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DROITS DE L'HOMME
HAUT-COMMISSARIAT

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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REFERENCE: G/SO 215/51 AUS (144) Follow-up
CE/YH/ys 2279/2013

21 February 2017

Dear Mr. Zoltowski,

I have the honour to refer to the follow-up procedure to communications considered by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights and to transmit to you herewith, for information, a copy of the State Party's further submission, dated 5 July 2016, concerning communication No. 2279/2013, which you submitted to the Human Rights Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

Yours sincerely,

Ibrahim Salama
Chief
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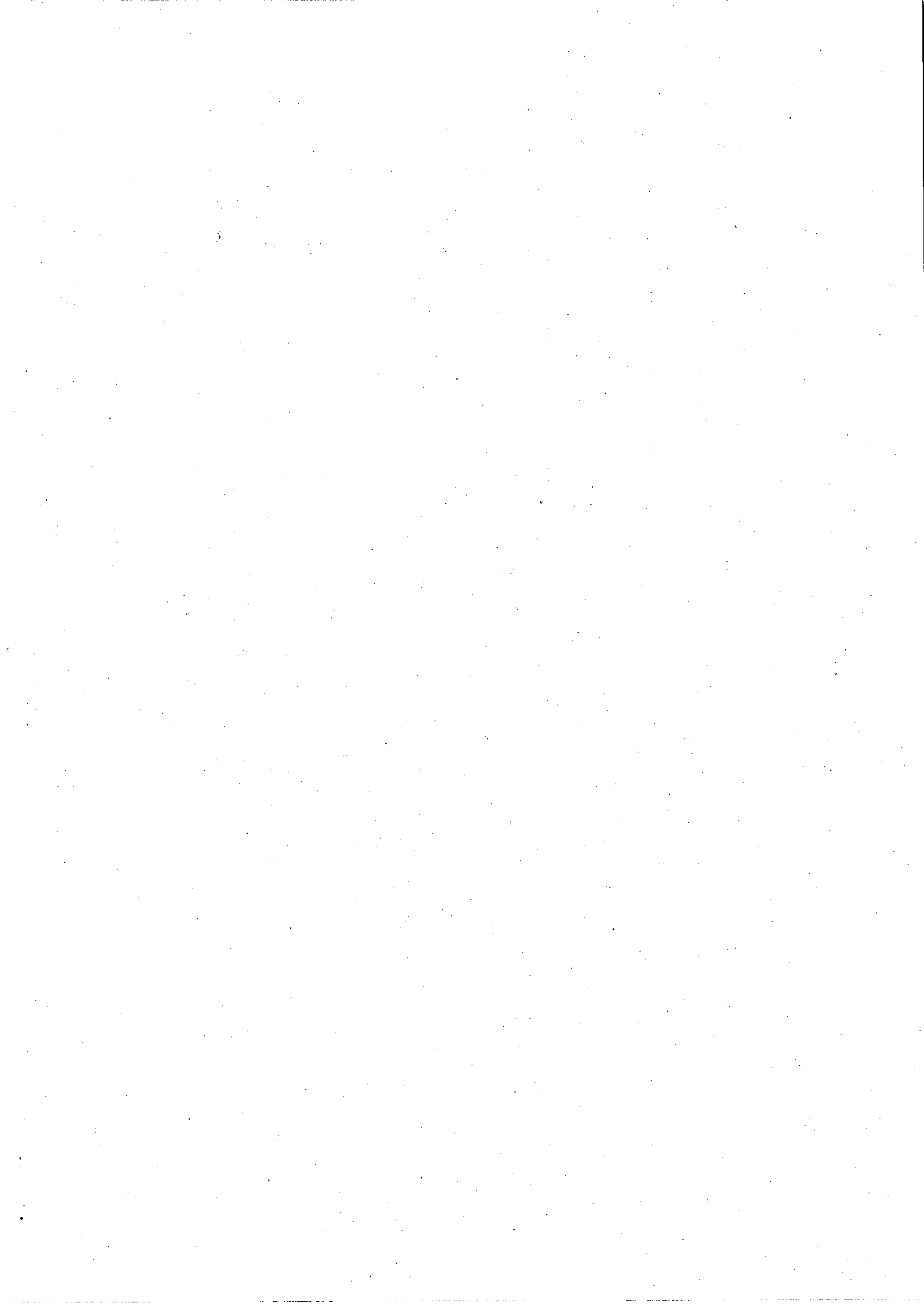

Note No. 509/2016

The Permanent Mission of Australia to the United Nations and other international organisations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and the Human Rights Committee (the Committee), and has the honour to refer to Communication 2279/2013 (Z v Australia).

The Australian Government (Australia) hereby provides its response to the Committee's Views. Given the sensitive nature of Family Court proceedings and restrictions under domestic law regarding the publication of any part of the proceedings which identifies the parties, Australia respectfully requests that the Committee not publish the response to the Views.

The Permanent Mission of Australia avails itself of this opportunity to renew to the Human Rights Committee and the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva
5 July 2016

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RESPONSE OF AUSTRALIA TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE IN COMMUNICATION NO. 2279/2013

1. The Australian Government (Australia) presents its compliments to the Human Rights Committee (the Committee). Australia has given careful consideration to the Views of the Committee in Communication No. 2279/2013 and provides the following comments in response.

Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR)

2. The Committee formed the view that an alleged lack of action by Australia to allow contact between the author and his child (subsequent to the child's removal from X country to Australia by the child's mother on 31 March 2010) constituted arbitrary interference with family under article 17 of the ICCPR. The Committee also considered that there had been a failure by the State to take necessary steps to guarantee the family's right to protection under article 23(1) of the ICCPR.
3. Australia respectfully disagrees with the Committee's Views that there has been a failure to provide the author with an opportunity to have contact with his child such as to constitute 'interference' with family under article 17 of the ICCPR. In this regard, Australia provides the following information to assist the Committee.
4. The author (an X and Australian national), commenced divorce and custody proceedings in X country on 26 February 2010. On 31 March 2010, the author's wife (born in Y country and an Australian national) flew with the child to Australia without the author's consent. In June 2010, the author sought the return of the child to X country under the *Hague Convention on the Civil Aspects of International Child Abduction* (the Hague Convention). In August 2010, the Court in X country made orders dissolving the parties' marriage 'by the fault of the wife' and providing that:

    a) the [author] be entrusted with execution of parental authority over the child, establishing the place of residence of the child with the [author];
    b) the mother be deprived of the parental responsibility over the child; and
    c) the costs of maintenance of the child be charged solely to the [author].

    The X court did not deal with the issue of contact between the mother and the child. The orders were not expressed as interim orders.

5. On 13 April 2010 the child's mother commenced proceedings (the domestic proceedings) in the Family Court of Western Australia (the Court) under the *Family Law Act 1975* (Cth) (the Family Law Act). On 21 April 2010 *ex parte* interim

orders were made providing that the child live with the mother and the author spend time with the child (as agreed between the parties). While Hague Convention return proceedings are on foot, domestic proceedings are not progressed to allow the relevant courts to determine the jurisdictional dispute. It is for the parties to progress the domestic proceedings, which the mother did in 2013.

6. Return proceedings under the Hague Convention involve an application for the return of a child to their habitual residence. Hague Convention proceedings are jurisdictional disputes which settle the most appropriate forum for the determination of parenting disputes. This then allows the relevant judicial and administrative bodies of the State of habitual residence to determine the long-term parenting arrangements for a child.
7. On 8 July 2011, the Full Court of the Family Court of Australia held that the State Central Authority had failed to discharge the burden of proving, on the balance of probabilities, that the author's child was habitually resident in X country. The Full Court found that Australia was the country of the child's habitual residence, the country where the child lived for three of his six years prior to spending five months in X country (before removal by his mother to Australia). The Hague Convention application for return of the author's child to X country was dismissed. The Committee has not made any adverse Views in relation to the return proceedings under the Hague Convention.
8. The Hague Convention also provides for access to children who live overseas. These access disputes differ from domestic parenting proceedings under the Family Law Act as the relief that may be sought from a court in a Hague Convention matter is limited to obtaining an order to secure the effective exercise of rights of access to the child. These proceedings do not involve issues relating to custody of a child, which would need to be resolved through domestic parenting proceedings under Part V11 of the Family Law Act.
9. The Hague Convention access application was filed by the State Central Authority on 2 July 2013. On 29 January 2014, the Court held that the State Central Authority had good cause to withdraw from the Hague Convention access proceedings and granted leave to the State Central Authority to withdraw. Further, the Court decided that the appropriate forum for resolving an access/contact dispute was the country of the child's habitual residence. The Court stayed the Hague Convention access proceedings to enable parenting orders to be determined under Australian domestic

law (Part V11 of the Family Law Act) in the domestic proceedings on the basis that Part V11 was the appropriate means to resolve the dispute.

10. The author was unable to continue the Hague Convention access proceedings in his own right as he was not a party to the proceedings and the Hague Convention access proceedings were dismissed on 18 March 2014. However, he had every opportunity to participate in the domestic parenting proceedings.

11. Finally, the Court stated:

> The [author] has every right to participate in the current WA parenting proceedings. He should now do so.
>
> ... I shall deal with [the current WA parenting proceedings] on 18 March 2014. I will consider any application the [author] is minded to make (as part of those proceedings) at that time. Similarly, I will consider any application that the mother is minded to make (as part of [the current WA parenting proceedings]) at that time. If the [author] elects not to participate in [the current WA parenting proceedings], then it is likely that the mother will seek final parenting orders on 18 March 2014. If the [author] elects to participate in the WA parenting proceedings, then it is likely that I will make appropriate interim and/or procedural orders with a view to facilitating the resolution of the parties' parenting dispute.

12. On 18 March 2014, the author did not appear in Court and the mother was required to serve documents on the author in X country (including her amended application).

13. The mother's amended application sought orders that she have sole parental responsibility for the child, who was nearly 10 years of age at that time. She also sought that the child live with her and she set out her proposals for contact between the author and the child.

14. The mother's amended application was heard on 27 May 2014. The Court was satisfied that the author was well aware of the existence of the domestic proceedings and the fact that they were listed before the Court on that day. However, as noted by the Court, the author elected not to participate in the proceedings.

15. The Court granted the author weekly telephone contact and supervised face to face contact with the child. The Court also stated:

> ... In my view there is an unacceptable risk of the child being removed from the mother's care and, indeed, being removed from the country if the [author's] time with the child is not strictly supervised. Moreover, there is an unacceptable risk of the [author] saying wholly inappropriate things to the child, as the mother has described in her affidavit. The [author] seems unable to control his emotions where the child is concerned and, in my view, it is in the best interests of the child to ensure that untoward events do not occur when he spends time with the [author]. My view in that regard may change over time if the [author] can demonstrate that he can behave responsibly when he spends time with the child.

16. As noted in Australia's original submissions to the Committee, the author was provided with opportunities to participate in domestic proceedings (for example, the Court made attempts to contact the author by telephone). The Court has noted that:

> It is clear beyond argument that the author has been given every opportunity to participate in the current WA parenting proceedings. For reasons best known to him, he has elected not to participate. Indeed, he has resolutely *refused* to participate.

17. The author has stated in his submissions to the Committee and in Court proceedings that he does not accept that Australia has jurisdiction over his child in any domestic custody proceedings and further, that he does not submit to Australian domestic proceedings in relation to the custody of his child. He has continued to seek the return of the child to X country even though a Hague Convention access application cannot provide him with the remedy he seeks.
18. Had the author participated in the domestic proceedings under the Family Law Act, he could have applied for a broad range of court orders, including orders relating to who the child should live with (custody) and spend time with.
19. Whilst the domestic proceedings were on foot, the author was provided with opportunities to communicate with his child. Further, on 17 June 2014 the Court ordered that the author could contact his child through weekly telephone calls at certain times as well as visits with the child in Australia under the supervision of an agreed agency or the child's mother (with advance notice and at agreed times).
20. Australia respectfully disagrees with the Committee's conclusions that Australia violated article 17 of the ICCPR through any alleged inaction by the Court. In Australia, the Court is independent (comprising the judicial arm of Government) and separate to the executive arm of Government (being the Central Authorities).
21. The Court decided, and the Central Authorities advised the author, that the more appropriate forum to seek access to his child was the domestic proceedings (rather than the Hague Convention access proceedings). Court orders were in place since 2010 and in 2014 specific orders were made, which enabled the author to spend time with his child. In light of these factual circumstances, Australia does not consider that there was any inaction by Australia to prevent the author from seeking access to his child nor does any alleged inaction by the Court constitute 'interference' with family within the scope of article 17 of the ICCPR.

22. Violations of article 23 are generally considered in conjunction with article 17, and have generally only been found to be violated in circumstances where an arbitrary interference with the right to family under article 17 of the ICCPR has been found. In Australia's view, there has been no violation of article 17 of the ICCPR and consequently no violation of article 23 of the ICCPR.
23. The author saw the child a number of times during the Hague Convention return proceedings and had telephone/Skype contact with the child. The Court noted on 17 June 2014 that evidence had been provided that Skype contact between the author and his child shortly before the previous Christmas appeared to upset the child. The Court described this as 'clearly not in the best interests of the child'. Despite having concerns, the Court made orders allowing for appropriately supervised contact. These orders continue to provide the author with an opportunity to have contact with the child, should he chose to do so. Although, the Court (again on 17 June 2014) observed that the author had elected not to contact his child for an extended period of time.
24. Given the steps taken by the Court to provide the author with an opportunity to participate in the domestic proceedings, Australia disagrees with the Committee's view that there has been any inaction on the part of Australia which would amount to a violation of article 23 of the ICCPR.

Article 24 of the ICCPR

25. The Committee formed the view that Australia had not taken measures of protection as required by the author's child, given his status as a minor, in violation of article 24(1) of the ICCPR. With respect to the Committee's views that Australia had violated article 24 of the ICCPR, Australia notes that under section 60CA of the Family Law Act, a child's best interests are the paramount consideration when a judicial officer of the relevant court makes parenting orders. In 2014, the Court ordered, based on the evidence before it, that the child should live with the mother and that the author could have weekly telephone contact and could spend time with the child in Australia under certain conditions. The Court explicitly took into account the best interests of the child and noted that the author had presented no alternative to the existing parenting arrangements as he had not taken advantage of opportunities presented to him to put forward proposals for the child's welfare. As stated above,

the Court also observed that the author had elected not to contact his child for an extended period of time.

26. Australia notes that the Committee has previously remarked that in child custody matters 'the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests'.[1]

27. There is no evidence to indicate that the Court did not make decisions about the child's welfare independently and impartially (both in the Court's decision to stay the Hague Convention access proceedings and the Court orders in the domestic proceedings). The Court clearly took into account the child's best interests under section 60CA of the Family Law Act. In these circumstances, Australia therefore does not agree with the Committee's Views that there was a violation of article 24 of the ICCPR.

Article 14(1) of the ICCPR

28. The Committee noted that the author's Hague Convention access application of 6 December 2011 was filed with the Court on 2 July 2013 (19 months later) and the Court stayed the application on 29 January 2014 due to the concurrent parenting procedures, initiated by the child's mother in April 2010 under the Family Law Act.

29. The Committee considered that Australia had not provided any justification for the alleged delay in dealing with the author's custody application or his access application. Australia refers to its original submissions that the Committee does not have jurisdiction in this matter as the author has not exhausted his rights in the domestic proceedings. Further, the return and access application have been exhausted under the Hague Convention but not in domestic proceedings. As the Court stated in relation to the access orders made:

> My view, in that regard, may change over time if the author can demonstrate that he behaved responsibly when he spends time with the child.

30. The Committee also expressed the view that Australia had not taken steps to ensure a provisional access scheme between the author and his child. The Committee formed the view that due to alleged delays in the Hague Convention access proceeding there had been a violation of article 14(1) of the ICCPR.

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[1] *Fei v. Colombia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995), paragraph 8.7.

31. Australia refers to its original submissions which acknowledged the Committee's remarks that custody proceedings should be adjudicated expeditiously.[2] However, it is not the purpose of Hague Convention access proceedings, or any Hague Convention application to progress domestic custody proceedings. With respect, Australia disagrees with the Committee's remarks that there was an alleged delay in progressing the author's custody application. The author did not make a custody application and the only custody application that he could make would be to the Court in the domestic proceeding. The author elected not to participate in such domestic proceedings. With respect to the Hague access application, Australia notes its original submission that there had not been any undue delay given the amount and scope of material provided by the author to the Australian Central Authority. This included consideration of the author's requests that did not fall within the jurisdiction of a Hague Convention application. Finally, as stated by the Court:

> The [author's] determination not to submit to Australian domestic law in relation to his dispute with the mother over contact with his child has been counterproductive, in that it has complicated this dispute and delayed it.

In light of these circumstances, Australia does not consider that there has been any undue delay such as to constitute a violation of article 14(1) of the ICCPR.

32. As noted above at paragraph 21, the Australian Central Authority notified the author that any remedies sought by the author were more appropriately the subject of domestic parenting proceedings under the Family Law Act. The Court decided to stay Hague Convention proceedings and provided the author with an opportunity to participate in the domestic proceedings. The author elected not to do so.

33. Further, as noted above at paragraph 19, whilst domestic proceedings were on foot the author was provided with opportunities to communicate with his child. The 2014 parenting orders enable the author to speak with the child each week and spend time with the child at agreed times under supervision. If the author does not have contact with the child, it is because he has elected not to do so.

Recommendations

34. The Committee has recommended that Australia provide a remedy for breaches of the ICCPR under article 2(3)(a) of the ICCPR, including compensation, ensuring regular contact between the author and his child as well as prevention of similar violations in

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[2] *Ibid*, paragraph 8.4.

the future. Given Australia does not agree with the Committee's findings that a breach of the ICCPR has occurred, Australia does not consider it appropriate to implement these recommendations of the Committee. Should the author wish to alter existing orders of the Court regarding his ability to visit and contact his child, the appropriate forum is the domestic proceedings under the Family Law Act.

35. Australia avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.