Communications with the Committee on the Rights of the Child under the Optional Protocol to the CRC on a Communications Procedure and Admissibility: Report on the Decisions of the Committee on Admissibility: Summary and Comments

Doek, Jaap E.

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Communications with the Committee on the Rights of the Child under the Optional Protocol to the CRC on a Communications Procedure and Admissibility

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

Jaap E. Doek*

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Universiteit Leiden
The Netherlands

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 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 to submit 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. 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 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.

The report is based on research until April 2020.

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A. Introduction

Until April 2020 the CRC Committee received over 300 individual communications under the CRC-OP3. 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)[1]. 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.

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 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.[2] 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.

[1] 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 www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx.

[2] 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, 8 April 2013.

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 made above.

B.2. Article 5, para 1.

This paragraph makes clear that the Committee shall only deal with violations of 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 Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC).

> Case A.A.A. (author) and U.A.I. (victim) v Spain (case nr. 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)[3]. See about this case also under nr. 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 text suggests that the rule is applicable whether or not the author provided an acceptable justification for her/his action without the consent of the child. That interpretation, however, does not seem to be logical. If the author cannot produce the required justification, the Committee should without further ado declare the communication

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

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 question then is: what does that mean in terms of decisions of the Committee? Assuming that the Committee has declared the communication admissible, it can revoke that decision 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 does not seem to be applicable only because the Committee decided not to examine the communication. At the same time, consideration of the merits is not an alternative because the communication will not be examined. Rule 22, 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 nr. 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).

Comment: 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 nr. 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.

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.[4]

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 nr. 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

[4] 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.

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 nr. 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 nr. 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 Y.M. (author) and Y. M. (victim) v Spain (case nr. 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 nr. 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.

In another case on age determination, a third-party submission, made by the Ombudsman of France, relates also to this case. See hereafter under B.9. article 7 (f) case D.K.N. v Spain.[5]

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 nr. 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).

[5] See about Spain's age assessment procedures also the press release of the Committee 'Spain's age assessment procedures violate migrant children's rights, UN committee finds', 13 October 2020 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26375&LangID=E.

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 nr. 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 nr. 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.

B.8. Art.7 (e)

All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.

Case D.C. (author and victim) v Germany (case nr. 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 absolve authors from exhausting them (para 6.5)[6]. 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.[7] 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[8] against conviction and sentence.[9] So no need to appeal to this Court. The Committee could have followed the same approach in this case

[6] The Human Rights Committee used the same reasoning in the case of A. v. Australia, CCPR/C/59/D/560/1993, para. 6.4.

[7] 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.

[8] 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.

[9] Case C.G.V. v Spain (Communication 701/1996).

See about this case also the case note of Daniella Zlotnik in the Leiden Children's Rights Observatory.

Case Z.Y. and J.Y. (authors) and A.Y. (victim) v Denmark (case nr. 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.

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 nr. 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).

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).

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 nr. 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 nr. 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 nr. 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).[10]

See about this case also the case note of Julia Sloth-Nielsen in the Leiden Children's Rights Observatory.

Case X (author) and Y and Z (victims) v Finland (case nr. 6/2016)[11]
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 nr. 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.

[10] 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.
[11] 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.

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).

Case A.S. (author and victim) v Denmark (case nr. 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 nr. 33/2017)
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[12] 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).

See about this case also the case note of Prof. U. Kilkelly in the Leiden Children's Rights Observatory.

Case Z.Y. and J.Y. (authors) and A.Y. (victim) v Denmark (case nr. 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.

[12] It happens rather often that the Committee suggests that article 3 has been violated while it is only para. 1 of that article.

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).

Case Y.F. (author) and F.F., T.F. and E.F. (victims) v Panama (case nr. 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 nr. 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).[13]

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).

[13] 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.

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.[14] 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. 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.[15]

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.

[14] 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).

[15] 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 D.K.N. (author and victim) v Spain (case nr. 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.

However, the author did receive the assistance of a lawyer and he was accompanied by a teacher when he underwent the forensic medical examination and therefore his claim that his right to be heard in the age assessment procedure was violated had not sufficiently been substantiated.

Third party submissions[16]

The Ombudsman of France made a third party submission on the issue of the age assessment[17] (note that there is nothing in CRC-OP 3 nor in the Rules of Procedure on third party 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[18], 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;

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

[17] 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.

[18] 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.

- 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.

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 nr. 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 nr. 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).

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.[19] 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

[19] 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.

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.[20]

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.[21]

[20] 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.
[21] 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.

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[22]. 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 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[23] wants to submit a third party intervention, it should submit a written request to the Committee (via petitions@ohchr.org).[24] 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.

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

[23] 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.

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

These interventions should not exceed 10 pages (a similar rule does not exist for the unrequested interventions).

C.5. Summary of some comments re the admissibility cases presented

C.5.1. 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. The right of a parent does not include the right to submit a communication without the consent of the child. The Committee should have said so explicitly in the case Y.F. v Panama.

- 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).

C.5.2. Communications incompatible with the provisions of the CRC

Communications that 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 provide 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.5.3. 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.

- 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. 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.

- 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.[25] A child-specific standard seems recommendable in this regard.

C.5.4. 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.

[25] 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.

- Not sufficiently substantiated: 5 out of the 11 cases mentioned under B.9. (article 7 (f)) 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).

The fact that out of the 17 inadmissible communications 11 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), that the alleged violations are well substantiated, for example by showing how the violations took place.