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**Committee on Economic, Social and Cultural Rights****Communication No. 3/2014\*****Views adopted by the Committee at its fifty-eighth session (6 to 24 June 2016)**

<i>Submitted by:</i>	A.M.B. (represented by counsel, Cesare Romano and Verónica B.Y. Aragón, International Human Rights Clinic, Loyola Law School, Los Angeles, and Karina Sarmiento, Asylum Access Ecuador)
<i>Alleged victim:</i>	C.A.P.M. (minor son of the author)
<i>State party:</i>	Ecuador
<i>Date of communication:</i>	28 July 2014, transmitted to the State party on 22 October 2014
<i>Date of adoption of Views:</i>	20 June 2016
<i>Subject matter:</i>	Discrimination against a foreign minor in respect of participation in youth soccer tournaments
<i>Substantive issues:</i>	Exercise of Covenant rights without discrimination; right to education; right to take part in cultural life; special protection measures for children and adolescents
<i>Procedural issues:</i>	Competence <i>ratione temporis</i> of the Committee; exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	2, para. 2; 4; 10, para. 3; 13 and 15
<i>Articles of the Optional Protocol:</i>	3, para. 1 and (2) (b)

\* In accordance with article 5, para. 1, of the provisional rules of procedure under the Optional Protocol, Mr. Rodrigo Uprimny, member of the Committee, did not take part in the consideration of the communication.



## **Decision on admissibility**

1.1 The author of the communication is A.B.M., born on 2 February 1971. She is submitting the communication on behalf of her minor son C.A.P.M., born on 21 July 1998. Mother and son are Colombian nationals. The author claims that her son is the victim of violations by the State party of his rights under article 10, paragraph 3, and articles 13 and 15, read in conjunction with article 2, paragraph 2, and article 4, of the International Covenant on Economic, Social and Cultural Rights.<sup>1</sup> The author is represented by counsel.

1.2 On 22 October 2014, the Working Group on Communications, acting on behalf of the Committee, rejected the author's request for interim measures because the criteria for adopting such measures, as set out in article 5 of the Optional Protocol, had not been met.

1.3 In the present decision, the Committee first summarizes the information and the arguments submitted by the parties; it then considers the admissibility of the communication; and, lastly, it draws its conclusions.

### **A. Summary of the information and arguments submitted by the parties**

#### **The facts as submitted by the author**

2.1 The author, her husband and their two minor children lived in the municipality of Pitalito, department of Huila, Colombia. In 2002, to escape the violence of the internal armed conflict and seek protection, the family fled to the city of Coca, in the province of Orellana, Ecuador.

2.2 On 12 December 2009, the State party recognized the refugee status of the author's minor children and C.A.P.M. received a refugee card. In 2010, a daughter born in the State party obtained an identity card as a foreign resident of Ecuador.

2.3 The author says that from an early age her son C.A.P.M. has played soccer in his spare time, for pleasure and for his personal development. Soccer is his way of gaining acceptance in the community and is his main form of participation in its cultural life. Moreover, his ambition is to play at a competitive professional level in the future. He has represented his school, district and canton on various soccer teams and has won individual and team awards.

2.4 In 2011, C.A.P.M. was selected for the Orellana province under-14 team to take part in the Sixth National Youth Games, which were being organized by the Bolívar Sports Federation, a member of the National Sports Federation (FEDENADOR). However, he was not able to register for the tournament or play in it, as he had no identity card, which was required under the rules on participation in the soccer competition at the Games.<sup>2</sup> The author claims that the Orellana Sports Federation made no attempt to facilitate his registration, saying that they only processed the application and only the Ministry of Sport could actually register him.

2.5 In 2012, C.A.P.M. was selected to represent the Orellana Sports Federation at the Seventh National Youth Games, in Manabí. However, the Federation, which was

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<sup>1</sup> The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force for the State party on 5 May 2013.

<sup>2</sup> Ministry of Sport, Bolívar Sports Federation, Sixth National Youth Games, Bolívar 2011, Football Competition Rules. The rules state: "For the registration of individuals in the system, please attach a recent colour photograph, a full-colour copy of their identity card and a certified copy of their birth certificate; all documents must be legible."

responsible for entering information in the Ministry of Sport's information technology (IT) system, told the author and her son that they must produce a citizen identity card and a certified copy of his birth certificate or, if neither was available, a naturalization card. They were also told that the Federation could not register him without an order from the Ministry of Sport, as there was no reference in the regulations to adolescents with refugee status, and that this was a matter of national policy. The author adds that on 7 August 2012 she tried in person to persuade officials at the Orellana Sports Federation to register her son, but was told that the only people who could be registered were those who met the criteria applied by the Ministry of Sport's IT system. The author maintains that, on this second occasion, the two implied reasons for refusing to register her son were that he was a refugee and that he was not Ecuadorian or naturalized.

2.6 On 16 August 2012, the author applied to Orellana Juvenile Court for a court order against the Ministry of Sport to protect her son's constitutional rights. She alleged that a number of those rights had been violated, including the right to take part in cultural life, sport and leisure activities and the right to equality and non-discrimination, as well as a number of rights recognized in human rights treaties, including those recognized in article 10, paragraph 3, of the Covenant. She argued in her application that C.A.P.M. had not been able to take part in the Sixth or Seventh National Youth Games; that he had been discriminated against because he was a refugee and a foreigner; and that he had been asked to meet criteria set out in the competition rules — not in laws or the Constitution — that constituted a violation of his right to sport and leisure and ran contrary to the best interests of the child.

2.7 On 1 October 2012, Orellana Juvenile Court rejected the application for a protective order, ruling that there had been no violation of any of C.A.P.M.'s rights under the Constitution and that he had not been discriminated against. The court pointed out that, under article 10 of the Naturalization Act, article 34 of the Convention relating to the Status of Refugees, and article 61 of the Regulations on the Application of the Right to Asylum in Ecuador, C.A.P.M. met the criteria for applying for an open-ended residence permit, a naturalization card and Ecuadorian nationality, with which he would have met the registration requirements for the Seventh National Youth Games. However, his parents did not take the necessary steps to obtain an Ecuadorian identity or naturalization card, even though they had known about this requirement for a year. The author appealed against the court's decision to the Orellana Provincial Court of Justice.

2.8 On 19 November 2012, the Provincial Court declared the application for a protective order to be without merit, pointing out, *inter alia*, that: "The action or omission alleged to have violated the rights [...] was not the result of an action or omission on the part of the public authority that was the respondent in the case, but rather the result of a decision by officials of the Orellana Sports Federation (a private-law entity), [whose] names and functions are not even specified [...] there is no record in any decision of the refusal to carry out the registration in question, or to show that all administrative channels had been exhausted in accordance with article 161 of the Sports Act." The complaint against the Ministry of Sport was therefore inadmissible as the Ministry was not the proper party against which to bring this complaint. The judgment was declared final and sent by the Provincial Court to the Constitutional Court for its information.

2.9 On 28 May 2013, the Constitutional Court decided to review the Provincial Court's ruling, in accordance with articles 86, paragraph 5, and 436, paragraph 6, of the Constitution and article 25, paragraph 2, of the Organic Act on Jurisdictional Guarantees and Constitutional Oversight. The author was notified of this decision. At the time of submission of the communication to the Committee, the case was still pending before the Court.

2.10 The author claims that it was because her family could not afford to go through the formalities for naturalization that she applied for a 9-VI protection visa for C.A.P.M.; as a result, he ceased to have refugee status and acquired an Ecuadorian citizenship card as a foreign resident. Armed with this document, in October 2013 the author again went in person to the Orellana Sports Federation to ask for C.A.P.M. to be registered for the Eighth National Youth Games, due to be held in Esmeraldas province; she was accompanied by a lawyer from the Standing Committee for the Defence of Human Rights in Orellana, the mother of one of C.A.P.M.'s teammates and the Orellana Ombudsman. The author claims that the official whose job was to enter information into the Federation's IT system refused to register her son, stating that he could only register Ecuadorian or naturalized citizens. She adds that Federation officials told her that the refusal to register C.A.P.M. and the reason for applying the rules was "because they would be wasting resources on training foreigners who, once they had completed their training, would go off to compete for their home country". As at the date of submission of the communication to the Committee, C.A.P.M. had not been allowed to take part in any of the tournaments or competitions organized by the National Sports Federation or its provincial affiliates.

2.11 On 29 January 2014, the Standing Committee for the Defence of Human Rights in Orellana asked the president of the Orellana Sports Federation to provide information on the right of minors with refugee status or with a protection visa to participate in their category at the national games and other competitions in which the Federation was involved; if they were not entitled to participate, he was asked to explain why. As at the date of submission of the communication to the Committee, the Federation had not yet replied.

2.12 The author contends that her communication meets all the requirements for admissibility. As regards the requirement set out in article 3, paragraph 1, of the Optional Protocol, she claims that, at the time she submitted the communication to the Committee, her application for a protective order, dated 16 August 2012, was still pending a final decision of the Constitutional Court and that the remedy had been unreasonably prolonged, given the particular circumstances of the case. Although it was the Constitutional Court itself that had decided to review the decisions of the lower courts on 28 May 2013, and despite the fact that the Organic Act on Jurisdictional Guarantees and Constitutional Oversight establishes a time limit of 40 days from the Court's decision to carry out the review, the case is still pending. The author adds that there is no justification for the authorities' failure to act; that she has acted in a conscientious and timely fashion throughout the proceedings; that her son's case is not a complex one; and that the delay has already seriously affected the effectiveness of the measures requested, since she was seeking an appropriate and prompt solution that would have allowed her son to play in junior tournaments and competitions in 2013.

2.13 The author adds that the Committee is competent *ratione temporis* to consider the communication, as the material facts that gave rise to the violation of C.A.P.M.'s rights constitute permanent damage that was continuing at the time of submission of the communication to the Committee, since he was not allowed to participate in tournaments and competitions organized by the National Sports Federation or its provincial affiliates. The violation of his rights under the Covenant therefore continued after the entry into force of the Optional Protocol for the State party.

### **The complaint**

3.1 The author claims that the acts described above constitute a violation of the rights of her minor child, C.A.P.M., under article 10, paragraph 3, and articles 13 and 15, read in conjunction with articles 2 and 4, of the Covenant.

3.2 The arbitrary interference with C.A.P.M.'s right to take part in Ecuadorian cultural life as a result of the application of rules requiring him to show an Ecuadorian identity card

to participate in soccer tournaments and competitions organized by the National Sports Federation and its provincial affiliates is a violation of his rights under article 15, read in conjunction with article 2, paragraph 2, of the Covenant. In practice, this requirement constituted indirect discrimination on the basis of his migration status and nationality, which is corroborated by the State party's alleged decision, expressed by an official of the Orellana Sports Federation, not to "waste resources on training foreigners who would later go back to their home country". The author adds that the State party has given no reasonable justification for this restriction. The State party also neglected its duty to promote and guarantee the exercise of the right to take part in cultural life by failing to ensure that its legislation was compatible with its obligations under the Covenant and its own Constitution. This duty is particularly important in the case of children and adolescents.<sup>3</sup> C.A.P.M. has chosen freely to make playing competitive soccer his life's goal. Considering that soccer has been his main means of gaining acceptance in his community and is the cultural link he shares with other teenagers, the arbitrary refusal to allow him to take part in this cultural activity has led to severe psychological harm, in terms of frustration, sleeplessness, anxiety and near-constant brooding over and obsession with the subject, as well as to social marginalization.<sup>4</sup> Under article 15, paragraph 1 (a), of the Covenant, everyone has the right to "take part in cultural life", which includes such events as sports and games.<sup>5</sup> Moreover, the right to play soccer competitively is also protected by article 15 of the Covenant. The author refers to general comment No. 21 and maintains that participation and accessibility are essential components of the right to take part in cultural life.<sup>6</sup>

3.3 The author stresses that the initial reason for refusing to register C.A.P.M. was his refugee status, i.e. his migration status. Later, after he had obtained an identity card as a foreign resident of Ecuador, his registration was again refused, this time on the grounds that he did not have Ecuadorian nationality, which constitutes discrimination on grounds of nationality. While C.A.P.M. is not prohibited by law from training for and playing in competitive soccer matches, the requirement imposed by the National Sports Federation and its affiliates restricts his ability to take advantage of effective and concrete opportunities to fully enjoy cultural activities.

3.4 As regards the obligations set out in article 2, paragraph 2, of the Covenant, the right to take part in cultural life cannot be restricted on the basis of an individual's refugee status,<sup>7</sup> especially when the person concerned is a child.<sup>8</sup> Likewise, this right cannot be

<sup>3</sup> See article 31 of the Convention on the Rights of the Child (the right to rest and leisure and to participate in recreational activities, cultural life and the arts) and Committee on the Rights of the Child, general comment No. 17 (2013): Right of the child to rest, leisure, play, recreational activities, cultural life and the arts (article 31), para. 11.

<sup>4</sup> The author submits a psychological report dated 2 July 2014.

<sup>5</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 21: Right of everyone to take part in cultural life (article 15, paragraph 1 (a), of the Covenant), paras. 11 and 13. The author stresses that, according to the United Nations Children's Fund (UNICEF), Access to and participation in sport is a human right and essential for individuals to lead healthy and fulfilling lives. Sport — from play and physical activity to organized competitive sports — has an important role in all societies. (UNICEF, *Sport for development and peace: Towards achieving the Millennium Development Goals: report of the United Nations Inter-Agency Task Force on Sport for Development and Peace*, 2003, pp. 1-2.).

<sup>6</sup> General comment No. 21, paras. 15 (a) and 16 (b).

<sup>7</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 20: Non-discrimination in economic, social and cultural rights (article 2, paragraph 2 of the Covenant), paras. 10 and 30; and general comment No. 21, para. 55 (a) and (d).

<sup>8</sup> The author points out that the Committee on the Rights of the Child has also determined that children should not be denied access to cultural activities on the basis of their refugee status, and that "particular attention" should be paid to refugee children's right to take part in cultural life, as cultural

denied or restricted for reasons of nationality, unless any such restriction is reasonable and provided for by law. As participation in junior soccer tournaments and competitions is an integral aspect of the right to take part in this cultural activity, refugee or migrant children or adolescents — who need priority attention — should not be denied the chance to fully exercise their cultural rights on account of their migration status or nationality.

3.5 Preventing C.A.P.M. from registering in tournaments and competitions organized by the National Sports Federation and its provincial affiliates on account of his migration status and nationality also constitutes discriminatory treatment and a violation of the right to education, as established in article 13, read in conjunction with article 2, paragraph 2, of the Covenant. The right of every person to take part in cultural life is intrinsically linked to the right to education.<sup>9</sup> The author contends that sports training is an educational and cultural activity. Junior soccer tournaments and competitions are therefore part of an educational programme, as set out in article 13 of the Covenant.<sup>10</sup> Accordingly, the soccer training activities organized by the State party through the National Sports Federation and its affiliates contribute to the development of a cultural identity and the exercise of the right to education. It is not just a matter of freedom to practise a sport, but of having access to an educational process that allows individuals to develop the abilities and skills they need to become a top-class sportsperson. As access to educational programmes cannot be denied on the basis of refugee status or nationality, the State party must ensure that access to education is fair. The State party has an obligation to organize its programmes carefully and to rectify any instances of de facto discrimination, so that educational institutions and programmes are accessible to all, without discrimination.<sup>11</sup>

3.6 By refusing to allow C.A.P.M. to take part in junior soccer tournaments organized by the National Sports Federation and its affiliates, the State party also failed in its obligation under article 10, paragraph 3 of the Covenant to take special measures of protection for children and young persons. The measures in question did not take the best interests of the child into account, and as a result C.A.P.M. missed out on several opportunities to compete at a formative stage of his adolescence, when he was at a critical point in the development of his potential to become a top-class soccer player. This situation also affected his relationships with his teammates, who did get the chance to compete, and with his family.

3.7 The restrictions to which C.A.P.M. was subjected are incompatible with article 4 of the Covenant. Moreover, the State party's own legal order, including the Constitution and the applicable international treaties, expressly prohibits the possibility of limiting the exercise of rights by foreigners, for the reasons given in the communication.

3.8 The author calls on the Committee to recommend that the State party grant full reparation to C.A.P.M., including compensation, satisfaction and a guarantee of non-repetition.

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activities can play a significant therapeutic and rehabilitative role in helping refugee children who have experienced trauma and separation (Committee on the Rights of the Child, general comment No. 17, paras. 16, 53 and 57; General Assembly resolution 58/5, "Sport as a means to promote education, health, development and peace", para. 1 (a); and UNICEF, *Sport, Recreation and Play*, UNICEF, New York, 2004, pp. 1-2).

<sup>9</sup> See general comment No. 21, paras. 2, 26 and 35.

<sup>10</sup> See general comment No. 13: The right to education (article 13), paras. 4-5, and Committee on the Rights of the Child, general comment No. 1: The aims of education, para. 9.

<sup>11</sup> See general comment No. 13, paras. 6, 31 and 37; and general comment No. 1 of the Committee on the Rights of the Child, para. 10.

### State party's observations on admissibility and the merits

4.1 On 21 April 2015, the State party submitted its observations on the admissibility and the merits of the communication, and requested that it be declared inadmissible on the grounds that the events that are the subject of the communication took place prior to the entry into force of the Optional Protocol for the State party; that domestic remedies had not been exhausted; and that the facts as submitted do not reveal any violation of Covenant rights, pursuant to article 3, paragraph 2 (b), article 3, paragraph 1, and article 3, paragraph 2 (e), respectively, of the Optional Protocol. Should the Committee consider the communication to be admissible, the State party maintains that there was no violation of C.A.P.M.'s rights under articles 10, 13 and 15, read in conjunction with articles 2 and 4, of the Covenant.

4.2 The author had ample opportunity to be heard in the proceedings related to the application for a protective order. This application was rejected on appeal by the Provincial Court in application of articles 9 and 41 of the Organic Act on Jurisdictional Guarantees and Constitutional Oversight, and article 161 of the Sports Act, because the subject was not a constitutional matter but a matter for the ordinary courts, *ratione materiae*, and because the author's allegations were unsubstantiated.

4.3 The alleged violations of the Covenant are based on events that took place in 2011 and 2012, when the Optional Protocol was not in force for Ecuador. The communication should therefore be declared inadmissible under article 3, paragraph 2 (b) of the Optional Protocol.

4.4 The author did not exhaust all domestic remedies. When she was unable to register C.A.P.M. for the soccer competitions at the national games, she submitted an application for a court order against the Ministry of Sport for the protection of constitutional rights. However, for such an application to be submitted, certain conditions must be met to enable any possible violation of a constitutional right to be verified; no application to the courts for a constitutional remedy can be made without first going through administrative channels or the ordinary courts. Under article 88 of the Constitution, such a remedy serves purely to protect against violations of the rights established in the Constitution. Additionally, article 39 of the Organic Act on Jurisdictional Guarantees and Constitutional Oversight establishes that an application for a protective order is appropriate in cases where no other constitutional remedy affords protection;<sup>12</sup> and article 41 of the Act sets out the legal basis for applications for a protective order and the conditions under which a party may be named as a respondent in the proceedings.

4.5 According to the jurisprudence of the Constitutional Court: "An application for a protective order is appropriate when the proceedings reveal a violation of constitutional rights arising from an act of a non-judicial public official, a violation that must be recognized as such by a judge of the Constitutional Court in a judgment. [...] An application for a protective order is not appropriate when the matter concerns mere aspects of legality, for which there exist ordinary judicial channels, particularly administrative ones, through which to claim one's rights."<sup>13</sup> In confirming this legal opinion, the Constitutional Court pointed out that "not all violations of the legal order necessarily have a place in the constitutional discourse, since suitable and effective channels for dealing with disputes over

<sup>12</sup> "Article 39. Purpose: The purpose of an application for a protective order is the direct and effective protection of the rights recognized in the Constitution and international human rights treaties, where they are not protected by applications for habeas corpus, access to public information, habeas data, non-compliance, special protection and special protection from decisions under the indigenous justice system."

<sup>13</sup> Judgment No. 001-010-JPO-CC of the Constitutional Court for the Transitional Period, 22 December 2010, case No. 999-09-JP.

legality are available within the ordinary courts”<sup>14</sup> and that an application for a protective order “does not constitute a mechanism for bypassing or replacing the ordinary judicial bodies”.<sup>15</sup> The State party maintains that the author did not use the appropriate remedy in this case, since, as pointed out in the Provincial Court’s ruling, she did not exhaust the relevant administrative remedy established in article 161 of the Sports Act.<sup>16</sup> In this respect, the State party notes that the author could have submitted a complaint or claim through administrative channels, which would ultimately have been resolved by the Ministry of Sport. What is more, the judicial system allows administrative acts to be challenged before the administrative courts, in accordance with the Organic Code of the Judiciary and the Administrative Disputes Act. The State party states that the author has also failed to exhaust the judicial proceedings she initiated in the constitutional channel, as a decision on the review of the judgment begun by the Constitutional Court is still pending.

4.6 The State party contends that the communication should be declared inadmissible under article 3, paragraph 2 (e) of the Optional Protocol, as there is no clear proof of how the acts that are the subject of the communication gave rise to the alleged violations. The evidence on which the communication before the Committee is based is weak, as it relies on statements allegedly made by officials of Orellana Sports Federation that have not been corroborated by any impartial witness and that cannot be objectively verified. The State party therefore rejects the author’s representation of the facts because it has not been sufficiently corroborated and stresses that the national courts which heard the author’s complaint concluded that there had been no violation of rights and that the claims in her complaint about the acts that had given rise to the alleged violation of C.A.P.M.’s rights had not been substantiated with verifiable evidence.

4.7 As for the merits of the communication, the State party maintains that it does not reveal any violation of the Covenant. In both its laws and its policies, the State party has applied standards in accordance with its obligations under the Covenant, to all people under its jurisdiction without discrimination, whether they are nationals or foreigners.

4.8 The communication does not reveal a violation of articles 10, 13 and 15, read in conjunction with articles 2 and 4, of the Covenant. The State party describes its legal framework, public policies and programmes related to the rights of children and adolescents, the right to education and the right to take part in cultural life, including sports training, physical education and recreational activities, as well as on access and attendance by foreign children and adolescents, regardless of their migration status, in Ecuadorian schools at the preschool, primary and secondary level. The State party asserts that the rights of the author’s son were not violated; that, as a minor, he received special protection from the authorities; that his right to equal treatment and free access to sporting activities was guaranteed; and that he benefited from the Ecuadorian education system and studied in a State school in the city of Orellana.

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

5.1 On 31 August 2015, the author replied to the State party’s observations on the admissibility and merits of the communication.

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<sup>14</sup> Judgment No. O16-13-SEP-CC of the Constitutional Court, 16 May 2013, case No. 1000-12-EP.

<sup>15</sup> Ibid.

<sup>16</sup> “Article 161. Appeals: The decisions of an organization that is part of the Ecuadorian sports system may be appealed before the sports organization immediately above it in the hierarchy in its field of competence, with the relevant Ministry as the ultimate arbiter, provided that the latter’s decision is not contrary to the international standards laid down in this area by the organizations that oversee the highest levels of performance and professionalism, without prejudice to the remedies and legal actions provided for in law and in international agreements.”



5.2 The author informs the Committee that, as it had been impossible for C.A.P.M. to take part in sports tournaments organized by the National Sports Federation and its provincial affiliates since 2011, he had been forced to leave Ecuador, leave his family behind and return to Barranquilla, Colombia, to fulfil his dream and ambition of becoming a professional soccer player.

5.3 With regard to the Committee's competence *ratione temporis*, the author claims that C.A.P.M. has been the victim of a continuing violation, which continued after the Optional Protocol entered into force for the State party. In 2011, her son was prohibited from registering for the national games for the first time because he did not have an Ecuadorian identity card. This prohibition was maintained the following year and was still in place when the author submitted her comments to the Committee. In October 2013, for example, his application to register for the Eighth National Youth Games was also rejected. Therefore, even though the violation of C.A.P.M.'s rights began in 2011, inasmuch as the registration requirements for soccer tournaments organized by the National Sports Federation and its provincial affiliates remain unchanged, the violation must be considered to have continued after 5 May 2013, the date on which the Optional Protocol entered into force for the State party.

5.4 The author reiterates that her communication meets the requirements for admissibility established in article 3, paragraph 1, of the Optional Protocol. She claims that the application for a protective order was the correct way to protect C.A.P.M.'s constitutional rights; that article 88 of the Constitution does not include the requirement set out in the Organic Act on Jurisdictional Guarantees and Constitutional Oversight for submitting an application for protection, i.e. that there should be no other suitable and effective judicial defence mechanism available to protect the right that has been violated; and that the Constitutional Court had ruled in an earlier case that article 88 of the Constitution establishes that an application for protection is not a residual or subsidiary remedy and that, in any case, the Constitution must take precedence.<sup>17</sup> Moreover, an administrative court would not have provided an effective remedy in the case of C.A.P.M., as it would have taken years to reach a decision.<sup>18</sup> In the circumstances of the present case, particularly the urgent need to find a quick remedy, the application for protection was the most suitable remedy to safeguard C.A.P.M.'s rights.

5.5 The author adds that the application for protection was dismissed by the judicial authorities for procedural reasons, without regard to the merits of the case, and that the proceedings ended with the judgment of the Provincial Court of 19 November 2012. After that judgment had been declared final on 28 May 2013, the Constitutional Court decided to review it, but the review procedure is not a regular mechanism and is not an ordinary procedural safeguard. The purpose of the Constitutional Court's review procedure is to declare jurisprudence to be binding, and it is the Court itself that decides which cases to review, so it is not a suitable mechanism for seeking an effective remedy and adequate reparation and is not one that the author could herself have used. If the Committee finds that the review procedure is an effective and appropriate remedy, the author contends, as a subsidiary argument, that the procedure has been unduly prolonged, and she reiterates the allegations made in the initial communication.

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<sup>17</sup> See resolution No. 172 of the Constitutional Court, "Admission of applications for protection", Official Gazette, No. 743, First Supplement, 11 July 2012.

<sup>18</sup> Declaration by the president of the Council of the Judiciary of 9 July 2013, in which he notes that the administrative courts are "one of the most neglected areas of the justice system. What is unprecedented and incomprehensible is that the administrative disputes apparatus is being dismantled to minimize the importance of public law and discredit any relationship with the State, including in judicial bodies where the proceedings had become interminable". Council of the Judiciary, "Council of the Judiciary sets up administrative disputes unit", [www.funcionjudicial-pichincha.gob.ec/](http://www.funcionjudicial-pichincha.gob.ec/).

5.6 The author points out that the State party has not addressed the merits of the communication, but has merely described the current constitutional and legal framework covering the right to education and the right to take part in cultural life. Moreover, the facts on which her complaint was based were not questioned by the State party's own judicial authorities when they considered her application for a protective order at first and second instance, and the State party's questioning of the facts as submitted by the author therefore contradicts the actions of its own authorities. She reiterates that the Federation's refusal to register C.A.P.M. was a discriminatory and arbitrary decision. The rules on registration of participants in soccer competitions required documents that were impossible for a refugee to obtain. In the lower court judgment, the Juvenile Court recognized that this was an obstacle and concluded that C.A.P.M.'s parents had not taken the necessary steps to obtain an identity or naturalization card for their son. Moreover, the Provincial Court that heard the appeal did not base its decision on the lack of evidence or question the facts either, focusing instead on the argument that the respondent was not the proper party against which to bring this complaint.

5.7 The author repeats her allegations in respect of articles 10, 13 and 15, read in conjunction with articles 2, paragraph 2, and 4, of the Covenant. With regard to her allegations concerning article 13, read in conjunction with articles 2, paragraph 2, and 4, of the Covenant, she stresses that she is not claiming that C.A.P.M.'s rights have been violated because of any lack of access to a school education, but because he was not able to participate in a formative educational activity, namely, the sixth and seventh national games. The author highlights the role of sports as an educational tool, and stresses that sport and physical education are a fundamental right and an essential part of education throughout school life.<sup>19</sup> In the present case, to prevent C.A.P.M. in a discriminatory manner from enjoying his right to take part in a competitive sport as an educational experience in itself was to deprive him of all the related educational benefits, thereby affecting his psychological and emotional well-being.

5.8 With regard to article 15, read in conjunction with articles 2, paragraph 2, and 4, of the Covenant, the author argues that the communication does not contest the State party's general legal framework regarding the right to take part in cultural life, but the rules on registration in soccer competitions at the national games and the actions of the authorities. She adds that the State party organizes national soccer competitions for minors and that participation and team selection should be decided solely on the basis of the players' merits. Participation cannot be refused for reasons of nationality, refugee status or migration status. Demanding an identity card for player registration constitutes indirect discrimination, since it cannot be obtained by anyone who was not born in Ecuador or who has not acquired Ecuadorian nationality by naturalization. In cases like that of C.A.P.M., refugee identity documents are not considered as identity cards. Moreover, both the Juvenile Court and the Provincial Court implicitly recognized in their judgments that refugees could not possibly meet the requirements unless they obtained an identity card or were naturalized. Later, C.A.P.M. decided to forgo his refugee status to apply for a 9-VI protection visa, and therefore received an identity card as a foreign resident. However, officials of the Orellana Sports Federation still refused to register him for the eighth national games on the grounds that he was not an Ecuadorian citizen.

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<sup>19</sup> See, *inter alia*, article 31 of the Convention on the Rights of the Child; General Assembly resolutions S-27/2 (10 May 2002), entitled "A world fit for children"; 58/5 (3 November 2003); 59/10 (27 October 2004); and 60/9 (3 November 2005), entitled "Sport as a means to promote education, health, development and peace"; Principle 7 of the Declaration on the Rights of the Child; United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference, Seventh Session, Paris, 1952; and articles 1 and 2 of the International Charter for Physical Education, Physical Activity and Sport.

### Additional information from the parties

6.1 On 21 January 2016, the State party submitted some additional comments to the Committee, repeating that the communication should be declared inadmissible on account of the Committee's lack of competence *ratione temporis* and the failure to exhaust domestic remedies.

6.2 The State party repeats its observation that the events that gave rise to the allegations of violations took place in 2011 and 2012, i.e. before the Optional Protocol entered into force for Ecuador, and that, accordingly, the communication was inadmissible under article 3, paragraph 2 (b) of the Optional Protocol. After referring to article 28 of the 1969 Vienna Convention on the Law of Treaties, it maintains that the treaty should be applied to "acts occurring in the future or pending resolution", and that these circumstances do not apply in the present case.

6.3 Moreover, the communication does not meet the admissibility requirement established in article 3, paragraph 1, of the Optional Protocol. The State party reiterates that the author should have submitted a complaint through the administrative justice system, the mechanism provided for by law that would have offered a suitable and effective remedy to protect the rights of C.A.P.M. After the alleged rejection of her application for registration by the Provincial Sports Federations, the author should have filed an appeal with the National Sports Federation, in accordance with article 161 of the Sports Act and article 100 of its implementing regulations. If she thought the decision of the National Sports Federation broke administrative rules and if she had brought the facts to the attention of the Ministry of Sport, the latter could have carried out an administrative inquiry under article 160 of the Sports Act. Also, under article 172 of the Legal and Administrative Rules governing the Executive Branch, the author could have filed an administrative complaint with the Ministry of Sport requesting an end to the action or conduct that allegedly violated C.A.P.M.'s rights. The decision on such a complaint could have been appealed before the highest authorities of the Ministry. If she was not satisfied with the Ministry's decision, the author could have submitted an administrative appeal before a judicial authority, which would have been heard by the Administrative Court where she lives, and the case could have ended in an appeal in cassation to the highest court of ordinary jurisdiction, the National Court of Justice. The State party argues that the purpose of the administrative remedy is to challenge administrative decisions or acts that harm or fail to recognize a subjective right.

6.4 As regards the merits of the communication, the State party repeats that the author's claims are not supported by evidence of the acts that purportedly gave rise to the alleged violations. The State party repeats its comments on article 13 of the Covenant and describes the rules that recognize the relationship between the right to education and the practice of sports. It maintains that it did not violate C.A.P.M.'s right to education and that he did not suffer discrimination as a result of the requirements for taking part in the national games.

6.5 The requirement to show an identity card, as established in the rules adopted by the sports federations, does not violate any right, as the purpose of an identity card is to prove a person's identity and the bearer's personal details. In the case of sports tournaments, this document makes it possible to check that participants meet certain criteria, such as being in a certain age group. Moreover, C.A.P.M. met the requirements for obtaining Ecuadorian nationality, which would have allowed him to get the necessary identity document. And in fact in 2013 he did obtain an Ecuadorian citizenship card as a foreign resident. What is more, the communication itself points out that C.A.P.M. represented his school, district and even Francisco de Orellana canton at various tournaments and sports competitions.

6.6 Furthermore, C.A.P.M.'s right to take part in cultural life was not violated. The State party has not interfered in his right to take part in cultural life through sports activities. As pointed out in the Juvenile Court's judgment, the author was aware of the registration requirements a year before she submitted her application for a protective order and did nothing to get her son an identity card. It adds that the requirement for producing a card applied to all children taking part in the sports championship, whether they were Ecuadorian nationals or not. Moreover, the author has produced no document to back up her claim that in 2013 the National Sports Federation prevented her son from taking part even though he had an identity card. Accordingly, the State party rejects and denies the author's allegations, for which there is no evidence. The State party provides a description of the policies and programmes of the Ministry of Sport that are designed to support and promote sport.

6.7 The State party maintains that it has demonstrated that it has caused no harm of any kind to the author or her son C.A.P.M. that might entail its international responsibility. On the contrary, it is clear from the information supplied by the author herself in her communication that C.A.P.M. took part in various sports activities at the school, district and provincial level. It is also clear that he voluntarily chose to leave the State party to pursue his ambition of becoming a top sportsman in the city of Barranquilla, Colombia.

6.8 On 19 February and 7 March 2016, the author contacted the Committee to repeat her previous arguments. She added that the State party's additional comments of 21 January 2016 offered no new information, but merely repeated earlier comments that she had already refuted. Furthermore, the submission of these comments created an unnecessary delay in the communication.

6.9 On 20 April 2016, the State party submitted additional information to the Committee and reiterated that the author had not shown that her son, C.A.P.M., had been the victim of a violation of his rights under the Covenant. According to a certificate issued by the Ministry of Sport on 3 February 2016, C.A.P.M. was not registered in the database of the Orellana Sports Federation and therefore could not participate in the national games.

6.10 According to an opinion issued by the Ministry of Sport on 27 January 2016, the Fundamental Charter for Sports Games, adopted on 25 February 2012, and the General Guidelines for National Games provide that such games are organized for the purpose of identifying talented athletes in each province, who can then go on to play on the national teams representing the State party in international events. It adds that, in accordance with the Olympic Charter of the International Olympic Committee, any competitor in the Olympic Games must be a national of the country of the National Olympic Committee which is entering such competitor. It is therefore necessary for the athletes who participate in these games to be able to represent the State party subsequently, which means that they must be of Ecuadorian nationality.

6.11 The State party informed the Committee that C.A.P.M. had left its territory on 26 January 2013 and that he is currently residing in Barranquilla (Colombia), where he is a member of a soccer club.

6.12 On 10 May 2016, the author submitted additional comments, maintaining that the additional comments submitted by the State party on 21 January and 20 April 2016 did not present any new information; they merely reiterated comments that had been duly refuted by the author, and they were untimely. In its last correspondence, the State party submitted documentation that had been in its possession and could have been submitted at an earlier date, at the time that it submitted its comments on the admissibility and the merits.

6.13 With regard to the certificate issued by the Ministry of Sport on 3 February 2016, the author claims that C.A.P.M. was part of the under-14 team selected to represent Orellana province at the Sixth National Games and that the communication concerns his

inability to participate in those games and in the 2012 and 2013 games precisely because he was denied registration in the database of the Orellana Sports Federation, and so obviously his name does not appear in the Federation's records. In addition, the certificate is ambiguous because it cannot be determined whether it refers to a particular year or to all the years in which her son was unable to participate in the national games. Ultimately, the author requested the Committee not to take this documentation into account.

6.14 The Fundamental Charter for National Games and the General Guidelines for Sports Games of 25 February 2012 do not apply retroactively, and they therefore cannot apply to the Sixth National Games, which were held in 2011. Furthermore, in relation to the national games in 2012 and 2013, article 1 of the Fundamental Charter states that competition "is the most effective means of promoting Olympic precepts [and of] developing social, intellectual, artistic and cultural values in Ecuadorian children and youths and the opportunity to excel through the demonstration of their full physical, technical and mental potential". Hence, this article only mentions the importance of Olympic precepts; it does not say that the goal of the national games is to train top-class athletes to participate in the Olympic Games.

## **B. Committee's consideration of admissibility**

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 9 of its provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (E/C.12/49/3), whether the case is admissible pursuant to the Optional Protocol. The Committee will consider a communication unless it fails to meet the admissibility criteria established in the Optional Protocol.

7.2 In the light of all the documentation made available to it by the parties under article 8, paragraph 1, of the Optional Protocol, the Committee notes that the same matter has not been and is not being examined under another procedure of international investigation or settlement. Consequently, the Committee finds that there is no obstacle to the admissibility of the communication under article 3, paragraph 2 (c), of the Optional Protocol.

7.3 The Committee takes note of the State party's argument that the communication is inadmissible because the events giving rise to the alleged violations took place in 2011 and 2012, before the Optional Protocol entered into force for the State party. The Committee also takes note of the author's claim that the violations of the rights of her son C.A.P.M. continued after the entry into force of the Optional Protocol, as the rules on registering for the soccer competition at the National Youth Games organized by the National Sports Federation and its provincial affiliates were still in force. Likewise, the author claims that in October 2013, i.e. after the entry into force of the Optional Protocol for the State party, her application for registration at the national games was rejected for the third time for the same reasons, though the State party rejects this claim for lack of evidence.

7.4 Under article 3, paragraph 2 (b), of the Optional Protocol, the Committee may not consider alleged violations of the Covenant that occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those alleged violations continued after the entry into force of the Optional Protocol. In the present case, the Committee notes that some of the acts that gave rise to the violations alleged by the author, including the judgments of the Juvenile Court and the Provincial Court, took place before 5 May 2013, the date of entry into force of the Protocol for the State party. However, subsequent to the entry into force of the Optional Protocol, the legal obstacles to C.A.P.M.'s participation in the tournaments continued to have effect, and in January 2014 this led the Standing Committee for the Defence of Human Rights in Orellana to ask the president of the Orellana Sports Federation to comment on the right of minors with refugee status or with a

protection visa to participate in the national games and other competitions in which the Federation was involved. The Committee also notes that the Provincial Court's judgment is pending review by the Constitutional Court. Whatever the Court's decision may be, the review constitutes an event that post-dates the entry into force of the Optional Protocol for the State party. In this connection, it can be gathered from the information in the case file that its decision will not necessarily be of a purely procedural nature. Therefore, the Committee is not precluded under article 3, paragraph 2 (b), of the Optional Protocol from considering the present communication.

7.5 The Committee takes note of the State party's argument that the author did not exhaust all available domestic remedies, as she should have submitted a complaint or claim through administrative channels and possibly a complaint to an administrative court, in accordance with the Sports Act, the Organic Code of the Judiciary, the Administrative Disputes Act and the Legal and Administrative Rules governing the Executive Branch; and that the Constitutional Court has noted on several occasions that an application for a protective order does not preclude the ordinary judicial bodies from considering matters concerned purely with legality (see para. 4.5 above). The Committee also takes note of the author's allegations about the slowness of administrative and administrative dispute-settlement procedures and her claim that, given the circumstances in the case of C.A.P.M. and the urgent need to protect his rights, an application for a protective order was the most suitable remedy. The author bases her argument on a general statement by the president of the Council of the Judiciary regarding the delays in administrative court proceedings.

7.6 The Committee notes that the author's application for a protective order was rejected by the Provincial Court, partly because there was no record to show that administrative remedies had been exhausted in accordance with article 161 of the Sports Act. In the present case, it is not for the Committee to determine whether the procedural requirements established in the Organic Act on Jurisdictional Guarantees and Constitutional Oversight and in the relevant jurisprudence of the Constitutional Court are in line with the State party's Constitution, but to determine whether the author exhausted all available and effective domestic remedies. The Committee notes that the author did not file a complaint in the administrative courts, which would have allowed the Committee to evaluate, in the circumstances of the case, whether an eventual undue delay by the authorities in resolving the matter would have left C.A.P.M. without protection and rendered the remedy ineffective in practice. The Committee emphasizes the particular diligence that States parties should exercise in processing and resolving domestic cases seeking the protection of rights recognized in the Covenant. At the same time, the Committee considers that the mere perception that domestic remedies are not effective is not sufficient to exempt the author of a communication from the requirement to try them. The Committee therefore finds that the present communication does not meet the admissibility criterion established in article 3, paragraph 1, of the Optional Protocol.

## **C. Conclusion**

8. Taking into consideration all the information provided, the Committee, acting pursuant to article 9, paragraph 1, of the Optional Protocol to the Covenant, is of the view that the communication is inadmissible. This decision is without prejudice to any decision in favour of C.A.P.M. that the Constitutional Court might take in the course of its *ex officio* review of the Provincial Court judgment of 19 November 2012.

9. The Committee on Economic, Social and Cultural Rights therefore decides:
- (a) That the communication is inadmissible under article 3, paragraph 1, of the Optional Protocol; and
  - (b) That this decision shall be communicated to the State party and to the author of the communication.
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