HUMAN RIGHTS COMMITTEE

Santacana v. Spain

Communication No. 417/1990*

15 July 1994

CCPR/C/51/D/417/1990*

VIEWS

Submitted by: Manuel Balaguer Santacana

Alleged victims: The author and his daughter, María del Carmen Balaguer Montalvo

State party: Spain

Date of communication: 9 July 1990 (initial submission)

Date of decision on admissibility: 25 March 1992

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

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 417/1990 submitted to the Human Rights Committee by Mr. Manuel Balaguer Santacana on behalf of himself and his daughter, María del Carmen Balaguer Montalvo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Manuel Balaguer Santacana, a Spanish citizen born in 1940 and residing in Barcelona, Spain. He submits the communication on his behalf and

on behalf of his daughter, María del Carmen Balaguer Montalvo, born in 1985, claiming that they are victims of violations by Spain of articles 23, paragraphs 1 and 4, and 24, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Spain on 25 April 1985.

The facts as submitted by the author:

2.1 The author states that in November 1983 he and María del Carmen Montalvo Quiñones decided to live together. On 15 October 1985, Ms. Montalvo gave birth to a girl, who was recognized by both parents and registered on the "Registro Civil" of Barcelona under the name of María del Carmen Balaguer Montalvo. The author further states that after the birth of the child, their relationship deteriorated irremediably; on 7 October 1986 Ms. Montalvo left the common household, taking the child with her. After several weeks the author learned that she had moved to Badalona, a town near Barcelona.

2.2 On 10 November 1986, the author filed with the Third Chamber of the Badalona Court (Juzgado Tres de Instrucción y Primera Instancia de Badalona) case No. 18/86 under the regime of "voluntary jurisdiction" (jurisdicción voluntaria), with a view to obtaining the recognition of his paternal authority (patria potestad) and visiting rights to his child. On 28 January 1987, the judge decided that provisional measures should be taken until a final decision was issued in the matter. The author was authorized to spend every Saturday or Sunday from 11 a.m. to 8 p.m. with his daughter, who by then was one year old. In February 1987 he saw his daughter, believed her to be in ill-health and took her to a doctor, keeping her for four days. Subsequent to this visit, the mother refused to let him see the child for a period of 19 months until November 1988.

2.3 On 23 June 1988, the Badalona Court issued an enforcement order ("Auto de obligado cumplimiento") against Ms. Montalvo, which she appealed to the Superior Court of Barcelona (Tribunal Superior) while continuing to deny the author access to his daughter. One year later, on 23 June 1989, the Superior Court affirmed the order of 23 June 1988.

2.4 On 19 July 1989, the mother started a contentious action (Demanda de Menor Cuantía) before the Badalona Court (case No. 406/89) aimed at modifying the provisional decisions of 28 January 1987 and 23 June 1988. On 16 March 1990, the Court decided to suspend the proceedings of voluntary jurisdiction pending decision on the contentious matter. The author appealed against this decision on 22 March 1990. Nearly two years later, on 31 January 1992, the Superior Court (Tribunal Superior) rejected the author's appeal.

2.5 The author also applied to the "Dirección General de atención a la infancia de la Conselleria de Benestar Social de la Generalitat de Catalunya", requesting that his daughter's case be further investigated and protective measures adopted. The department seized of the matter carried out a summary investigation and accepted to consider it in more detail. In April 1990, however, the same department informed the author that it had received an explicit order from the court of first instance to refrain from further examining the case, since the court considered that it alone was competent.

2.6 The author emphasizes the urgency of the matter since these are his daughter's formative years. He claims that irreparable harm is being done to her by depriving her of the opportunity of having contact with her father. In this connection he refers to pertinent psychological and sociological studies that conclude that the separation of a child from any one parent may have serious psychological consequences. He finally invokes the Convention on the Rights of the Child, in particular article 9, paragraph 3, of which provides:

> "States parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

The complaint:

3. The author claims that he is a victim of a violation of article 23, paragraphs 1 and 4, of the Covenant, because he has been denied family rights and equality of treatment by the Spanish courts in the award of child custody and because of the failure of the courts to act promptly in enforcing a regime of reasonable parental visits. He also claims a violation of his daughter's rights under article 24, paragraph 1, of the Covenant, since a child should be afforded access to both parents, especially during her formative years, except in very specific circumstances. He further claims that Spanish legislation does not sufficiently guarantee the right of access and that the practice of Spanish courts, as illustrated by his own and many other cases, reveals a bias in favour of mothers and against fathers. Although he does not specifically invoke article 26 of the Covenant, the author's allegations also pertain to this provision.

The State party's observations and the author's comments thereon:

4.1 The State party, in submissions dated 14 January, 15 February, 10 April, 10 September 1991 and 20 and 26 February 1992 objects to the admissibility of the communication as an abuse of the right of submission under article 3 of the Optional Protocol and further argues that the author has failed to exhaust domestic remedies, as required by article 5, paragraph 2(b), of the Optional Protocol.

4.2 The State party summarizes recent developments in the pending proceedings as follows:

> A. Proceedings under "non-contentious jurisdiction"
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> 1. Order of 16 March 1990 of the Badalona Court which suspended the proceedings under non-contentious jurisdiction.
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> 2. Mr. Balaguer, having been notified of this order, filed an application for reconsideration (recurso de reposición) of the order, which was dismissed on 30 April 1990.3. On 25 June 1990 Mr. Balaguer submitted a further request for review, with a subsidiary appeal (recurso de reforma y subsidiario de apelación).
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> 4. Procedural order of 25 June 1990, declaring the request for review inadmissible

subsequent to the application for reconsideration having been lodged and a decision given, and ordering the application for leave to appeal (recurso de apelación) to be processed.

5. Procedural order by the judge, dated 18 December 1990, ordering the parties to be summoned to appear before the Superior Court.

6. Receipt of the orders made under non-contentious jurisdiction by Section Fifteen of the Superior Court of Barcelona, to which the appeal lodged by Mr. Balaguer was transmitted.

7. Procedural order, dated 31 January 1991, by Section Fifteen of the Superior Court, by which the Barcelona Bar was requested to appoint a court lawyer for Mr. Balaguer.

8. Procedural order, dated 23 May 1991, relating to the appointment of the representative for Mr. Balaguer.

9. Procedural order, dated 21 June 1991, authorizing the file to be made available to Mr. Balaguer's lawyer.

10. On 31 January 1992, Section Fifteen of the Superior Court of Barcelona dismissed Mr. Balaguer's appeal because the contentious action of Ms. Montalvo before the Badalona Court was deemed to take precedence.

B. Contentious proceedings of minor jurisdiction

1. On 10 January 1991, in the contentious proceedings instituted by Ms. Montalvo in respect of parental authority and custody of the child, Mr. Balaguer challenged the competence of the Badalona Court by entering a written plea to the jurisdiction on the grounds that he was domiciled in Barcelona.

2. Procedural order of 17 January 1991 acknowledging the plea and recording that the issue of competence had been raised.

3. Answer by the Government Attorney to the objection on the issue of competence, dated 4 March 1991, proposing that it should be dismissed as being untimely, since it should have been raised within a period of six days following the summons to answer the case.

4. Procedural order of 6 May 1991 calling for evidence on the contested issue.

5. Procedural order of 10 July 1991 stating that the issue is awaiting decision.

6. On 12 September 1991 Mr. Balaguer submits to the Court information about his journalistic activities in Barcelona.

7. On 16 September 1991 the Court requests clarification from the Barcelona City Hall.

8. On 19 September 1991, the Administrative Division of the High Court of Justice of Catalonia requests information from the Court concerning the complaint made by Mr. Balaguer seeking to establish judicial liability on the part of members of the Badalona Third Chamber.

9. On 24 September 1991 the Administrative Division of the High Court of Justice of Catalonia receives information from the Court concerning the accusation made by Mr. Balaguer.

10. On 1 October 1991 it is agreed to schedule hearings for the 16th of that month.

11. On 15 October 1991 the General Council of the Judiciary is informed of the steps being taken in the case, in view of its interest following the complaint by Mr. Balaguer.

12. On 16 October 1991 the parties' counsel and advocates do not appear for the hearings.

13. On 18 October 1991 the attorney for Ms. Carmen Montalvo Quiñones requests acceptance of his withdrawal from the case.

14. On 28 October 1991 the Association of Attorneys is requested to appoint a new attorney for Ms. Montalvo Quiñones.

15. On 31 January 1992 the new attorney is appointed.

16. On 21 February 1992 the court decides to make a further request to the Barcelona City Hall for clarification of Mr. Balaguer's residential status, such clarification being required in order to resolve the interlocutory matter regarding competence raised by Mr. Balaguer.

4.3 As to the duration of the proceedings, the State party affirms that the author himself is to blame, because he has engaged various procedures that have delayed final adjudication of his case. Moreover, if he claims that the proceedings are too slow, he should have filed and still could file a complaint under article 24 of the Spanish Constitution.

4.4 The State party concludes that since the issues raised by Mr. Balaguer are being dealt with by the Spanish courts in the exercise of Spanish sovereignty, domestic remedies have not been exhausted, and that the communication should be declared inadmissible.

4.5 With regard to the merits, the State party indicates that on two occasions the author misused his visiting rights by keeping his daughter longer than permitted. It denies any discrimination in the pertinent Spanish law and indicates, inter alia, that the competent judge

acted pursuant to the law applicable in 1986 (article 159 of the Civil Code), which provided as follows: "if the parents are separated and do not decide by mutual agreement, male and female children less than seven years of age shall remain in the custody of the mother, unless the judge for special reasons rules otherwise". Article 160 provides that: "the father and the mother, even if not exercising parental authority, shall have the right of access to their minor children". The State party contends that these provisions are fully compatible with the Covenant and refers in this connection to the Committee's Views on communication No. 201/1985, Hendriks v. The Netherlands [1].

5.1 As to the delays in the proceedings, the author informed the Committee on 21 August 1991 that:

(a) From the date of his initial petition for visiting rights (relación paterno-filial) there has been an interval of 1,747 days (5½ years as of the time of the present decision by the Committee);

(b) The interval between the Badalona Court's order and the Superior Court's confirmatory order was 360 days;

(c) The interval between the Superior Court's order and the Badalona Court's order of suspension was 238 days.

5.2 He further adds that following the order by the court of first instance suspending an order from a superior court, proceedings have been delayed for no apparent reason:

(a) The interval between the submission of the appeal against the suspension order (22 March 1990) and the transfer of the case to the Superior Court was 300 days;

(b) The time elapsed from the submission of the appeal (22 March 1990) to date (August 1991) has been 517 days.

5.3 The author thus complains that as of August 1991 the court had not decided on his application for visiting arrangements and had not made a ruling, although 1,747 days had elapsed.

5.4 By letter of 24 February 1992 the author challenges the rationale of the decision of the Superior Court of Barcelona of 31 January 1992, suspending his previously recognized right to access, which he had been unable to exercise in view of "the mother's intransigence and opposition in attitude of revenge". He adds that this last decision under the regime of voluntary jurisdiction is not subject to appeal.

5.5 The author claims that the application of domestic remedies in his case has been unreasonably prolonged, within the meaning of article 5, paragraph 2, of the Optional Protocol. In this context he refers to the Committee's admissibility decision in communication No. 238/1987. [2]

The Committee's admissibility decision:

6.1 During its 44th session in March 1992, the Committee considered the admissibility of the communication. The Committee first considered whether the author had standing to act on his daughter's behalf, as he was not the custodial parent. It noted that it was evident that the author's daughter could not herself submit a communication to the Committee, and further observed that the bond between a father and his daughter, as well as the nature of the allegations in the case, were sufficient to justify representation of the author's daughter by her father.

6.2 The Committee ascertained that the same matter was not being considered under another procedure of international investigation or settlement.

6.3 As to the requirement of exhaustion of domestic remedies, the Committee noted the State party's indication that proceedings in the case remained pending. It observed that Mr. Balaguer's attempts to vindicate a right of access to his daughter had begun in 1986 and that he had not seen his daughter for several years. Taking into account the proviso in article 5, paragraph 2(b), about undue prolongation of remedies, coupled with the fact that the situation (in 1992) prevented both the author and his daughter from having contact with each other, the Committee deemed it unreasonable to expect the author to continue awaiting a final decision on custody and visiting rights and considered a delay of over five years in the determination, at first instance, of a right of access in custodial disputes to be excessive. It concluded that article 5, paragraph 2(b), did not preclude it from considering the merits of the case.

6.4 On 25 March 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 23, paragraphs 1 and 4, 24, paragraph 1, and 26 of the Covenant.

The State party's submission on the merits and the author's comments thereon:

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 16 November 1992, the State party challenges the Committee's conclusion that the author has standing to act on his daughter's behalf. In this context, it noted that it ascertained that

- the author never complied with his obligations, agreed to in January 1987 with the child's mother, to contribute financially to the girl's upbringing;

- his allegations relating to the poor physical health of his daughter have proven false;

- his allegations relating to the presumed disorderly lifestyle of the mother have been proven wholly false; and

- the author never purported to act as representative of his daughter in the domestic judicial proceedings.

7.2 As to whether the same matter is under examination by another instance of international investigation or settlement, the State party questions the veracity of the author's initial submissions to the Committee, given that

- he has written twice to the office of examining magistrate of Badalona with indications that his case is pending before the "international court of justice" (tribunal internacional de justicia) so as to vindicate his rights;

- he has indicated to the same office that he has presented his case to UNESCO in Paris, in his function as "secretary-general" of a non-governmental organization.

In the circumstances, the State party requests the Committee's confirmation that the requirements of article 5, paragraph 2(a), of the Protocol have been met.

7.3 As to the issue of exhaustion of domestic remedies, the State party reiterates that both in respect of non-contentious jurisdiction and contentious proceedings of minor jurisdiction (see paragraph 4.2 above), available and effective domestic remedies have not been exhausted. With respect to the purported "undue prolongation" of domestic remedies, the State party emphasizes that this rule is inapplicable in the author's case, as all the delays in the proceedings (both non-contentious and contentious) are solely attributable to Mr. Balaguer. Thus, the author's own behaviour and his repeated refusal to comply with the terms of access initially agreed upon led to the decision of the Badalona Court of 16 March 1990 to suspend proceedings under non-contentious jurisdiction. As to the contentious jurisdiction, the State party recalls that the author himself is the defendant in these proceedings - as a result, he has seen fit to delay these proceedings as much as possible, either by challenging the jurisdiction of the Court of Badalona or by changing legal representatives. The State party notes that all legal representatives assigned to or chosen by the author have, after varying periods of time, refused to represent him any further.

7.4 The State party explains that the custody of children (patria potestad) is governed by articles 154, 156 and 159 of the Civil Code. Article 159 was amended in October 1990 by Law 11/1990, out of concern that the previous provision, which as a rule gave custody to the mother save under exceptional circumstances, discriminated on the basis of sex. Under the provision as amended, the judge must decide, in the best interest of the children, which of the parents will be awarded custody and, to the extent that this is possible and reasonable, hear the children; it is mandatory to hear children over the age of 12. The State party points out that at no point, before the change in legislation of afterwards, did the author seek custody of his daughter, either before the local courts or before the Committee. By contrast, it was the girl's mother who, since the end of 1989, has sought to obtain a ruling on the exclusive custody of the child.7.5 The State party recalls that the right of access of parents to their children is governed by article 160 of the Civil Code. Under article 159, paragraph 3, the judge decides on the modalities of access and on the special conditions of access, with a view to avoiding that any harm be done to the children. The State party rejects as "totally unjustified" and unsubstantiated the author's claim that his right of access has been violated ("Es una ... denuncia radicalmente falsa").

7.6 The State party affirms that article 23, paragraph 1, does not apply in the author's case. It argues that the cohabitation, of limited duration, from April 1985 until shortly after the birth of Maria del Carmen, between the author, a 44-year old married man, and Carmen Montalvo, a 17-year old minor, does not qualify as a "family" within the meaning of article 23, paragraph 1. Furthermore, the relationship between the author and Ms. Montalvo, highly problematic while it lasted and never placed on firm legal grounds, cannot, in the State party's opinion, be deemed a "fundamental [element] of society" which is entitled to "protection by society and the State". Rather, the State party qualifies the author's behaviour as bigamy.

7.7 In the State party's opinion, article 23, paragraph 4, cannot apply in the author's case either, as the author never formalized his relationship with Ms. Montalvo, either through marriage or other legal arrangements. As a result, there cannot be any question of a "dissolution" of a marriage within the meaning of article 23, paragraph 4, first sentence, which would trigger the State party's obligation to guarantee the equality of rights and responsibilities of spouses. The State emphasizes that the author was married when a child was born out of his relationship with Ms. Montalvo.

7.8 As to the alleged violation of article 24, paragraph 1, the State party affirms that the author's daughter has not suffered discrimination of any type, and that, as a minor, she is given the requisite measures of protection, both by her mother and by the State.

7.9 The State party dismisses as absolutely unfounded ("radicalmente falsa") the author's allegations under article 26, namely that he is discriminated against in relation to his right of access to his daughter. It explains that under Spanish legislation, no distinction is made between legitimate and illegitimate children; for both, the parents have the same rights and responsibilities, which are guaranteed by law. In particular, any parent has the right of access to his or her child; in conflictual situations, it is incumbent upon the (family) judge to take the necessary measures to avoid any harm to the children. The procedure, the State party submits, was strictly followed in the author's case.

7.10 In this context, the State party recalls that the author and Ms. Montalvo agreed, in January 1987 and with the approval of a judge, upon a visiting rights regime, under which the girl could spend several days during every second weekend ("unos dias") with the author. The first time the author made use of this right, he disappeared with the child for four days, and the mother had to travel to Paris, where she found the child, according to the State party, in disgraceful circumstances ("en lamentables condiciones"). The second time, the author once again took off with his daughter, this time for four months, during which he did not maintain a fixed domicile, taking refuge, at one point, in a religious institution. Those incidents, the State party affirms, did not deprive the author of his right of access.7.11 After appropriate psychological tests, the parents, again with the judge's approval, agreed that the author could visit his daughter in an appropriate public institution or public place. This form of contact between father and daughter produced unsatisfactory results, as the child displayed signs of anguish and discomfort during the visits. Thereafter, the mother proposed, and the judge agreed to, that contacts between the author and his daughter take place at her home; under the terms of this agreement, the author would be allowed to see his daughter

alone, in the mother's absence but with the assistance of the police (Mossos d'esquadra).

7.12 According to the State party, the author rejected this form of contact with his daughter. Rather, he requested that the child be brought to an orphanage ("un establecimiento de acogida, es decir un orfanato"), where he would then visit her. Faced with this attitude of the author, and given that the mother had, in the meantime, initiated judicial proceedings, the judge suspended non-contentious proceedings by decision of 14 March 1990. The State party underlines that this decision did not deny the author his right of access to his daughter.

7.13 The author, rather than accepting the visiting rights regime negotiated earlier, proceeded to file recourse upon recourse, requesting that the initial visiting rights regime of January 1987 be reinstated. The State party notes that, significantly, the author has never filed similar requests in the context of the contentious proceedings. The State party concludes that no one, be it the mother, the authorities or the judge, has denied the author the right of access to his daughter; rather, the latter has simply refused to avail himself of the formula deemed by all to be the one that is in the child's best interest, namely contacts between child and father in the mother's home but in her absence.

7.14 In the light of all of the above, and given that the author has at times chosen to misrepresent his situation and deliberately to distort his claims both before the local courts and before the Human Rights Committee, the State party requests that the Committee dismiss Mr. Balaguer's complaint as an abuse of the right of submission.

8.1 In his comments, dated June and 6 September 1993, the author dismisses the State party's submission as untruthful, distorting the facts, devious and reflecting the outdated societal and family concepts of the Spanish authorities and/or the law. The Committee, after carefully examining the author's comments, however, feels obliged to note that they frequently amount to critical comments directed against the government official responsible for the State party's submission in the instant case. To the extent that this is the case, the Committee will not consider the author's comments.

8.2 Mr. Balaguer reaffirms that he is entitled to represent his daughter before the Committee, not however by refuting the State party's observations but by reference to paragraph 6.2 of the Committee's decision on admissibility. He confirms that his case has not been presented to another instance of international investigation or settlement and contends that the State party's doubts in this respect are designed to discredit him.

8.3 To the State party's reaffirmation that domestic remedies have not been exhausted and that delays in the adjudication of the matter must be attributed to the author himself, Mr. Balaguer replies that the judge of the Badalona Court has never seen fit to handle the requests to determine the issue of custody and visiting rights properly and in accordance with the applicable law. No indication is, however, given as to which laws and regulations have not been observed by the State party's judicial authorities. The author adds that he cannot exhaust domestic available remedies, by way of appeal or amparo, since the court of first instance had not handed down a decision at first instance more than seven years after his initial petition.

8.4 The author reaffirms that he is a victim of violations of articles 23, paragraphs 1 and 4, 24, paragraph 1, and 26; he does so by reference to his earlier submissions, which in his opinion clearly demonstrate that his allegations are well-founded. In particular, he submits that the relationship with his daughter must be subsumed under the term "family" within the meaning of article 23, paragraph 1, and that the family unit has not benefitted from the requisite protection of the State.

8.5 Apart from violations of the Covenant, the author contends that the Spanish authorities have violated article 9 of the Convention on the Rights of the Child (CRC) in his case, and in particular of paragraph 3 of this provision, which he claims guarantees the contact with both mother and father for children whose parents are separated. It is submitted that the attitude of the judicial authorities in the case constitute a violation of article 9 CRC, notwithstanding the Government's assurance that the CRC would be incorporated into domestic law.

8.6 The author accuses the State party of not citing, or citing incorrectly, the applicable domestic laws and regulations, the relevant jurisprudence of domestic tribunals, or relevant international instruments. A careful analysis of his comments reveals, however, that he does not himself cite any provisions of the Spanish Civil Code, the Code of Civil Procedure, regulations governing family relations, or the jurisprudence of the domestic courts, save for unidentified excerpts of Supreme Court or Constitutional Court decisions.

Review of admissibility issues and examination of the merits:

9.1 The Committee has considered the present communication in the light of all the information provided by the parties. It takes note of the State party's reiterated request that the complaint be dismissed as an abuse of the right of submission, as well as the author's rebuttal.

9.2 The Committee has taken note of the State party's observations questioning the decision on admissibility of 25 March 1992. Having duly considered the arguments summarized in paragraphs 7.1 to 7.3 above, the Committee concludes that there is no reasonto revise its decision on admissibility. [3] Firstly, in respect of the question of the author's standing to represent his daughter, it reiterates that standing under the Optional Protocol may be determined independently of national regulations and legislation governing an individual's standing before a court of law. This means that regardless of what Mr. Balaguer did to represent his daughter's interests before the Spanish courts, the considerations in paragraph 6.2 above apply. Secondly, the Committee has ascertained that the author's case is not pending before another instance of international investigation or settlement. Finally, while it is true that many delays in the proceedings must be attributed to the author himself, it nonetheless remains that after several years of contentious proceedings, there is no evidence of a judicial decision at first instance. In a dispute about custody rights and access to children, the Committee considers this delay to be unreasonable.

10.1 On the merits, the questions before the Committee concern the scope of articles 23, paragraphs 1 and 4, and 24, paragraph 1, i.e. whether these provisions guarantee an

unqualified right of access for a divorced or separated parent, or not, and a child's right to have contact with both parents. Another issue is whether decisions on custody and access rights in the case have been based on distinctions made between fathers and mothers and, if so, whether these distinctions are based on objective and reasonable criteria, as follows from the application of article 26 of the Covenant.

10.2 The State party has argued that article 23, paragraphs 1 and 4, do not apply to the case, as the author's unstable relationship with Ms. Montalvo cannot be subsumed under the term "family", and no marital ties between the author and Ms. Montalvo ever existed. The Committee begins by noting that the term "family" must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child[4]. Some minimal requirements for the existence of a family are however necessary, such as life together, economic ties, a regular and intense relationship, etc.

10.3 In the instant case, irrespective of the nature of the author's relationship with Ms. Montalvo, the Committee observes that the State party has always acknowledged that the relations between the author and his daughter were protected by the law, and that the mother, between 1986 and 1990, never objected to the author's contacts with his daughter. It was only after Mr. Balaguer continuously failed to observe, and objected to, the modalities of his rightof access, that she sought exclusive custody and non-contentious proceedings were suspended. The Committee concludes that there has been no violation of article 23, paragraph 1.

10.4 The Committee further notes that article 23, paragraph 4, does not apply in the instant case, as Mr. Balaguer was never married to Ms. Montalvo. If paragraph 4 is placed into the overall context of article 23, it becomes clear that the protection of the second sentence refers only to children of the marriage which is being dissolved. In any event, the material before the Committee justifies the conclusion that the State party's authorities, when determining custody or access issues in the case, always took the child's best interests into consideration. This is true also for the decisions of the Third Chamber of the Court of Badalona, which the author has singled out in particular.

10.5 The author has claimed a violation of article 24, paragraph 1, since his daughter, as a minor, has not benefitted from the appropriate measures of protection, by law or otherwise, on the part of her family and the State. The Committee cannot share this conclusion. On the one hand, the girl's mother has, on the basis of the available documentation, fulfilled her obligations as custodian of the child; secondly, there is no indication that the applicable Spanish law, in particular Sections 154, 156, 159 and 160 of the Civil Code, do not provide for appropriate protection of children upon dissolution of a marriage or the separation of unmarried parents.

10.6 Finally, having examined the material before it, the Committee concludes that no issues arise under article 26 in the circumstances of the case. There is no indication that the author was treated arbitrarily and on the basis of unreasonable criteria by the Spanish authorities, or that he was treated differently from others in a similar situation.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach by the State party of any of the provisions of the Covenant.

Footnotes

*/ Made public by decision of the Human Rights Committee.

*/ A concurring individual opinion by Committee member Elizabeth Evatt is appended to the text of the Views.

1/ Views adopted on 27 July 1988.

2/ Floresmilo Bola ñ os v. Ecuador , Views adopted on 26 July 1989.

3/ The Committee regrets that subsequent to the decision on admissibility, the parties have become locked in disputes that are of little relevance to the content of the initial communication. It notes that the file reveals that the author used his demarches before the Human Rights Committee for purposes of the proceedings, to which he is party, before the Court of Badalona. Thus, it transpires that he used United Nations stationery in correspondence with the Court of Badalona, although he was not authorized to do so. While these occurrences do not have a direct bearing on the examination of communication No. 417/1990, they may discredit the procedure under the Optional Protocol.

4/ See Views on communication No. 201/1985 (Hendriks v. The Netherlands), adopted on 27 July 1988, paragraph 10.3.

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

Appendix

Individual opinion (concurring) by Mrs. Elizabeth Evatt under rule 94, paragraph 3, of the Committee's rules of procedure, concerning communication No. 417/1990 (Manuel Balaguer Santacana v. Spain)

I agree with the Committee's conclusion that there has been no violation of the author's rights under the Covenant. I agree also that, in the circumstances of the case, it is not necessary to apply article 23, paragraph 4, since the measures of protection required for a minor under article 24, paragraph 1, also require that decisions about custody and access (visiting rights)

be decided on the basis of the child's best interests.

I do not agree, however, with an interpretation of the concept of "marriage" in article 23, paragraph 4, which would automatically exclude its application to relationships which, while not "formal" marriages, are in the nature of marriage and share many of its attributes including joint responsibility for the care and upbringing of children. Legal regimes applying to such relationships should, in my view, be in conformity with article 23, paragraph 4.

Elizabeth Evatt

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