# Individual communications submitted under the under the Optional Protocol to the CRC on a Communications Procedure and Admissibility

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Leiden Children's Rights Observatory Papers

Leiden Law School

*No. 2, 12 May 2022*

# Individual communications submitted under the under the Optional Protocol to the CRC on a Communications Procedure and Admissibility

*Updated Report on the Decisions of the Committee on Admissibility: Summary and Comments*

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*This papers series forms part of the Leiden Children's Rights Observatory of Leiden Law School under the responsibility of the observatory's editorial board. It aims to reflect on developments concerning the CRC-OP3 and related issues from scholarly and/or professional perspectives.*

Suggested citation: J.E. Doek, *Communications with the Committee on the Rights of the Child under Optional Protocol to the CRC on a Communications Procedure and Admissibility. Report on the Decisions of the Committee on Admissibility: Summary and Comments*, Leiden Children's Rights Observatory Papers No. 2, 12 May 2022.

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## Abstract

The first question the Committee on the Rights of the Child has to answer when it receives communications submitted under the Optional Protocol to the UN Convention on the Rights of the Child (CRC) on a communications procedure (CRC-OP3) is: is the communication admissible? Experiences show that the majority of the cases dealt with by the Committee so far is inadmissible. This means that a lot of time and energy invested in the submission of the communication did not produce the intended result: a decision of the Committee on the complaint that one or more rights in the CRC were violated. This report presents an updated version of the annotated overview of the decisions of the Committee in which it declared the communication inadmissible. It also provides a number of overarching comments and reflections, in order to inform individuals or (legal) professionals who consider submitting a communication to the Committee, about the different admissibility criteria of CRC-OP3 and the way the Committee applies and interpreters these criteria.

The report indicates that many cases are declared inadmissible because they are ill-founded or not sufficiently substantiated. In some cases the communication is partly declared inadmissible inter alia because it claims that many articles of the CRC have been violated without any facts to substantiate all or part of these claims. This gives reason for future authors of submissions to make sure that their claim that a right of the CRC was violated is based on the correct legal provisions and that sufficient facts are presented to substantiate the claim. In some cases, adults, usually one of the parents, claim a violation of their rights under the CRC. These claims are inadmissible because they are considered incompatible with the provisions of the CRC, which protect the rights of children and not the rights of adults. Some issues are given separate attention such as the request of States Parties to deal with the admissibility separately from the merits, the intervention of third parties and the working methods of the Committee.

This report has been updated until April 2022.[1] In addition, to the previous report, it includes the admissibility decisions of the CRC Committee made at its 85$^{th}$ – 89$^{th}$ sessions. Specific attention is given to admissibility and extra-territorial jurisdiction.


[1] The first report was based on research until April 2020. See J.E. Doek, Communications with the Committee on the Rights of the Child under Optional Protocol to the CRC on a Communications Procedure and Admissibility. Report on the Decisions of the Committee on Admissibility: Summary and Comments, Leiden Children's Rights Observatory Papers No. 1, 22 October 2020.

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## A. Introduction

Until April 2020 the CRC Committee received over 300 individual communications under the CRC-OP3.[2] Only 116 of these communications were registered because all the other cases clearly did not meet the basic prima facie requirements for admissibility. The main reasons for this non-registration are: communication against a State that is not a party to the CRC OP3 (art. 1, para 3); the alleged violations took place prior to the entry into force of the CRC OP3 in the country concerned (art. 7 sub g); domestic remedies were clearly not exhausted (art. 7 sub e); and cases that were manifestly unfounded (art. 7 sub f). However, there is no statistical data, disaggregated e.g. by ground for inadmissibility, by the nature of the alleged violations of the CRC and by the author (child or representative), information that could be useful for providing concrete guidance on the importance of requirements for admissibility. However, the statistics show that the admissibility requirements did indeed help the Committee to reduce the number of cases that needed a more thorough consideration.

The 116 registered cases involved migration-related issues, including non-refoulement, age determination, administrative detention of migrant children, separation of children from their parents, family reunification and access to asylum proceedings, and child abduction, custody and visiting rights, surrogacy, juvenile justice, corporal punishment, male circumcision, right to education and climate change.

The Committee has (as of March 2020) adopted decisions in 39 of the registered cases and found violations of the CRC in 12 cases, while 17 were declared inadmissible and the other cases were discontinued.

During the year 2021 alone, the Committee adopted and published 22 decisions and decided 7 cases on the merits, while 6 were declared inadmissible and 9 were discontinued.[3] In January 2022, the Committee adopted and published 11 decisions: 3 cases on the merits, 2 inadmissible cases[4] and 6 discontinued cases.[5]

The figures show inter alia that a vast majority of the communications submitted to the Committee did not get the substantive attention the authors wanted. This is most likely the result of a lack of awareness and/or understanding of the requirements that must be met in order to get a substantive decision from the Committee on the alleged violation(s) of one or more rights enshrined in the CRC. It is therefore necessary to present an overview of the

[2] Note of the Committee on CRC-OP3 trends: Recent developments in the individual communications received under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC-CRC); last updated April 2020 https://www.ohchr.org/en/treaty-bodies/crc/individual-communications. Since then there have been no updates on the number of submitted communications, but it is safe to assume that the number of cases brought before the committee has increased.

[3] During the 86th, 87th and 88th session.

[4] In 2022, the Committee declared two cases partly inadmissible: in a case against France (CRC/C/89/D/77-79-109-2019), the Committee declared complaints about violation of art. 7, 8, 16 and 28 CRC inadmissible because they were ill-founded (art. 7(f) CRC OP3). In a case against Switzerland (CRC/C/89/D/74/2019), the Committee declared the complaints regarding art. 16 CRC inadmissible ex. art. 7(e) and complaints regarding art. 4 and 11 CRC inadmissible ex. art. 7 (f) CRC OP3.

[5] During the 89th session.

inadmissibility decisions of the Committee so far and the grounds for these decisions, together with a number of analytical observations and comments.

The grounds for declaring a communication inadmissible can be found in the CRC-OP3: article 1, para 3, article 5 and article 7. In the Rules of Procedure issued by the Committee, specific rules on the matter of (in)admissibility can be found in Rules 20 – 22.[6] They allow the Committee, for example, to review a declaration of inadmissibility or revoke it, while a decision on admissibility shall be taken as quickly as possible. The grounds for admissibility mentioned in the CRC-OP3 are to a large degree the same as applicable for the communications brought before other human rights treaty bodies.

## B. Jurisprudence of the Committee on admissibility

In the presentation of the cases the Committee declared inadmissible, I shall follow the order of the articles relevant for a decision on admissibility: article 1, para 3, article 5 and article 7, with the note that inadmissibility declarations may be based on more than one of these provisions.

### B.1. Article 1, para 3.

No communication shall be received by the Committee if it concerns a State that is not a party to the present Protocol.

From the information provided by the Committee it is clear that such communications are immediately declared inadmissible and not registered at all. See some comments in the Introduction.

### B.2. Article 5, para 1.

Under this article the Committee is competent to receive and consider communications submitted by or on behalf of an individual or group of individuals, *within the jurisdiction of a State party,* claiming to be victims of a violation by that State party of any rights set forth in the CRC, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC).

#### B.2.1. Admissibility and jurisdiction

The CRC Committee had to deal with the meaning of "within the jurisdiction of a State party" in two cases which drew a lot of international attention, namely a case against France about violation of rights of French children in refugee camps in Syria. The other case against Argentina and some other countries was about the violations of the rights of children outside their territory as a result of their failure to address (adequately) climate change. Although there are similarities in the reasoning of the Committee regarding the meaning of "within their jurisdiction", it seems to be appropriate to present the cases separately given the rather significant differences in their context.

[6] Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN doc. CRC/C/62/3/Rev.1, 13 October 2021.

It is in this context not possible to give a full picture about the extra-territorial reach of human rights but some remarks:

- The history of the drafting of the CRC shows that the Convention does not limit jurisdiction of a State to its territory.[7]
- The thorny question: under what conditions does the jurisdiction of a State party to the CRC extend "extra-territorial"?
- There seems to be a certain consensus on these conditions: first the so-called spatial model of jurisdiction meaning the State should have effective control over territory (outside its own territory). Second: the personal model of jurisdiction meaning that the State should have authority and control over an individual.

- It should also be noted that the CRC Committee is of the view that "State parties should take extra-territorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection"[8]

*B.2.1.1. Children in refugee camps in Syria and their rights*

Case L.H. et.al, and A.F (authors) and S.H. M.A. et.al. (victims) v France (Case No. 79/2019 and No. 109/2019)

Final decision of the Committee CRC/C/85/D.79/2019- CRC/C/85/D/109/2019, 2 November 2020 (date of submission 13 March and 25 November 2019; date of decision 30 September 2020[9]).

Subject matter: Repatriation of children whose parents are linked to terrorism activities; protection measures; right to life; access to medical care; unlawful detention.

The case is of course of great importance for the rights of children under the CRC underscored by the third-party submissions by the Consortium on Extraterritorial Obligations and by a group of 31 academics. For practical reasons I'll present what I a consider to be the key of the view of the Committee on admissibility in this case.

"In the present case, the Committee notes that it is uncontested that the State party was informed of the situation of extreme vulnerability of the children who were

[7] The reference to "territories" in the final draft was deliberately removed. See Sharon Detrick, *the United Nations Convention on the Rights of the Child. A Guide to the "Travaux Préparatoires"*,.Dordrecht: Martinus Nijhoff Publishers 1992, p. 145 – 147.

[8] Joint General Comment No.4 of the Committee on the Protection of All Migrant Workers and Members of Their Families/No 23 of the Committee on the Rights of the Child (2017), para. 17(e) and 19.

[9] The decision was limited to the matter of admissibility of the communications. See about this case also H. Duffy, *Communication 79/2019 and 109/2019 et. al.*, Leiden Children's Rights Observatory, Case Note 2021/3, 18 February 2021. And inter alia Chrisje Sandelowsky – Bosman and Ton Liefaard, 'Children trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child', *Nordic Journal of Human Rights*, https://doi/org/10.1080/18918131.2020.1792090; Marko Milanovic, Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights, https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and -the-extraterritorial-application-of-human-rights.

detained in refugee camps in a conflict zone. Detention conditions have been internationally reported as deplorable and have been brought to the attention of the State party's authorities through the various complaints filed by the authors at the national level. The detention conditions pose an imminent risk of irreparable to the children's lives, their physical and mental integrity and their development. The Committee recognizes that the effective control over de camps was held by a non-state actor that had made it publicly known that it did not have the means or the will to care for the children and women detained in the camps and that it expected the detainees' countries of nationality to repatriate them. The Committee also notes that the Independent International Commission of Inquiry on the Syrian Arab Republic has recommended that countries of origin of foreign fighters take immediate steps towards repatriating such children as soon as possible. In the circumstances of the present case, the Committee observes that the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking actions to repatriate them or provide other consular responses. The circumstances include the State party's rapport with the Kurdish authorities , the latter's willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Syria Kurdistan since March 2019"(para 9.7.).

In light of the above, the Committee concludes that the State party does exercise jurisdiction over the children and that the authors claims have been sufficiently substantiated and declares the communications admissible (par 9.10). In January 2022 the Committee decided on the merits of the case.[10]

Comments: Duffy regrets that the Committee did not elaborate a little bit more on the basic standard it was applying to determine jurisdiction. Milanovic notes that is unclear what test precisely is applied by the Committee but is clearly not the one of control over the camps. Duffy agrees that the required effective control was not over the territory or the persons but over the children's situation.[11] I agree with both that the Committee took a flexible and functional approach. France has the duty to protect the children because it has the ability to do so under the given circumstances.

*B.2.1.2. Climate change and children's rights*

On 23 September 2019, Chiara Sacchi and 15 other children (aging from 8 to 17) from 12 different countries submitted a Communication to the CRC Committee claiming that 5 States parties to the CRC OP3, Argentina, Brazil, France, Germany and Turkey are violating their rights under the CRC, more specifically art. 3, 6, 24 and 30, by causing and perpetuating the climate crisis. Although it was one document it had to be sent to each of the States mentioned with the invitation to respond and thus resulted in 5 different cases and decisions of the Committee: Chiara Sacchi et v Argentina (Case No. 104/2019), idem v Brazil (Case No.

[10] Final decision of the Committee case No. 77/2019, 79/2019 and 109/2019, 23 February 2022 (date of submission 13 March 2019 and 25 November 2019; decision 8 February 2022).

[11] H. Duffy, *Communication 79/2019 and 109/2019 et. al.*, Leiden Children's Rights Observatory, Case Note 2021/3, 18 February 2021.

105/2019), France (Case No. 106/2019), Germany (Case No. 107/2019) and Turkey (Case No. 108/2019). Third party interventions by two former UN Special Rapporteurs on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. On 3 June 2021, the Committee conducted an oral hearing (cf. Rule 19 of the Rules of Procedure) of the authors of the communication via video conference.

In each country circumstances, such as legislation, policies, institutes like the (children's) ombudsperson, are different but the Committee's arguments regarding the key issues, jurisdiction and admissibility and the domestic remedies, are in essence the same. The focus of this paper will be on these key issues and limited to the case v Argentina.

Case Chiara Sacchi et al, Scott Gilmore et al and Ramin Pejan et al (authors and victims) v Argentina (Case No. 104/2019)[12]

Final decision of the Committee CRC/C/88/D/104/2019, 8 October 2021 (date of submission 23 September 2019; date of decision 22 September 2021).

Subject matter: failure to prevent and mitigate the consequences of climate change.

The first key issue in this case was, like in the case L.H. v France discussed above under B.2.1.1, the interpretation of the obligation of States parties to respect and ensure the rights in the CRC of each child "within their jurisdiction". The Committee pays elaborated attention to this matter in para 10.2 – 10.12 with inter alia references to cases of the Human Right Committee, the European Court on Human Rights and the Inter American Court on Human Rights.

The Committee concludes that the appropriate test for jurisdiction in the present case is the one adopted by the Inter American Court of Human Rights because it clarified the scope of extraterritorial jurisdiction in relation to environmental protection. Thus the view of the Committee implies: when transboundary damage occurs that affects treaty-based rights the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of human rights of persons outside its territory. This jurisdiction is based on the understanding that the State in whose territory or under whose jurisdiction the activities were carried out has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory.

After the Committee concludes that the State party has effective control over the sources of emissions that contributed to the causing of reasonably foreseeable harm to children outside its territory, it had to determine whether there is a sufficient causal link between the harm alleged by the authors and the State party's actions or omissions for the purpose of establishing jurisdiction (para 10.12). After some observations on the harm suffered by the authors (para 10.13) the Committee concludes that the authors have sufficiently justified that the impairment of their CRC

[12] See about this case also M. Wewerinke-Singh, *Communication 104/2019 Chiara Sacchi et al v. Argentina et al*, Leiden Children's Rights Observatory, Case Note 2021/10, 28 October 2021.

rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. They have further established that they have personally experienced a real and significant harm. As a consequence of this the Committee finds that art. 5 para 1 is not an obstacle for the consideration of the communication.

Comments: It should be noted that the nationality of the children, which was a factor in the case against France, has not been mentioned at all. The finding on the jurisdiction seems to suggest that every child, wherever he or she lives, can submit a communication to the Committee against any of the States parties to CRC OP3 on violations of her/his rights under the CRC as a result of the concerned State party's failure to comply with the obligation to prevent transboundary damage. The condition that there is a causal link between what happened in Argentina and the damage a child in Sweden suffers as a result of climate change does not seem a problem. In this regard: "the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location (para 10.10 in case v Argentina).

However, there is another important problem: if a child, whatever her/his location may be, wants to submit a successful communication about violation of her/his rights by a country (State party to OP3) because of the harm it has caused to her/him as a result of the failure to comply with its obligation to prevent transboundary damage, the child has to exhaust the domestic remedies in the country concerned. That may be a serious obstacle e.g. for a child from the Marshall Islands who wants to file a communication against e.g. Germany[13]. See about this aspect of the climate cases under B.8 art. 7 (e).

This was without any doubt a very important case. A press communication was released by the OHCHR to draw the (inter)national attention to issues the Committee had to deal with. However, and most likely because the case was inadmissible (see hereafter under B.8 art. 7 (e)), the Committee did something very unusual for treaty bodies. It wrote an open letter to all authors of the communication to acknowledge the significance of their action and provide them with a simplified explanation of the case.[14]

### B.2.2. Limitation of articles that can be invoked under article 5 para 1?

Case V.A. (author) and E.A. and U.A. (victims) v Switzerland (Case No. 56/2018)
Final decision of the Committee CRC/C/85/D/56/2018, 30 October 2020 (date of submission 21 September 2018; date of decision 28 September 2020)

Subject matter: Deportation to Italy.

[13] In the case v Argentina the authors argued that the State party has failed to demonstrate that requiring exhaustion of remedies would be fair to the authors residing outside its borders.
[14] See about this open letter also T. Liefaard, 'Open Letter on Climate Change', Leiden Children's Rights Observatory, 20 October 2021.

In this case the State party Switzerland argued that the provisions of the articles 2(2), 3, 6 (2), 22 and 24 of the Convention do not provide a basis for subjective rights whose violations can be invoked before the Committee. In responding to these arguments the Committee reminds the State party that the CRC recognizes the interdependence and equal importance of all rights (civil, political, economic, social and cultural) that enable children to develop their mental and physical abilities, personalities and talents to the fullest extent possible. The Committee is of the view that there is nothing in article 5 (1) (a) of the Optional Protocol to suggest a limited approach to the rights whose violations may be invoked in the individual communications procedure (para 6.5).

Case A.M. (author) and M.K.A.H. (victim) v Switzerland (Case No. 95/2019)
In this case the same arguments and responses can be found. See about both cases also under B.8 article 7 (e) and B.9 article 7 (f).

Case A.A.A. (author) and U.A.I. (victim) v Spain (Case No. 2/2015)
Decision of the Committee: CRC/C/73/D/2/2015, 26 October 2016 (date of communication 5 October 2015; date of decision 30 September 2016)[15]. See about this case also under B.6. article 7 (c) and under B.9. article 7 (f).

Subject matter: Aunt's request for visitation with her niece.

The author claimed a violation of article 14 and 17 ICCPR. This claim was declared inadmissible because it falls outside the scope of the CRC OP3 as defined in article 5, para 1.

To avoid misunderstandings: one can only complain in a communication to the Committee about violations of rights enshrined in the OPSC and/or the OPAC, if the State concerned has ratified one or both Optional Protocols.

## B.3. Article 5, para 2.

Communications on behalf of an individual or a group of individuals are only admissible if submitted with the consent of the individual(s), unless the author can justify that the communication was submitted without the required consent. According to Rule 20, para. 4 of the Rules of Procedure, the Committee may, in cases without evidence of the required consent and after consideration of the particular circumstances of the case and the information provided, decide that it is not in the best interests of the child(ren) concerned to examine the communication. This rule is quite surprising. First, it seems to be redundant because article 5, para. 2 is clear: cases without evidence of the required consent are inadmissible. Second, the rule suggests that the Committee may decide to examine a communication that does not have the required consent if that is in the best interests of the child. That possibility is in conflict with article 5, para. 2 CRC OP3. Third, the rule seems to be applicable whether or not the author provided an acceptable justification for her/his action without the required consent. That interpretation, however, does not seem to be logical. If the author cannot produce the required justification, the Committee should without further

[15] In the overview of the recent jurisprudence on the Committee's website the initials of the author of the communication are M.A.A.

ado declare the communication inadmissible under article 5 para. 2. If the author, however, provides an acceptable justification, the Committee can nevertheless, according to Rule 20, para 4, decide that it is not in the best interests of the child to examine the communication. The conclusion for now: the Committee will examine all communications submitted on behalf of a victim (or a group of victims) without her/his (their) consent, unless that examination is not in the best interests of the victim(s). The Committee may revoke its decision that a communication is admissible in the light of any explanation submitted by the State party and/or the author according to Rule 22, para 2 of the CRC OP3 Rules of Procedure. But this Rule implies that the Committee cannot revoke its decision that the communication is inadmissible. Rule 20, para. 4 therefore needs an explanation in terms of the nature of the Committee's decision not to examine a communication and what reading of the 'bests interests of the child' would justify that.

Case J.S.H.R. (author) and L.H.L. and A.H.L. (victims) v Spain (Case No. 13/2017)

Final decision of the Committee: CRC/C/84/D/13/2017, 17 June 2019 (date of communication 20 September 2016; date of decision 15 May 2019). See further about this case also under B.6. article 7 (c).

Subject matter: removal of children from Switzerland to Spain by the mother without consent of the father; right of child to maintain contact with the father.

Father without custody claimed on behalf of his children without their consent, alleging that the State party had violated articles 2-12, 16, 18, 19, 27 and 35 CRC. Core of the claims: alleged abduction by the mother of the children from Switzerland to Spain and the lack of access to his children.

View of the Committee: even though the father did not have the custody of his children, he had the right to represent them before the Committee, unless the communication was not in the best interests of the children (para. 9.2). Due to lack of contact with his children, it was impossible for the father to obtain their consent. According to the Committee, the submission did not appear to be contrary to the (best) interests of the children and the lack of consent of the children is justified. The Committee considered the submission admissible under articles 5 (2).

Comments: the decision to give a father without custody the right to represent his child(ren) may be understandable given the fact that the author was clearly the legal father of the children. However, the "unless" in para. 9.2. is puzzling because it suggests inter alia that the communication of a father without custody will be inadmissible if the representation of the child is not in her or his best interests. I am afraid that this reasoning is a mix of article 5, para 2, which requires that a communication on behalf of a child or children is submitted with her/his/their consent unless acting without this consent can be justified (bests interests does not play a role in this regard) and Rule 20, para 4 stating that if there is no evidence of this consent the Committee may decide that it is not in the best interests of the child(ren) to examine the communication. Does this mean that the Committee will declare the communication inadmissible and if so, on which ground(s)? Maybe, abuse of the right

of submission of a communication? Furthermore, the question may be raised whether a biological father without custody has also the right to represent his child(ren). Only if this fatherhood is recognized by the mother or if proven via DNA test or assumed by the fact that the mother does not want to cooperate with the DNA test?

Altogether raising the right to represent the child is quite confusing in the context of the CRC-OP3. Apparently, one does not need a formal/legal right to represent the child to submit a communication to the Committee on behalf of the child. One only needs the consent of the child. The child may refuse to give her/his consent even for the submission by a person who is her/his legal representative.

Case Y.F. (author) and F.F., T.F. and E.F. (victims and children of the author) v Panama (Case No. 48/2018)

Final decision of the Committee: CRC/C/83/D/48/2018, 28 February 2020 (date of submission 21 June 2018; date of decision 3 February 2020). See for this case also under B.6. article 7 (c)

Subject matter: Transfer of children from Benin to Panama with the consent of the father; non-return without his consent; right of the child to maintain direct contact with the father.

The State party argued that the submission was inadmissible because the author had not provided evidence that the children (at the time of submission 16, 14 and 13 years old) have consented to the submission of the communication and that he did not justify or explain why he acted without their consent (para, 5.1). The Committee did not pay attention to this argument. This is remarkable because the father did admit that he did not have the consent of his children; instead, he claimed that he, as the father of the children, has the right to bring an action before the Committee. The submission, however, was declared inadmissible for other reasons (see hereafter under B.6. article 7 (c))

Comments: one may assume that the Committee just forgot to pay attention to the inadmissibility arguments of the State party regarding the lack of consent of the children. Another assumption may be that the Committee did not agree with the father's view that he does not need the consent of the children because as their father he has the right to act on their behalf without their consent. But if so, the Committee should have declared the submission inadmissible under article 5, para 2 because the justification of the father for acting without the consent of his children is legally wrong.

In light of this, it is interesting to refer to rule 13, para 2 of the Rules of Procedure, which deals with the concern that the consent of the victim may be the result of improper pressure or inducement. In such case the Committee may instruct the Secretary-General to request additional information or documents that show that the submission was not a result of improper pressure or inducement. Neither the Optional Protocol nor the Rules of Procedure contain provisions requiring that the author of a submission on behalf of the child should meet specific qualifications e.g. regarding age, nationality or residence. It is clear that the victim has to be a person living within the

jurisdiction of the State party concerned. The person representing him, however, could live outside that jurisdiction and not be a national of the State party concerned.

Case M.W. (author) and V.W. (victim) v. Germany (Case No. 75/2019)
Final decision of the Committee CRC/C/87/D/75/2019, 9 July 2021 (date of submission 18 January 2019, date of decision 31 May 2021)

Subject matter: Lack of enforcement of judicially established contact regime between father and child.

In this case of divorced parents the rather common problem was the enforcement of court decisions re the contact between the child (children) and the parent not in charge of the daily upbringing of the child (often the father). The mother did not cooperate in facilitating the contact between the child and her father inter alia canceling meetings with the legal guardian and the court expert. The daughter (now 13 years old) expressed repeatedly as her view, e.g. at a court hearing on 8 January 2021, that she does not want any contact with her father.

The Committee: "a communication may be submitted on behalf of alleged victims without their express consent when the author can justify acting on their behalf and the Committee deems it to be in the best interests of the child. Under such circumstances, a non-custodial parent should still be considered a legal parent and can represent his or her child or children before the Committee, unless it can be determined that he or she is not acting in the best interests of the child or children" (para 9.2).

"Although the Committee considers that the author's decision to bring this complaint forward in the absence of his daughter's consent was justifiable at the time when the complaint was filed (…..) subsequent events lead the Committee to conclude that it is no longer in the child's best interest for it to examine the communication without V.W.s (the daughter) express consent" (para 9.3). So the communication was declared inadmissible under article 5 (2) of the CRC OP3.

Case R.N. (author) and L.A.H.N (victim) v Finland (Case No. 98/2019)
Final decision of the Committee CRC/C/85/D/98/2019, 12 October 2020 (date of submission 15 August 2019; date of decision 28 September 2020).

Subject matter: best interests of the child; children's rights.

The State party argued that the communication was inadmissible because the mother did not provide proof of the child's consent nor a justification for her action on behalf of the child. This was not contested by the mother and the view of the Committee is remarkable. It notes that the child was 10 years old at the time of the submission of the communication and capable of discerning and expressing his views. However it notes that the author is the child's mother and that she has joint custody and considers that the material before it does not indicate that the submission of the communication is clearly against his best interests.

Comments: Article 5 para 2 seems to be rather straight forward. If you submit a communication on behalf of somebody you need her/his consent unless you can justify (in the submission) that you act without such consent. A possible reason for confusion is that this provision only talks about *submission* and not on admissibility. Submission is possible without consent if that can be justified and the Committee deems it (= the submission) in the best interests of the child. But it is obvious that a communication without the required consent is inadmissible, unless…. I think the jurisprudence of the Committee provides some guidance: the submission of a communication without the required consent is OK if the lack of consent can be justified. However, this does not automatically mean that the communication is admissible. Developments related to the lack of consent, in this case the views of the child, can lead to the decision of the Committee to declare the communication inadmissible despite the fact that the communication met the conditions set in article 5, para. 2.

As in other cases under article 5, para. 2 the view of the Committee re the role of parents is again confusing. A legal parent can represent her/his child before the Committee unless it can be determined (by the Committee I assume) that he or she is not acting in the best interests of the child. First a parent (and any other person) can submit a communication on behalf of a child. There is no provision in the CRC OP3 that the Committee has the authority to decide that you (a parent or a brother or any other person) cannot represent the child because you are not acting in the child's best interests.

Finally (case R.N. v Finland) if you are a parent of the child and have joint custody you apparently don't need the consent of your child even when he/she is capable of discerning and expressing his/her views. Your submission is admissible if the Committee is of the view that it is not clearly against the best interests of the child.

Case UG (author) and E.S. and B.M (victims) v Belgium (Case No. 34/2017)

Final decision of the Committee CRC/C/85/D/34/2017, 21 October 2020 (date of submission 24 June 2017; date of decision 28 September 2020).

Subject matter: Condemnation of an adolescent, deprivation of liberty and separation from the child.

The author was the legal guardian of E.S. born in Romania 26 June 1999 and the mother of B.M. A case with a special story. E.S. married in Romania at the age of 13 and came to Belgium when she was 14 and gave birth to B.M. when she was 15. In 2016 she was placed in a closed institution for child protection and separated from her child.

The legal guardian explained why he submitted his communication without the consent of E.S. This could amount to a justification of the lack of consent. However, E.S. had left Belgium and the communication was submitted 2 days before E.S. turned 18. This meant that the author was not the legal guardian of E.S. anymore. The Committee was of the view that in light of these facts the author should have sought the consent of E.S. for the submission of his communication. But the author did not provide a justification for the impossibility to communicate with E.S. and therefore the

Committee declared the communication inadmissible in accordance with article 5, para. 2 CRC OP3.

Case L.H. et al v France (Case No. 79/2019 and Case No. 109/2019)
(See for details about this case above under B.2. Article 5 para. 1)

The State party argued that the communications are inadmissible because the authors were acting without the consent of the children or their mother (par 4.2). In responding to this argument the Committee observations relevant for other cases as well. "the Committee does not endorse the authors' assessment that the children's age would not allow them to give consent for the authors to act on their behalf before the Committee. Except for the youngest children, all other children should be presumed to be able to form an opinion and provide their consent in that regard. However in this particular case communications between the children and the authors was limited and no realistic possibility for the children to provide their written consent. The Committee is of the view that the communications appear to be submitted in the best interests of the children and that article 5, para 2 CRC OP3 is not an obstacle for admissibility.

## B.4. Article 7 (a)

The communication is anonymous. None of the inadmissibility declarations of the Committee was based on article 7 (a). It may be that of the non-registered cases some were declared inadmissible, because they were submitted anonymously.

## B.5. Article 7 (b)

The communication is not in writing.

The same remarks as made under article 7 (a) can be made here. However, in the literature this requirement has been questioned or criticized. The CRC-OP3 is meant to make it possible for a child to submit a complaint to the CRC Committee about a violation of her/his rights under the CRC. Many children, and not only the very young and/or do not (yet) have the capacity to produce a written complaint. One can argue that this would not be a problem because these children can be represented by an adult person (e.g. one of the parents) or by an NGO. That representation, however, may not be provided to the child because of a conflict of interest or for other reasons. In order to address this dependency of the child on the willingness of adults, the Committee should develop for children easily accessible and child-friendly ways to contact the Committee. For instance, by allowing a verbal submission via Skype or by allowing the submission of drawings/paintings. One could also consider the pros and cons of the use of other tools, including for example social media. In this regard it is interesting to note that the admissibility of communications under the Convention on the Rights of Persons with Disabilities does not require submissions in writing.[16]

[16] See for more on the requirement "in writing" inter alia S.I. Spronk, 'Realizing Children's Right to Health: Additional Value of the Optional Protocol on A Communications Procedure'*, SSRN Electronic Journal* 2012; G. de Beco, 'The Optional Protocol to The Convention On The Rights Of The Child On A Communications Procedure', *Human Rights Law Review* 2013; Z.S. Woldemichael, 'Communications Procedure under the 3rd Optional Protocol to the Convention on the Rights of the Child: A Critical Assessment', *Jimma University Journal of Law* (78) 2015.

## B.6. Article 7 (c)

The communication constitutes an abuse of the right of submission of such communication or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto.

Case A.A.A. (author) and U.A.I. (victim) vs Spain (Case No. 2/2015)

See for details of this case and other decisions of the Committee under B.2. article 5 (1) and under B.9. article 7 (f).

Subject matter: Aunt's request for visitation with her niece.

The claim that her (the author's) rights under article 39 CRC were violated is incompatible with the provisions of the Convention because they protect the rights of children and not the rights of adults and are therefore inadmissible under article 7 (c).

Comments: The rather general statement of the Committee that the articles of the CRC do not protect the rights of adults may be stating the obvious. However, article 5 CRC (i.e. States parties shall respect the rights of parents to provide the child with appropriate direction and guidance in the exercise by the child of her/his rights), article 18 (2) (i.e. States Parties shall render appropriate assistance to parents in the performance of their child-rearing responsibilities) and article 27 (3) (i.e. States Parties shall take appropriate measures to assist the parents (…)) indicate that parents (and/or guardians) are entitled under the CRC to respect for their rights and to appropriate assistance. These provisions seem to make it possible that an adult (i.e. a parent or legal guardian of the child) submits the communication (complaint) that the State violated her/his rights under the CRC, for example the right to appropriate assistance in the performance of her/his parental child rearing responsibilities, including the responsibility to secure the conditions of living necessary for the child's development.

Case X (author) Y and Z (victims) v Finland (Case No. 6/2016)

Decision of the Committee: CRC/C/81/D/6/2016, 10 July 2019 (date of communication 16 July 2016; decision Committee 15 May 2019). See about this case also decisions of the Committee under B.7. article 7 (d) and B.9. article 7 (f).

Subject matter: Contact of children with their mother.

The author (i.e. the mother) claimed that Finland had violated her rights and the rights of her children (Y and Z) under the articles 2, 3, 5, 6, 7, 9, 12, 13, 14, 18, 19, 24, 29 and 39 of the CRC. The Committee (para 9.3.) considered the author's claim that her own rights were violated incompatible with the provisions of the CRC, which protect the rights of children and not of adults, and thus is inadmissible under article 7 (c) (para 9.3).

Comments: Regarding the statement that the CRC does not protect the rights of adults, see the comments on the previous decision (A.A.A. (author) and U.A.I. (victim) v Spain). The admissibility was questioned by the State party *inter alia* because the author is not the custodial parent or the legal representative of the children. The Committee

confirmed its view that a non-custodial parent should still be considered the legal parent and can represent her or his child(ren) before the Committee, unless it can be determined that he or she is not acting in the children's best interests (para 9.4). See also the comments under B.3. article 5 para 2.

Case J.S.H.R. (author), L.H.L. and A.H.L. (victims) v Spain (Case No. 13/2017)
See for details of this case and other decisions of the Committee under B.3. article 5 (2) and under B.9. article 7 (f).

The Committee confirmed its view that claims made by an adult author about the violation of her or his rights under the CRC are incompatible with the CRC and therefore inadmissible under article 7 (c).

Case D.R. (author) and G.R., H.R., V.R. and D.R. (victims) v Switzerland (Case No. 86/2019)
Final decision of the Committee CRC/C/87/D/86/2019, 16 June 2021 (date of submission 15 May 2019; date of decision 31 May 2021).

Subject matter: Deportation to Sri Lanka; access to medical care.

The Committee recalls regarding the allegations of violations of the rights of the author and his wife (D.R. and V.R.) that the Convention protects the rights of children and not those of adults and considers that this part of the communication is incompatible with the provisions of the Convention and thus inadmissible under article 7 (c) CRC OP3 (para 10.3).

### B.6.1. Determination of age and burden of proof

For the admissibility of a communication it is required that the victim of the alleged violations of rights in the CRC is at time of these violations a person below the age of 18. It may be difficult to prove this fact, especially for persons in the context of migration because they may not have a birth certificate or other documents to prove that they were children at the time of the violation of their rights. So far the Committee has dealt with a number of these cases all against Spain. Two issues were and still are important: the methods used to determine the age (see case D.K.N. v Spain hereafter) and the burden of proof.

#### *B.6.1.1. Methods to determine age*

Case Y.M. (author) and Y. M. (victim) v Spain (Case No. 8/2016)
Final decision of the Committee CRC/C/78/D/8/2016, 11 July 2018 (Date of submission 16 December 2016; date of decision 31 May 2018).

Subject matter: Determination of the age of an alleged unaccompanied minor.

Discussion about age determination: It was clear, however, that the author was not a child anymore (i.e. below age 18) when the alleged violations of the CRC took place. Therefore, the submission was not admissible under article 7 (c) due to the incompatibility with the provisions of the CRC.

Case A.D. (author) and A.D. (victim) v. Spain (Case No. 14/2017)
Final decision of the Committee: CRC/C/80/D/14/2017, 14 August 2019 (date of submission 17 March 2017; date of decision 1 February 2019).

Subject matter: Determination of the age of an alleged unaccompanied minor.

Again a case of determination of the age of the author/victim A.D., an undocumented asylum seeking person. At arrival he gave as his day of birth 1 December 1998. Later he stated that this was a mistake as a result of his poor mental state due to the very difficult journey to Spain. The traditional age determination method (X-ray left hand + use of Greulich and Pyle atlas) showed that the age of his bone was over 18 years. Together with other discrepancies, the Committee concluded that the communication was not compatible with the provisions of the CRC and was thus inadmissible under article 7 (c).

Comments: The Committee states in this case that young people who claim to be a minor should have the benefit of the doubt, meaning that they should be presumed to be a minor and be treated as such until it can be established with certainty that they are of full legal age[17].

Case D.K.N. (author and victim) v Spain (case No. 15/2017)
Final decision of the Committee, CRC/C/80/D/15/2017 (date of communication 13 March 2017; date of decision 1 February 2019).

Subject matter: Age assessment procedure in respect of an alleged unaccompanied child.

The State party argued that the communication was inadmissible under article 7 (c) because the author had not presented any document offering a reliable proof of his age while medical tests had shown that he had reached the age of majority. The Committee noted that there was no evidence in the record to show that the author who claimed to be a minor, was an adult at the time of his arrival in Spain. He had a certified copy of his birth certificate that was never examined by the State party. The Committee was of the view that article 7 (c) did not constituted an obstacle to admissibility.

**Third party submissions**[18]

The Ombudsman of France made a third party submission on the issue of the age assessment[19] (note that there is nothing in CRC OP3 nor in the Rules of Procedure on third party

[17] Confirming views of the Committee expressed in General Comment No.6 on the Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005, para.31 (i).Repeated in Joint general comment No.4 (2017) of the Committee on the Protection of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 4.

[18] See about the rules for third party submissions under C para 4.

[19] This submission relates also to communications Nos. 11/2017, 14/2017. 15/2017, 16/2017, 20/2017, 22/2017, 24/2017, 25/2017, 26/2017, 28/2017, 29/2017, 37/2017, 38/2017, 40/2018, 41/2018, 42/2018 and 44/2018 registered with the Committee.

submissions, but the Committee has adopted Guidelines, as discussed later below, see para. C. 4). The Ombudsman refers to the lack of common rules or agreements on age assessment in European States and argues, with reference to various experts and research[20], that the Greulich and Pyle method (see for use of this method the case A.D. v Spain under B.6.) is not suitable for the age assessment of non-European populations. Given the fact that age assessment is a recurrent problem particularly in cases of refugee/asylum seeking children, the recommendations the Ombudsman presents to the Committee are important. He recommends that:

- a multidisciplinary approach be taken to age assessment and that medical testing be used as a last resort when there are serious doubts about the person's age;

- the child be informed and given the opportunity to provide prior consent;

- the person be presumed to be a child during the age assessment process and that protective measures be taken, such as the appointment of a legal representative to assist throughout the proceedings;

- the testing be carried out with strict respect for the rights of the child, including the right to dignity and physical integrity;

-the child's right to be heard be respected;

- if the findings of the procedure are inconclusive, the person be given the benefit of the doubt;

- an application for protection not be denied solely on the basis of a refusal to undergo medical tests;

- an effective remedy be provided through which decisions based on an age assessment procedure may be challenged.

The Ombudsman could have referred to the General Comments No. 6 and No. 23 of the CRC Committee mentioned above (footnote 5) with detailed rules for the age assessment. E.g "the assessment must be conducted in a scientific, child and gender sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child" (GC No. 6 para. 31 (i) and "States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes" (GC 23 para. 4).

*B.6.1.2. Burden of proof*

In a number of cases on age determination the Committee has been dealing with the fact that a young person was facing serious problems in proving that he/she was below the age of 18. For instance the birth certificate from Guinea submitted by the author was not a proof that he was a minor because it did not contain biometric data ( nor does a birth certificate from the Netherlands). The Committee apparently felt the need to set in cases of age determination a standard by which the State party should share the burden of proof with the author of the

[20] See e.g. D. Wenke, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, Strasbourg: Council of Europe 2017.

communication. This standard is: " the burden of proof does not rest solely with the author of the communication, especially considering that the author and the State do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information". But it is not clear what this standard means in practice. In the following cases different observations are made by the Committee depending on the circumstances of the case.

Case A.D. (author and victim) v Spain (Case No. 21/2017)

Final decision of the Committee CRC/C/83/D/21/2017, 10 March 2020 (date of submission 2 June 2017; date of decision 4 February 2020).

Subject matter: Age assessment procedure in respect of an unaccompanied minor.

A.D. submitted a copy of his birth certificate from Mali confirming that he was a minor but the State party questioned the validity of this certificate. The Committee notes the argument of the author that if the State party has doubts about the validity of his birth certificate it should have contacted the consular authorities of Mali to verify his identity which it failed to do. It concluded that article 7 (c) is not an obstacle to the admissibility of the communication.

Case M.A.B. (author and victim) v Spain (Case No. 24/2017)

Final decision of the Committee CRC/C/83/D/24/2017, 24 March 2020 (date of submission 12 July 2017; date of decision 7 February 2020).

Subject matter: Age determination procedure in respect of an alleged unaccompanied minor.

M.A.B. submitted a copy of his Guinean birth certificate to the competent court but did not receive a response. According to the State party the certificate did not contain biometric data and thus was not a proof of age. But the Committee notes the view of M.A.B. that, if the state party had doubts about the validity of the birth certificate it should have contacted the consular authorities of Guinea to verify his identity, which it did not do (para. 9.2.). Committee: in light of this article 7 (c) does not constitute an obstacle for admissibility.

Case H.B. (author and victim) v Spain (Case No. 25/2017)

Final decision CRC/C/83/D/25/2017, 27 March 2020 (date of submission 12 July 2017; date of decision 7 February 2020).

Case M.B.S. (author and victim) v Spain (Case No. 26/2017)

Final decision of the Committee CRC/C/85/D/26/2017, 2 November 2020 (date of submission 19 July 2017; date of decision 28 September 2020).

These two cases (25/2017 and 26/20) were almost a copy of Case 24/17. Same subject matter and same problem with the Guinean birth certificate and the same argument that the State party should have contacted the consular authorities of Guinea to verify the identity of the author but did not do so (para. 9.2.). Implicit in both cases: the state party failed to share the burden of proof.

Case M.B. (author and victim) v Spain (Case No. 28/2017)
Final decision of the Committee CRC/C/85/D/28/2017, 27 October 2020 (date of submission 20 July 2017; date of decision 28 September 2020).

Another case in which the birth certificate was not a proof of age because of the lack of biometric data. The author had submitted the originals and copies of his Guinean birth certificate. The Committee noted that the validity of these documents were not denied by authorities of the state party nor of the country of origin (para. 9.2) . Thus article 7 (c) is not an obstacle for admissibility.

Case L.D. and B.G. (authors and victims) v Spain (Cases No. 37/2017 and No. 38/2017)
Final decision of the Committee CRC/C/85/D/37/ 2017 and 38/2017, 24 November 2020 (date of submission 20 December 2017; date of decision 28 September 2020).

Case No. 37/2017 of L.D. was discontinued because the author's counsel had lost contact with him. In case No 38/2017 the Committee was dealing with the same problems as mentioned in the previous cases. In this case the State party should have contacted the consular authorities of Algeria to verify the identity of the author and did not do it (para. 10.2). Again article 7 (c) is no obstacle for admissibility.

Case S.M.A. (author and victim) v Spain (Case No. 40/2018)
Final decision of the Committee CRC/C/85/D/40/2018, 2 November 2020 (date of submission 9 February 2018; date of decision 28 September 2020).

Another case in which the birth certificate was not considered reliable or authentic (no anthropometric information, no photograph no physical description). The Committee notes that birth certificate has not been found false or otherwise not authentic by the judicial authorities and is therefore of the view that article 7 (c) is not an obstacle for admissibility (para. 7.2.).

Case C.O.C. (author and victim) v Spain (Case No.63/2018)
Final decision of the Committee CRC/C/86/D/63/2018, 24 February 2021 (date of submission 28 November 2018; date of decision 29 January 2021).

In this case the author/victim stated that he was a minor when he arrived in Spain confirmed by an official passport that he was not referred to by the State party in its observations. However the State party argued that the communication was inadmissible because medical evidence demonstrates that the author/victim is at least 18 years old. The Committee notes the author's argument that the State party failed to demonstrate that the medical tests were in fact conducted and evaluated by specialized medical personnel. The Ombudsman confirmed that an evaluation was not possible and the Committee concluded that article 7 (c) is not an obstacle for admissibility.

## B.7. Art. 7 (d)

The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.

Case X (author) and Y and Z (victims) v Finland (Case No. 6/2016)
See for details about this case and other decisions of the Committee under B.6. art. 7 (c) and B.9. art. 7 (f).

Subject matter: Contact of children with their mother.

The claims concerned a number of issues like custody, emergency placement and place of residence of the child were already dealt with by the Human Rights Committee and the European Court of Human Rights and therefore declared inadmissible under article 7 d (para 9.2).

Comments: Regarding the inadmissibility under article 7 (d), the Committee made a remark on the information that the case had also been considered by the European Court of Human Rights which declared it inadmissible. The decision of this Court does not specify the basis for the finding of inadmissibility and consequently the Committee considers that the Court did not examine the same matter (para 9.2). This confirms the importance of a motivated decision and lawyers should keep this in mind, if the applicability of article 7 (d) is under discussion because of a decision of the European Court of Human Rights or another relevant body.

Case Z.H. and A.H. (authors), K.H., M.H. and E.H. (victims) v Denmark (Case No. 32/2017)
Final decision of the Committee: CRC/C/82/D/32/2017, 24 October 2019 (date of submission 22 August 2017, date of decision 18 September 2019).

Subject matter: Deportation of children from Denmark to Albania.

The Human Rights Committee had already dealt with the claim that the blood feud in Albania would expose the children to a risk of irreparable harm if the family was to be removed to Albania and the Committee was thus precluded by article 7 (d) to consider this claim.

However, the claim that it would be in the best interests of the children if they remain in Denmark in order to ensure their physical, psychological and mental well-being and healthy development was not raised in the communication with the Human Rights Committee. Therefore, the Committee was not precluded under article 7 (d) from considering this claim.

Case E.P. and F.P. (authors) and A.P. and K.P. (victims) v Denmark (Case No. 33/2017)
Final decision of the Committee: CRC/C/82/D/33/2017, 8 November 2019 (date of communication 10 September 2017; date of decision 25 September 2019).

Subject matter: Deportation of children from Denmark to Albania.

The Human Rights Committee had already dealt with the claim also mentioned in the previous case of Z.H. and A.H. v Denmark. Therefore, under article 7 (d) this claim was declared inadmissible. The claims under article 3 (1) (best interests of the child) and 28 (the right to education), however, were not dealt with by the Human Rights Committee

and the CRC Committee is thus not precluded (under article 7 (d)) from considering those claims.

Case A.B. (author and victim) v Finland (Case No. 51/2018)
Final decision of the Committee CRC/C/86/D/51/2018, 12 March 2021 (date of submission 27 June 2018; date of decision 4 February 2021).[21]

Subject matter: Best interests of the child; discrimination; non-refoulement.

The State party argued that the author's allegation of violation of article 3 and 22 CRC has been dealt with by the European Court on Human Rights and thus inadmissible under article 7 (d) of CRC-OP3. But the author's uncontested assertion was that this Court only dealt with his mother's rights and that it did not examine the case in substance due to non-fulfilment of formal requirements. The Committee concludes that the Court did not examine the same matter in the meaning of article 7 (d) and the claims on violation of article 3 and 22 are admissible. (see about this case also under B.9).

## B.8. Art.7 (e)

All available domestic remedies have not been exhausted.

As a starter: In the case of the Children in Refugee Camps in Syria (Case No. 79/2019 and 109/2019, see for details under B.2.1.1) the authors stated that domestic remedies are unavailable and ineffective in the context of all requests for protection and/or repatriation of children and their mothers. This statement was not challenged by the State party. Conclusion: if there are no domestic remedies available there is nothing to exhaust and article 7 (e) is not an obstacle for admissibility.

Case D.C. (author and victim) v Germany (Case No. 60/2018)
Final decision of the Committee: CRC/C/83/D/60/2018, 10 March 2020 (date of submission 27 August 2018; date of decision 4 February 2020).

Subject matter: Exclusion from voting on the basis of age.

The author claimed that with the rejection of his claims by the Higher Administrative Court of Saarland he had exhausted all available and effective domestic remedies. He acknowledged that he could have submitted a complaint to the Constitutional Court of Saarland. That avenue of seeking remedy, however, would be hopeless because this Court upholds categorical exclusion of minors from the right to vote based on the permanent case law of the Federal Constitutional Court which has justified the exclusion of minors from the right to vote for decades. In other words, these domestic remedies were ineffective according to the author. The Committee noted that the mere doubts or assumptions about the success or effectiveness of remedies do not

[21] See about this case also M. Sormunen, *Communication 51/2018: A.B. v. Finland*, Leiden Children's Rights Observatory, Case Note 2021/4, 7 May 2021.

absolve authors from exhausting them (para 6.5)[22]. Consequently, the communication was declared inadmissible under art. 7 (e).

Comments: The Committee noted that the author (i.e. a boy of 16) did not specify the case law of the Federal Constitutional Court. This seems to imply that if he had done this the exception in article 7 (e) could have been applicable. But without that information, the Committee followed the same reasoning as used by other treaty bodies. I would like to note that the State party did not reject the author's claim that the Saarland and Federal Constitutional Court have systematically rejected claims related to the right of minors to vote, e.g. as unfounded. In this regard, I would like to refer to the view of the Human Rights Committee that the burden of proof cannot rest on the author only, especially considering that the author and the State party do not always have equal access to the evidence. This is for example true when it is only the State party that possesses the relevant information.[23] This view may not be directly applicable to this case, but how difficult would it have been for the State party to look for the jurisprudence of the relevant Constitutional Courts to either contradict the author's views or confirm them. The lack of any reaction of the State party to the author's allegations suggests that he may have been right.

Finally, the traditional view that doubts on effectiveness of remedies do not absolve the author from exhausting them needs some correction. Regarding the State party's claim that not all domestic remedies have been exhausted, the Human Rights Committee responded that it has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. In the case under consideration, the case law of the Saarland's Constitutional Court shows repeatedly and recent rejections of application for amparo[24] against conviction and sentence.[25] So no need to appeal to this Court. The Committee could have followed the same approach in this case.[26]

Case Z.Y. and J.Y. (authors) and A.Y. (victim) v Denmark (Case No. 7/2016)
Final decision of the Committee: CRC/C/78/D/7/2016, 9 August 2018 (date of submission 25 November 2016; date of decision 31 May 2018).

Subject matter: Deportation of family with child to Afghanistan.

[22] The Human Rights Committee used the same reasoning in the case of A. v. Australia, CCPR/C/59/D/560/1993, para. 6.4.
[23] Case E.E.H. v. L.A.J. CCPR/C/91/D/1422/2005, para. 6.7. The reference to this case can be found in the individual (dissenting) opinion of José Ángel Rodrigues Reyes and Luis Ernesto Pedernera Reyna to the case F.N.P. and J.M.P. v Spain before the CRC Committee, CRC/C/81/D/19/2017.
[24] A writ of amparo (or: recurso de amparo) is a remedy for protection of constitutional rights in jurisdictions of Spanish speaking countries in Latin America and Spain and the Philippines.
[25] Case C.G.V. v Spain (Communication 701/1996).
[26] See about this case also D. Zlotnik, *Communication 60/2018: D.C. v. Germany*, Leiden Children's Rights Observatory, Case Note 2020/4, 15 September 2020.

Complaints about the violation of the articles 6, 7 and 8 were not raised in the domestic procedures. This means that the domestic remedies had not been exhausted. Submission inadmissible under article 7 (e).

Case Y.F. (author) and F.F., T.F. and E.F. (victims) v Panama (Case No. 48/2018)
Final decision of the Committee: CRC/C/83/D/48/2018, 28 February 2020 (date of submission 21 June 2018; date of decision 3 February 2020).

Subject matter: transfer of children from Benin to Panama with the consent of the father; non-return without his consent; right of the child to maintain direct contact with the father.

The domestic proceedings were not completed yet when the communication was submitted. The committee (*ex officio*) considered the duration of the domestic proceedings and concluded that the application of the domestic remedies has not been unduly delayed (para 8.2.). The exception in article 7 (e) did not apply and thus the domestic remedies were not exhausted and the submission was inadmissible under article 7 (e).

Case V.A. (author) and E.A. and U.A. (victims) v Switzerland (Case No. 56/2018)
Final decision of the Committee CRC/C/85/D/56/2018, 30 October 2020 ( date of submission 21 September 2018; date of decision 28 September 2020)

Subject matter: Deportation to Italy

The author complaints about actions of the police during the attempted removal and claims violation of article 2, 3, 6 (2) and 24 but did not institute domestic legal proceedings. She also claimed violation of article 37 due to the reception conditions of her family's first stay in Switzerland but did not challenge these conditions before the Swiss authorities. The Committee's conclusion is obvious: the communication is inadmissible under article 7 (e).

### B.8.1. Exceptions on the requirement of exhausting domestic remedies

The rule that all available domestic remedies have to be exhausted is not an obstacle for admissibility if the application of domestic remedies is unreasonably prolonged or unlikely to bring effective relief.

#### *B.8.1.1. Unreasonably prolonged remedies*

Case H.M. (author) and A.E.A. (author's son) v Spain (Case No. 115/2020)
Final decision of the Committee CRC/C/87/D/115/2020, 22 June 2021 (date of submission 8 March 2020; date of decision 31 May 2021).

Subject matter: Right to education of a Moroccan child born and raised in Spain.

This case was about the rejection of an enrolment application for the 2019/2020 school year of the mother for her son. The related proceedings were taking time and request for provisional measures to allow the child to be enrolled was denied.

The Committee: the fact that, almost two years after the application to enroll the child was submitted, the courts have still not reached a final decision on the application, and

the denial of all of the author's requests for provisional remedies. The Committee is of the view that the domestic legal proceedings were unreasonably prolonged and that, as a result, the author was not required to exhaust them under article 7(e).

Comment: factors that played a role in this case were that the State party failed to comply with the Committee's request for interim measures and that the Committee was of the view that the prolonged exclusion of the child from primary education constitutes irreparable harm to the child. One should not conclude that in general a domestic remedy is unreasonably prolonged if it does not produce a remedy two years after it was initiated.

*B.8.1.2. Ineffective remedies*

The Committee has, in cases in which there was a possibility of immediate expulsion from the territory of the State party against which the communication was addressed, introduced a rather consistent view on the effectiveness of domestic remedies.

Most of these cases were against Spain with as the Subject matter: Determination of the age of an alleged unaccompanied minor while also procedural matters were addressed such as the non-exhaustion of domestic remedies.

The standard view of the committee in these cases: "In the context of the author's imminent expulsion from the Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation cannot be considered effective." The wording of this view is of course adjusted to the circumstances of a case e.g. expulsion to North Macedonia (hereafter case 49/2018). The Committee has so far not specified when a case can be considered as excessively prolonged. Regarding the effectiveness of domestic remedies the Committee quite regularly noted that the State party has not specified that the remedies invoked (or: possible, or: recommended) would suspend the author's deportation. Accordingly the Committee concluded that article 7 (e) CRC OP3 does not constitute a barrier (or: obstacle) to the admissibility of the communication. This view was expressed in the following cases.

Case N.B.F. (author and victim) v Spain (Case No. 11/2017)

Final decision of the Committee CRC/C/79/D/11/2017, 18 February 2019 (date of submission 15 February 2017; date of decision 27 September 2018).

Subject matter: Determination of the age of an alleged unaccompanied minor.[27]

Para. 11.3 on exhausting domestic remedies with the standard view of the Committee.

Case M.T. (author and victim) v Spain (Case No. 17/2017)[28]

Final decision of the Committee CRC/C/82/D/17/2017 (date of submission 19 May 2017; date of decision 18 September 2019).

[27] See about this case also J. Dorber & M. Klaassen, *Communication 11/2017: N.B.F. v. Spain*, Leiden Children's Rights Observatory, Case Note 2019/4, 24 September 2019.

[28] See about this case and the cases 16/2017 A.L. v. Spain. Case 22/2017 A.B. v. Spain, Case 24/2017 M.A.B. v. Spain, and Case 27/2017 R.K. v. Spain, the case note of Pablo Ceriani: P. Ceriani Cernadas, *Communication 16/2017: A.L. v. Spain et. al.*, Leiden Children's Rights Observatory, Case Note 2020/2, 18 May 2020.

Subject matter: determination of the age of an alleged unaccompanied minor asylum seeker.

Para. 12.2 – 12.4 on exhausting domestic remedies with the standard view of the Committee

Case A.D. (author and victim) v Spain (Case No. 21/2017)
Final decision of the Committee CRC/C/83/D/21/2017 (date of submission 2 June 2017; date of decision 4 February 2020).

Subject matter: Age assessment procedure in respect of an unaccompanied minor.

Para. 10.3 on exhausting domestic remedies with the standard view of the Committee.

Case M.A.B. (author and victim) v Spain (Case No. 24/2017)
See about this case also under B.6 Article 7 (c).

Para. 9.3 on exhausting domestic remedies with the standard view of the Committee.

Case H.B. (author and victim) v Spain (Case No. 25/2017)
See about this case also under B.6 Article 7 (c).

Para 9.3 on exhausting domestic remedies with the standard view of the Committee.

Case M.B.S. (author and victim) v Spain (Case No 26/2017)
See about this case also under B.6 Article 7 (c).

Para 9.3 on exhausting domestic remedies with the standard view of the Committee.

Case M.B. (author and victim) v Spain (Case No. 28/2017)
See about this case also under B.6 Article 7 (c)

Para 9.3 on exhausting domestic remedies with the standard view of the Committee.

Case L.D. and B.G. (authors and victims) v Spain (Case No. 37/2017 and No. 38/2017)
See about this case also under B.6 Article 7 (c).

Para 10.3 on exhausting domestic remedies with the standard view of the Committee.

Case C.O.C. (author and victim) v Spain (Case No. 63/2018)
See about of this case also under B.6 Article 7 (c).

Para 8.3. on exhausting domestic remedies with the standard view of the Committee.

Case L.I. (author) and B.I. (victim) v Denmark (Case No. 49/2018)
Final decision of the Committee CRC/C/85/D/49/2018, 9 October 2020 (date of submission 17 July 2018; date of decision 28 September 2020).

Subject matter: deportation of a mother and her daughter to the Republic of North Macedonia, where the child would allegedly be at risk of honour killing.

Para 5.2. on exhausting domestic remedies with the standard view of the Committee.

Case D.R. (author) and G.R., H.R., V.R. and D.R. (victims) v Switzerland (Case No. 86/2019)

See about this case also under B. 6 Article 7 (c)

Subject matter: Deportation to Sri Lanka; access to medical care.

In this case the Committee did not repeat its standard view but dealt in detail with the domestic remedies available according to the State Party and which were not used by the author (or victims) and thus making the communication inadmissible.

The Committee noted that lodging an appeal to the Federal Administrative Court would not have automatically suspended the execution of the removal decision. The possibility to request the Court to grant suspensive effect to the appeal: the State party has not provided any concrete evidence that such request could have been granted in this case. Therefore, the Committee concluded that article 7 (e) is not an obstacle to the admissibility of the communication.

Comments: this case shows how much the Committee insists on the effectiveness of domestic remedies in case of deportation, by even requiring that domestic remedies are guaranteeing the suspension of a deportation order.

Case A.M. (author) and M.K.A.H. (victim) v Switzerland (Case No. 95/2019)

Final decision of the Committee CRC/C/88/D/95/2019, 3 November 2021 (date of submission 27 August 2019; date of decision 22 September 2021)

Subject matter: expulsion of a child with her mother to Bulgaria.

In this case the claims of the mother re the violation of article 24 and 29 were inadmissible because she had not given reasons for not raising these violations during the domestic asylum procedure, meaning that the domestic remedies were not exhausted.

Comments: A special matter in this case was the alleged violation of article 12 CRC. In the State party the right of the child to be heard in judicial and administrative concerning her/him can only be applied if he/she is capable of forming his/her own views and has the required maturity. Only then a child will be given the opportunity to express him- or herself at a hearing.[29] The Committee observed that the State party did not give an explanation for the national legislation, which limits the right of the child to be heard nor information about effective remedies for the child to claim violation of article 12. In conclusion, the claim regarding the violation of article 12 is admissible under article 7 (e) CRC OP3.

Case R.H.M. (author) and Y.A.M. (victim) v Denmark (Case No. 83/2019)

Final decision of the Committee CRC/C/86/D/83/2019, 5 March 2021 (date of submission 26 April 2019; date of decision 4 February 2021).

[29] Case M.K.A.H. v Switzerland (Communication 95/2019), para. 5.20.

Subject matter: Deportation of a girl to Somalia, where she would allegedly risk being forcefully subjected to female genital mutilation.

In this case the Immigration Appeals Board confirmed the decision of the Danish Immigration Service to revoke the residence permits of the children of R.H.M. It was clear that the decision of the Service and the Appeals Board did not pay attention to the risk of female genital mutilation because it was not part of the assessment of these bodies. The State party argued that the mother could have appealed from the decision of the Immigration Appeals Board and that therefore domestic remedies were not exhausted. The Committee: "an appeal against the Immigration Appeals Board's decision would not have been an effective remedy within the meaning of article 7 (e) of the Optional Protocol as it would not have examined the author's claims presented to the Committee, namely, the risk that Y.A.M. would face the risk of being subjected to female genital mutilation in case of return to Somalia".

Case Chiara Sacchi et al v Argentina (Case No. 104/2019)

For details about this so-called climate change case see above under B.2.1.2. Another problem of admissibility was the requirement of exhausting domestic remedies.

In the joint communication of the children they argued that pursuing domestic remedies would be unduly burdensome and costly, that the respondents' courts are unable to effectively remedy the violations in this case because they involve legal questions that raise, with respect to diplomatic relations, non-justiciable issues in their domestic tribunals and that the complexity of the case would cause unreasonable delay. These arguments were based on the idea that at the same time in 5 countries domestic remedies should be exhausted which would cause the problems mentioned. However, since the joint communication led to 5 different cases which took into account the specific circumstances of each country the arguments re the exhaustion of domestic remedies became more country specific. It goes beyond the scope of this paper to present the arguments exchanged in each individual case re the (non)exhausting of domestic remedies.

The Committee repeated the arguments of the author why they did not exhaust domestic remedies. In this case and all 4 others the committee recalls that the authors must make use of all judicial or administrative that may offer them a reasonable prospect of redress, the Committee considers that domestic remedies need not be exhausted if they objectively have no prospect of success, for example in cases where under applicable domestic laws the claims would be inevitably be dismissed or where established jurisprudence of the highest domestic tribunals would preclude a positive result. However, the Committee notes that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors form exhausting them.

The core findings of the Committee in all cases:

- The authors did not make any attempt to pursue the available remedies other than expressing doubts about the prospects of success of any remedy.

- The authors have not sufficiently substantiated their arguments that the application of the remedies is unlikely to bring effective relief (exception under article 7 (e)).
- The authors have failed to justify that accessing available domestic remedies in the State party would be unreasonably prolonged (exception under article 7 (e))

Consequently, the Committee finds the communication inadmissible for failure to exhaust the domestic remedies, a finding in all 5 cases.

## B.9. Article 7 (f)

The communication is manifestly ill-founded or not sufficiently substantiated.

Case A.A.A. (author) and U.A.I. (victim) v Spain (Case No. 2/2015)
See for details and another decision of the Committee under B.3. article 5 (2) and under B.6. article 7 (c).

Subject matter: Aunt's request for visitation with her niece.

The courts of first instance, appeal and cassation rejected the application of the author on the basis of the best interests of the child because of the potentially harmful impact of initiating a relationship with an unknown relative who was in serious conflict with the child's parents. The claim that article 3 (1) was violated was not sufficiently substantiated and that also applied to the claim that the rights of the child in the articles 13, 14, 16 and 39 were violated. The communication was declared inadmissible under article 7 (f).

Case J.A.B.S. (author) and A.B.H. and M.B.H. (victims) v Costa Rica (Case No. 5/2016)
Decision of the Committee CRC/C/74/D/5/2016, 1 March 2017 (date of communication 19 September 2015; date of decision 17 January 2017).

Subject matter: Registration of birth in the civil registry.

This communication was ruled manifestly ill-founded *inter alia* because the author had not presented convincing arguments to demonstrate that the assignment of two surnames to his children, in line with the Costa Rican law, constituted a barrier to their ability to have full knowledge of their biological origins.

Case I.A.M. (author) and K.Y.M. (victim) v Denmark (Case No. 3/2016)
Decision of the Committee CRC/77/D/3/2016, 8 March 2018 (date of communication 12 February 2016; date of decision 25 January 2018).

Subject matter: Deportation of a girl to Somalia where she allegedly would risk to be subjected to female genital mutilation.

The mother claimed that her daughter was discriminated against because there was no appeal possible for her from a decision of the Refugee Appeals Board that there

was no link between the lack of appeal and her daughter's origin. This claim was considered manifestly ill-founded and thus inadmissible under article 7 (f).

The mother also claimed that the rights of her daughter under articles 3 (1) and 19 CRC would be violated if she was deported to Somalia where she may be subjected to female genital mutilation. The Committee declared these claims admissible (para. 10.5 and 10.6).[30]

Case X (author) and Y and Z (victims) v Finland (Case No. 6/2016)[31]
See for details of this case and other decisions of the Committee under B.6. article 7 (c) and under B.7. article 7 (d).

Subject matter: Contact of children with their mother.

Regarding article 7 (f), the Committee recalled that it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice. The author contested the conclusions reached by the domestic courts but had not demonstrated that the assessment of the courts of the facts and evidence was clearly arbitrary or otherwise amounted to a denial of justice. The author's claim regarding the enforcement of her children's contact with her was insufficiently substantiated and thus inadmissible under article 7 (f).

Case Z.H. and A.H. (authors) and K.H., M.H. and E.H. (victims) v Denmark (Case No. 32/2017)
See for details of this case and the decision of the Committee under B.7. article 7 (d).

Subject matter: Deportation from Denmark to Albania.

In this case the Committee repeated what it said in the previous case (X. and Y. and Z. v Finland) about the competence of national authorities. It concluded (similarly to that case) that the authors had not shown that the assessment by the Immigration Appeals Board of the facts and evidence presented by the authors was clearly arbitrary or otherwise amounted to a denial of justice. Furthermore, the authors, regarding their claim that it would be in the bests interests of their children to remain in Denmark, failed to justify the existence of real, specific and personal risk of irreparable harm to their children's rights upon return to Albania. The conclusion of the Committee was that this part of the communication was insufficiently substantiated and thus inadmissible under article 7 (f).

[30] The Committee requested the State party to refrain from returning the mother and her daughter to Somalia while their case is under consideration. Denmark has suspended the execution of the deportation order. See about this case also J. Sloth-Nielsen, *Communication 3/2016: I.A.M. on behalf of K.Y.M. v Denmark*, Leiden Children's Rights Observatory, Case Note 2018/1, 18 July 2018.

[31] In the overview of the recent jurisprudence on the Committee's website the initials of the author of the communication are S.H. and the initials of the victims E.J. and M.J.

Case A.S. (author and victim) v Denmark (Case No. 36/2017)
Final decision of the Committee CRC/C/82/D/36/2017, 8 November 2019 (date of communication 18 October 2017; date of decision 26 September 2019).

Subject matter: Deportation of a child and his mother to Pakistan.

Claims of violation of articles 2, 6, 7 and 8 CRC are general of nature and do not provide any information or arguments to justify how these rights would be violated in the event of his deportation to Pakistan (para. 9.3). These claims were manifestly ill-founded and therefore inadmissible under article 7(f).

Furthermore, the author had not shown that the assessment of the facts and evidence presented by the author to the Refugee Appeals Board and the Immigration Appeals Board was arbitrary or otherwise amounted to a denial of justice (para 9.8).

Case E.P. and F.P. (authors), A.P. and K.P. (victims) v Denmark (Case No. 33/2017)[32]
See for details of this case and another decision of the Committee under B.7. article 7 (d).

Subject matter: Deportation of children to Albania.

The claim concerned violation of article 3[33] and 28 because the deportation of the children to Albania was not in their best interests and would constitute a serious setback in their education. Authors had failed to justify the existence of a real risk of irreparable harm for their children upon return to Albania and the communication was therefore not sufficiently substantiated and thus inadmissible under art. 7 (f).

Case Z.Y. and J.Y. (authors) and A.Y. (victim) v Denmark (Case No. 7/2016)
See for details of this case and another decision of the Committee under B.8. article. 7 (e).

Subject matter: Deportation of family with child to Afghanistan.

The claim was that the son was discriminated (art. 2 CRC) against because his case was handled by the Board (i.e. the Refugee Appeals Board) without any access to an appeal. However, the claim of the authors had not demonstrated that the lack of appeal would be based on the son's origin. Therefore, this claim was manifestly ill-founded and inadmissible under art. 7 (f). Furthermore, the authors had not provided any arguments to justify the existence of a specific and personal risk of serious violation of the rights of their son enshrined in the CRC upon return to Afghanistan. The Committee therefore considered this part of the communication insufficiently substantiated and thus inadmissible under art. 7 (f).

[32] See about this case also U. Kilkelly, *Communication 33/2017: E.P. and F.P. v. Denmark*, Leiden Children's Rights Observatory, Case Note 2020/1, 18 February 2020.
[33] It happens rather often that the Committee suggests that article 3 has been violated while it is only para. 1 of that article.

Case Y.F. (author) and F.F., T.F. and E.F. (victims) v Panama (Case No. 48/2018)
See for details of this case and another decision of the Committee under B.8. article 7 (e).

Subject matter: Transfer of children from Benin to Panama.

The submission was inadmissible under article 7 (f) because the author has not substantiated his claims regarding the alleged violations of the rights contained in articles 2, 5, 8, 9, 10, 11, 16, 35 and 37 of the CRC.

Case F.N.P and J.M.P. (authors) and the son of the authors (victim) v Spain (Case No. 19/2017)
Final decision of the Committee: CRC/C/81/D/19/2017, 2 September 2019 (date of submission 22 March 2017; date of decision 31 May 2019).[34]

Subject matter: Theft of a newborn baby at a private clinic.

The parents stated that their child was abducted shortly after his birth and that he was the victim of a violation of his rights under the articles 7, 8, 9, 21 and 35 CRC and articles 1, 2, 3, and 6 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC).

Regarding the applicability of article 7 (c) the State party argued that the complaint of the parents that the State failed to conduct an investigation into the alleged offence of abduction is incompatible *ratione materiae* with the Convention because this right (to an investigation) was not recognized in the CRC and thus inadmissible. The Committee (para 6.3) did not agree with the State party that the failure to investigate did not violate any right under the CRC. The Committee referred to article 35 CRC, which requires States parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. It is of the view that a failure or refusal to investigate a case of child abduction can constitute a violation of that article. The Committee concluded that the communication was admissible under article 7 (c).

Regarding the applicability of article 7 (f) the Committee stated that it is aware of the difficulties faced by victims of baby abductions in producing conclusive evidence and also of the context of abductions in the State during the period in question.[35] However, the Committee noted that the information before it does not allow to conclude that, in the light of the facts submitted by the authors and the evidence produced, the decisions of the Spanish courts were clearly arbitrary or amounted to denial of justice.

[34] This case is not mentioned in the overview of recent jurisprudence on the website of the Committee. Not clear what the reason of this not being mentioned is.
[35] The Committee refers to inter alia a Report of the Working Group on Enforced or Involuntary Disappearances (UN Doc. A/HRC/27/49/Add.1, 2 July 2014) which confirmed that during and after the Franco regime hundreds of babies were stolen from hospital maternity wards and illegally offered for adoption. It also received information about the many obstacles that prevent documentation of cases of child theft and the ineffectuality of the investigative measures taken to date (para 8 and 35).

Accordingly, the Committee considered that the communication had not been sufficiently substantiated and declared it inadmissible under article 7 (f).

Comments: this case is a special one for at least two reasons. First, the interpretation by the Committee of article 35 CRC. The obligation to take all appropriate national, bilateral and multilateral measures to prevent *inter alia* the abduction of children includes the obligation to investigate a case of child abduction. I assume that this reasoning also applies to article 34 CRC which has a similar wording: "States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent…" various forms of sexual abuse and sexual exploitation of children.

Second, it is so far the only case of inadmissibility in which some members of the Committee did not agree with the majority.[36]

Committee member Olga A. Khazova (individual dissenting opinion) believes, particularly in view of the nature of the violations claimed and the prevalence of similar violations in the State party during the period in question, that the communication is sufficiently substantiated and thus admissible under article 7 (f).

Committee members José Ángel Rodriguez Reyes and Luis Ernesto Pedernera Reyna (joint dissenting opinion) present similar arguments for the admissibility of the communication, but also stated that the majority did not take into account *inter alia* the Views of the Human Rights Committee in Edriss El Hassy v. Libyan Arab Jamahiriya (CCPR/C/91/D/1422/2005, para 6.7). In this case the Human Rights Committee noted that the State party has provided no response to the author's allegations regarding the forced disappearance of his brother. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone possesses the relevant information.

This case in particular raises the question what level of substantiation the author has to provide to prevent inadmissibility under article 7 (f). See hereafter under C. 5.4.

### B.9.1 Declared inadmissible without much explanation

In some cases the Committee states that the claims in the communication are not sufficiently substantiated for the purpose of admissibility without further explanation on e.g. what was lacking in the presentation of the facts and/or applicable national legal provisions. This happened in a number of cases against Spain in which the authors claimed the violations of the same articles. Remarkable similarities perhaps because the authors were advised or assisted by the same person or organization.

In the following cases the Committee stated that the claims under article 18 (2) (or: 18), 27 and 29 were not sufficiently substantiated for the purpose of admissibility and thus inadmissible under article 7 (f) CRC OP3.

[36] Rule 24 of the Rules of procedure states that a member of the committee, who participated in the discussion, may request that the text of her or his individual opinion be appended to the Committee's decision or Views.

Case N.B.F. v Spain (Case No. 11/2017), para. 11.4. See also under B.6 art. 7 (c).

Case A.D. v Spain (Case No. 21/2017), para. 10.5. See also under B.6. art. 7 (c).

Case M.B. v Spain (Case No. 28/2017), para. 9.4. See also under B.6. art. 7 (c).

Case M.A.B. v Spain (Case No. 24/2017), para. 9.4. See also under B.6. art. 7 (c).

Case M.B.S. v Spain (Case No. 26/2017), para. 9.4. See also under B.6. art. 7 (c).

Case L.D. and B.G. v Spain (Case No. 37 and 38/2017), para. 10.4. See also under B.6. art. 7 (c).

Case S.M.A. v Spain (Case No. 40/2018), para. 7.3. see also under B.6. art. 7 (c).

Case C.O.C. v Spain (Case No. 63/2018), para. 8.4. See also under B.6. art. 7 (c).

Case R.Y.S (author and victim) v Spain (Case No. 76/2019), para 7.4. did mention article 18 (2) and 29 but not article 27 CRC.

Case H.M. V Spain (Case 115/2020) See also under B.8. art.7 (e). Para. 11.4. The author's claims under article 29 CRC, relating to the characteristics required of an education have not been sufficiently substantiated for the purpose of admissibility and thus inadmissible under article 7 (f)

Case A.B. v Finland (Case 51/2018), para 11.3. The Committee takes note of the author's claims based on article 2, 13, 14, 16, 17 and 29 of the Convention related to the incidents and constraints that the author experienced as a child of lesbian parents in the legal and social context of the Russian Federation. However, the author has failed to substantiate those claims and the Committee declares those parts of the communication inadmissible under article 7 (f). See also under B.7. art. 7 (d).

### B.9.2 Claims regarding violation of article 2 CRC

Case W.M.C. (author) and X.C., L.G. and W.G. (victims) v Denmark (Case No. 31/2017)
Final decision of the Committee CRC/C/85/D/31/2017, 15 October 2020 (date of submission 8 August 2017; decision 28 September 2020).

Subject matter: deportation of three children and their mother to China

Para. 7.3. The claim based on article 2 CRC was presented in a general manner without showing the existence of a link between her children's and her own origin and the alleged absence of appeal proceedings against the decisions of the Danish Refugee Appeals Board. Claim manifestly ill-founded and thus inadmissible under art, 7 (f)[37]

Case V.A. v Switzerland (Case No. 56/2018), para 6.4. Claim of violation article 2 CRC presented in a very general manner without explaining the basis of the alleged violation; claim manifestly ill-founded and inadmissible under art. 7 (f). See also under B.2 Article 5, para 1 and B.8. Article. 7 (e).

[37] See about this case also M.A.K. Klaassen & P.R. Rodrigues, *Communication 31/2017: W.M.C. v. Denmark*, Leiden Children's Rights Observatory, Case Note 2021/2, 29 January 2021.

Case A.M. v Switzerland (Case No. 95/2019), para 9.7. Similar problem with the claim of violation of article 2 CRC and thus also declared manifestly ill- founded and inadmissible under art. 7 (f). See also under B.2 article 5, para 1 and B.8 Article 7 (e).

### B.9.3. Claims regarding the violation of article 3, para 1 CRC

In some communications the author claims that article 3 para 1 has been violated because the court(s) failed to take into account the best interests of the child.

In this kind of cases the Committee expressed as its view; "as a general rule it comes under the jurisdiction of the national courts to examine the facts and evidence and to interpret and enforce domestic law, unless such examination (or: their assessment) or interpretation is clearly arbitrary or amounts to a denial of justice and it is therefore not for the Committee to assess the facts of the case and the evidence in the place of the national authorities but, rather, to ensure that the assessments were not arbitrary or amount to a denial of justice and that the best interests of the child were a primary consideration in that assessment[38]

If the author has not demonstrated that the examination of the facts and evidence and/or the interpretation of domestic law by the authorities or courts was clearly arbitrary or amounted to denial of justice the claim will be considered as not sufficiently substantiated and thus declared inadmissible under art.7 (f). See about this matter inter alia:

Case A.A.A. v Spain (Case No. 2/2015), para 4.2. See about this case also under B.6 art. 7 (c).

Case L.I. v Denmark (Case No. 49/2018), para 5.6. See about this case also under B.6 art. 7 (e).

Case L.S. (author) and R.S. (victim) v Switzerland (Case No. 81/2019)
Final decision of the Committee CRC/C/85/D/81/2019, 28 October 2020 (date of submission 1 February 2019; date of decision 30 September 2020)

Subject matter: Family reunification.

Para. 6.4. the Committee: the author did not demonstrate that the court's assessments were arbitrary or otherwise amounted to a denial of justice in relation to her claims under article 3, 6, 7, 24 and 27 and these claims are therefore inadmissible under art. 7 (f). The claims under article 2 and 22 were manifestly unfounded because based on the assumption that the child has the right to have his or her family members granted residence status for the purpose of family reunification, but article 22 does not provide the child with such right.

Case K.S.G. (author) and A.R.G. (victim) v Spain (Case No. 92/2019)
Final decision of the Committee CRC/C/85/D/92/2019, 2 November 2020 (date of submission 21 June 2019; date of decision 28 September 2020)

[38] The committee is not consistent in the presentation of its views. Sometimes very short and limited to the first part but sometimes more elaborated like the text quoted which is from Case L.S. v Switzerland (case No. 81/2019). See also inter alia Case J.S.H.R. v Spain (case No. 13/2017 para. 9.5.); Case A.Y. v Denmark (case No. 7/2016 para. 8.8)

Subject matter: Best interests of the child; sexual abuse; separation of a minor from his parents.

Para 4.2. Author claims that the national courts by refusing to suspend completely the father's visitation schedule did not take adequate account of the best interests of the child (A.R.G.). But the committee considers that the mother has not demonstrated that the examination of the facts and evidence by the national authorities was clearly arbitrary or amounted to denial of justice. Consequently, the claim has not been sufficiently substantiated and thus inadmissible under art. 7 (f).

Case R.N. (author) and L.H.A.N. (victim) v Finland (Case No. 98/2019)
See about this case also under B.2 Article 5, para. 2.

Subject matter: Best interests of the child; children's rights.

Para. 7.5: "the Committee considers that, while the author disagrees with the conclusions reached by domestic authorities, she has not demonstrated that the authorities' assessment of the facts and evidence, including the child's wishes and their handling of his behavior and relations with his parents, was clearly arbitrary or otherwise amounted to denial of justice". Conclusion: the communication is manifestly ill-founded and thus inadmissible.

## B.10. Article 7 (g)

The facts that are subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless these facts continued after that date.

Case A.H.A. (author and victim) vs Spain (Case No. 1/2014)
Decision of the Committee CRC/C/69/D/1/2014, 8 July 2015 (date of communication 23 September 2014; date of decision 4 June 2015).

Subject matter: Determination of age within proceedings to grant special protection to a child deprived of his family environment.

The decision of the Supreme Court of Spain and all the facts referred to in the communication occurred prior to 14 April 2014, the date of the entry into force of the CRC-OP3 for Spain. Therefore, the communication was inadmissible *ratione temporis* under article 7 (g).

Comments: This was the first registered case dealt with by the Committee. The focus is exclusively on the matter of admissibility. No observation from the State party concerned the admissibility or the merits. It was *prima facie* very clear that the communication was inadmissible and one may wonder why this case was registered at all.

Case S.C.S. (author) and B.S.S., C.A.S. and C.M.S. (victims) v France (Case No. 10/2017)
Decision of the Committee CRC/C/77/D/10/2017, 26 March 2018. (Date of communication 5 January 2017; date of decision 25 January 2018).

Subject matter: Eviction of a family with children from a Roma camp.

The Committee noted that all the facts mentioned in this communication, including the ruling of the Council of State at the final instance, occurred prior to 7 April 2016, the date of entry into force of the Optional Protocol for the State party. Therefore, the communication was inadmissible *ratione temporis* under article 7 (g).

Case N.R. (author) and C.R. (victim) v Paraguay (Case No. 30/2017)
Final decision of the Committee CRC/C/83/D/30/2017, 12 March 2020 (date of submission 10 May 2017; date of decision 3 February 2020).

Subject matter: Right to maintain personal relations and direct contact with the father.

In this case the courts approved the agreed arrangements for visitation and other forms of contact (between C.R, and her father) in a judgment of 30 April 2015. The OP entered into force for Paraguay on 20 April 2017 and the State party argued that the communication is inadmissible under article 7 (g) because the problems re the arrangement did not continue on a permanent basis. The father argued that he continues to encounter obstacles in maintaining relationship with his daughter after 20 April 2017 despite his submission of several complaints to the courts that the judgment of 30 April 2015 has still not been enforced. The Committee: in the particular circumstances of the case the violations alleged by the author continued after the entry into force of the OP3 and the Committee is therefore not precluded by article 7 (g) to consider the communication.

Case J.A. and E.A. (authors) and E.A. and V.N.A. (victims) v. Switzerland (Case No. 53/2018)
Final decision of the Committee CRC/C/85/D/53/2018, 16 October 2020 (date of submission 3 August 2018; date of decision 28 September 2020)

Subject matter: Deportation to Nigeria of a family with two children.

In this case the deportation decision was taken by the competent migration office and confirmed in 2010 and repeated requests for reconsideration had no success. The last one was taken on 3 August 2017 some days after the OP entered into force for Switzerland. However, the Committee is of the view that the repeated requests for reconsideration do not automatically justify the competence *ratione temporis* of the Committee (para. 6.5.).

## B.11. Article 7 (h)

The communication is not submitted within one year after the exhaustion of the domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.

No cases found in which the Committee declared a communication inadmissible on the basis of this provision.

# C. Some additional information and some final comments and suggestions

## C.1. Admissibility and Split Requests

In a number of cases the State party requested that the decision on the admissibility should be taken separately from the views on the merits (see e.g. case D.K.N. v Spain under B. 9. and the cases E.P. and F.P. and Z.H. and A.H. v. Denmark under B.7.). These requests were not granted without any explanation. This is remarkable because in its own Rule 20 the Committee committed itself to decide as quickly as possible, by a simple majority whether the communication is admissible or not under the Protocol. This rule suggests that the decision on the admissibility will be taken first, followed by a separate decision on the merits of the case in a later stage.

It was found, however, that such a separate review was slowing down the process. It could take several years before the Committee would be able to consider the merits. So the practice changed and currently, as a general rule, the Committees (treaty bodies) consider admissibility and merits simultaneously, unless the State party requests that the admissibility be examined separately and the Committee grants such a request.[39] From the practice of the CRC Committee so far, it seems that the tendency is not to grant requests to separate the decisions on the merits from the admissibility decisions.

## C.2. Working Methods: Working group(s) and rapporteurs

To understand the decision-making process of the Committee related to communications it has received, the following information may be helpful.

Rule 6 of the procedural rules provides that the Committee may establish working group(s) and may designate rapporteur(s) to make recommendations to the Committee and to assist in any manner in which the Committee may decide. According to the Working Methods of the Committee, a working group (hereafter WG) of nine members (of the Committee) will be established and every two years four or five members rotate. The Chairperson of the WG appoints per case one of the members as rapporteur. This person examines all the information received by the Committee and proposes a course of action. Drafts on admissibility and merits approved by the rapporteur will be sent to the WG for information and comments. Taking into accounts the comments the rapporteur will prepare a consolidated draft decision on the admissibility and the merits and send it to the WG. After the WG has approved the draft, it will be sent to the Committee for discussion and approval.[40]

[39] See about this matter and the role of the Petitions and urgent actions Section of the OHCHR: C. Callejon, K. Kemileva & V. Kirchmeier, *Treaty Bodies' Individual Communication Procedures: Providing Redress and Reparation to Victims of Human Rights Violations*, Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2019, p. 16 and 17.

[40] Working Methods to deal with individual communications under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted by the Committee on 2 October 2015 and revised by the Working Group on communications on 2 June 2017, para 20 – 26 on the role of the Working Group.

It should be noted that in the decision on a communication as published by the Committee there is no information on the rapporteur in the case, only the names of all members of the Committee who participated in the examination of the case. This is also the practice of some other Committees like the Human Rights Committee and the CEDAW Committee. The Committee on CESCR, however, merely states that the views or decision is adopted by the Committee. It remains unclear why Committees mention the names of the Committee members who participated in the consideration or examination of the communication and why there is no mentioning of the approval (similar to the CESCR Committee) by the Committee as a whole.

Sometimes a member did not participate because the communication involved a State party he or she is a national of. This reason and two other reasons for non-participation can be found in Rule 8 of the Rules of Procedure and not, as one could expect given the importance of this rule, in the Optional Protocol itself. Most of the time, however, there is no explanation why some members did not participate. It is recommended to change this practice in order to avoid any misunderstanding or even speculation about members who did not participate.

Finally, it should be noted that the decisions of the CRC Committee do not – at the end – contain the request to the State party to publish the decision and distribute it widely, in an accessible format, so that it reaches all sectors of the population, including children. Such a request can be found in the decisions of the Human Rights Committee and the CEDAW Committee. One may argue that this request is unnecessary given the obligations of States parties mentioned in article 17 CRC-OP3. However, concerning the views and recommendations, the obligation is limited to facilitate access. It is recommended that the Committee follows the practice of the other Committees mentioned.

### C.3. Interim measures, article 6 CRC-OP3 and Rule 7 of the Rules of procedure

The Committee can at any time, after the receipt of a communication and before the determination on the merits, request the State party concerned to take such interim measures as necessary to avoid irreparable harm to the victim(s) of the alleged violations. Rule 7 of the Rules of procedure allows the Committee to designate a rapporteur or working group to make such requests. In the cases mentioned under B. these requests for interim measures, usually made by the Working Group on behalf of the Committee, were all meant to refrain States Parties from returning or deporting a child (children) to her/his (their) country of origin as long as the case is under consideration by the Committee.[41]

### C.4. Third party interventions

The Committee has adopted Guidelines on third-party interventions under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure[42]. There is no provision in the CRC-OP3 nor in the Rules of Procedure that explicitly mentions the possibility of submissions by third parties. According to the Committee, it can apparently be based on Rule 23 paragraph 1 of the Rules of Procedure stating: "At any time after the receipt

[41] See for example case D.K.N v Spain, case Z.Y. and J.Y. v Denmark in which the State party suspended the execution of the deportation order to Afghanistan; see also in the case E.P. and F.P. v Denmark regarding the deportation to Albania.

[42] Adopted at the 83rd session of the Committee 20 January – 7 February 2020.

of a communication and before the determination on the merits has been reached, the Committee may consult or receive, as appropriate relevant documents emanating from … *inter alia* all other United Nations organs, other treaty bodies, the special procedures of the United Nations, regional human rights systems, non-governmental organizations, National Human Rights Institutions ( e.g. an Ombudsperson in the case D.K.N. v Spain), specialized and relevant State institutions." It is not clear whether this is an exhaustive list but the Rules contain a detailed list indicating that the Committee can consult many different agencies and receive relevant information from them in the form of a third party intervention.

The Working Group on communications (WG) of the Committee will decide whether to accept information or documentation submitted by third parties. This rule seems to make it possible that the WG accept a third party interventions but exclude some of the documents used. Third party interventions should not focus on the facts and/or allegations of the case. If they do challenge facts and/or allegation the intervention will not be considered by the Committee. According to the Guidelines there are two possibilities:

- Requested third party interventions: the Working Group on communications (WG) of the Committee can, on its own initiative, request a third-party intervention. There are no further specific rules for these interventions at the request of the WG. One can assume, however, that the invitation specifies the case the intervention should deal with, the issues the WG wants to be covered, the deadline for the submission of the intervention and the maximum number of pages (see hereafter). Furthermore, one may assume that such invited interventions will be accepted by the WG and that they will be sent to the parties to the communications.
- Unrequested third party interventions: if an institution, an agency or another body[43] wants to submit a third party intervention, it should submit a written request to the Committee (via petitions@ohchr.org).[44] It should provide a brief introduction of the persons or entities submitting the request, the number(s) of the case(s) concerned and the object and purpose of the intervention; all in one page. In this case para. 2 of the Guidelines seem applicable: if the Committee, via the WG, authorizes an intervention, it will invite the third party to submit this intervention before a certain date ("within a specific time frame"). The WG can also invite the third party to focus on specific issues. These interventions should not exceed 10 pages (a similar rule does not exist for the unrequested interventions).

## C.5. Summary of some comments regarding the admissibility cases presented

### C.5.1. Admissibility and jurisdiction

In two landmark decisions the Committee took the well-argued position that the phrase in article 5 para. 1 CRC OP3 "within their jurisdiction" does not mean that obligation of State

[43] Given the reference of the Committee to Rule 23 paragraph 1 of the Rules of procedure I assume that individuals cannot submit a third party intervention. However, in paragraph 1 of the guidelines the Committee indicates that also persons can make a request for submission of a third party intervention.

[44] The Committee publishes an updated list of pending cases with a short summary of the subject m atter and this may trigger an institution to submit a request for a third party intervention.

parties to secure the rights of children is limited to the children on their territory. It means that claims of violations of the rights of children, who are outside the State Party's territory can be declared admissible when certain conditions are met (see under B.2.1.1. about children in refugee camps in Syria and under B.2.1.2 about children victims of climate change)

### C.5.2. Submission on behalf of child(ren): position of parents and consent

In two cases the right of a parent to submit a communication on behalf of her/his child was questioned and linked to the requirement of consent. With reference to previous comments under article 5, para 2, I would like to come to some conclusions:

- The right of a parent to submit a communication on behalf of her/his child does not depend on having custody. Regardless any legal qualification or recognition every parent can submit a communication for her/his child.

- Every parent submitting a communication on behalf of her/his child needs the consent of this child unless he/she can justify acting without this consent. This provision (art. 5, para 2) means that if the Committee is of the view that if this justification is not acceptable the communication has to be declared inadmissible under article 5 para. 2. We may assume that the right of a parent does not include the right to submit a communication without the consent of the child. However the Committee did accept the lack of consent because the author is the mother of the child and has joint custody and despite the fact that the child was 10 years old and capable of expressing his views (case R.N. v Finland). Thus the communication is admissible but not if the Committee is of the view that the submission is clearly against the best interests of the child.

- The wording of Rule 20 para. 4 of the Rules of Procedure could have been clearer. If there is no evidence of the consent of the child(ren) the Committee may decide that it is not in the best interests of the child(ren) to examine the communication. By lack of further specification, I assume that it does not matter whether for example the parent has justified the lack of consent because the other parent made it impossible to contact the child(ren) (see the case of J.S.H.R. v Spain). Whether the lack of consent of the child is justifiable or not: the Committee can decide in the best interests of the child not to examine the communication. I assume that article 5, para 2 CRC-OP3 means that the communication is not admissible if one fails to provide an acceptable justification for the lack of consent. But does Rule 20 para 4 mean that the Committee can examine this communication if it is in the best interests of the child? If so, one may wonder why one should be concerned about the justification of the lack of consent. If there is no evidence of consent, justifiable or not, the Committee may or may not examine the communication in the best interests of the child(ren).

- The Committee confirmed in the case on the children in refugee camps in Syria[45], its view that all children, except the youngest children, should be presumed to be able to form an opinion. However, circumstances in this particular case made it unrealistic for children to provide a written consent. This observation is confusing: does the Committee expect that children provide a consent in writing?

### C.5.3. Communications incompatible with the provisions of the CRC

Communications incompatible with the provisions of the CRC are inadmissible under article 7 (c) CRC OP3. The cases dealt with by the Committee under this particular provision were all incompatible because adults were claiming a violation of their rights under the CRC. The Committee's answer to these claims was that they are incompatible with the provisions of the CRC because the CRC protects the right of children and not the rights of adults. This is rather straight forward but also at the same time too simplistic. Under the CRC, States Parties have the obligation to respect, protect and fulfill the rights and/or entitlements of the ones charged with the responsibility of upbringing a child, in particular parents and legal guardians. They have the right to respect for their rights and duties to provide the child with guidance and directions in the exercise of her/his rights (art. 5 CRC), the right to assistance in the upbringing of the child (art. 18 (2) and 27 (3) CRC). In my view, it cannot be excluded that a parent submits a communication claiming that her/his right to appropriate assistance as recognized in article 18 and 27 have been violated. Such a communication can therefore not be declared inadmissible under article 7 (c) CRC OP3.

### C.5.4. Exhausting domestic remedies

This condition for admissibility is a rather complex one, due to the two exceptions regarding the applicability of this condition. From the decisions of the Committee some (preliminary) conclusions can be drawn.

- All available and effective domestic civil, administrative and criminal law remedies have to be exhausted. This is not the case if one presents claims about violation of children's rights to the Committee that have not been submitted to domestic remedies (see case Z.Y. and J.Y. v Denmark).

- Accessibility is part of or even a condition for effectiveness. The refusal to provide the necessary legal aid in order to be able to access the relevant judicial review (i.e. to appeal a certain decision) leaves the author without means to appeal. In that case, article 7 (e) should not be seen as an obstacle to admissibility (see case A.S. v Denmark). It is not clear to me whether this decision can be generalized and how far. For instance, does it mean that at the domestic level children claiming violations of their rights should be provided with free legal aid in order to make remedies accessible and that a failure to do so mean that the domestic remedies are *a priori* ineffective? This would require further clarification.

[45] The decision limited to the matter of admissibility of the communications, see case L.H. et.al, and A.F (authors) and S.H. M.A. et.al. (victims) v France (Case No. 79/2019 and No. 109/2019), para. 9.4.

- Regarding domestic remedies that are unlikely to bring effective relief, the Committee is of the view that domestic remedies do not need to be exhausted if they objectively have no prospect of success either because the claim will inevitably be dismissed or because established jurisprudence shows that the case will be unsuccessful. However, the mere doubts or assumptions about the success or effectiveness of remedies are not a justification for not exhausting them (see the case D.C. v Germany). The leaves open the question: is it necessary to substantiate doubts or assumptions with the submissions of copies of court decisions if the case law of the Courts (e.g. Constitutional Courts) has repeatedly and recently rejected similar claims by children?

- The effectiveness of domestic remedies was a specific issue in cases of deportation (see cases E.P. and F.P. v Denmark and Z.H. and A.H. v Denmark). The Committee is of the view that in the context of imminent expulsion, any remedies that do not suspend the execution of the existing deportation order cannot be considered effective. Therefore, the fact that the author (s) did not request judicial review of a refusal of the appeal because it would not bring effective relief falls under the exception in article 7 (e). I sympathize with the decision, but am wondering how much this approach is in line with the view of the Committee (and other human rights treaty bodies) on its role *vis a vis* the role of the State party. The Committee is of the view (see e.g. case X v Finland, para 9.8) that it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been arbitrary or amounts to denial of justice (see for more on this matter under B.9 art. (f)). If a State party enforces its domestic law by expulsion of a child and her/his family when is that arbitrary or a denial of justice? To declare a remedy ineffective because it does not suspend the expulsion seems to go beyond the Committee's own view about its role in relation to that of national authorities. The allegation of very serious violations of the rights of children does not absolve the author(s) of this allegation from the exhaustion of domestic remedies (Case Chiara Sacchi et al v Argentina; Case No. 104/2019)

- What if a procedure is unreasonably prolonged? This exception is not applicable if the long duration of the procedure is caused by judicial activities of the author (see case Y.F. v Panama). There is no decision yet of the Committee setting a standard for an "unreasonably prolonged" procedure. The Human Rights Committee is of the view that a two year long procedure cannot be considered as unreasonably prolonged, while the exception is applicable in cases of delays from three to eleven years.[46] A child-specific standard seems recommendable in this regard. The case H.M. v Spain (Case No. 115/2020) seems to have an indication in case the right to education is at risk. Proceedings which deprive the child from education for a period of two years (or more) can be considered as unreasonably prolonged.

[46] Human Rights Committee case R.L. et al. v Canada Communication No. 358/89, para. 6.3. and International Justice Resource Center, *Exhaustion of Domestic Remedies in the United Nations System*, p. 12.

### C.5.5. Communication ill-founded or not sufficiently substantiated

From the case law of the Committee, it is not very clear when a communication is qualified as ill-founded and when it is considered to be "not sufficiently substantiated". Most of the cases declared inadmissible under article 7 (f) were not sufficiently substantiated, although some differences can be noted:

- Ill-founded: when there is a lack of legal grounds for the arguments of the author(s) the Committee prefers to qualify the communication as ill-founded. For instance, in the case J.A.B.S. v Costa Rica, the author's claim that it was impossible to challenge the decision of the civil registry was considered unfounded because the author could appeal. In the case I.A.M. v Denmark, the claim of the mother that her daughter was discriminated against because there was no appeal possible from a decision of the Refugee Appeals Board was ill-founded because there was no link between the lack of appeal and the daughter's origin. The lack of appeal was a reality for all refugees. See also the case Z.Y. and J.Y. v Denmark in which the Committee responded in the same way to the claim that the son was discriminated against because of the lack of appeal.

- Not sufficiently substantiated: under B.9. (article 7 (f)) some cases were dealing with the possible expulsion or deportation of a child (children) from Denmark to another country. In a number of these cases the author has not demonstrated that the assessment of the courts of the facts and the evidence was clearly arbitrary or otherwise amounted to a denial of justice making the claim(s) not sufficiently substantiated. And in one, the author failed to justify the existence of real, specific and personal risk of irreparable harm to their children's rights upon return to the home country (i.e. Albania). In a number of cases against Spain the Committee considered some of the claims insufficiently substantiated without further motivation. This may be understandable given the similarities in these cases but rather concrete reasons for this finding would support the acceptance of the inadmissibility decision. Furthermore the similarities raise the question whether the Committee could/should deal with such cases in a more efficient manner. For example give concrete motivation for the finding that the claim was not sufficiently substantiated in one case and refer to this case the other similar cases for the motivation of their inadmissibility.

- The claim that rather broadly framed provisions of the CRC, e.g. article 2 and 3 para. 1, are violated requires specific information to substantiate this claim. Article 2, specify which concrete treatment or actions concerning the child amount to discrimination (see under B.9.2.); article 3, para. 1 provide evidence that the inadequate attention for the best interests of the child by a court or authority amounts to an arbitrary decision or to denial of justice (see under B.9.3.)

The fact that many cases were, at least partly, declared inadmissible because they were ill-founded or not sufficiently substantiated provides a significant warning for all who want to submit a communication to the Committee, and in particular all those who are doing this on behalf of a child or children. It is strongly recommended to make sure, using the precedent of

cases ruled inadmissible under article 7 (f) CRC OP3, that the alleged violations are well substantiated, for example by showing how the violations took place.