



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 communications No. 114/2020, No. 116/2020, No. 117/2020 and No. 118/2020*, **

<i>Communications submitted by:</i>	A.B.A. and F.Z.A. (No. 114/2020) (represented by counsel, Francisco Morenilla Belizón); F.E.M. and S.E.M. (No. 116/2020) (represented by counsel, Francisco Morenilla Belizón); S.E.Y. and M.E.Y. (No. 117/2020) (represented by counsel, Francisco Solans Puyuelo); and N.L., R.A. and M.A.A. (No. 118/2020) (represented by counsel, Andrés Ceballos Cabrillo)
<i>Alleged victims:</i>	A.B.A. and F.Z.A. (No. 114/2020); F.E.M. and S.E.M. (No. 116/2020); S.E.Y. and M.E.Y. (No. 117/2020); and R.A. and M.A.A. (No. 118/2020)
<i>State party:</i>	Spain
<i>Dates of communications:</i>	27 February 2020 (No. 114/2020); 14 March 2020 (No. 116/2020); 23 April 2020 (No. 117/2020); and 2 May 2020 (No. 118/2020) (initial submissions)
<i>Date of adoption of Views:</i>	12 September 2022
<i>Subject matter:</i>	Right to education of Moroccan children born and raised in Spain
<i>Procedural issue:</i>	Failure to exhaust domestic remedies
<i>Substantive issues:</i>	Discrimination; best interests of the child; education
<i>Articles of the Convention:</i>	2, 3, 28 and 29
<i>Articles of the Optional Protocol:</i>	6 and 7 (c), (e) and (f)

* Adopted by the Committee at its ninety-first session (29 August–23 September 2022).

** The following members of the Committee participated in the consideration of the communication: Suzanne Aho, Aïssatou Alassane Moulaye, Rinchen Chopel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.



1.1 The authors of the communications are A.B.A. and F.Z.A. (No. 114/2020), brother and sister and nationals of Morocco who were born in Melilla, Spain, on 11 November 2014 and 11 October 2015, respectively; F.E.M. and S.E.M. (No. 116/2020), sisters and nationals of Morocco born in Melilla on 20 July 2004 and 29 October 2006, respectively; S.E.Y. and M.E.Y. (No. 117/2020), twin sisters and nationals of Morocco born in Melilla on 19 July 2010; and N.L. (No. 118/2020), a national of Morocco born on 3 February 1982, who is submitting the communication on behalf of her children R.A. and M.A.A., nationals of Morocco born in Melilla on 8 December 2009 and 26 January 2013, respectively. The authors claim that the State party has violated their rights under articles 2, 3 and 28 of the Convention. The author of communication No. 118/2020 also claims a violation of article 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 Pursuant to article 6 of the Optional Protocol, on 10 March 2020 (No. 114/2020), 20 March 2020 (No. 116/2020), 27 April 2020 (No. 117/2020) and 7 May 2020 (No. 118/2020), the working group on communications, acting on behalf of the Committee, requested the State party to adopt interim measures to allow the authors immediate access to the public education system in Melilla while their cases were pending before the Committee. The Committee reiterated its requests for interim measures in respect of communications No. 114/2020 and No. 116/2020 on 22 April 2020 and in respect of all the communications on 23 September 2020.

Facts as submitted by the authors

Communication No. 114/2020

2.1 On 13 May 2019, the mother of A.B.A. and F.Z.A. applied for her children to be enrolled in school, using the regular procedure established under the domestic laws of the State party. She enclosed with the application the certificates of their birth in Melilla, their family book and copies of their passports. On 21 November 2019, after the school year had begun without their having received a response from the authorities, the authors requested that the courts order the children's enrolment,¹ but they received no response to their request. On 19 December 2019, they petitioned the administrative courts for an emergency provisional remedy ordering their enrolment. Administrative Court No. 3 rejected this request for a provisional remedy on 10 February 2020.

Communication No. 116/2020

2.2 On 13 May 2019, the mother of F.E.M. and S.E.M. applied for her daughters to be enrolled in school, using the regular procedure established under the domestic laws of the State party. She enclosed with the application the certificates of their birth in Melilla, their family book, copies of their passports and copies of requests for the issuance of their health cards. On 29 October 2019, after the school year had begun without their having received a response from the authorities, the authors requested that the courts order the children's enrolment, but they received no response to their request. On 19 December 2019, they petitioned the administrative courts for an emergency provisional remedy ordering their enrolment. Administrative Court No. 2 rejected this request for a provisional remedy on 13 February 2020 and rejected an appeal lodged against that decision on 18 February 2020.

Communication No. 117/2020

2.3 S.E.Y. and M.E.Y. were attending the public school in whose catchment area they resided during the 2019/20 school year. However, on an unspecified date, they were expelled on the ground that they did not possess health cards. On 15 May 2019, the girls' mother applied for them to be enrolled in school, using the regular procedure established under the domestic laws of the State party. With the application, she enclosed the certificates of their birth in Melilla, copies of their passports, copies of requests for the issuance of their health cards and a notarial act in which a Spanish citizen declared that she had been living with the

¹ Pursuant to article 29 (2) of Act No. 29/1998 of 13 July on the Administrative Courts.

mother and the two girls at her address in Melilla since 2016. After submitting several complaints about the authorities' failure to respond, on 19 December 2019, the authors were notified of a decision by the Provincial Director of the Ministry of Education and Vocational Training refusing to enrol the children on the ground that the established requirements had not been met. On 31 March 2020, the authors petitioned the administrative courts for an emergency provisional remedy ordering the children's enrolment. Administrative Court No. 3 rejected this request for a provisional remedy on 16 April 2020.

Communication No. 118/2020

2.4 On 6 May 2019, N.L. applied for her children R.A. and M.A.A. to be enrolled in school, using the regular procedure established under the domestic laws of the State party. With this application, she enclosed the certificates of their birth in Melilla, their family book, a copy of a request for their names to be entered in the municipal register and a notarial act in which the mother's brother, a Spanish national, declared that he was living with the mother and her two children at his address in Melilla. On 29 October 2019, after the school year had begun without their having received a response from the authorities, the authors requested that the courts order the children's enrolment, but they received no response to their request. On 3 January 2020, they petitioned the administrative courts for an emergency provisional remedy ordering their enrolment. Administrative Court No. 2 rejected this request for a provisional remedy on 19 February 2020.

Context of the communications

2.5 The authors explain that, in order for a foreign national's name to be recorded in the Melilla municipal register, unlike in the rest of Spain, he or she must be in possession of a residence permit or visa, meaning that the municipal registration process is tied to the lawfulness of the foreign national's administrative situation. They argue that this requirement, which is established in article 16 (2) of Act No. 7/1985 of 2 April establishing the basic provisions of local government, is contrary to domestic law, which provides that the right to education is universal and thus enjoyed by foreign children on an equal basis with Spanish children, regardless of their administrative situation.²

2.6 The authors add that, because they have been unable to enrol in the public education system of the State party, they are obliged to attend an unregulated school called the Residence for Muslim Moroccan Students in Melilla, which is neither accredited nor recognized as a school.³ This means that they will not be able to earn the qualifications needed in order to thrive and integrate in their country of residence and live and work there with dignity, which places them in a situation of social exclusion.

2.7 According to the authors, the difficulties involved in enrolling children of Moroccan origin born and residing in Melilla have been reported publicly and are well known. These difficulties have also been decried on a regular basis by civil society and even by the Ombudsman.⁴

Complaint

3.1 The authors claim that, since they were born in Melilla and ample proof of their residence in the city has been provided, the only explanation for the refusal to enrol them in school is that they are being discriminated against on the grounds of their Moroccan origin and their lack of a residence permit, in violation of article 2 of the Convention.⁵

² Pursuant to article 9 of Organic Act No. 4/2000 of 11 January on the rights and freedoms of foreign nationals in Spain and their social integration.

³ This allegation is not made in communication No. 118/2020.

⁴ Ana Torres Menárguez and Laura J. Varo, "Más de 200 niños sin documentos viven pendientes de su escolarización en Melilla", *El País*, 1 August 2019, available at https://elpais.com/sociedad/2019/07/31/actualidad/1564596428_176991.html.

⁵ The authors cite general comment No. 1 (2001), para. 10, which states that: "Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends

3.2 The authors claim that, because primary education is not only a right but also an obligation, denying them such education is contrary to their best interests, in violation of article 3 of the Convention.⁶ They add that at no point has any effort to determine their best interests been made.

3.3 The authors claim that not being enrolled in school is preventing them from enjoying a decent quality of life and developing all their capacities, in violation of article 28 of the Convention. The authors of communication No. 118/2020 claim that this also violates article 29 of the Convention.

3.4 The authors stress that, as its name indicates, the school that they attend is not secular, which means that they are being forcibly educated in the Muslim religion, in violation of their right and that of their parents to religious freedom, which is protected under article 14 of the Convention.⁷

3.5 In the light of the foregoing, the authors request that they be immediately enrolled in school.

Additional information provided by the authors

4. On 18 April 2020, the authors of communications No. 114/2020 and No. 116/2020 informed the Committee that, on 20 March 2020, they were notified of the decision of the Provincial Director of the Ministry of Education and Vocational Training to reject the enrolment applications they had submitted in May 2019 on the ground that the established requirements had not been met. They add that, on 29 March 2020, they brought new legal proceedings, in which they claimed that their fundamental rights had been violated by the aforementioned decisions. Simultaneously, within the framework of these proceedings, they submitted new requests for the application of interim measures based on the Committee's requests of 10 and 20 March 2020. They add that, on 14 April 2020, these requests were rejected by Administrative Courts No. 3 and No. 2, respectively, which claimed, *inter alia*, that the Committee's requests are not binding.

State party's observations on the requests for interim measures

5.1 On 11 May 2020, the State party submitted its observations on the requests for interim measures in respect of communications No. 114/2020 and No. 116/2020.⁸ It argues that the State party's obligations with respect to the requests made by the Committee are limited, under article 6 (1) of the Optional Protocol, to the urgent consideration of the interim measures requested. The State party argues that it has scrupulously complied with this obligation.

5.2 The State party argues that the Committee's requests failed to demonstrate either that there were exceptional circumstances or that the authors might suffer irreparable damage if the measures requested were not taken. The State party warns that the authors would be harmed if, after their immediate provisional enrolment, it was decided at the end of the proceedings that the measure should be lifted, as this would mean that they would have to leave an educational environment into which they might have settled. The State party argues that such harm could be greater than the harm that might result from the enrolment, if it were to happen, being delayed for a certain period of time.

5.3 The State party notes that it has forwarded the contents of the authors' communications, along with the administrative files relating to their enrolment applications, to the Ministry of Education and Vocational Training for an urgent review of their situation to assess whether the interim measures requested by the Committee should be adopted. The

the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities."

⁶ The author cites general comment No. 14 (2013), para. 79.

⁷ This claim is not made in communication No. 118/2020.

⁸ These observations also addressed communications No. 111/2020, No. 113/2020, No. 114/2020 and No. 116/2020, also before the Committee.

State party asserts that, in communication No. 111/2020, the name of the girl in question appeared in the municipal register and, once various branches of the police had conducted visits to confirm that she genuinely resided in Melilla, she was enrolled in school on a permanent basis.

State party's observations on admissibility and the merits

Observations on the account of the facts and the context

6.1 The State party submitted its observations on the admissibility and the merits of the communications on 21 December 2020 (No. 114/2020), 30 December 2020 (No. 116/2020), 8 March 2021 (No. 117/2020) and 23 September 2020 (No. 118/2020). In these observations, it included information on the factual and legal context of the communications that had also been included in communication No. 115/2020. The Committee refers to its Views on that communication.⁹

6.2 The State party claims that, between the months of September and November 2020, the local education authorities asked the Provincial Immigration and Border Force of the National Police to check whether various children who had applied to be enrolled in schools in Melilla were genuinely resident there. In relation to communication No. 114/2020, on 16 September 2020, the National Police found that the authors did not reside at their stated address. The persons who actually lived at that address stated that they did not know the authors' family. In relation to communication No. 116/2020, on an unspecified date between September and November 2020, the National Police found that the authors were residing at their stated address. In relation to communication No. 117/2020, on 22 September 2020, the National Police found that the authors did not reside at their stated address, which turned out to be an empty plot of land. In relation to communication No. 118/2020, on 22 September 2020, the National Police found that the authors did not reside at their stated address. The persons who actually resided at that address stated that they did not know the authors' family.

6.3 With regard to the judicial proceedings brought by the authors, the State party explains that two types of proceedings have been brought. On the one hand, the authors of communications No. 114/2020, No. 116/2020 and No. 118/2020 filed an administrative appeal in respect of the authorities' alleged silence vis-à-vis their enrolment applications for the 2019/20 school year. The State party claims that, in all three cases, these appeals were intended to determine whether the authorities had in fact ignored the authors' applications, and did not address the question of whether the authors were entitled to be enrolled in school. In each case, the courts found that the authorities had expressly stated their decision by publishing a list of admitted students that did not include the names of the authors. In all three cases, the authors appealed the courts' decisions. These appeals were still pending at the time of the submission of the State party's observations.

6.4 The State party explains that, on the other hand, the authors of communications No. 114/2020, No. 116/2020 and No. 117/2020 filed separate administrative appeals¹⁰ against the decisions refusing their enrolment for the 2019/20 school year, of which they had been notified in March 2020. It explains, in relation to communications No. 114/2020 and No. 117/2020, that the authors appealed the initial court decisions rejecting their applications but subsequently failed to attend a hearing before the Administrative Division of the High Court of Justice of Andalusia, Ceuta and Melilla. Consequently, the Division dismissed the appeals on 1 September 2020 and 21 January 2021, respectively. Since these decisions were not appealed, they became final. The authors of communication No. 117/2020 also filed a second administrative appeal through the ordinary procedure. That appeal is still pending. In the case of communication No. 116/2020, the authors appealed the initial court decision rejecting their applications. The Administrative Division dismissed this appeal on 29 September 2020; this dismissal decision became final as it was not appealed by the authors.

⁹ *A.E.A. v. Spain* (CRC/C/87/D/115/2020), paras. 7.3–7.9.

¹⁰ Through the special procedure for the protection of the fundamental rights of the individual, which is governed by articles 114–122 of Act No. 29/1998 of 13 July on the Administrative Courts.

Observations on admissibility

6.5 The State party argues that the communication is inadmissible under article 7 (e) of the Optional Protocol for failure to exhaust domestic remedies. It asserts that proceedings regarding enrolment for the 2019/20 school year were under way before the administrative courts at the time of the submission of the communication to the Committee, that two of these sets of proceedings are currently at the appeals stage (No. 116/2020 and No. 118/2020), and that, in the other two sets of proceedings, the authors did not appeal the decisions issued in their case, rendering those decisions final. Moreover, the question to be determined by these proceedings is not whether the authors meet the requirements for enrolment, but whether the alleged silence of the authorities amounted to agreement to enrol the authors. The State party notes that administrative appeals of the second category, against the decisions rejecting the authors' enrolment applications, were either not filed or were dismissed. Only the authors of communication No. 117/2020 filed a new appeal through the ordinary procedure, which is still pending.

6.6 The State party argues that direct access to the Committee cannot be allowed before domestic legal proceedings have come to an end, as the domestic courts must be given the opportunity to reach a decision, within a reasonable period of time, on the merits of the cases brought before them. It adds that the inability of the domestic courts to rule on the merits of the cases can be attributed to the authors' failure to properly formulate their claims during the proceedings. It also argues that a review of the domestic judicial proceedings brought by the authors would reveal that they were resolved promptly. The State party argues that, in any case, there is no justification for the authors' not only having decided not to await the completion of the legal proceedings before turning to the Committee, but also their having deliberately "interrupted" or, in other words, "terminated", the proceedings by neglecting to exhaust the various appeal procedures and judicial remedies available to them under procedural law as the recipients of an unfavourable judicial ruling.

Observations on the merits

6.7 The State party contests the assertion that the reason that the authors, like other children in a similar situation who have brought complaints before the Committee, are unable to enrol in school is because they are in Melilla in an irregular situation and do not have a residence permit or visa. The State party recalls that all children in Spain have an absolute right to education, on equal terms, regardless of their nationality or administrative situation.

6.8 The State party argues that, while it is true that the particular situation in Melilla makes municipal registration especially difficult for foreign nationals living there in an irregular situation, this difficulty does not prevent children with an irregular residential status from enrolling in school, since the Ministry of Education and Vocational Training has agreed to accept other additional means as proof of actual residence in the city. According to the State party, the authors were refused enrolment because their actual residence had not been proven using the means permitted under the applicable regulations. It adds that none of the documents submitted either with the enrolment applications or thereafter constitutes reliable proof of the authors' actual, continuous residence in Melilla.

6.9 According to the State party, a certificate of birth in Melilla is not proof of actual residence, as pregnant women living in Nador, Morocco, often go to Melilla Hospital to give birth because the conditions there are better than in Moroccan health facilities and foreign patients receive the same care as Spanish nationals, free of charge. The following also do not constitute proof of actual residence: an application for municipal registration, since it only attests to the fact that the person submitting the application was physically present in Melilla at the time when the application was filed; requests for health-care services; or notarial acts that consist merely of statements made by private individuals with no evidentiary value that neither claim nor attest to any connection with the authors (the veracity of which is highly questionable). The State party adds that the fact that the documentation submitted was inadequate is not a bar to the future submission of new documents – for example, the documents produced by the National Police after verifying the child's residence – that could provide proof of actual residence in Melilla, which the education authorities would then duly

assess. It emphasizes that, in three of the four communications, the enquiries carried out by the National Police revealed that the authors did not reside at the addresses indicated.

6.10 On the basis of the foregoing, the State party concludes that there has been no violation of articles 2, 3, 28 or 29 of the Convention. It adds that there is nothing under these articles or any other national or international law that requires the State party to enrol in its schools children who cannot provide proof of actual residence in its territory. The State party asserts that there was no discrimination against the authors because of their status as foreign nationals, as the decision not to enrol them had nothing to do with their not having a municipal registration certificate or a residence permit; rather, the decision was based on the fact that their actual residence in the State party had not been proven, either at the time when their enrolment application was submitted or thereafter.

6.11 The State party notes that the authorities must take a particularly serious and rigorous approach when assessing applications for the enrolment of children from the province of Nador in schools in Melilla. It adds that the number of such requests is increasing every year and that, given the current situation in the city, with schools that are full and that cannot be enlarged, applications that do not provide reliable proof that the child resides in Melilla cannot be approved.

6.12 The State party requests that the communication be declared inadmissible or, in the alternative, that it be dismissed on the ground that no violation of the Convention has been found.

Authors' comments on admissibility and the merits

7.1 The authors submitted their comments on the State party's observations on admissibility and the merits on 3 May 2021 (No. 114/2020), 5 May 2021 (No. 116/2020), 4 May 2021 (No. 117/2020) and 3 July 2021 (No. 118/2020).

Communications No. 114/2020 and No. 116/2020

7.2 The authors claim that, in the documentation submitted, there is a wealth of evidence proving their residence in Melilla. They add that, since the border was closed as a result of the coronavirus disease (COVID-19) pandemic, it is indisputable that they reside in Melilla, since they have appeared in court on several occasions, which would have been impossible if they did not reside in the city. The authors of communication No. 116/2020 add that the National Police confirmed their residence in Melilla, as acknowledged by the State party. The authors of communication No. 114/2020 question the validity of the report submitted by the National Police, insofar as it claims that the persons who were found to be living at their stated address did not know the authors' family. They explain that the person who lives at that address is the authors' aunt, with whom the authors and their parents had been living since 2014, and that a notarial act in which the authors' aunt affirms as such was submitted in all the judicial proceedings. However, on 24 July 2020, the authors' mother filed a complaint of gender-based violence, in which she listed another address, at which she and the authors had been residing since the beginning of 2020. The authors emphasize that, after submitting her complaint, the mother was offered a place in a shelter, which she accepted. According to the authors, the issue is not whether the family has its actual place of residence in Melilla, but the exact location of their place of residence. They point out that, in their claim filed in response to the rejection of their enrolment application for the 2020/21 school year, they requested that the National Police conduct a home visit at their new address. They add that the reason why the authors' mother provided her sister's address in their enrolment applications is that this had been their place of habitual residence until 2020, they do not have a rental contract or any utilities contracts at their current address, and, since their health card applications had been rejected on the ground that they were unable to prove that their current address is their actual place of residence, their mother felt that the most appropriate thing to do was to provide her sister's address. Lastly, the authors claim that their situation highlights the real plight of families who do not have a rental contract or utilities contracts and who cannot therefore have their names entered in the municipal register, use health-care services or enrol their children in school.

7.3 Regarding the exhaustion of domestic remedies, the authors argue that the State party's approach is based on the idea that domestic remedies may be deemed exhausted not when domestic procedural remedies have been exhausted or when the processing of those remedies is unreasonably prolonged, but when the specific procedure that the State party considers to be the most appropriate for proving the claims of the party has been exhausted. They emphasize that, in their initial request, they provided evidence of delays in the processing of remedies by the High Court of Justice of Andalusia, that they appealed the decision by which their request for a provisional remedy was rejected, and that this appeal has not yet been resolved. They add that the State party has neglected to mention the interim measures requested as part of the various sets of judicial proceedings to prevent irreparable harm that would defeat the ultimate purpose of the remedy. According to the authors, the domestic remedies that have been exhausted are those related to interim protection, and this is without prejudice to the legal proceedings brought in respect of the refusal to enrol the authors in school.¹¹

7.4 With regard to the merits, the authors allege that, since the authorities are aware of the special difficulties faced by foreign nationals in an irregular situation, their insufficient and, in some cases, non-existent assessment of the best interests of the child in relation to this and other similar communications is unacceptable and violates article 3 (2) of the Convention. They add that interpreting the best interests of the child from a threefold perspective¹² would have entailed, inter alia: attempting to listen to the children themselves or to their legal representative in order to clarify the situation with regard to their actual residence in Melilla; submitting a clear and flexible request for the correction of the enrolment application to facilitate the enrolment process; and, where necessary, requesting the municipal authorities to prepare social reports to assess the children's situation, instead of enlisting the services of the National Police. Moreover, if the best interests of the child had been duly taken into account, the decision extending the list of supporting documents required to prove actual residence would have been interpreted as establishing an open list, not a closed list, as understood by the authorities.

Communications No. 117/2020 and No. 118/2020

7.5 Regarding their residence in Melilla, the authors of communication No. 117/2020 claim that they lived at the address provided to the State party's authorities until late May 2020, when they moved to another dwelling, for which they provided the wrong address. They claim that, on 31 August 2020, they informed the National Health-Care Management Institute of the change to their address and that they also informed the Ministry of Education and Vocational Training of this change on 22 September 2020. However, on 22 September 2020, the Provincial Immigration and Border Force visited the wrong address – that is, an address other than that which the authors had provided. The authors of communication No. 118/2020 claim that, following a change in the numbering of the street where they lived, their old street number, which appeared in the deed of purchase of their house, changed. The authors of both communications add that, given that the border was closed because of the COVID-19 pandemic, they were unable to leave Melilla for the duration of the 2020/21 school year, which is proof that they do in fact reside in the city.

7.6 The authors of both communications argue that, in any event, even if certain documents were missing from their enrolment applications, this situation should have been remedied ex officio given that schooling is compulsory. They add that, although they are aware of the difficulties facing the education authorities in Melilla, these difficulties should not detract from the need to guarantee the enjoyment of the fundamental right to education of children, who are one of the most vulnerable population groups. The authors maintain that

¹¹ The authors add that they brought new ordinary judicial proceedings, including requests for interim measures, following the rejection of their new enrolment applications for the 2020/21 school year. Their request for interim measures was refused, and this decision is currently under appeal. A review of the merits is currently under way.

¹² As a substantive right, a fundamental and interpretative legal principle, and a rule of procedure, as established in general comment No. 14.

they have proved that they do not reside in Morocco and cross the border every day. Acting with prudence and rigour to counter fraud should never be used as a reason to punish children who, like the authors, actually live in Melilla.

7.7 With regard to the failure to exhaust domestic remedies, the authors of communication No. 117/2020 claim that the available remedies were not effective. They claim that the first administrative appeal they filed was rejected before the end of the school year, while the second administrative appeal is still pending, and argue that this demonstrates that the appeal process does not constitute an effective remedy in this context, since, by the time a final decision is made, a whole school year will have passed, causing irreparable damage to the authors. They claim that they did not submit the present communications to the Committee until after their requests for interim measures had been rejected. Once those requests had been rejected, the remaining available remedies were ineffective and prolonged, as has been shown.

7.8 Regarding the context, the authors reiterate that equality between residents in regular and irregular situations for the purposes of school enrolment is officially recognized under domestic law. However, this recognition is, in reality, illusory, since an irregular administrative situation constitutes an insurmountable obstacle to school enrolment in Melilla. The authors add that it can also be seen from communications No. 111/2020¹³ and No. 113/2020,¹⁴ also before the Committee, that actual residence is insufficient for enrolling a child in school in Melilla. The first communication involved a child who was enrolled only after the Committee intervened, even though her name appeared in the municipal register. The four children concerned by the second communication had a long-term stay report demonstrating that their family had actually resided in Melilla for over 30 years, but they were not enrolled in school until their names were recorded in the municipal register.

7.9 On the merits, the authors argue that the State party's claim that the documents they submitted do not constitute evidence of their residence in the city demonstrate its lack of flexibility and willingness to ensure the realization of the right to education. They claim that the State party has not acted diligently in its efforts to verify their actual residence and has not properly assessed their best interests in relation to their right to education, in violation of article 3 of the Convention, read in conjunction with article 28. They add that the principle of the best interests of the child requires that the State party take proactive steps to assess those interests when making decisions that will have an impact on their education, which it failed to do. They argue that the State party has not explained how the best interests principle has been respected in their case – in other words, it has not explained what it considers to be in the children's best interests, on what criteria its decisions have been based, or how the children's interests have been weighed against other considerations.

7.10 The authors add that the obligation of States parties under article 2 of the Convention requires them to actively identify children in respect of whom special measures may need to be adopted to facilitate the recognition and realization of their rights. They add that, although the State party maintains that its decision was based on a lack of documentation, such reasoning is nonetheless discriminatory, since this lack of documentation is inextricably linked to the origin and personal circumstances of the authors.

7.11 Lastly, the authors of communication No. 117/2020 claim that the failure to comply with the Committee's request for interim measures constitutes a violation of article 6 of the Optional Protocol. They note that the Committee has already addressed the compulsory nature of interim measures on several occasions.¹⁵

7.12 The authors request that: (a) the communication be declared admissible; (b) violations of the articles of the Convention mentioned above be found, and that the authors be immediately enrolled in school; (c) the State party be urged to take the steps necessary to comply with the Convention in terms of enrolling in school children who actually reside in

¹³ See *N.S. v. Spain* (CRC/C/85/D/111/2020).

¹⁴ See *L.B. et al. v. Spain* (CRC/C/86/D/113/2020).

¹⁵ The author cites *M.T. v. Spain* (CRC/C/82/D/17/2017), *M.B.S. v. Spain* (CRC/C/85/D/26/2017), and *M.A.B. v. Spain* (CRC/C/83/D/24/2017).

Melilla by relaxing the criteria for proving their residence and requiring the police to verify the residence of all applicants for enrolment; (d) the State party be urged to apply the interim measures requested by the Committee; and (e) adequate reparation be granted in the form of compensation and rehabilitation for the harm suffered by the authors as a result of having been deprived of their right to an education for at least two school years, with compensation being provided at the rate of €3,000 for each school year that they have missed and will miss until they are enrolled.

Additional information provided by the parties

Communications No. 114/2020 and No. 116/2020

8.1 On 4 June 2021, the State party informed the Committee that the authors of communication No. 116/2020 had been enrolled in school pursuant to a decision issued on 9 March 2021. The State party requests that consideration of the communication, which has become moot as a result of the authors' being admitted to school, be discontinued, in accordance with rule 26 of the Committee's rules of procedure.

8.2 On 12 October 2021, the authors of communication No. 114/2020 informed the Committee that they had been enrolled in school on 25 June 2021 for the 2021/22 school year but requested the Committee to examine the violations that had allegedly occurred up to that date. On the same day, the authors of communication No. 116/2020 confirmed the information provided by the State party on 4 June 2021 but also requested that the Committee examine the violations that had allegedly occurred up to that date.

Communications No. 117/2020 and No. 118/2020

8.3 On 8 March 2021 and 25 May 2021, the State party requested the authors of communications No. 118/2020 and No. 117/2020 to clarify to the Committee their actual place of residence, in view of the possibility that the addresses stated in their enrolment applications may be incorrect, and given the authorities' desire to provide schooling for children who actually reside in Melilla, regardless of their administrative situation in Spain.

8.4 On 5 June 2021, the authors of communication No. 117/2020 reiterated that information on their actual residence had already been submitted on 31 August 2020 to the National Health-Care Management Institute and on 22 September 2020 to the Ministry of Education and Vocational Training. On 17 September 2021, the authors of both communications informed the Committee that they had been enrolled on 25 June 2021 for the 2021/22 school year but requested the Committee to examine the violations that had allegedly occurred up to that date.

8.5 On 7 and 14 December 2021, the State party confirmed the information submitted by the authors of communication No. 117/2020 and requested that consideration of the communication be discontinued on the ground that there could be no legitimate interest in pursuing it further.

8.6 On 7 and 14 December 2021, the State party confirmed the information submitted by the authors of communication No. 118/2020 and requested that consideration of the communication be discontinued. On 6 June 2021, the Administrative Division of the High Court of Justice of Andalusia partially upheld the authors' claim on the ground that the authorities had failed to state the reasons for rejecting their enrolment applications, declaring that decision null and void and rolling back the proceedings to the time before that decision had been made. It argues that this contradicts the authors' argument that there is no effective remedy to enforce their rights before the domestic courts, and reiterates its arguments with regard to the inadmissibility of the communication. The State party also reiterates its arguments with regard to the merits.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 The Committee takes note of the State party's argument that the communications are inadmissible for failure to exhaust domestic remedies because: (a) proceedings regarding enrolment for the 2019/20 school year were under way before the administrative courts at the time when the communications were submitted to the Committee (two cases were at the appeals stage when the parties' observations were submitted and the decisions taken in the two other cases had become final because the authors had not filed an appeal); (b) the question to be determined by these proceedings is not whether the authors meet the requirements for enrolment, but whether, by allegedly remaining silent, the authorities agreed to enrol the authors; and (c) administrative appeals of the second category against the decisions rejecting the authors' enrolment applications were either not filed, were dismissed or were pending on the date of submission of the observations (see para. 6.5). The Committee also takes note of the State party's argument that the inability of the domestic courts to rule on the merits of the cases within a reasonable period of time can be attributed to the authors' failure to properly formulate their claims during the proceedings, and that there is no justification for the authors' failure to exhaust the various domestic remedies available (see para. 6.6). At the same time, the Committee takes note of the authors' argument that the available remedies were ineffective for the purposes of their enrolment and had been unreasonably prolonged. In particular, the Committee takes note of the authors' argument that they submitted communications to the Committee only after their first request for interim measures had been rejected and that the amount of time that had elapsed had served to demonstrate that all the remedies they had sought had been ineffective (see paras. 7.3 and 7.7). The Committee notes that the authors applied for the remedies necessary to secure their provisional enrolment in school and that these were not granted. The Committee also notes that over two years (communications No. 114/2020, No. 117/2020 and No. 118/2020) or almost two years (communication No. 116/2020) have elapsed since the authors submitted their first enrolment applications, without a final decision on their legal claims having been handed down, until the Ministry of Education intervened. It also notes the rejection of the authors' requests for interim measures submitted at the national level and the failure to apply the interim measures requested by the Committee, which were intended to secure the authors' immediate enrolment. In the Committee's view, the prolonged exclusion of a child from compulsory education constitutes irreparable harm within the meaning of article 6 of the Optional Protocol. In the light of the context already known to the Committee and the fact that the courts have still not taken a final decision on the authors' enrolment applications almost two years (in the case of communication No. 116/2020), or more than two years (for the rest of the communications), after they were submitted; and in the light of the fact that all the requests for interim measures made by the authors were rejected, the Committee considers that the domestic judicial proceedings were unreasonably prolonged, thus impeding the authors' access to justice.¹⁶ Consequently, the Committee concludes that the authors were not required to exhaust these remedies, in accordance with article 7 (e) of the Optional Protocol.

9.3 The Committee takes note of the claims made by the authors of communications No. 114/2020, No. 116/2020 and No. 117/2020 that, because they have been excluded from the Spanish education system, they must attend a religious school and be educated in the Muslim religion, in violation of their right to freedom of religion under article 14 of the Convention. However, the Committee notes that the authors have not raised this claim during the domestic proceedings and have not therefore exhausted domestic remedies in that regard for the purposes of article 7 (e) of the Optional Protocol.

¹⁶ See the Convention, art. 4, and general comment No. 5 (2003), para. 24.

9.4 With respect to the claims made by the authors of communication No. 118/2020 under article 29 of the Convention, the Committee is of the view that they have not been sufficiently substantiated for the purposes of admissibility and therefore finds them inadmissible under article 7 (f) of the Optional Protocol.

9.5 However, the Committee is of the view that the authors of all the communications have sufficiently substantiated their claims under articles 2, 3 and 28 of the Convention that their right of access to education has been violated; that they have been discriminated against on the grounds of their national origin and administrative situation; and that their best interests were not duly considered when they were denied access to compulsory education. The Committee notes that, although the authors were finally enrolled in school between March and June 2021, this did not occur until, in one case, almost two years, and, in the other cases, more than two years after the initial submission of their applications in May 2019 and a year after the Committee's request for their immediate enrolment as an interim measure, and that, because of this delay, they missed nearly two full academic years of primary education, in the case of the authors of communication No. 116/2020, or two full academic years, in the case of the authors of the other communications. The Committee considers that the authors' late enrolment has not provided comprehensive reparation for the alleged violations of their rights under the Convention, the merits of which warrant consideration by the Committee. The Committee therefore finds that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

10.1 The Committee has considered the present 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.

10.2 The Committee recalls that, under article 2 of the Convention, States parties must respect and ensure the right of all children under their jurisdiction of access to education, without distinction of any kind. In addition, because enjoyment of the rights contained in the Convention follows from access to education, it is imperative that the best interests of the child be a primary consideration in any procedure aimed at a child's enrolment in school.¹⁷

10.3 The Committee must make the following three determinations: (a) whether the State party has violated the authors' right of access to education under article 28 of the Convention; (b) whether the refusal to enrol the authors in school constituted discriminatory treatment under article 2 of the Convention, read in conjunction with article 28; and (c) whether the procedure aimed at the authors' provisional enrolment took due account of their best interests in accordance with article 3 of the Convention, also read in conjunction with article 28.

10.4 On the first point, the Committee recalls that the right to education "epitomizes the indivisibility and interdependence of all human rights"¹⁸ and that its importance is such that the Convention provides not only for the right of every child to have access to an education (art. 28), but also for an "individual and subjective right to a specific quality of education".¹⁹ The Committee is also of the view that the right to education should be guaranteed to all children of compulsory school age, regardless of their nationality or administrative situation. The Committee notes that, in the present case, both the State party and the authors agree that it has been recognized that all children have an absolute right to education in Spain, on an equal basis and regardless of their nationality or administrative situation. The Committee takes note of the State party's argument that the refusal to enrol the authors in school was related not to their national origin or administrative situation, but to the fact that their actual residence in Melilla had not been proven (see paras. 6.8–6.10). However, the Committee takes note of the authors' argument that, despite any official recognition under domestic law, the facts reveal that, in practice, the authors, like all children in an irregular administrative

¹⁷ General comment No. 14 (2013), paras. 30 and 79.

¹⁸ Committee on Economic, Social and Cultural Rights, general comment No. 11 (1999), para. 2.

¹⁹ Committee on the Rights of the Child, general comment No. 1 (2001), para. 9.

situation residing in Melilla, encounter obstacles that prevent their enrolment in school (see paras. 2.5–2.7, 7.2, 7.4–7.5 and 7.8).

10.5 The Committee recalls that article 2 of the Convention explicitly requires States parties to respect and ensure the rights set forth in the Convention, which entails the following:

The obligation to respect [the right to education] requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal.²⁰

10.6 The Committee takes note of the State party's argument that none of the documents submitted by the authors constitutes reliable proof of their actual residence. The Committee recalls that, as a general rule, it comes under the jurisdiction of national bodies to examine the facts and evidence and to interpret domestic law, unless such examination or interpretation is clearly arbitrary or amounts to a denial of justice.²¹ However, in the present cases, the Committee is of the view that the documents furnished by the authors in applying for their enrolment in school constitute, at a minimum, sufficient evidence of their residence, which imposes on the State party a positive obligation to conduct the checks necessary to confirm their actual residence. In the present cases, the Committee notes that the National Police conducted visits to the alleged addresses of the authors to confirm their actual residence between September and November 2020, that is, almost 18 months after the authors had submitted their enrolment applications. The Committee is of the view that, in addition to being required to immediately enrol the children upon confirmation of their actual residence in Melilla, the State party should have taken all the steps necessary to confirm their actual residence in an expeditious manner. In the present cases, the Committee cannot consider 16 to 18 months to be a reasonable time period for the fulfilment of this obligation. In the absence of any further explanation from the State party as to why the authors of communication No. 116/2020 were not immediately enrolled following verification of their actual residence, or as to why the authorities took between 16 and 18 months to take proactive steps to confirm the actual residence of the authors of all the communications, the Committee is of the view that their right of access to education under article 28 of the Convention has been violated.

10.7 With regard to the second point to be determined, namely, whether the refusal to enrol the authors constituted discriminatory treatment within the meaning of article 2 of the Convention, the Committee recalls that the discrimination prohibited by article 2 of the Convention may be "overt or hidden".²² This means that such discrimination can be de jure or de facto and direct or indirect.²³ The Committee considers that the prohibition of

²⁰ Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999), para. 47. See also joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child (2017), para. 60, which states that: "The Committees strongly urge States to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented children, from registering at schools and educational institutions."

²¹ See, inter alia, the Committee's decisions of inadmissibility in *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; and in *Navarro Presentación and Medina Pascual v. Spain* (CRC/C/81/D/19/2017), para. 6.4.

²² General comment No. 1 (2001), para. 10.

²³ *A.E.A. v. Spain*, para. 12.8. The Committee has on several occasions highlighted the need to combat de jure or de facto and direct and indirect discrimination, including in relation to access to education. See CRC/C/AUT/CO/3-4, para. 25; CRC/C/VNM/CO/3-4, para. 29; and CRC/C/THA/CO/3-4, para. 33. See also the various international instruments that recognize as discrimination any distinction based on purpose (intention) or effect (result): United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education, art. 1; International Convention on the Elimination

discrimination applies to both the public and the private sphere and that a violation of article 2 may result from a rule or measure that is apparently neutral or lacking any intention to discriminate but has a discriminatory effect.²⁴ However, not every distinction, exclusion or restriction based on the grounds listed in the Convention amounts to discrimination, as long as it is based on reasonable and objective criteria that are necessary and proportionate in the pursuit of a legitimate aim under the Convention.²⁵

10.8 Once again, the Committee notes that, although the State party itself recognizes that all children living in its territory have an unrestricted right to education, the authors have demonstrated that, in practice, they encounter obstacles to school enrolment (see para. 10.4). The Committee is of the view that the authors have demonstrated how, in practice, the application of administrative requirements for access to public education disproportionately²⁶ affects children who, like the authors, are irregular residents in Melilla (and therefore non-nationals), who face undue delays in their enrolment (either because they are not immediately enrolled once their actual residence had been verified, as in the case of communication No. 116/2020, or because certain steps necessary to promptly confirm their actual residence are not taken, as in the case of the rest of the communications). Therefore, in the present case, the facts reveal, at a minimum, the existence of indirect, de facto differentiation based on the irregular administrative situation of the authors and, consequently, their national origin. The Committee must therefore determine whether the application of these administrative requirements, which gives rise to de facto indirect differentiation, meets the criteria described in the preceding paragraph.

10.9 The Committee takes note of the State party's argument that the authorities are required to take a particularly serious and rigorous approach when assessing applications for enrolment in schools in Melilla, given the specific situation of the city (see para. 6.11). The Committee is of the view that the State party has demonstrated that it is pursuing a legitimate interest in seeking to ensure that only those children who actually reside in Melilla have access to public education and in seeking to prevent fraudulent behaviour in this manner. However, it also takes note of the authors' argument that the difficulties facing the education authorities in Melilla should not detract from the need to guarantee the enjoyment of their right to education, and that acting with prudence and rigour to counter fraud should never be used as justification for "punishing" children who actually live in Melilla (see para. 7.6). In this regard, the Committee is of the view that the State party's legitimate interest cannot entail the de facto exclusion from the education system, for a prolonged period of time, of children who, like the authors, are in an irregular administrative situation. The Committee considers that the State party has not duly demonstrated that the manner in which the administrative requirements have been applied is necessary and proportionate in the light of the legitimate interest pursued, particularly in view of the authors' vulnerability and the serious consequences of their prolonged exclusion from the public education system. The Committee therefore concludes that the application of these administrative requirements for access to the public education system, which resulted in the failure to enrol the authors for almost two years in one case and for over two years in the other cases, constituted a violation of their right not to be discriminated against recognized in article 2 of the Convention, read in conjunction with article 28.

10.10 Having found a violation of the aforementioned articles (see paras. 10.6 and 10.9), and given the specific circumstances of the present cases, the Committee considers it

of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Convention on the Rights of Persons with Disabilities, art. 2; Human Rights Committee, general comment No. 18 (1989), para. 7; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7 (including mention of direct and indirect discrimination).

²⁴ See, mutatis mutandis, *F.A. v. France* (CCPR/C/123/D/2662/2015), para. 8.11; and *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

²⁵ See, inter alia and mutatis mutandis, *Genero v. Italy* (CCPR/C/128/D/2979/2017), paras. 7.3–7.6; *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3; *Yaker v. France* (CCPR/C/123/D/2747/2016), paras. 8.14–8.17; and *Hebbadj v. France* (CCPR/C/123/D/2807/2016).

²⁶ See, mutatis mutandis, *Genero v. Italia*, para. 7.4.

unnecessary to take a view on the claims made under article 3 (1) of the Convention, read in conjunction with article 28, which are based on the same facts.

10.11 Lastly, the Committee notes the State party's failure to comply with the Committee's requests, issued on 10 March 2020 (No. 114/2020), 20 March 2020 (No. 116/2020), 27 April 2020 (No. 117/2020) and 7 May 2020 (No. 118/2020), and reiterated on 22 April 2020 (No. 114/2020 and No. 116/2020) and 23 September 2020 (in respect of all the communications), for interim measures consisting of the immediate enrolment of the authors. The Committee takes note of the State party's argument that, under the Optional Protocol, its obligations are limited to the urgent consideration of the interim measures that it has been requested to adopt (see para. 5.1). The Committee recalls that it has repeatedly found in its jurisprudence that, by ratifying the Optional Protocol, States parties assume an international obligation to take the interim measures requested under article 6 of the Optional Protocol, as such measures, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.²⁷ Consequently, the Committee considers that the failure to adopt the interim measures requested was itself a violation of article 6 of the Optional Protocol.

11. The Committee, acting under article 10 (5) of the Optional Protocol, finds that the facts before it reveal violations of articles 28 and 2 of the Convention, read in conjunction with article 28, and of article 6 of the Optional Protocol.

12. The State party should therefore provide the authors with effective reparation for the violations suffered, including by providing adequate compensation, and take proactive steps to help them to catch up at school and reach the same level as their peers as soon as possible. The State party is also under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

(a) Ensure that, when the local administrative and judicial authorities receive a request for the enrolment in Melilla of a child who claims to reside in the city, they take effective and expeditious steps to confirm the child's residence;

(b) Ensure that, in cases where the actual residence in Melilla of a child requesting enrolment is confirmed, the local administrative and judicial authorities enrol him or her immediately;

(c) Ensure that, when there is a dispute over a child's right to education, there is an effective and accessible remedy that may be provided promptly and expeditiously, and that both the children and their parents or guardians have full knowledge of this remedy and the related procedures;

(d) Provide specialized training for judges and administrative staff on the implementation of the Convention.

13. In accordance with article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, 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 disseminate them widely.

²⁷ See, inter alia, *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.11.