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

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Individual communications submitted 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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Abstract

The first question the Committee on the Rights of the Child (Committee or CRC Committee) 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 many communications submitted were inadmissible (and not registered for consideration by the Committee). This implies that despite significant time and effort dedicated to submitting the communication, the desired outcome—a decision from the Committee regarding the complaint of one or more violations of rights under the CRC—was not achieved. In quite a number of cases the Committee decided to discontinue the consideration (see hereafter in the Introduction) This report presents an updated version of the annotated overview of the decisions of the Committee in which it declared the communication inadmissible. Additionally, it offers several overarching comments and reflections with the aim of informing individuals or (legal) professionals who are contemplating submitting a communication to the Committee. These insights shed light on the various admissibility criteria outlined in CRC-OP3 and how the Committee applies and interprets these criteria.

The report indicates that many cases are declared inadmissible because they are ill-founded or not sufficiently substantiated. In some cases, a communication is deemed partially inadmissible because it asserts violations of numerous articles of the CRC without providing factual substantiation for all or some of these claims. This underscores the importance for future authors of submissions to ensure that their assertions of CRC rights violations are grounded in the appropriate legal provisions and supported by sufficient factual evidence. Additionally, in certain instances, adults—typically one of the parents—allege violations 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 March 2024.[1] In addition, to the previous report, it includes the admissibility decisions of the CRC Committee made at its 90th – 95th 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

It should be kept in mind that the Committee receives more communications than it deals with in terms of admissibility and merits. More than 50% of the communications are not registered for consideration by the Committee.(see for more info para C.2 on the working methods of the Committee) 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 registered cases involved numerous 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. Other cases concerned international child abduction, custody and visitation rights, surrogacy, juvenile justice, corporal punishment, male circumcision, right to education and climate change. In sessions 90 – 95 the committee considered 5 cases. Of these, 21 were admissible (although in one of them the Committee concluded that the alleged violations were not sufficiently substantiated); 6 cases were declared inadmissible and 23 were discontinued.
The figures show, inter alia, a high number of cases declared admissible, and consequently a low number of cases declared inadmissible by the Committee. One possible explanation is a significant increase in 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 and/or the OP's. But keep in mind that many communications are not registered because they do not meet the admissibility requirements. A large number of discontinued cases were discontinued as a result of an agreement between the author of the communication and the State party. This indicates that the submission of communications may lead to extra attention from the State party concerned and an adequate response to complaints in the communication. For instance, the State party may decide to grant asylum or refrain from the deportation of the child (and her/his parent(s). This means that consideration of the communication by the Committee is no longer necessary. There are also cases that were discontinued because the author ceased to be interested in the case after submission.

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

[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/Rev.1, 13 October 2021.

quickly as possible. The grounds for admissibility mentioned in the CRC-OP3 mirror, to a large degree, the admissibility criteria used by 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 for the registration of communications para C.2. about the working methods of the Committee.

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 that drew a lot of international attention. The first was a case against France about violation of rights of French children in refugee camps in Syria. The second was a case against Argentina and some other countries in relation to the violations of the rights of children outside these states ' territory as a result of their failure to (adequately) address climate change. Although there are similarities in the reasoning of the Committee regarding the meaning of "within their jurisdiction", it seems appropriate to present the cases separately, given the rather significant differences in their context.

It is not possible to give a full account of the extraterritorial application of human rights, but some remarks are apposite:

- The history of the drafting of the CRC shows that the Convention does not limit the jurisdiction of a State to its territory.[3]
- The thorny question: when does the jurisdiction of a State party to the CRC extend "extra-territorially"?
- There seems to be a certain consensus in relation to extraterritorial jurisdiction: First, the so-called spatial model of jurisdiction requires that the State should have effective

[3] 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.

control over a territory or part of a territory outside its own territory. Second, the personal model of jurisdiction implies that the State should have authority and control over the alleged perpetrator of human rights.

- 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"[4]

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[5][6]).

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

The authors of the communications, L.H., L.H., and D.A., acted on behalf of their grandchildren: S.H. (born in 2017), M.A. (born in 2013), A.A. (born in 2014), J.A. (born in 2016), A.A. (born in 2017), and R.A. (born in 2018). Additionally, C.D. and A.F. represented L.F. (born in 2003), A.F. (born in 2006), S.F. (born in 2011), N.F. (born in 2014), and A.A. (born in 2017). These children were all French nationals, and their parents were accused of collaborating with ISIL. While some of the children were born in Syria, others were taken there by their parents at a young age. They were detained in camps under Kurdish control in Syrian Kurdistan, including Roj, Ain Issa, and Al-Hol. The authors argued that the French Government had failed to take necessary measures to repatriate the children, which they asserted violated Articles 2, 3, 6, 20, 24, and 37 of the CRC.[7]

The case is of significance for the rights of children under the CRC, as underscored by the third-party submissions by the Consortium on Extraterritorial Obligations and by a group of 31 academics respectively. For practical reasons I will present what I consider to be the highlights of the Committee's views 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 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

[4] 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.

[5] 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.

[6] 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;

[7] Communications No. 79/2019 and 109/2019 L.H. et al v. France and 77/2019 F.B. et al v. France, para 1.

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 the 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.[8]

Comments: Duffy regrets that the Committee did not elaborate a little bit more on the basic standard it was applying to determine jurisdiction. Milanovic[9] notes that it is unclear what test precisely is applied by the Committee, but it is clearly not the one of effective 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.[10] I agree with both that the Committee adopt a flexible and functional approach. France has a duty to protect the children because it has the ability to do so under the given circumstances.

For similar views of the Committee, see also the Case P.N.,K.K. and O.M. (authors) and S.N. e.a. v Finland (Case No 100/2019), e.g. in para 11.3. "The Committee (….) considers that the State party as the State of the children's nationality (……) has the capability and the power to protect the rights of children in question by taking action to repatriate them or provide other consular responses. This capability was demonstrated by the fact that the State party already successfully repatriated 26 Finnish children."[11]

B.2.1.2. Climate change and children's rights

On 23 September 2019, Chiara Sacchi and 15 other children (aged from 8 to 17) from 12

[8] 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).

[9] Marko Milanovic, EJIL: Talk! Blog of the European Journal of International Law. November 10, 2020

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

[11] See also E. Ignatius, *Communication No. 100/2019: P.N. et al v. Finland,* Leiden Children's Rights Observatory, Case Note 2023/01, 12 January 2023.

different countries submitted a Communication to the CRC Committee claiming that five 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 five different cases and decisions of the Committee: Chiara Sacchi et v Argentina (Case No. 104/2019), idem v Brazil (Case No. 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 a video conference.

In each country circumstances, legislation, policies, and institutions such as the (children's) ombudsperson, are different, however, the Committee's arguments regarding the key issues, i.e. jurisdiction, admissibility and domestic remedies, are in essence the same. The focus of this paper is on these key issues and is 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, as in the case of L.H. et. al 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 elaborate attention to this matter in para 10.2 to 10.12 with inter alia references to cases of the Human Rights 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 Committee's view 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[13], 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 which territory or under whose jurisdiction the activities were carried out has effective

[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.

[13] This refers to the State under whose jurisdiction or control the activity that caused environmental damage originated, could origin or was implemented. Advisory Opinion OC-23/17 of the Inter-American Court on Human Rights, footnote 195.

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 had effective control over the sources of emissions that contributed to the cause of reasonably foreseeable harm to children outside its territory, it had to determine whether there was 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 rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. They also have further established that they had personally experienced real and significant harm. As a consequence, the Committee finds that art. 5 para 1 is not an obstacle for the consideration of the communication.

Comments: It is important to highlight that the children's nationality, a significant aspect of the case against France, has not been addressed. The determination of jurisdiction appears to imply that any child, regardless of their place of residence, can lodge a communication with the Committee against any State party to CRC OP3 for violations of their rights under the CRC due to the State party's failure to prevent cross-border harm. 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 to be 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 violations 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. This may be a serious obstacle e.g. for a child from the Marshall Islands who wants to file a communication against e.g. Germany[14]. See this aspect of the climate cases under Art. 7 (e) of B.8.

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, 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

[14] In the case of Chiara Sacchi et al, Scott Gilmore et al and Ramin Pejan et al (authors and victims) 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.

authors of the communication to acknowledge the significance of their action and to provide them with a simplified explanation of the case.[15]

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.

In this case, Switzerland argued that the provisions of the articles 2(2), 3, 6 (2), 22 and 24 of the CRC 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 also both cases 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)

Final decision of the Committee: CRC/C/73/D/2/2015, 26 October 2016 (date of submission 5 October 2015; date of decision 30 September 2016)[16]. See also this case 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 of the ICCPR. This claim was declared inadmissible because it falls outside the scope of the CRC OP3 as defined in Article 5, para 1.

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. Pursuant to Rule 20, paragraph 4, of the Rules of Procedure, in situations lacking evidence of the necessary consent, the Committee has the authority, after

[15] See about this open letter also T. Liefaard, 'Open Letter on Climate Change', Leiden Children's Rights Observatory, 20 October 2021.

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

evaluating the specific circumstances and information provided, to determine that it is not in the best interests of the child(ren) concerned to review the communication.

This rule appears somewhat perplexing for several reasons. Firstly, it seems redundant, since Article 5, paragraph 2 is explicit: cases lacking evidence of required consent are deemed inadmissible. Secondly, the rule suggests the Committee may choose to review a communication lacking consent if it is deemed in the best interests of the child, which is inconsistent with Article 5, paragraph 2 of CRC OP3. Thirdly, the rule seems to apply regardless of whether the author provided an acceptable justification for acting without the required consent. This interpretation seems illogical; if the author fails to provide the necessary justification, the Committee should promptly declare the communication inadmissible under Article 5, paragraph 2. Conversely, if the author does provide an acceptable justification, the Committee could still opt not to examine the communication in the best interests of the child under Rule 20, paragraph 4.

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. However, 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 submission 20 September 2016; date of decision 15 May 2019). See 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 the child to maintain contact with the father.
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> 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.
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> 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 Article 5, para 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 (best 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 a communication inadmissible and if so, on which ground(s)? Maybe, abuse of the right to submit a communication? Furthermore, the question may be raised whether a biological father without custody also has the right to represent his child(ren). Only if this fatherhood is recognized by the mother or if it is proven via a 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 or 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 such as 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 a judicially established contact regime between father and child.

In this case of divorced parents, the rather common problem was the enforcement of court decisions regarding 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 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 January 8, 2021, that she does not want any contact with her father.

The Committee stated that "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 was 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.

Case P.N.,K.K. and O.M. (authors) and S.N. e.a. (victims) v. Finland (case No. 100/2019).

Final decision of the Committee CRC/C/91/D/100/2019, 20 October 2022 (date of submission 30 September 2019, date of decision 12 September 2022).

Subject matter: Repatriation from refugee camps in The Syrian Arab republic of children whose parents are linked to terrorist activities.

The Communication was submitted not only on behalf of six children identified by their relatives but also by the same persons on behalf of 33 children, not mentioned by name, who were in the same circumstances as the six mentioned by name. During the drafting of the OP3, efforts to make it possible to submit a communication on behalf of a group of children (not specified by name) [actio popularis] failed. Given this history, the State's arguments for declaring this communication inadmissible was not surprising. The authors had not provided the identities of the 33 children nor established that they act with the consent of these children. The Committee did not respond to the State's argument but instead crafted its own reasons for declaring the communication on behalf of the 33 children inadmissible (para 10.4). The Committee decided that the authors failed to justify acting on behalf of these children who are not their relatives, or to show that the relatives of these children would be unable to file a communication with the Committee on their behalf. Therefore, the authors lack *ius standi* to represent other children of Finnish nationality in the camp.

Comments: Article 5 para 2 seems to be rather straight forward: it indicates that a communication submitted on behalf of an individual or group shall be with their consent unless the author of the communication can justify acting without that consent. This provision only talks about *submission* and not about admissibility, which may be confusing. Thus, submission is possible without the consent of the alleged victim/s if that can be justified and the Committee deems the submission of the complaint to be in the best interest of the child. Nonetheless, a communication without the required consent is inadmissible, unless…. I think the jurisprudence of the Committee provides some guidance regarding the "unless": the *submission* of a communication without the required consent is possible, 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. Furthermore (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.

Finally, the submission of a communication on behalf of a group of unidentified children (case 110/2019 v Finland) seems to be admissible if the author(s) can prove that they are relatives of the children and that other relatives are unable to file a

communication on behalf of these children. However this does not mean that a collective communication is possible. If you have to prove that you as an author are a relative it seems unavoidable that you have to give the name of the child (children). And even if you do prove that you are a relative you still need the consent of the child (children) a factor the Committee forgot to mention.

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 26June 1999, and the mother of B.M. A case with a special story. E.S. married in Romania at the age of 13 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 two days before E.S. turned 18. This meant that the author was no longer a legal guardian of E.S.. 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. However, the author did not provide a justification for the impossibility of communicating 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 response to this argument the Committee's observations are 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 were 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 were based on Article 7 (a). It is possible that some of the non-registered cases 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, this requirement has been questioned or criticized in the literature. 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, not only the very young, 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 other reasons. In order to address this dependency of the child on the willingness of adults, the Committee should develop 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 using 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.[17]

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).

[17] 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.

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) to submit 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)

Final decision of the Committee: CRC/C/81/D/6/2016, 10 July 2019 (date of submission 16 July 2016; date of decision 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).

Case S.B. (author) and H.F. (victim) v Luxembourg (Case No. 138/2021).

Final decision of the Committee CRC/C/93/D/138/2021, 6 June 2023 (date of submission 2 June 2020; date of decision 8 May 2023)

Subject matter: return of a child to Luxembourg following international abduction; right to maintain personal relations, and direct contact with the mother.

The author claimed that the court of appeal had violated article 42 of the regulation (CE) No 2201/2003 concerning rules for execution of a court decision. The Committee noted that it has, in light of Article 5 OP3, no competence to deal with such violations. However, if it can be shown that the violation of the above rules also breaches the CRC, then there would be no impediment to the Committee's jurisdiction.

Case E.A. (author) and M.F. (victim) v Switzerland (Case No. 125/2020)

Final decision of the Committee CRC/C/94/D/125/2020, 21November 2023, (date of submission 20May 2020; date of decision20 September 2023).

Subject matter: Return of a child to Eritrea.

The asylum application of the author and M.F. was rejected by the State Secretariat for migration, which meant that the child had to return to Eritrea. The author brought on her own behalf and on behalf of M.F. the matter before the European Court of Human Rights. The Court declared the applications to be inadmissible. This decision may mean that the case was already dealt with by another body; see also this aspect below under rt. 7 (d) OP3. The Committee asked the author to provide copies of the applications submitted to the Court because the author asserted that the content of these applications was different from that of the communication submitted to the Committee. The checking of the content was necessary to ensure that the communication is admissible under Article 7 (d). Despite requests from the Committee, the information provided by the author remain incomplete. The refusal of the author to provide the copies obstructed the consideration of admissibility and constitutes an abuse of the right of submission. The Committee, therefore, declares the communication inadmissible under Article 7 (c) of the Optional protocol.

Case D.E.P (author and victim) v Argentina (case No. 89/2019)

Final decision of the Committee CRC/C/94/89/2019, 21 December 2023 (date of submission 1 March 2019; date of decision 19 September 2023)

Subject matter: Criminal conviction of the author without taking into account the fact that he was a child when determining the length of the sentence (….).

The child argued that the State party had violated Article 25 CRC by failing to regularly review the deprivation of liberty and consider whether it continued to be necessary. The committee notes that Article 25 of the Convention does not refer to deprivation of liberty in the criminal context but seeks to extend the guarantee of juvenile justice recognized in Articles 37 and 40 of the Convention to those cases in which the child "has been placed by competent authorities for the purposes of care, protection or treatment of her his or her physical and mental health". Accordingly, the Committee declares the author's claims under Article 25 of the Convention inadmissible *ratione materiae* pursuant to Article 7 (c) of the Optional Protocol.

Comments: The Committee's argument for limiting the scope of applicability of Article 25 is not a strong one. This Article does not refer to e.g. placements in foster-care or in psychiatric institutions. The drafting history shows that the representative of the USA stated that Article 25 would not apply to placements under the juvenile justice system. Remarkably the Committee follows the understanding of the delegation of the State that is the only one that did not ratify the CRC. It is unclear what the Committee means when it says that Article 25 seeks to extend the guarantees of juvenile justice to those cases in which the child has been placed for the purposes of care… etc." However, the articles 37 and 40 do in no way provide for a regular review of a placement in the context of juvenile justice.

The role of the Committee in correcting errors of national courts

States parties have argued that a communication was inadmissible under article 7 (c) when the author approached the Committee to correct an error in the national courts. Two recent examples illustrate the practice of the Committee.

Case N.E.R.A. (author) and J.M. (victim) v Chile (Case No. 121/2020)

Final decision of the Committee CRC/C/90/D/121/2020, 20 June 2022 (date of submission 9 July 2019; date of decision 1 June 2022)

Subject matter: Return of a child with autism to Spain under the Hague Convention on the Civil Aspects of International Child Abduction.

The State party argued that the Committee cannot establish itself as an appellate body to correct errors of law in the interpretation and application of domestic and international law in force in the State party or in the legal reasoning underlying a particular domestic judgement. Relevant here is the argument of the author that the Supreme Court did not correctly apply the concept of the best interests of the child (Article 3 (1) CRC).

The Committee's general rule is that it is for the national bodies to examine the facts and evidence and to interpret domestic law, unless such examination or interpretation is clearly arbitrary or amounts to a denial of justice. In cases of international return of children or adolescents, it is not the role of the Committee to decide whether the Hague Convention on the Civil Aspects of International Child Abduction was correctly interpreted or applied by national courts but rather to ensure that such interpretation or application is in accordance with the obligations under the CRC.

Similar observations of the Committee can be found in the Case C.O.D. (author) and C.A.K.O. (victim) v Chile CRC/C/92/D/129/2020, March 16, 2023 (date of submission September 27, 2020; date of decision January 25, 2023).In both cases the authors claimed that the domestic court did not correctly apply the concept of the best interests of the child (Case No. 121/2020) or took the decision to return the child without consideration of the best interests of the child. Given the fact that the Hague Convention is meant inter alia to protect the best interests of the child the views of the Committee on these claims are important. This matter will be discussed in para. B.9.3. Claims regarding the violation of article 3, para 1 CRC.

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 a person below the age of 18 at time of these violations. 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. The Committee has dealt with a number of such cases, mostly against Spain. A newer case has been brought against France. Two issues are important in cases of age determination: 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 no longer a child (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, August 14, 2019 (date of submission March 17, 2017; date of decision February 1, 2019).

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

Again, there isa 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 old. 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[18].

Case D.K.N. (author and victim) v Spain (case No. 15/2017)

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: 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 re the determination of age.

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

[18] 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.

[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.

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[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 is presumed to be a child during the age assessment process and 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 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

[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.

he was a minor because it did not contain biometric data (ironically, nor does a birth certificate from the Netherlands).[21] 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 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". However, it is unclear what this standard means in practice. In the following cases, the Committee makes different observations 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 to 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).

[21] See CRC/C/82/D/27/2017, 5 November 2019

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 26/2017) were almost copies of Case 24/2017. 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).

In another case, 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 was 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, and no photograph no physical description). The Committee notes that the 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. Article 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).[22]

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 Articles 3 and 22 are admissible. (see about this case also under B.9).

Case S.F. (author) and W.W. (victims) v Ireland (Case No. 94/2019).

Final decision of the Committee CRC/C/91/D/94/2019, 19 December 2022 (date of submission 19 August 2019 date of decision 12 September 2022)

In this case the author had requested the European Court on Human Rights to take an interim measure. However, she did not submit a full application to the Court and thus the Court had not examined the same matter within the meaning of art. 7 (d) OP3.

Case E.A. (author) and M.F. (victim v Switzerland (Case No. 125/2020)

This case was declared inadmissible by the Committee under Article 7(c) but deserves some attention because the case was also brought before the European Court of Human Rights and may thus be inadmissible under Article 7 (d). The Committee: "the same matter" in Article 7 (d) must be understood as relating to the same complaint concerning the same individual, the same facts and the same substantive issues. When the European Court declared that applications inadmissible because they did not

[22] 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.

disclose any apparent violation of the rights and freedoms guaranteed by the (European) Convention or the Protocols thereto and because the admissibility criteria of the Convention had not been met these decisions necessarily implied a degree of examination of the merits of the cases. In the light of this consideration the Committee could declare the communication inadmissible under Article 7 (d). However, to make sure that the communication dealt with the same matter as the applications to the European Court it wanted to have copies of the applications to the European Court. When it did not obtain such copies, the communication was declared inadmissible because it was an abuse of the right to submit (see about this case also under art, 7 (c)).

B.8. Article7 (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. The same statement was made in the case of the repatriation of Finnish children from camps in Syria and the Committee noted that the State party had not demonstrated that the authors had any judicial remedy at their disposal that was available and effective[23]

Conclusion: if no domestic remedies are 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 remedies, however, would be hopeless because this Court upholds the 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

[23] Case P.N., K.K. and O.M. v Finland, CRC/C/91/D/100/2019. 20 October 2022, para 10.5.

absolve authors from exhausting them (para 6.5)[24]. 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 that used by other treaty bodies. I 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 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.[25] This view may not be directly applicable to this case, but how difficult it would 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 effectiveness of remedies does not absolve the author from exhausting them requires 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[26] against conviction and sentence.[27] Therefore, there is no need to appeal to this Court. The Committee could have followed the same approach as in this case.[28]

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).

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

[25] 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.

[26] 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.

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

[28] 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.

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 have 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, 28February 2020 (date of submission 21 June 2018; date of decision 3February 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 21September 2018; date of decision 28September 2020)

Subject matter: Deportation to Italy

The author complaints about the 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).

Case N.B. (author and victim) v Georgia. Case 84/2019.
Final decision of the Committee CRC/C/90/D/84/2019, 21 June 2022 (date of submission 19 November 2018; date of decision 1 June 2022)

Subject matter: protection of the child from physical or mental violence. Injury or abuse; discrimination.

The State party argued that the communication was inadmissible because the author failed to bring civil proceedings inter alia against the kindergarten. The Committee notes the argument of the author that in the absence of recognition of the act of corporal punishment the civil action is groundless. The Committee further considers that civil proceedings aimed at seeking compensation for damages do not substitute

for the obligation of State authorities to effectively investigate and bring charges against the alleged perpetrator for the alleged offences. The Committee seems to join the Human Rights Committee[29] but it is still not fully clear what this consideration means in practical terms. My assumption: if the State party has not initiated criminal proceedings or if the proceedings are not completed the author does not need to start civil proceedings for damages in order to meet the exhausting requirement of art. 7 (e). The State party also argued that the communication is inadmissible because the author did not file a complaint on discriminatory treatment with the oversight mechanism within the Office of the Public Prosecutor. The author: that is not an effective remedy because its decisions are recommendatory in nature. The Committee: it is generally not necessary to exhaust avenues before non-judicial bodies that cannot provide redress in order to fulfill the requirements of Article 7 (e) of the Optional Protocol.

Case O.M. (author) and C.C.O.U., C.C.A.M. and A.C.C. (victims) v Denmark (case No 145/2021)
Final decision of the Committee CRC/C/94/D/145/2021, 16 October 2023. (date of submission 25 May 2021; date of decision 19 September 2023)

The State party argued that the domestic remedies were not exhausted because the author never raised arguments related to the violations of the rights of the children. The Committee found that the author consistently raised violations of his right to family life which is intimately linked to the children's right not to be separated from their father and he had referred to Article 3 in proceedings before the district court while the impact of the separation on the children should have been a central issue. So, the requirements of Article 7 (e) have been met.

Comment: it seems that if one claims a violation of family life e.g. because of the separation of a parent from the children the violations of the rights of children of the family don't need to be separately argued before national courts to meet the requirements of Article 7 (e).

B.8.1. Exceptions regarding 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.

[29] The committee refers to the case Maharjan v Nepal, CCPR/C/105/D/1863/2009.

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 requests for provisional measures to allow the child to be enrolled were 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 denied 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 .

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 is initiated.

Four similar communications on the right to education of Moroccan children born and raised in Spain were submitted to the Committee and it came to the same conclusion on the matter of admissibility. Cases 114/2020, 116/202, 117/2020 and 118/2020. The Committee adopted its views on 12 September 2022. CRC/C/91/D/114/2020, idem 116/2020, idem 117/2020 and 118/2020, 20 October 2022.

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 procedural matters were addressed such as the non-exhaustion of domestic remedies.

The **standard view of the committee in these cases is that** "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[30]." 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.[31]
>
> 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)[32]

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

> 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.

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[30] Case N.B.F. v Spain (Case No 11/2017 para 11.3

[31] 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.

[32] 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 notes of P. Ceriani Cernadas, Communication 16/2017: A.L. v. Spain et. al., Leiden Children's Rights Observatory, Case Note 2020/2, 18 May 2020.

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 17July2018; date of decision 28 September2020).

Subject matter: Deportation of a mother and her daughter to the Republic of North Macedonia, where the child would allegedly be at risk of honor 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).

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)

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 of requesting 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 regarding the violation of Articles 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 matters 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 will a child be given the opportunity to express him- or herself at a hearing.[33] 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 4February 2021).

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

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

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 B.2.1.2. Another problem of admissibility is 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 authors as to why they did not exhaust domestic remedies. In this case and in all four others, the Committee recalls that the authors must make use of all judicial or administrative remedies 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 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 from 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 the success of any remedy.
- The authors have not sufficiently substantiated their arguments that the application of the remedies is unlikely to providing 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 found the communication inadmissible for failure to exhaust the domestic remedies, a finding in all five 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)

Final decision of the Committee CRC/C/74/D/5/2016, 1March 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)

Final decision of the Committee CRC/77/D/3/2016, 8 March 2018 (date of communication 12February 2016; date of decision 25 January 2018).

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

The mother claimed that her daughter was discriminated against because there was no appeal possible for her from the 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 were deported to Somalia where she may be subjected to female genital mutilation. The Committee declared these claims admissible (para. 10.5 and 10.6).[34]

Case X (author) and Y and Z (victims) v Finland (Case No. 6/2016)[35]

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 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. Y. and Z. v Finland) about the competence of national authorities. It concluded (similarly to that case) that the authors did not show 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 Committee concluded that this part of the communication was insufficiently substantiated and thus inadmissible under Article 7 (f).

[34] 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.

[35] 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.

The 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) [36]
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[37] 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 against (art. 2 CRC), 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).

[36] 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.
[37] 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).[38]

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 Article7 (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.[39] 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.

[38] 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.

[39] 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 special for at least two reasons. The first is, 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.[40]

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) presented 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. 5.5.[41]

Circumstantial evidence for the purpose of admissibility (art. 7 f)

It seems that in the case F.N.P. and J.M.P. v Spain, some members of the Committee are of the view that the circumstances in which the alleged violations took place may

[40] 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.

[41] In 2022, the Committee declared two cases partly inadmissible: in a case against France (CRC/C/89/D/77-78-109-2019), the Committee declared complaints about violation of art. 7, 8, 16 and 28 CRC inadmissible because they were ill-founded (art. 7(f) OP3-CRC). 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.

provide sufficient substantiation for the purpose of admissibility. The fact that similar violations, as the alleged one, were prevalent in Spain apparently justifies the conclusion that the claim that the child concerned was abducted from the hospital was sufficiently substantiated and thus admissible.

In the case F.B. et al. and S.B. et al. v France (case 77/2019, 78/2019 and 109/2019) regarding the repatriation of children from camps in Syria a similar issue had to be addressed. The State party emphasizes that, to date, the authors have not provided any evidence that the right to life and the right to health of the children who are subject of the communications are under threat or that the children are arbitrarily detained by the Syrian Democratic Forces. They merely described the general situation in the camps. The Committee notes that the security situation, the restrictions on movement and the sanitary conditions described apply to all children who are being held in the camps including the child victims, who must face the same detention and living conditions as the other people living in the camps. The Committee is of the view that the *causes of harm* (emphasis added) have been sufficiently identified and that there is no reason to believe that the children specifically named in these communications are less at risk than other people in the camps.

The case of S.S.F. (author) and S.M.F. (daughter of the author) v Denmark. Final decision of the Committee CRC/C/90/D/969/2019, June 24, 2022. (date of submission2 September 2019; date of decision 27 May 2022) is another example of how the circumstances can provide sufficient substantiation of the claim for the purpose of admissibility,

> Subject matter: Deportation of a girl to Somalia, where she would allegedly risk being forcefully subjected to female genital mutilation.
>
> The State party argued that the author has failed to establish a prima facie case for the purpose of admissibility of her communication under the Convention and that she has not sufficiently substantiated her claim that her daughter would be exposed to a real risk of irreparable harm if she returned to Somalia. The Committee held that in light of the author's allegation regarding *the general situation of the prevalence of female genital mutilation in Somalia and the circumstances under which she would be returned as a single mother (*emphasis added), the author's claim based on Articles 3 and 19 of the Convention have been sufficiently substantiated for purposes of admissibility (para 7.2.)
>
> The same argument was made in case I.A.M. and K.Y.M. v Denmark (case No. 3/2016) mentioned above.

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, such as 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.

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 that those parts of the communication are 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; date of decision 28 September 2020).

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

Para. 7.3. The claim based on Article 2 of the 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)[42]

Case V.A. v Switzerland (Case No. 56/2018), para 6.4. The 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).

Case A.M. v Switzerland (Case No. 95/2019), para 9.7. A 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 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[43] It should be noted that this view is a general rule and is also applied in other cases, However in case of the alleged violation of art. 3 (1) an additional element is the primary consideration of the best interests of the child.

In light of this view, the claim that Article 3 (1) is violated cannot be sufficiently substantiated by the statement that the court failed to take into account the best interests of the child. However, not clear whether the conditions for admissibility (arbitrary, denial of justice, best interests of the child not primary consideration) are cumulative. For instance, the author proofs that the best interests of the child were not a primary consideration and thus sufficient

[42] 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.

[43] 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)

substantiation for the purpose of admissibility. See about the best interests of the child as a primary consideration the cases in para. B.9.3.1, and also inter alia[44]:

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; therefore, these claims are therefore inadmissible under art. 7 (f). The claims under Articles 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 June2019; date of decision 28 September 2020)

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

Para 4.2. The author claims that the national courts refusing to suspend the father's visitation schedule completely 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 a 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.3 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

[44] See also Case S.B. (author) and H.F. (victim) v Luxembourg. Final decision of the Committee CRC/C/93/D/138/2021, 6 June 2023 (date of submission 2 June 2020; date of decision 8 May 2023)

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.9.3.1. Best interests of the child in cases of international abduction and return of children.

In two recent cases on international return, the authors claimed that Article 3 para 1 was violated and that the national court made a decision without consideration of the best interests of the child. A specific challenge for the Committee given the fact that in both cases the interpretation and application of the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Hague Convention) played a role, and that this Convention has as basic/general assumption that the immediate return of an abducted child is in her/his best interests.

Case N.E.R.A. (author) and J.M. (the author's son) v Chile (Case No 121/2020).

Final decision of the Committee CRC/C/90/D/121/2020, 20 June 2022 (date of submission 9 July 2020; date of decision 1June 2022).

Case C.O.D. (author) and C.A.K.O. (the author's son) v Chile (Case No. 129/2020)

Final decision of the Committee CRC/C/92/D/129/2020,16 March 2023 (date of submission 27 September 2020; date of decision 25 January 2023).

In both cases the Committee is, in line with its general rule, of the view that, in cases of the international return of children and adolescents, it is not the role of the Committee to decide whether the Hague Convention on the Civil Aspects of International Child Abduction was correctly interpreted or applied by national courts, but rather to ensure that such interpretation or application is in accordance with the obligations established by the Convention[45].

However, there are differences in the views/observations between the two cases. The key assumption of the Hague Convention is that it is in the best interests of the abducted child to be returned to the country of her/his habitual residence. There are some exceptions to this rule specified in Articles 12, 13 and 20 of the Hague Convention.

In Case No.121/2020, the author argued that the Supreme Court of Chile did not correctly apply the concept of the best interests of the child. The Committee responding to the claim of the State party that the author's intention was to treat the Committee as an appellate body (para 4.2.), is of the view that examining the allegation of the author would not entail establishing itself as an appellate body. However, the principle of the best interests of the child enshrined in Article 3, para 1 of the CRC imposes both procedural and substantive obligations and the Committee is competent to review whether the reasoning underlying the

[45] CRC/C/90/D/121/2020, para 7.4. and CRC/C/92/129/2020, para 6.5.

decisions made by the domestic courts complies with those obligations. The Committee also believes that the very substance of the author's allegation lies in determining the scope of the State party's obligations under the CRC with regard to decisions taken on the basis of the Hague Convention. In that regard the Committee is of the view that domestic courts , when deciding on international child abduction cases, must first and effectively asses the factors that may constitute an exception to the duty to immediately return the child (under Articles 12, 13, and 20 of the Hague Convention), particularly when such factors are raised by one of the parties to the proceedings and make sufficiently reasoned decision on this point (para 8.5. of this case). This last line suggests that even if the parties did not raise factors the court ex officio should make an assessment of factors relevant for the application of one of the possible exceptions.

In Case No. 129/2020, the author claimed that the decisions of the domestic courts were taken without consideration of the best interests of the child, which meant that the child will be returned to his alleged aggressor in violation of the CRC Article 3 (1). The Committee repeats its view expressed in the previous case that in ruling on cases involving the international return of children, national courts must effectively assess the factors that may constitute an exception to the duty to immediately return the child, in particular when such factors are raised by one of the parties in the proceedings and must issue a sufficiently reasoned decision on this point.

It seems that in both cases views on admissibility is mixed with views on the merits reflecting the complexity of this kind of cases[46].

Some conclusions are possible regarding the admissibility of cases of the international return of children under the Hague Convention.

1.Decisions on the international return of children by domestic courts exclusively based on the Hague Convention and its assumption that the immediate return of an abducted child is in her/his best interests do not necessarily ensure compliance with the State party's obligation under the CRC, in particular Article 3 para 1. A claim of violation of this provision may be admissible. It should be noted that the Committee did not explicitly endorse the view of the European Court on Human Rights that in all return cases, an individual assessment of the best interests of the child concerned is necessary. This Court observed: "The child's best interests from a personal development perspective will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences (….) For that reason those best interests must be assessed in each individual case"[47]. This approach raises the question whether Committee can indeed

[46] See also the M.S. Basi & C. M. Pedreño, Communication 121/2020, N.E.R.Á. on behalf of J.M. V Chile, Leiden Children's Rights Observatory, Case Note 2022/3, 31 October 2022.

[47] European Court on Human Rights Case Neulinger and Shuruk v Switzerland 41615/07, 6 July 2010, para 138; however, it is worth noting that this position was slightly changed in the case of X v. Latvia

decide, in a case in which the national court orders the immediate return of the child because it meets all requirements of the Hague Convention for such return, that Article 3 para 1 CRC has been violated although the State party did act in accordance with its obligation under the Hague Convention. See also hereafter under C.3.

2. Domestic courts have to ensure compliance with Article 3 (1) CRC in every decision in which exceptions provided for in Articles 12, 13 and 20 of the Hague Convention apply or are invoked. In light of the view of the Committee in case No. 121/2020 the advice to applicants is to present the factors relevant for the applicability of one of the exceptions to the immediate return of the child. If the courts failed to ensure compliance with Article 3 (1) the claim that this article was violated is admissible unless that claim is not sufficiently substantiated. Furthermore, courts have to assess as a matter of priority factors that may constitute an exception to the duty to immediately return the child. The failure to do so may be the reason for an admissible claim.

B.10. Article 7 (g)

The facts that are subject to 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 communication23 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 addressed 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)

Final 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 April 7, 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, 12March 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 30April 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.).

Case P.N.K.K. and O.M. (authors) and S.N. e.a. (victims) v. Finland (Case No. 100/2019)

Final decision of the Committee CRC/C/91/D/100/2019, 20 October 2022 (date of submission 30 September 2019; date of decision 12 September 2022)

Subject matter: Repatriation of children from refugee camps in the Syrian Arab Republic.

The State party argued that the authors' claims are inadmissible because they refer to events that occurred before the entry into force on February 12, 2016 of the OP3-CRC (Para 4.3.). The Committee notes that the inaction of the State party has allowed for the alleged violations to continue after that date. It concludes that it is not precluded

by Article 7 (g) of the Optional Protocol from examining the communication (para 10.6)[48].

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 were 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 (for example, 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 bound 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 admissibility will be taken first, followed by a separate decision on the merits of the case at 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.[49] 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 the communications it has received, the following information may be helpful.

[48] In this para the Committee made a mistake by referring to the entry into force of the CRC for the State Party.
[49] 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.

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 will rotate. The Chairperson of the WG appoints per case one of the members as rapporteur. This person examines all of 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.[50]

The working group decide to register a communication based on proposals of the Petitions Section. This Section can reject cases that are clearly inadmissible at the pre-registration stage. Cases that are potentially registrable are transmitted to the Working Group for a decision on registration.[51]

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 (similarto the CESCR Committee) by the Committee as a whole.

Sometimes a member did not participate because the communication involved a State party that 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 of 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

[50] 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.
[51] The Petitions section is part of the Office of the High Commissioner for Human Rights which assist all human rights treaty bodies in dealing with communications submitted to them.

Committee. One may argue that this request is unnecessary given the obligations of States parties mentioned in article 17 of theCRC-OP3. However, concerning the views and recommendations, the obligation is limited to facilitating 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.[52]

The Committee is of the view that the State party, if it did not implement the requested interim measures, is in violation of Article 6 CRC-OP3. In the case S.F (author) and W.W. and S.W. (victims) v Ireland) the Committee requested Ireland to adopt interim measures to suspend the return of the children to Canada pending the consideration of the case by the Committee. But the State party informed the Committee that it had carefully and in good faith considered the Committee's request for interim measures. However, the State party was not in a position to comply with the request in this particular case as it was in conflict with court proceedings under the Convention on the Civil Aspects of International Child Abduction (para 2.1.).[53] The Committee did not conclude that this was a violation of article 6 of the OP3 but three members of the Committee gave there (dissenting) opinion on this matter: A State party cannot evade its obligation under article 6 (1)of the Optional Protocol by invoking a possible conflict with its domestic law or with an international treaty. A remarkable opinion. It creates an absolute obligation that has to be met by the State party even if it results in the violation of obligations existing under another international treaty that the State party has ratified. Furthermore, it is remarkable in light of the fact that the decisions of the Committee on the merits of a case are not creating obligations for the State party. They are non-binding but the interim measures are.

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[54]. There

[52] 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.

[53] See about the interim measure in this case also, C. Paul, Communication No. 94/2019: S.F. on behalf of W.W. and W.F v. Ireland, Leiden Children's Rights Observatory, Case Note 2023/02, 29 March 2023.

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

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 decides whether to accept information or documentation submitted by third parties. This rule seems to make it possible for the WG to accept a third-party intervention 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 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[55] wants to submit a third party intervention, it should submit a written request to the Committee (via petitions@ohchr.org).[56] 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 on a single page. In this case, para. 2 of the Guidelines seems 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 a third party to focus on

[55] 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.

[56] 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.

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 parties to secure the rights of children is limited to the children on their territory. This 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 child 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 present the following conclusions:

- The right of a parent to submit a communication on behalf of her/his child does not depend on custody. Regardless of 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 of the children in refugee camps in Syria[57], that all children, except the youngest children, should be presumed to be able to form an opinion. However, the circumstances in this particular case made it unrealistic for children to provide written consent. This observation is confusing: does the Committee expect children to provide written consent?

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 were incompatible with the provisions of the CRC because the CRC protects the right of children and not the rights of adults. This is straightforward 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 those 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) of CRC OP3.

C.5.4. Exhausting domestic remedies

This condition for admissibility is a rather complex one, due to the two exceptions regarding its applicability. 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).

[57] 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.

- 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 this case, Article 7 (e) should not be seen as an obstacle to admissibility (see case A.S. v Denmark). It is unclear whether this decision can be generalized and how far. For instance, does this 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 requires 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 of D.C. v Germany). This 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 of 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 11 years.[58] A child-specific standard seems recommendable in this regard. The case of 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.

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 of 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 of 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 of 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 facts and evidence was clearly arbitrary or otherwise amounted to a denial of justice making the claim(s) insufficiently 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,

[58] 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.

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 as another similar case 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.)

- Sufficient substantiation of the claim for the purposes of admissibility by circumstantial evidence (?). The examples of cases in which circumstances play a role in establishing sufficient substantiation of the claim deserve some further attention. It seems that just the risk of a violation of the right(s) of a child in circumstances that prima facie suggest that a violation may occur is enough to substantiate the claim for the purpose of admissibility. But not clear whether this means that the Committee can conclude on the basis of the circumstances that the rights of the child have been violated.

The fact that many cases were, at least partly, declared inadmissible because they were ill-founded or insufficiently 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) of CRC OP3, that the alleged violations are well substantiated, for example, by showing how the violations took place.