied against mothers on several occasions.¹⁵

7.10 Lastly, the author considers that, since her claims under article 13 (b) of the Convention on the Civil Aspects of International Child Abduction have not been properly examined, the French courts have not ascertained either the state of her husband's health or the consequences that a return to Israel would have on the child. As a result, they have breached the child's right to protection by the State, as provided for under article 24 (1) of the Covenant.

7.11 The author therefore requests the Committee to declare the communication admissible and to find a violation of articles 17, 23 (1) and 24 (1) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee takes note of the author's claims that the State party is violating her and her son's rights under articles 17, 23 (1) and 24 (1) of the Covenant.

8.4 The Committee observes that the author lodged an application concerning the same facts with the European Court of Human Rights. She was informed by letter of 15 October 2015 that a single judge had declared the application inadmissible on the ground that the

¹⁵ In the case of *Neulinger and Shuruk v. Switzerland*, which bears a strong resemblance to the present case, the European Court of Human Rights found that criminal proceedings that could entail a prison sentence could not be ruled out (*Neulinger and Shuruk v. Switzerland*, application No. 41615/07, judgment of 6 July 2010, para. 149).

admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met. The Committee recalls that, on ratifying the Optional Protocol, France entered a reservation excluding the competence of the Committee to consider cases that are being or have been examined under another procedure of international investigation or settlement.

8.5 With reference to its case law relating to article 5 (2) (a) of the Optional Protocol,¹⁶ the Committee recalls that, when the European Court of Human Rights bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, the same matter should be deemed to have been examined within the meaning of the reservations to article 5 (2) (a) of the Optional Protocol.¹⁷ It is therefore for the Committee to determine whether, in the case in question, the Court went beyond the examination of the purely formal criteria of admissibility when it declared the application inadmissible on the ground that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met.

8.6 The Committee notes that the European Court of Human Rights has examined the author's application and has declared it inadmissible under articles 34 and 35 of the European Convention on Human Rights. However, the Committee also notes the brevity of the reasoning set out in the letter sent by the Court to the author, which did not put forward any argument or clarification to indicate that the admissibility decision had been based on the merits.¹⁸ In the light of these particular circumstances, the Committee considers that it is not able to determine with certainty that the case as presented by the author has already been the subject of even a limited examination on the merits¹⁹ within the meaning of the reservation entered by the State party. For these reasons, the Committee considers that the reservation entered by the State party concerning article 5 (2) (a) of the Optional Protocol does not, in itself, represent an impediment to its consideration of the communication on the merits.²⁰

8.7 In the light of the foregoing, the Committee considers that the author has sufficiently substantiated her claims under articles 17, 23 (1) and 24 (1) of the Covenant, for the purposes of admissibility, and proceeds to consider the communication on the merits, under article 2 of the Optional Protocol.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee takes note of the author's assertion that, by declaring the non-return of her child, T.N., to Israel wrongful under the Convention on the Civil Aspects of International Child Abduction, the French courts violated her and her son's rights under articles 17, 23 (1) and 24 (1) of the Covenant.

9.3 The Committee observes that the author's allegations raise the question of State interference in family life and that it must therefore determine whether this interference could be considered arbitrary or unlawful under articles 17 and 23 (1) of the Covenant. The Committee takes note of the author's argument that the non-return of her son to Israel is not wrongful under article 3 of the Convention on the Civil Aspects of International Child Abduction insofar as her husband, who had been physically and mentally incapacitated in a car accident, was not actually exercising custody rights. It also takes note of the author's view that the decision of the French courts to declare the non-return of the child to Israel wrongful constitutes arbitrary interference with her family and private life, in violation of articles 17 and 23 (1) of the Covenant. The Committee further takes note of the State party's argument that the application of the Convention is consistent with the objectives of articles 17, 23 (1)

¹⁶ *Rivera Fernández v. Spain* (CCPR/C/85/D/1396/2005), para. 6.2.

¹⁷ See, inter alia, *Mahabir v. Austria*, para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and *A.M. v. Denmark* (CCPR/C/16/D/121/1982), para. 6.

¹⁸ *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2.

¹⁹ *Mahabir v. Austria*, para. 8.3.

²⁰ *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

and 24 (1) of the Covenant relating to the protection of family ties and children. The Committee notes that the implementation of the Convention can have implications for the enjoyment of the rights enshrined in the Covenant, which does not mean that the application of its provisions necessarily implies a violation of the right to the protection of family life. In the present case, the Committee observes that the author has not demonstrated how, in their application of the Convention in the interests of the family and the child, the national courts failed to take into account the rights protected by articles 17 and 23 (1) of the Covenant.

9.4 As regards the claim of interference with the author's private and family life under articles 17 and 23 (1) of the Covenant, the Committee emphasizes that the author does not discuss the legality of this interference. As to the alleged arbitrariness of the interference invoked by the author, the Committee recalls its jurisprudence that interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.²¹ The notion of "arbitrariness" includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.²² The Committee observes that, in the present case, the author has not demonstrated how, in ordering the return of the child to Israel in application of the Convention on the Civil Aspects of International Child Abduction, the national authorities took decisions that were at variance with the provisions of the Covenant.

9.5 With regard to the claim relating to the author's health, the Committee takes note of her assertion that, as a result of her health, she was unable to travel to Israel with the child on the agreed date and that this situation falls within the exceptions provided for in articles 3 and 13 of the Convention on the Civil Aspects of International Child Abduction. The Committee also notes the author's argument that, while the two courts in question, namely, the Marseille court of major jurisdiction and the Aix-en-Provence Court of Appeal, did not question the certificates produced in support of this argument, they did not take these certificates into account in their decisions. The Committee further notes the State party's response that the argument put forward by the author on the basis of her health is not a circumstance provided for in articles 3 and 13 of the Convention and that this fact does not entail any violation of articles 17 and 23 (1) of the Covenant. The Committee notes, moreover, the State party's argument that the author has failed to demonstrate that it was completely impossible for her to travel, rest and seek medical treatment in Israel or that her condition justified the child's prolonged absence in spite of the father's application. The Committee observes that it is for the domestic courts to evaluate the facts of the case and the evidence submitted, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice, and that, in the present case, this claim cannot be upheld, as the author has not demonstrated how the proceedings before the national courts were arbitrary or amounted to a denial of justice.²³

9.6 As to the claim under article 24 (1), the Committee takes note of the author's allegation that the authorities failed to take into account the exceptions provided for in article 13 (b) of the Convention on the Civil Aspects of International Child Abduction by not ascertaining either the state of her husband's health or the consequences of the child's return to Israel. The Committee notes the State party's argument that, while the national courts had not been guided by further investigations into her husband's health, this was because the Convention placed the burden of proving the existence of a grave risk on the parent who opposed the return of the child. The Committee also notes the State party's argument that, far being aimed at the separation of the child from his mother, the decision of the national authorities to declare the non-return of the child to Israel wrongful was aimed at preserving the joint custody that she exercised with the father. The Committee observes that the author has not contested the fact that she and the father jointly exercise custody of the child, both by

²¹ *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 8.6; and *Nystrom et al. v. Australia* (CCPR/C/102/D/1557/2007), para. 7.6.

²² *Budlakoti v. Canada* (CCPR/C/122/D/2264/2013), para. 9.4. See also general comment No. 35 (2014) of the Human Rights Committee on liberty and security of person, para. 12.

²³ *A.W.K. v. New Zealand* (CCPR/C/112/D/1998/2010), para. 9.3; *Simms v. Jamaica* (CCPR/C/53/D/541/1993), para. 6.2; *Fernández Murcia v. Spain* (CCPR/C/92/D/1528/2006), para. 4.3; and *A.J. v. G. v. Netherlands* (CCPR/C/77/D/1142/2002), para. 5.5.

virtue of their status as non-divorced spouses and in accordance with a ruling issued on 15 December 2014 by the Petah-Tiqwa family court, to which the father had referred the matter. The Committee also notes that the authorities of the State party insisted that the author's husband should provide guarantees relating to the author's care after her and her child's return to Israel.

9.7 The Committee recalls the principle that the child's best interests must be a primary consideration in all decisions affecting him or her.²⁴ It considers that, in the present case, the author has not presented any evidence to demonstrate that the child's best interests were not taken into account by the national courts, which considered evidence relating to the author's and her child's enjoyment of family life when satisfying itself that the child could live with both parents. The Committee notes that, in a ruling of 15 December 2014, the Petah-Tiqwa family court had already concluded that the parents would have joint custody of the child. The Committee also notes that the Aix-en-Provence Court of Appeal sought and received guarantees from the author's husband in order to protect the child's and the author's interests, including the cancellation of the decision barring the child from leaving Israel, written evidence that he has waived the right to apply "in future" for an order barring the child and his mother from leaving the country, written evidence that he has waived all rights to further coercive criminal or civil proceedings against the author in relation to wrongful removal and, lastly, an undertaking to provide housing and financial assistance for the author and the child for at least four months after their return to Israel.

9.8 The Committee points out, however, that it is concerned with the implementation of the Convention on the Civil Aspects of International Child Abduction only insofar as it relates to the enjoyment and implementation of the rights protected by the Covenant, in this case the right to protection of family life and the State's obligation to protect the child. The Committee also points out that the mechanism provided for under the Convention on the Civil Aspects of International Child Abduction is intended for urgent situations that do not necessarily concern the permanent custody rights to which a parent can lay claim. The Committee further points out that the author will always be able to claim custody of her child before the appropriate authorities should the need arise.

9.9 In the light of the foregoing, the Committee considers that the author has not demonstrated how the decisions of the national courts declaring the non-return of the child, T.N., to Israel wrongful under the Convention on the Civil Aspects of International Child Abduction failed to meet the criteria of reasonableness, objectivity and legitimacy of aim. The Committee therefore concludes that the facts before it do not disclose a violation of the author's and her son's rights under articles 17, 23 (1) and 24 (1) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not disclose a violation by the State party of the author's and her son's rights under articles 17, 23 (1) and 24 (1) of the Covenant.

²⁴ *D.T. and A.A. v. Canada* (CCPR/C/117/D/2081/2011), para. 7.10.