



# Convention on the Rights of the Child

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## Committee on the Rights of the Child

### Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016\*, \*\*

<i>Communication submitted by:</i>	D.D. (represented by counsel, Mr. Carsten Gericke, and by Fundación Raíces, a non-governmental organization)
<i>Alleged victim:</i>	D.D.
<i>State party:</i>	Spain
<i>Date of communication:</i>	26 November 2015
<i>Date of adoption of Views:</i>	1 February 2019
<i>Subject matter:</i>	Summary deportation of an unaccompanied child from Spain to Morocco
<i>Procedural issues:</i>	Inadmissibility <i>rationae loci</i> , <i>rationae personae</i> and <i>rationae materiae</i> , failure to exhaust domestic remedies
<i>Articles of the Convention:</i>	3, 20 and 37
<i>Articles of the Optional Protocol:</i>	5 and 7 (e)

1.1 The author of the communication is D.D., a Malian citizen born on 10 March 1999. He claims to be a victim of violations of articles 3, 20 and 37 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 On 9 June 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request to consider the admissibility and merits of the communication separately.

#### The facts as submitted by the author

2.1 In 2013, the author left his village in Mali because of the armed conflict. He arrived in Morocco in February 2014 and spent nearly a year living in the informal migrant camps on Mount Gurugú surrounding the Spanish enclave of Melilla.

\* Adopted by the Committee at its eightieth session (14 January–1 February 2019).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Olga A. Khazova, Hatem Kotrane, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Kirsten Sandberg, Ann Marie Skelton, Velina Todorova and Renate Winter.



2.2 During this period, the author sometimes slept rough in the forest, begged in Moroccan villages and lived without access to drinking water, health services or education. The author claims to have been subjected to violence and raids by Moroccan security forces, who frequently threw stones at camp residents and destroyed their belongings and survival equipment.

2.3 The author attempted to scale the border fences<sup>1</sup> separating Melilla from Moroccan territory on several occasions. One such occasion was on 18 March 2014, when the author was repeatedly beaten with a stick by Moroccan security forces while attempting to gain access to the first fence. He lost his front teeth as a result of this incident. After the attack, the author walked 20 kilometres back to the camp.

2.4 On 2 December 2014, the author and a group of people of sub-Saharan origin left Mount Gurugú with the intention of entering Melilla. The author reached the top of the third fence and saw that other people climbing down the fence on the other side were being summarily pushed back by the Spanish Civil Guard and handed over to Moroccan forces. Then, for fear of being deported and subjected to possible ill-treatment and violence by Moroccan forces, the author waited for several hours at the top of the fence. During this period, he was not offered any form of assistance. He had no access to water or food. He was also unable to communicate with the Civil Guard, since he did not speak Spanish and there were no interpreters present. Finally, he climbed down the fence with the help of a ladder provided by the Civil Guard. As soon as he set foot on the ground, he was arrested and handcuffed by the Civil Guard, handed over to the Moroccan forces and summarily deported to Morocco.<sup>2</sup> At no time was his identity checked. He was also denied the opportunity to explain his personal circumstances, give his age, challenge his imminent deportation or claim protection as an unaccompanied child. He was not assisted by lawyers, interpreters or doctors. After being released by the Moroccan security forces, the author returned to Mount Gurugú where he continued to live in precarious conditions, in constant fear of violence and raids at the hands of Moroccan security forces.

2.5 The author submits that there were no effective domestic remedies available to him that could have served to suspend his deportation from Spain to Morocco on 2 December 2014.<sup>3</sup> He points out that the deportation was summarily executed without him being notified of a formal expulsion decision that he could have challenged before the competent authorities.

2.6 On or around about 30 December 2014, the author entered Spain through Melilla and went to stay in the temporary reception centre for migrants. In February 2015, he was transferred from the enclave of Melilla to mainland Spain. At the end of July 2015, thanks to the assistance of Fundación Raíces, a non-governmental organization (NGO), and the consular registration card issued to him by the Malian consulate in Madrid,<sup>4</sup> which showed his date of birth as 10 March 1999, the author obtained protection as an unaccompanied

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<sup>1</sup> The border consists of three parallel fences – two outer fences six metres high and one inner fence three metres high.

<sup>2</sup> The author encloses photographs of him climbing down the fence and then being arrested, handcuffed and returned to Morocco by the Spanish Civil Guard.

<sup>3</sup> Regarding the availability of domestic remedies, the author cites the Views of the Human Rights Committee on the cases of *Giry v. Dominican Republic* (CCPR/C/39/D/193/1985), *Wolf v. Panama* (CCPR/C/44/D/289/1988) and *Choudhary v. Canada* (CCPR/C/109/D/1898/2009). As to the effectiveness of domestic remedies, he cites the Views of the Committee against Torture on the cases of *Arkauz Arana v. France* (CAT/C/23/D/63/1997), *I.S.D. v. France* (CAT/C/34/D/194/2001) and *Tebourski v. France* (CAT/C/38/D/300/2006). He also invokes the case law of the European Court of Human Rights to support the argument that, in deportation cases, only remedies with suspensive effect should be considered effective (*Hirsi Jamaa and others v. Italy* [application No. 27765/09] and *A.C. and others v. Spain* [application No. 6528/11]).

<sup>4</sup> The author provides a copy of his Malian consular registration card, which shows his full name (D.D.), his date of birth (10 March 1999), his parents' names (Chaka and Yayi) and his occupation (student).

child and was placed in a residential centre for minors under the care of the Spanish authorities.<sup>5</sup>

2.7 The author states that, on 30 March 2015, Spain adopted Organic Act No. 4/2015 on safeguarding the security of citizens,<sup>6</sup> which entered into force on 1 April 2015. This law, and in particular its tenth additional provision concerning the special regime applicable in Ceuta and Melilla, legalizes the Spanish practice of indiscriminate summary deportations at the border<sup>7</sup> and makes no reference to unaccompanied minors nor establishes any procedure for their identification and protection.

### The complaint

3.1 The author alleges a violation of article 20 (1) of the Convention, in that he was not afforded the protection he was entitled to receive from the State party as an unaccompanied child deprived of his family environment.<sup>8</sup> He recounts that when the Spanish Civil Guard in Melilla arrested him, handcuffed him and returned him to Morocco on 2 December 2014, his identity was not checked, no assessment of his protection needs was carried out and he was not given the opportunity to explain his personal circumstances. He maintains that none of the Spanish Civil Guard officers even attempted to find out his name and age or ascertain whether he was in a vulnerable situation before returning him to Morocco.

3.2 The author adds that, as the Committee has noted, States' obligation to provide special protection and assistance to unaccompanied children: (a) cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as being wholly or partly outside the jurisdiction of the State; (b) applies even in respect of minors who are subject to the jurisdiction of the State when trying to enter the national territory; (c) includes taking all necessary steps to identify minors who are not accompanied at the earliest possible stage, particularly at the border; and (d) in the event of uncertainty, requires the State to accord the individual the benefit of the doubt, such that, if there is a possibility that he or she is a child, he or she is treated as such.<sup>9</sup>

3.3 The author also alleges a violation of article 37 of the Convention in that the Spanish authorities deported him to Morocco without procedure or prior assessment of any kind and exposed him to a risk of irreparable harm. He claims that the State party knew, or should have known, that by summarily returning him to Morocco and handing him over to the Moroccan security forces, he was at risk of being exposed to violence, cruel, inhuman or degrading treatment<sup>10</sup> and precarious living conditions, without access to health services, drinking water and sufficient food in the informal migrant camps on Mount Gurugú. The author states that the injury to his mouth (damaged front teeth), which was the result of ill-treatment and violence at the hands of the Moroccan security forces, was visible to members of the Spanish Civil Guard on the day of his deportation.

3.4 The author maintains that, in accordance with the principle of non-refoulement, and before summarily deporting him, the State party should have ascertained whether there

<sup>5</sup> The author provides a copy of a memorandum issued on 10 August 2015 by the Community of Madrid confirming compliance with the residential care order issued in his favour, which refers to the decision of the Commission for the Guardianship of Minors of the Department of Social Affairs of the Community of Madrid pursuant to which the author was placed under the guardianship of the Spanish authorities.

<sup>6</sup> The author provides copies of reports and communications issued in 2014 by the Office of the United Nations High Commissioner for Refugees, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Human Rights Watch and Amnesty International, among others, all of which express concern about the draft content of this law.

<sup>7</sup> The author cites the cases pending before the European Court of Human Rights *N.D. v. Spain* and *N.T. v. Spain* (applications Nos. 8675/15 and 8697/15).

<sup>8</sup> The author cites the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, paras. 7 and 9.

<sup>9</sup> *Ibid.*, paras. 12, 13, 18 and 31.

<sup>10</sup> The author cites the Committee's concluding observations on the combined third and fourth periodic reports of Morocco (CRC/C/MAR/CO/3-4), para. 34, and the Committee's general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, para. 26.

were substantial grounds for believing that there was a real risk of irreparable harm to the author in Morocco. The author emphasizes that, as part of this assessment, the Spanish authorities should have taken into account his age and vulnerable situation<sup>11</sup> and the particularly serious consequences that inadequate food and health services might cause in his case.<sup>12</sup>

3.5 Finally, the author submits that the State party, by its action and omission,<sup>13</sup> did not at any time take into account the best interests of the child recognized in article 3 of the Convention in that: (a) it failed to consider how its State policy and standard practice of indiscriminate summary deportations impacts on the best interests of the group of unaccompanied minors assembled at the Spanish-Moroccan border in Melilla, including the best interests of the author, as a member of this group;<sup>14</sup> (b) it did not allow the author to enter Spanish territory and did not take any steps to verify his identity, assess his situation and protect him as an unaccompanied child;<sup>15</sup> and (c) the Spanish Civil Guard did not take the author's personal circumstances into account, but instead arrested him, handcuffed him and summarily deported him to Morocco without considering any other alternative that would be in his best interests.

3.6 The author proposes, as possible reparation measures, that the State party: (a) amend or repeal Organic Act No. 4/2015 on safeguarding the security of citizens, and in particular its tenth additional provision on the special regime applicable in Ceuta and Melilla, so as to include a specific reference to the need to comply with the provisions of the Convention and to ensure that children at the border undergo identity checks; (b) create and implement a special protocol for the use of the Spanish Civil Guard in Melilla and Ceuta that includes specific measures for the identification and protection of children at the border; and (c) grant financial compensation to the author and take steps to provide for his rehabilitation, if necessary.

#### **State party's observations on admissibility**

4.1 In its observations of 30 August 2016, the State party specifies, with regard to the facts, that when the author entered Spain on 30 December 2014 he gave a different name – Y.D. rather than D.D. – and different nationality and said that he was of full legal age.<sup>16</sup> It submits that the State party cannot be held responsible for the events that occurred during the brief period<sup>17</sup> in which, on 2 December 2014, the Spanish authorities exercised their legitimate right and international obligation to repel the author's assault on and unlawful attempt to breach the border crossing. It adds that the incident was not a deportation because the author was not able to complete his attempt to enter Spain illegally. The State party also states that, on 2 December 2014, the author did not have any form of identity document in his possession, exchanged not a single word with the Spanish Civil Guard in Melilla, "did not at any time claim to be a minor and did not appear to be one". It maintains that, in the absence of any express claim or any form of identity document, a person who

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<sup>11</sup> The author cites European Court of Human Rights, *P. and S. v. Poland* (application No. 57375/08), decision of 30 October 2012; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (application No. 13178/03), decision of 12 January 2007, para. 69; and *Rahimi v. Greece* (application No. 8687/08), decision of 5 July 2011, paras. 92–94.

<sup>12</sup> The author cites the Committee's general comment No. 6, para. 27.

<sup>13</sup> The author cites the Committee's general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, paras. 17–18.

<sup>14</sup> *Ibid.*, para. 19.

<sup>15</sup> The author cites the Committee's general comment No. 6, paras. 2, 84 and 87.

<sup>16</sup> The State party provides copies of the identification cards issued to Y.D. by the temporary reception centre for migrants in Melilla (with a photo in which the author's face is not clear) and the Melilla police centre (with a photo in which his face is clear). These show date of entry into Spain (30 December 2014), date of birth (2 November 1994), country of birth (Burkina Faso) and parents' names (Saka and Yavi).

<sup>17</sup> The State party cites, and provides a link to, a video produced by the NGO Prodein, purely, it indicates, with the aim of illustrating the practice of refusing admission at the border. The State party refers to the period of less than one minute in this video in which the Spanish Civil Guard are shown detaining, handcuffing and returning the author to the other side of one of the fences at the Melilla border crossing.

manages to climb over six-metre high fences cannot be considered to be a minor. Lastly, the State party submits that Malian consular registration cards, such as the one provided by the author, are issued without checking the official registers of the accrediting country and purely on the basis of the foreign national identification number issued by the Spanish authorities.

4.2 The State party submits that, with regard to the facts allegedly attributable to the Moroccan authorities, the communication is inadmissible *rationae loci* under article 5 of the Optional Protocol.

4.3 The State party also submits that the communication is inadmissible *rationae personae*, in accordance with article 1 of the Convention, because the author was 20 years old at the time of the events. It asserts that the author claimed to be of legal age on two occasions – on 30 December 2014, at the temporary holding centre for migrants in Melilla, and on 12 January 2015, at the Melilla police centre for foreign nationals. On both occasions, the author was informed of his rights in a language he understood and was assisted by free lawyers but there is no record of him having claimed to be a minor. It adds that the author claimed to be a minor only after contacting the NGO Fundación Raíces, which applied to the Malian consulate in Madrid for a consular card on his behalf.

4.4 The State party submits that, in relation to the right to asylum and the right to protect borders against unlawful entry, the communication is inadmissible *rationae materiae* because these rights are not recognized in the Convention.

4.5 The State party further submits that, under article 7 (e) of the Optional Protocol, the communication is inadmissible on the grounds of failure to exhaust domestic remedies, given that: (a) the author could have applied for asylum in the countries through which he travelled (Mauritania and Morocco); (b) he could have applied for asylum in Spain at the International Protection Office at the Beni Enzar border crossing instead of crossing the border illegally; (c) he could have applied for a visa to enter and work legally in Spain;<sup>18</sup> and (d) once in Spanish territory, he had access to effective judicial remedies through which to challenge the administrative decision ordering his expulsion.<sup>19</sup>

#### **Author's comments on the State party's observations on admissibility**

5.1 In his comments of 21 November and 12 December 2016, the author claims that the State party wrongly interprets this communication as relating to the author's right to asylum and to enter Spain. He reiterates that the scope of the communication is limited to the actions of the Spanish authorities during the hours of 2 December 2014 in which the author was under Spanish jurisdiction.

5.2 The author submits that the communication is admissible *rationae loci* because he entered Spanish territorial jurisdiction as soon as he crossed the first fence of the Melilla border crossing and was thus under the effective control of members of the Spanish Civil Guard in Melilla when they arrested him, handcuffed him and returned him to Morocco. The author emphasizes that this claim is admitted by the State party in its observations and in the video of the events that it cites as evidence. He asserts that the State party cannot arbitrarily and unilaterally curtail its obligations under the Convention by establishing specific areas or zones that remain wholly or partially outside its jurisdiction.<sup>20</sup> He adds that he is not claiming that Spain is responsible for the conduct and actions of the Moroccan authorities, but rather that Spain knew, or should have known, about them.

5.3 The author maintains that the communication is admissible *rationae personae* because on 2 December 2014 he was a minor, as evidenced by the passport issued to him

<sup>18</sup> The State party provides a copy of the Framework Cooperation Agreement on Immigration concluded between the Kingdom of Spain and the Republic of Mali.

<sup>19</sup> The State party provides a copy of the administrative deportation file, administrative appeals against the deportation decision and judgment No. 283/2016 of 13 July 2016 of Melilla Administrative Court No. 2. All the documents provided refer to Y.D., born in Burkina Faso, on 2 November 1994, to parents named Saka and Yavi.

<sup>20</sup> The author cites the Committee's general comment No. 6, paras. 2 and 12. See also para. 3.2 above.

by the Malian consulate in Madrid on 3 October 2015.<sup>21</sup> The State party has treated the author appropriately, as an unaccompanied minor, since recognizing his correct age, which was confirmed in July 2015. At that time, the State party assumed legal guardianship of the author and recognized him as a minor of Malian nationality, as stated in the certificate of guardianship issued by the Community of Madrid<sup>22</sup> and his Spanish residence permit.<sup>23</sup> In accordance with the principle of *venire contra factum proprium*, or estoppel, the State party cannot claim that the author is not a minor because it has already recognized and treated him as a minor.

5.4 The author further submits that the communication is admissible *rationae materiae* because his claims are not based on his right to asylum.

5.5 The author reiterates that there were no effective domestic remedies available that he could have exhausted. He notes that the only effective remedies are those that have suspensive effect. He submits that the irreparable harm caused by an unlawful deportation occurs immediately after expulsion, hence the need for the remedy to have suspensive effect in order to be considered effective.<sup>24</sup> The author maintains that: (a) before his deportation, he did not receive a formal deportation order or decision that he could have challenged before an administrative or judicial authority and, since his deportation was immediate and summary, he did not have access to any form of legal assistance or available remedy that would have had suspensive effect; (b) after his deportation, he did not have access to an effective or even potential remedy, as it would not have had suspensive effect because the deportation had already been carried out.<sup>25</sup> He argues, in addition, that all the remedies invoked by the State party are also ineffective because they would not remedy the alleged violations of his rights in relation to the events that occurred on 2 December 2014.

5.6 The author submits that his entry into Spain on 30 December 2014 and the subsequent immigration formalities are irrelevant to the present communication.

#### **Additional observations from the parties on admissibility**

6.1 In its observations of 22 March 2017, the State party argues that the person who entered Spain on 30 December 2014 is not the minor, and author of this communication, who has been receiving official assistance from the Spanish authorities. The State party notes that the passport submitted by the author was issued on 3 October 2015 and includes a photograph of him that was taken when he was already residing in Spain and receiving assistance from the Spanish child protection authorities. The State party claims that “a simple comparison” of the author’s passport photograph (corresponding to D.D.) and the photograph on the identification card issued by Melilla police centre for foreign nationals (corresponding to Y.D., who allegedly entered Spain on 30 December 2014) shows that the author is a different person from the one who climbed over the Melilla border fence on 30 December 2014. The State party maintains that “any immigrant who scales the fence and breaches the border protection mechanism is identified by the Spanish authorities”. Accordingly, it claims that, if the author had scaled the border fence illegally, “his details would be on record, together with a photograph of him taken on the same date at Melilla police centre and upon his admission to the temporary reception centre for migrants”. The State party also asserts that the author has not proved that he took part in an assault on the border fence in Melilla and that there is no record of how he entered Spain. The State party also submits that the facts cannot be admitted on the basis of the author’s mere claim that he is a minor.

<sup>21</sup> The author provides as proof a copy of his Malian passport, his birth certificate and his Spanish residence permit.

<sup>22</sup> The author provides a copy of the certificate dated 18 November 2015 in which the Community of Madrid assumes legal guardianship of the author.

<sup>23</sup> The author provides as evidence his Spanish residence permit bearing his date of birth: 10 March 1999, confirming his Malian nationality and bearing the words “under the guardianship of the Community of Madrid”.

<sup>24</sup> The author cites *Tebourski v. France*, para. 7.4, and *Choudhary v. Canada*, para. 8.3.

<sup>25</sup> The author cites *Arkauz Arana v. France*, para. 6.1.

6.2 The State party denies having returned the author to Morocco. It alleges that no evidence has been adduced that the author took part in an illegal assault on the border fence and “much less that he did so on the dates indicated in the initial communication”.

7.1 In his comments of 5 May 2017, the author claims that the State party makes contradictory allegations. He points out that, in its initial observations, the State party claims that the author is the same person as the one who was registered at the temporary reception centre for migrants and at Melilla police centre on 30 December 2014 and that he was not a minor. However, in its additional observations, the State party argues that the author is not the same person as the one registered by the Spanish authorities on 30 December 2014. The State party contradicts itself so as not to focus on the author’s summary deportation on 2 December 2014, which is the only issue to which the present communication relates.

7.2 The author maintains that he submitted photographs<sup>26</sup> proving the deportation carried out on 2 December 2014 and that he has identified himself in these photographs. He adds that the State party accepts that the author was returned to Morocco by the Spanish Civil Guard on 2 December 2014<sup>27</sup> and does not deny that the person appearing in the video cited by the State party itself is the author. The author affirms that the person who was registered at the temporary reception centre for migrants in Melilla under the name Y.D. on 30 December 2014 is him. He points out that the name of the person registered at the temporary reception centre for migrants on that day and the names of his parents are phonetically the same as the author’s details as shown on his Malian consular card, especially bearing in mind the transposition of the oral Bambara language (the author’s mother tongue) into the Spanish language. He adds that the photographic comparison invoked by the State party lacks probative value and that the State party could verify that the author is the person who was registered at the temporary reception centre for migrants in Melilla on 30 December 2014 were it to make a comparison between the fingerprints taken at the temporary reception centre and those recorded in the Register of Unaccompanied Foreign Minors.

7.3 The author maintains that the State party cannot cite any available effective remedy because the lack of an effective remedy constitutes the very cornerstone of its policy of indiscriminate summary deportations.<sup>28</sup>

#### **State party’s observations on admissibility and the merits**

8.1 In its submissions of 14 May 2018, the State party reiterates its arguments on the inadmissibility of the communication *rationae loci* and *rationae materiae*. It maintains that the facts presented by the author in his initial communication are “a gross manipulation” because:

(a) On the date on which he submitted the present communication, the author had already been officially recognized as a minor by the Spanish authorities, who had accepted the original birth certificate submitted by him as sufficient proof “even though no biometric data were provided, since the certificate was assessed in conjunction with an assessment as to whether or not he appeared to be a minor”. It reiterates that there is no record of the author having illegally climbed over the border fence in Melilla;

(b) The author wants the Committee to confuse the author with Y.D., who is a different person with a similar first and family name but a different nationality (Burkina Faso), who is of full legal age (born on 2 November 1994) and took part in an illegal assault on the Melilla border fence in early December 2014. It claims that Y.D. was registered as an adult at the temporary reception centre for migrants in Melilla on 10 December 2015.

8.2 The State party requests the Committee to discontinue its consideration of the present communication, in accordance with rule 26 of its rules of procedure, given that the

<sup>26</sup> See footnote 2 above.

<sup>27</sup> See para. 4.1 above.

<sup>28</sup> The author cites the third-party intervention submitted by the Council of Europe Commissioner for Human Rights, para. 35, concerning the cases of *N.D. v. Spain* and *N.T. v. Spain* (applications No. 8675/15 and No. 8697/15) pending before the European Court of Human Rights.

Spanish authorities have recognized the author as a minor under the guardianship of the Community of Madrid without there having been any violation of his rights at the time of submission of the communication. The State party cites the case of *R.L. v. Spain*,<sup>29</sup> in which the Committee decided to discontinue consideration of the communication because it was proved that the author was already considered and treated as a minor by the Spanish authorities.

8.3 Lastly, the State party submits that there was no violation of the Convention.

#### **Author's comments on the State party's observations on admissibility and the merits**

9.1 In his comments of 31 July 2018, the author reiterates his arguments regarding the admissibility and the merits of the communication.<sup>30</sup> He submits that the State party refers only to questions of fact, omitting to comment on any of his arguments concerning alleged violations of the Convention or the evidence adduced to substantiate such violations. In addition, the State party changes its version of the facts in each of its observations. In particular, the State party does not provide any evidence to support its claim that the author is a different person from the person reported to have been deported on 2 December 2014, even though it has fingerprints taken at the temporary reception centre for migrants in Melilla under the name Y.D. and fingerprints taken at the Registry of Unaccompanied Foreign Minors under the name D.D., which could have been compared in order to prove that the person in each case is one and the same. The State party cannot invoke inaccuracies in its own registration system as an argument against the author.

9.2 The author notes that the Committee has expressed concern about the State party's practice of automatically returning children seeking international protection in the autonomous cities of Ceuta and Melilla, without respecting the necessary guarantees.<sup>31</sup> He adds that the Committee has urged Spain "to ensure throughout its territory the effective legal protection of unaccompanied children and to ensure that the principle of non-refoulement is applied and that the best interests of the child are taken into account as a primary consideration"<sup>32</sup> and "to put an end to the practice of automatic refoulement of some children, ensuring that all procedures and criteria are in accordance with their status as children and with national and international legislation".<sup>33</sup>

9.3 The author claims that the Committee's reasoning in *R.L. v. Spain*, a case involving the age assessment of an unaccompanied child, is not applicable to the present communication. He submits that there are no grounds for the Committee to decide not to consider the present communication.

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<sup>29</sup> The State party provides a copy of the Committee's decision in *R.L. v. Spain* (CRC/C/77/D/18/2017).

<sup>30</sup> The author notes that the general comments recently issued by the Committee and other treaty bodies specify the content of the violations alleged in the present communication. The author cites, in particular, joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, paras. 12 and 46; general comment No. 4 (2018) of the Committee against Torture on the implementation of article 3 of the Convention in the context of article 22; and joint general comment No. 4 (2017) of the Committee on the Protection of the Rights 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.

<sup>31</sup> The author refers to the Committee's concluding observations on the combined fifth and sixth periodic reports of Spain (CRC/C/ESP/CO/5-6), para. 44 (d).

<sup>32</sup> *Ibid.*, para. 45 (a).

<sup>33</sup> *Ibid.*, para. 45 (d).



### Third-party intervention

10.1 On 31 May 2018, the International Commission of Jurists, the European Council on Refugees and Exiles, the AIRE Centre and the Dutch Council for Refugees submitted a third-party intervention.<sup>34</sup>

10.2 The third-party interveners point out that the European Court of Human Rights has established that where a State takes action to prevent foreign nationals from entering its territory or to return them to another State, such conduct constitutes an exercise of jurisdiction that engages the responsibility of the State in question.<sup>35</sup> They add that construing the obligations of the State in this manner is necessary in order to avoid depriving the Convention rights of effectiveness<sup>36</sup> and that such an interpretation must be applied irrespective of the border control methods employed by the State. It follows, therefore, that the question of entry to a State's territory is not decisive when assessing whether a State is exercising or has exercised its jurisdiction.

10.3 The third-party interveners maintain that the State must grant access to its territory to children at its border who are subject to its authority or effective control, as a prerequisite to the initial assessment process. They add that children should have the opportunity to present meaningful objections to their potential expulsion, as required by the principle of non-refoulement and the prohibition of collective expulsions. They further add that, in accordance with the Convention, the State must allow children access to its territory as a prerequisite to the initial assessment process in order to fulfil its obligations under articles 3, 20 and 37 of the Convention.

### Parties' comments on the third-party intervention

11. In his comments of 31 July 2018, the author notes that the intervention reaffirms the scope and content of the State party's obligations in relation to the alleged violations of articles 3, 20 and 37 of the Convention.

12.1 In its observations of 31 August 2018, the State party argues that the third-party intervention is based on incorrect premises, since any person wishing to seek asylum in Spain can do so from outside Spanish territory without the need to join a mob formed for the purpose of making illegal, collective and violent assaults on the border fence. Spain therefore has the right to prevent illegal entry to its territory, in accordance with article 51 of the Charter of the United Nations (on the right to self-defence) and article 13 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (on the prevention of unauthorized border crossings). It adds that, according to article 1 (F) (c) of the Convention relating to the Status of Refugees, persons who engage in acts contrary to the purposes and principles of the United Nations shall be excluded from the possibility of asylum.

12.2 The State party argues that the principle of non-refoulement applies only when the person comes from a territory in which there is a risk of persecution, which is not so in the present case. It also argues that, in the cases brought before international bodies concerning assaults on the border fence in question, there is no evidence that the complainants have been persecuted at the hands of the Moroccan authorities. It adds that these are cases of migration for reasons other than those that would justify an asylum application, because the migration is not prompted by a situation of persecution.

12.3 The State party argues that the Spanish authorities, in accordance with article 22 (2) of the Convention, first attempted to locate the family of the unaccompanied foreign minor and in the meantime took appropriate protective measures.

<sup>34</sup> The intervention analyses the legal principles and jurisprudence related to the scope and content of States' obligations in relation to State jurisdiction under the Convention, access to territory, the principle of non-refoulement and the prohibition of collective expulsions, without reference to the particular facts of the present communication.

<sup>35</sup> *Hirsi Jamaa and others v. Italy* (application No. 27765/09), judgment of 23 February 2012, para. 180.

<sup>36</sup> The third-party interveners cite European Court of Human Rights, *Sharafi and others v. Italy and Greece* (application No. 16643/09), judgment of 21 October 2014, para. 210.

12.4 The State party reiterates that a child who has not breached the border protection mechanism is not under Spanish jurisdiction. The European Court of Human Rights has extended the jurisdiction of the State extraterritorially in cases where migrants did not have the option of applying to enter the territory legally.<sup>37</sup>

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

13.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the communication is admissible.

13.2 The Committee notes the State party's arguments that the communication is inadmissible *rationae personae* because, firstly, the author initially declared himself to be of legal age upon his entry into Spain and, secondly, it claims that the author is not the same person who entered Spain on 30 December 2014 and was registered under the name Y.D. The Committee notes, however, that the Malian birth certificate, passport and consular card, all of which are official documents issued in the author's name that must be presumed to be authentic unless there is evidence to the contrary, show that the author was 15 years old on 2 December 2014, when the events took place. The Committee also notes that the State party itself has acknowledged the authenticity of these documents by issuing the author with a residence permit and a certificate of legal guardianship by the Community of Madrid.

13.3 As to the mismatches between the details of the person registered by the Spanish authorities and those of the author, the Committee notes that the file provides no conclusive evidence that shows that the author is not the person who attempted to gain access to Melilla on 2 December 2014 in the circumstances described. The Committee considers that the burden of proof cannot rest solely on the author of the communication, especially given that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.<sup>38</sup> In the present case, the Committee considers that the author has provided a credible and consistent account of the facts, which is supported by evidence. The Committee also notes the author's allegations that the State party could have compared the fingerprints of the person registered as Y.D. with those of the author. The Committee therefore finds the present communication admissible *rationae personae*.

13.4 The Committee takes note of the State party's argument that the communication is inadmissible *rationae loci* because the actions of the Moroccan authorities are not attributable to Spain. The Committee notes, however, that the scope of the present communication is limited to the actions of the Spanish authorities on 2 December 2014, to the exclusion of those of the Moroccan authorities. In this regard, the Committee notes that, according to the author, he was arrested by Spanish security forces at the third fence of the Melilla border crossing and was handcuffed and returned to Moroccan territory. Given these circumstances, and irrespective of whether or not the author is considered to have arrived in Spanish territory, he was under the authority or effective control of the State party. The Committee therefore finds the present communication admissible *rationae loci*.

13.5 The Committee also notes the State party's argument that the communication is inadmissible *rationae materiae* because it refers to the author's right to asylum, which is not covered by the Convention. The Committee notes, however, that the present communication concerns alleged violations of the author's rights under articles 3, 20 and 37 of the Convention and not his right to asylum. The Committee therefore finds that the communication is admissible *rationae materiae*.

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<sup>37</sup> The State party does not cite any specific case.

<sup>38</sup> See, inter alia, the Views of the Human Rights Committee on the cases of *Purna Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 12.2; *El Hassy v. Libyan Arab Jamahiriya* (CCPR/C/91/D/1422/2005), para. 6.7; and *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3.

13.6 Lastly, the Committee notes the State party's argument that the complainant did not exhaust available domestic remedies, in accordance with article 7 (e) of the Optional Protocol, in that: (a) he did not seek asylum in the countries he travelled through; (b) he did not apply for asylum in Spain at the Beni Enzar border crossing; (c) he did not apply for a work visa for Spain; and (d) after entering Spain, he had access to effective remedies through which to challenge the administrative decision ordering his expulsion. The Committee notes that, in points (a), (b) and (c) above, the State party simply suggests that the author could have applied for asylum or a work visa before entering the State party's territory; such suggestions therefore cannot be considered effective remedies with respect to his expulsion. The Committee also notes that it can be gleaned from the case file that on 2 December 2014 no formal expulsion order against the author had been issued. Accordingly, the Committee considers that, in the context of the author's imminent expulsion on 2 December 2014, and in the absence of a formal expulsion order that could have been challenged by the author, the judicial remedies mentioned in point (d) of the State party's argument would have been worthless, as they were neither available nor effective. Consequently, the Committee considers that article 7 (e) of the Optional Protocol does not constitute a barrier to the admissibility of the present communication.

13.7 The Committee considers that, in accordance with article 7 (f) of the Optional Protocol, the author has sufficiently substantiated his complaints under articles 3, 20 and 37 of the Convention. The Committee therefore finds the complaint admissible and proceeds to consider it on the merits.

*Consideration of the merits*

14.1 The Committee has considered this communication in the light of all the information made available to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

14.2 The issue before the Committee is whether, in the circumstances of this case, the author's return to Morocco by the Spanish Civil Guard on 2 December 2014 violated his rights under the Convention. In particular, the author claimed that, by summarily deporting him to Morocco on 2 December 2014, without performing any form of identity check or assessment of his situation, the State party: (a) failed to provide the author with the special protection and assistance to which he was entitled as an unaccompanied minor (art. 20); (b) failed to respect the principle of non-refoulement and exposed the author to the risk of violence and cruel, inhuman and degrading treatment in Morocco (art. 37); and (c) failed to consider the best interests of the child (art. 3).

14.3 The Committee is of the view that the State's obligations to provide special protection and assistance to unaccompanied children, in accordance with article 20 of the Convention, apply even "with respect to those children who come under the State's jurisdiction when attempting to enter the country's territory".<sup>39</sup> Similarly, the Committee considers that "the positive aspect of these protection obligations also extends to requiring States to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border".<sup>40</sup> Accordingly, it is imperative and necessary that, in order to comply with its obligations under article 20 of the Convention and to respect the best interests of the child, the State conducts an initial assessment, prior to any removal or return, that includes the following stages: (a) assessment, as a matter of priority, of whether the person concerned is an unaccompanied minor, with, in the event of uncertainty, the individual being accorded the benefit of the doubt such that, if there is a possibility that the individual is a child, he or she is treated as such; (b) verification of the child's identity by means of an initial interview; and (c) assessment of the child's specific situation and particular vulnerabilities, if any.<sup>41</sup>

14.4 The Committee is also of the view that, in compliance with its obligations under article 37 of the Convention, in order to ensure that no child is subjected to torture or other

<sup>39</sup> General comment No. 6, para. 12.

<sup>40</sup> *Ibid.*, para. 13.

<sup>41</sup> *Ibid.*, para. 31.

cruel, inhuman or degrading treatment, the State should not return a child “to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child”.<sup>42</sup> The Committee therefore considers that, in accordance with article 37 of the Convention and the principle of non-refoulement, the State has an obligation to carry out a prior assessment of the risk, if any, of irreparable harm to the child and serious violations of his or her rights in the country to which he or she will be transferred or returned, taking into account the best interests of the child, including, for example, “the particularly serious consequences for children of the insufficient provision of food or health services”.<sup>43</sup> In particular, the Committee recalls that, in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to: (a) access the territory, regardless of the documentation they have or lack, and be referred to the authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards.<sup>44</sup>

14.5 In the present case, the Committee notes that on 2 December 2014: (a) the author arrived in Spain as an unaccompanied child deprived of his family environment;<sup>45</sup> (b) the author was left climbed up on one of the Melilla border fences for several hours, without receiving any form of assistance from the Spanish authorities; (c) as soon as he climbed down from the fence, he was arrested, handcuffed and returned directly to Morocco by the Spanish Civil Guard; and (d) in the period between his coming down the fence and being returned to Morocco, the author did not receive any legal assistance, was not offered the assistance of an interpreter to enable him to communicate properly, was not subjected to an initial assessment process to determine whether he was an unaccompanied child, was not given the benefit of the doubt and treated as a child, did not undergo an identity check or interview and was not asked about his specific personal circumstances and/or his particular vulnerabilities at that time.

14.6 The Committee also notes the State party’s allegation that the principle of non-refoulement does not apply in the present case because it only applies when the person comes from a territory where there is a risk of persecution. However, the Committee reiterates that the State party has an obligation not to return a child “to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child”.<sup>46</sup> The Committee also notes that, before returning the author to Morocco, the State party did not ascertain his identity, did not ask about his personal circumstances and did not conduct a prior assessment of the risk, if any, of persecution and/or irreparable harm in the country to which he was to be returned. The Committee considers that, given the violence faced by migrants in the Moroccan border area<sup>47</sup> and the ill-treatment to which the author was subjected, the failure to assess the risk of irreparable harm to the author prior to his deportation or to take into account his best interests constitutes a violation of articles 3 and 37 of the Convention.

14.7 The Committee considers that, in the light of the circumstances of the case, the fact that the author, as an unaccompanied child, did not undergo an identity check and assessment of his situation prior to his deportation and was not given an opportunity to challenge his potential deportation violates his rights under articles 3 and 20 of the Convention.

<sup>42</sup> Ibid., para. 27, and joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child, para. 46.

<sup>43</sup> General comment No. 6, para. 27.

<sup>44</sup> Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child, para. 17.

<sup>45</sup> General comment No. 6, para. 7.

<sup>46</sup> Ibid., para. 27.

<sup>47</sup> The Committee’s concluding observations on the combined third and fourth periodic reports of Morocco (CRC/C/MAR/CO/3-4) and the concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on the initial report of Morocco (CMW/C/MAR/CO/1).

14.8 Lastly, the Committee considers that the manner in which the author was deported, as an unaccompanied child deprived of his family environment and in a context of international migration, after having been detained and handcuffed and without having been heard, without receiving the assistance of a lawyer or interpreter and without regard to his needs, constitutes treatment prohibited under article 37 of the Convention.

14.9 The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts before it amount to a violation of articles 3, 20 and 37 of the Convention.

15. The State party should provide the author with adequate reparation, including financial compensation and rehabilitation for the harm suffered. The State party is also under an obligation to prevent similar violations from occurring in the future, in particular by revising Organic Act No. 4/2015 on safeguarding the security of citizens, which was adopted on 1 April 2015. The State party should moreover revise the tenth additional provision of that law, on the special regime applicable in Ceuta and Melilla, which would authorize its practice of indiscriminate automatic deportations at the border.<sup>48</sup>

16. The Committee recalls that, in becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Convention or its two substantive optional protocols.

17. Pursuant to article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within six months, information about the measures it has taken to give effect to the Committee's Views. The State party is also requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish the Committee's Views and to have them widely distributed.

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<sup>48</sup> CRC/C/ESP/CO/5-6.