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Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 17/2017*, **

Communication submitted by:	M.T. (represented by the non-governmental organization Fundación Raíces)
Alleged victim:	M.T.
State party:	Spain
Date of communication:	19 May 2017
Date of adoption of Views:	18 September 2019
Subject matter:	Determination of the age of an alleged unaccompanied minor asylum seeker
Procedural issues:	Inadmissibility *ratione personae*; non-exhaustion of domestic remedies
Articles of the Convention:	2, 3, 8, 12, 20 and 22
Articles of the Optional Protocol:	6 and 7 (c), (e) and (f)

1.1 The author of the communication is M.T., a citizen of Côte d'Ivoire born on 31 December 1999. He claims to be a victim of violations of articles 2, 3, 8, 12, 20 and 22 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 In accordance with article 6 of the Optional Protocol, on 23 May 2017, the Working Group on Communications, acting on behalf of the Committee, requested that the State party recognize the author as a minor and offer him due protection, enable him to apply for asylum through a legally appointed guardian or representative and allow him to remain in Spanish territory while his asylum application was being processed.

1.3 On 19 December 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request that the admissibility of the communication be considered separately from its merits.

* Adopted by the Committee at its eighty-second session (9–27 September 2019).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Olga A. Khazova, Cephas Lumina, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.

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The facts as submitted by the author

2.1 On 15 January 2017, the author arrived in Almería, having travelled by small boat from Nador, Morocco. He fled Côte d'Ivoire after his father was arrested by the national armed forces and subsequently killed after being accused of collaborating with anti-Government militias in the north of the country. The author, who was undocumented, informed the Spanish Red Cross that he was a minor and was taken to the National Police station, where he again stated that he was a minor.

2.2 On 18 January 2017, without having seen the author or having made the necessary enquiries with the Embassy of Côte d'Ivoire in Madrid in order to determine his age, Almería Court of Investigation No. 5 ordered that the author be placed in the holding centre for adult foreign nationals in Aluche, Madrid, where he remained until 2 February 2017. The author was then transferred to a hostel under the Red Cross programme for the provision of humanitarian assistance to immigrants.

2.3 In April 2017, his cousin sent him his birth certificate, his certificate of nationality and his identity certificate, containing a photograph of him and his fingerprint, from Côte d'Ivoire; these documents proved the fact that he was a minor and his identity.

2.4 On 19 April 2017, members of the non-governmental organization Fundación Raíces brought him before Madrid municipal police officers who are trained to work with minors, to whom he submitted his documents.[1] After being transferred to the Minors Unit of the National Police, he was taken to the Immigration and Borders Brigade. The police officers spoke in Spanish and there was no interpretation at any time. After three or four hours, they left him on the street, without giving him any information or handing him over to the protection services and without notifying the Office of the Prosecutor for Minors.

2.5 On 20 April 2017, the author went to the Office for Refugee Assistance in Madrid to submit an asylum application using his documents. The investigating officer who received him told him that he could not apply for asylum because, as a minor, he had to submit the application with his legal guardian. After making some enquiries, she also informed him that the Office of the Prosecutor for Minors had not yet determined his age. The author did not receive any written notification, not even a copy, or any proof of his visit to the Office for Refugee Assistance. The author then went to the Embassy of Côte d'Ivoire to apply for a passport. He notes that his original documents were de facto recognized as valid by the Embassy of Côte d'Ivoire as they were accepted for the purposes of the passport application.

2.6 On 4 May 2017, the author kept a second appointment at the Office for Refugee Assistance, accompanied by a lawyer. He was again informed that, as a minor, he could not apply for asylum without a guardian. After making a telephone call to the Office of the Prosecutor for Minors, the investigating officer told the author that he could not apply for asylum until the contradiction between the age shown in his documents (his birth certificate, certificate of nationality, identity certificate and the receipt showing that he had applied for a passport) and the age given in a decree of majority that had been issued by the Public Prosecution Service without his being notified, had been resolved. The author requested the investigating officer to provide written confirmation that the Office for Refugee Assistance had decided, for a second time, not to allow him to apply for asylum, but the investigating officer refused to do so.

2.7 On 8 May 2017, Fundación Raíces sent a letter to the Deputy Director General for Asylum of the Ministry of the Interior, stating that the author had twice been prevented from applying for asylum, noting that he was in a situation of vulnerability and requesting that he be given an urgent appointment with the Office for Refugee Assistance so as to be able to submit his asylum application and that he be notified in writing if that request was rejected.

2.8 Throughout this period, the author continued living in the hostel, which was adult accommodation that lacked appropriate conditions of hygiene, did not offer the support that

[1] The author later explains that the Red Cross referred him to Fundación Raíces because he had documents proving that he was a minor and because his appearance and behaviour suggested that he could be a minor.

the author needed and left him exposed to numerous risks, as it was a place where conflicts often broke out.[2]

2.9 On 6 June 2017, the author went to the Embassy of Côte d'Ivoire in Madrid to collect his passport. Since it was not ready, he was given a certificate with a photograph that indicated that his passport application was still being processed. On the same day, he went to the Office of the Prosecutor for Minors in Madrid, accompanied by his lawyer, who was not allowed to assist him during the meeting. He stated that he was a minor and that he had made that clear upon his arrival in Spain. He also provided all the documents that were available to him: a copy of all his documents; the original receipt showing that he had applied for a passport, with a photograph; the original certificate from the Embassy indicating that his passport application was being processed; and the original of his identity certificate. The prosecutor urged him to undergo age determination tests, which the author refused to do, on the grounds that he had documents proving that he was a minor. The prosecutor warned him that his refusal to undergo the tests would be considered an indication that he was an adult. The prosecutor required the author to submit all his documents so that they could be made available to the police and ordered the Immigration and Borders Brigade to take him to Aluche police station so that his case could be written up and recorded in the police register. The prosecutor informed the lawyer that they would know in a few hours whether the author was considered an adult or a minor. The lawyer wanted to accompany the author to the police station but was not allowed to do so.

2.10 In the afternoon of that day, Fundación Raíces received a telephone call from the police, who said that the prosecutor for minors had ordered them to leave the author on the street. The police asked whether Fundación Raíces knew of any place where they could take him. Fundación Raíces gave the police the address of the adult accommodation where the author had been staying up to that point.

2.11 Since the Office for Refugee Assistance had not provided written confirmation of its decision not to allow him to apply for asylum, the author was unable to initiate any domestic proceedings in order to defend his right to seek international protection. In addition, the author points out that he was not notified at any time that a decree of majority had been issued, if indeed it had. He adds that, in any case, age determination decrees issued by the Public Prosecution Service cannot be appealed in the courts, as confirmed by the Constitutional Court in its decision No. 172/2013 of 9 September 2013, and that he has therefore exhausted all available domestic remedies.

The complaint

3.1 The author claims to be a victim of a violation of article 2 of the Convention because he suffered discrimination on the basis of his status as an unaccompanied foreign minor. He would not have been in a situation of such vulnerability and unable to apply for asylum if he had been accompanied by his family, for in that case his application would have been authorized, or if he had been an adult, for in that case he would not have needed authorization.

3.2 The author claims that the best interests of the child, as recognized in article 3 of the Convention, were not taken into account during the asylum application process. He notes that, as a minor, he had the right to apply for asylum with the safeguards and guarantees provided for by the Office of the United Nations High Commissioner for Refugees, as stipulated in the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin.[3] He notes that the State party did not uphold the principle that a person should be presumed to be a minor, especially when there is a real risk of irreparable harm, as is the case when a person is unable to apply for asylum, with the consequences that this entails.[4] He explains that he had original documents from his country of origin that proved his identity and the fact that he was a minor.

[2] The author notes that he was beaten twice at the hostel.

[3] Paras. 68–75.

[4] Ibid., para. 31 (i).

3.3 The author maintains that the State party violated his right to preserve his identity, which is enshrined in article 8 of the Convention. He notes that age is a fundamental aspect of identity and that the State party has an obligation not to undermine his identity, as well as to preserve and recover the elements thereof. He notes that as he had original documents that proved his identity, including the fact that he was a minor, this fact should never have been doubted, unless there was proof to the contrary.

3.4 The author claims a violation of article 12 of the Convention, as the State party did not give him the opportunity to be heard. He notes that he was denied the right to be heard on two occasions when he was prevented from applying for asylum on the grounds that he did not have a guardian. He was thus denied the opportunity to explain why he had fled his country of origin.

3.5 He also claims a violation of article 20 of the Convention, since the State party failed to provide him with due protection as a child deprived of his family environment.

3.6 Lastly, the author claims to have suffered a violation of article 22 of the Convention, given that, after receiving advice from an organization that specializes in such matters, he tried to apply for asylum on two occasions but was not allowed to do so. Moreover, despite repeated requests, he was not notified of this refusal in writing, which meant that he was unable to take any domestic action to defend his rights. This exposed him to various risks, including the possibility of expulsion, and made it impossible for him to initiate any domestic proceedings in order to defend his right to seek international protection.

3.7 According to the author, the fact that the Office for Refugee Assistance requires all minors wishing to apply for asylum to do so in the presence of their legal guardian prevents children who have been declared to be adults on the basis of bone age tests from seeking international protection, even if they have valid documents from their countries of origin proving that they are minors.[5]

3.8 The author proposes the following possible solutions: (a) that the State party recognize that he is a minor; (b) that he be allowed to apply for asylum as a minor; (c) that he be declared in need of protection and placed under the guardianship of the Community of Madrid; and (d) that all his rights as a minor be recognized, including the rights to be heard, to receive State protection, to have a legal representative, to receive an education and to be granted a residence and work permit to allow him to fully develop as a person and be integrated into society.

State party's observations on admissibility

4.1 In its observations of 18 August 2017, the State party maintains that, on the day of his illegal entry into Spain, the author and the other occupants of the small boat in which he was travelling were held at Almería police station, where they were identified, informed of their rights in the presence of an interpreter and assigned a court-appointed lawyer. The author claimed to be an adult, a claim that was consistent with his physical appearance. The State party reports that, on account of the author's illegal entry into Spain, expulsion proceedings were initiated against him for the purpose of returning him to his country of origin. With the help of an interpreter, he was personally notified of the removal order and was informed that he could lodge an appeal against it. Since no consular authority offered to identify the author, it was not possible to carry out the removal order, and he was released and referred to the Red Cross hostel.

4.2 The State party notes that, on 19 April 2017, the author appeared before the Madrid Immigration and Borders Brigade and claimed to have been born on 31 December 1999. He refused to undergo medical age determination tests and asked to be considered a minor on the basis of the documents that he provided, namely: (a) a photocopy of his birth certificate; (b) a photocopy of his certificate of nationality, on which the font of the figures showing the date of birth, which had been printed using a typewriter, clearly did not match that of

[5] The author refers to Save the Children España, *Infancias Invisibles: Menores extranjeros no acompañados, víctimas de trata y refugiados en España* (Invisible children: unaccompanied foreign minors, victims of trafficking and refugees in Spain), 2016.

the other figures in the document, which had been printed using a dot printer; and (c) an identity certificate containing a photograph of a person who did not resemble the author. The police did not activate the unaccompanied minors protocol because they had no doubt that he was an adult, in view of his physical appearance, the "crude falsification" of the age on his certificate of nationality and the lack of resemblance between the author and the person in the photograph on the identity certificate.

4.3 The State party explains that the prosecutor requested the forensic police to verify the content of the identity certificate. The forensic police found that the fingerprint did not match the one previously taken from the author, which was in the State party's official records. On 27 June 2017, the prosecutor issued a decree of majority.

4.4 The State party claims that the communication is inadmissible *ratione personae*, under article 7 (c) and (f) of the Optional Protocol, because the author is an adult. This is clear from the fact that: (a) the author voluntarily declared that he was an adult when he arrived in Spain; (b) he refused to undergo medical age determination tests; and (c) his true identity is not known because the person for whom the identity certificate was issued is not the author, since the fingerprints do not match, photocopies of certificates without biometric data do not constitute proof of identity or age, and the photocopies provided had clearly been falsified to change the date of birth.

4.5 The State party also maintains that the communication is inadmissible under article 7 (e) of the Optional Protocol because not all domestic remedies have been exhausted, given that: (a) if the author was of the view that the medical tests carried out were insufficient, he could have applied to the Public Prosecution Service for additional testing;[6] (b) the author can request a review of any Autonomous Community decision finding that he is not a minor, under article 780 of the Civil Procedure Act; (c) the author can challenge his removal order before the administrative courts; and (d) the author can initiate non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015.

4.6 As to the author's argument that the prosecutor's determination of the age of an undocumented person cannot be appealed in the courts, according to Constitutional Court decision No. 172/2013 of 9 September 2013 concerning *amparo* application No. 952/2013, the State party notes that the Court itself, in the same decision, states that determinations of this kind are only "provisional" and that a final ruling as to the age of an undocumented person may be sought from the judicial authority through the appropriate channels, which have not been exhausted in the present case.

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

5.1 In his comments of 6 November 2017, the author maintains that, contrary to the State party's claims, the documents that he submitted to the police on 19 April were originals, accompanied by the corresponding photocopies. With regard to the identity certificate, he notes that the State party's assertion that the person in the photograph does not resemble the author is a mere conjecture.

5.2 The author maintains that neither he nor his lawyers were informed that, by means of the decree of 16 May 2017, the prosecutor had initiated investigative proceedings for the protection of minors with respect to the author and had then closed the case without having seen him or heard either him or his lawyers, thus preventing him from being defended and from knowing his legal situation with regard to the determination of his age.

5.3 On 1 June 2017, the author went to the Office for Refugee Assistance for the third time, accompanied by his lawyers, in order to apply for asylum. He was told that he could submit his application for international protection as long as he declared that he was an adult. However, the author considered that this was contrary to his interests as a minor.

5.4 The author notes that, although the decree of majority concerning him was issued on 27 June 2017, his representatives were not aware of it until 25 July 2017, when they received a letter from the chief prosecutor for minors in which it was mentioned. He claims

[6] See para. 7.1 below.

that this prevented him from having his rights legally defended and rendered him even more vulnerable. Neither the police nor the Public Prosecution Service contacted the Embassy of Côte d'Ivoire in Spain before 27 June 2017 to verify the identity of the author or the validity of the documents provided. On 18 July 2017, the Embassy issued a passport in the author's name, with 31 December 1999 as the date of birth.[7]

5.5 The author notes that, on 31 July 2017, the Public Prosecution Service filed a criminal complaint against the author and three members of Fundación Raíces for identity theft and falsification.[8]

5.6 On 3, 10 and 28 August 2017, the author sent letters to the Office of the Chief Prosecutor for Minors, indicating that he had received his passport and requesting that he be sent a copy of the decree of majority as a matter of urgency and that the interim measures requested by the Committee be implemented. He also informed the Office that he was in a vulnerable situation because he was being housed in a shelter for adults. Finally, on 5 September 2017, he was sent the decree of majority that had been issued on 27 June 2017.

5.7 On 26 September 2017, the author returned to the Office for Refugee Assistance, accompanied by a lawyer. He was unable to apply for asylum as a minor, because the Office once again took into account the decree of majority that had been issued by the Public Prosecution Service, even though the author showed his passport, which proved that he was a minor. The author explains that he was in such a grave situation that he finally submitted his application as an adult, since this was the only option available to him. He gave 1 January 1999 as his date of birth.

5.8 On 27 October 2017, the author applied to the Public Prosecution Service for a review of the decree of majority. He also reiterated his request to the protection services of the Community of Madrid to be admitted to the protection system as a minor in need of protection.

5.9 In response to the State party's argument that the communication should be considered inadmissible *ratione materiae*, the author argues that: (a) it can be asserted that he is a minor, based on his passport; (b) it is not true that he declared himself to be an adult upon entering Spain and, in any case, such a declaration could not be considered evidence that he was an adult; (c) the allegation that his true identity is not known does not amount to evidence that he is an adult; and (d) his refusal to undergo very intrusive age tests that yield highly questionable results cannot in any way be interpreted as evidence that he is an adult. The author notes that, according to the latest scientific literature, radiological age determination tests, in particular the evaluation of X-rays of the left wrist using the Greulich and Pyle method, have such wide margins of error that they cannot be used to draw definite conclusions. Moreover, these tests are applicable to the Caucasian population but not to persons from other continents, such as Africans, who have a different bone maturation period.[9]

5.10 With regard to the exhaustion of domestic remedies, the author claims that the State party presented a list of formally available remedies without commenting on the accessibility and/or effectiveness of those remedies, yet the burden of proof falls to the State party.[10] He explains that he was never notified of the steps taken by the police and the Public Prosecution Service in connection with the age determination procedure and was therefore unable to use the domestic remedies mentioned by the State party.

[7] The author attaches a copy of his passport.

[8] See paras. 7.4, 10.1 and 11.1 below.

[9] The author refers to "Conclusiones de la Jornada de Trabajo sobre Determinación Forense de la Edad de los Menores Extranjeros no acompañados. Documento de Consenso de Buenas Prácticas entre los Institutos de Medicina Legal de España" (Conclusions of the Workshop on the Determination of the Forensic Age of Unaccompanied Foreign Minors. Good Practice Consensus Document by the Legal Medicine Institutes of Spain), *Revista Española de Medicina Legal*, vol. 37, No. 1 (January–March 2011).

[10] The author cites European Court of Human Rights, *Akdivar and others v. Turkey*, and Inter-American Court of Human Rights, *Galindo Cárdenas et al. v. Peru*.

5.11 Regarding the State party's claim that the author was informed of the possibility of lodging an appeal against the removal order, the author maintains that the removal order cannot be challenged directly before the courts but only by lodging an appeal that is decided upon by the Government within a period of three months and that does not suspend the effects of the removal order.

5.12 In response to the State party's argument that the author could have initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015, the author claims that Fundación Raíces sought to use this remedy on another occasion and that the application was dismissed on the grounds that the remedy was not appropriate.[11]

5.13 Lastly, the author claims that the State party failed to take the interim measure requested by the Committee, since he was never placed under guardianship and therefore could not go to the Office for Refugee Assistance to apply for asylum as a minor.

State party's observations on the merits

6.1 In its observations of 14 March 2018, the State party reiterates its account of the events and its arguments regarding the admissibility of the communication. The State party considers that there is no evidence that the author's return to his country of origin, where he has personal and family ties, would put him at risk of irreparable harm, nor would it constitute an exceptional circumstance.

6.2 The State party reiterates that the author has not exhausted the available domestic remedies. It adds that "there are effective means of challenging age determination at a later stage", since the submission of new objective evidence, such as original identity documents with biometric data and proof of age or objective medical counter-evidence, may lead the Public Prosecution Service to agree that the investigation into the real age of the minor should be reopened.[12]

6.3 The State party notes that the author's claim of an alleged violation of his best interests is generic and that he fails to specify clearly how the provision in question was violated. The Committee's general comment No. 6 establishes that a person should be presumed to be a minor in the event of uncertainty, but not when it is obvious that the person is an adult, in which case the national authorities may legally consider him or her as such without having to conduct any tests. However, in the present case the authorities gave the author the opportunity to undergo objective medical tests to determine his age. The State party points out that when adults are admitted to shelters that are intended for minors, they may subject those who are actually minors to abuse and ill-treatment.

6.4 Regarding the author's claim of an alleged violation of his best interests, in relation to articles 18 (2) and 20 (1) of the Convention, the State party points out that the author was rescued by Spanish authorities while aboard a flimsy boat; that he was looked after by health services on arrival on Spanish soil and provided with a lawyer and an interpreter free of charge; that as soon as he claimed to be a minor, this was reported to the Public Prosecution Service, the institution responsible for protecting the best interests of the child; and that the author is currently at liberty and is receiving social assistance.

6.5 As to the allegations based on article 8 of the Convention, the State party considers that the author has not shown how his right to preserve his identity was violated. It adds that the Spanish authorities registered him under the name that he gave when he illegally entered Spanish territory and that the resulting documents are, in fact, what allow him to exercise his rights today.

[11] The author provides a copy of decision No. 261/2016, in which the application in question was dismissed.

[12] The State party refers to articles 6 and 12 (4) of Organic Act No. 1/1996 of 15 January 1996 on the Legal Protection of Minors. It also notes that article 35 of Organic Act No. 4/2000 of 11 January 2000 on the Rights and Freedoms of Foreign Nationals in Spain and their Social Integration is applicable in this case.

6.6 With regard to the author's claim that his right to be heard was violated, the State party maintains that the author always had the opportunity to be heard and to make statements. The author was heard initially while being held at the police station, where he was identified, informed of his rights in the presence of an interpreter and assigned a court-appointed lawyer. The author was also entitled to make statements at the Office for Refugee Assistance.

6.7 As to the author's allegations that he was deprived of his right to receive special protection and assistance from the State, which is enshrined in article 20 of the Convention, the State party notes that "in the present case, since there is evidence that he is an adult, the right in question simply does not apply".

6.8 As to the possible solutions put forward by the author in his initial communication, the State party maintains that the author neither requests nor proposes "any means of determining with certainty" his age. He does not propose that any other objective medical tests be carried out, nor that the information concerning him be verified with the authorities of his supposed country of origin.

Author's comments on the State party's observations on the merits

7.1 In his comments of 19 March 2018, the author notes that the State party bases its entire legal argument on the existence of objective medical tests, without specifying what those tests are or providing a copy of the test results. He clarifies that he never underwent age determination tests either in Almería or in Madrid.

7.2 On 6 November 2017, the Provincial Prosecutor's Office in Madrid dismissed his application for a review of the decree of majority of 27 June 2017, even though the passport that he submitted is not fake, shows no signs of having been falsified and has not been the subject of a complaint or legal proceedings. The Prosecutor's Office argued that the passport could not be taken into account, "since, according to the factual background given in the present decree and the expert reports that have been drawn up, it has been established that the person who came to this Prosecutor's Office on 6 June 2017 was not M.T. and the true identity of that person could not be determined". In this regard, the author claims that it has not been established that the person who appeared was not M.T., because the criminal proceedings brought by the Public Prosecution Service have not yet concluded.

7.3 On 17 November 2017, the author initiated proceedings before an administrative court in order to directly challenge the decree issued by the Public Prosecution Service and to request a precautionary measure. In a decision handed down on 19 December 2017, his appeal was dismissed on the grounds that the court did not have jurisdiction over the case. The author states that an application for reconsideration of his request for precautionary measures is pending before the same administrative court, while an appeal against the decision regarding the court's lack of jurisdiction is pending before the High Court.

7.4 In a decision handed down on 26 February 2018, the Madrid Provincial High Court dismissed the complaint lodged by the Public Prosecution Service against members of Fundación Raíces, on the grounds that there was no evidence of their involvement in any offence.

7.5 The author reiterates his claims regarding the admissibility of the communication. With regard to the State party's allegations that he has not provided any evidence that he is a minor, the author maintains that: (a) he submitted his birth certificate and his certificate of nationality to the police; (b) he submitted the passport application receipt from the Embassy, containing a photograph and his date of birth, to the Public Prosecution Service on 6 June 2017; and (c) he submitted his passport, once he had received it, to the Public Prosecution Service on 3 and 28 August and 27 October 2017.

7.6 The author claims that the fact that his application for a review of the decree of majority was rejected, even though he had submitted a valid passport that was not the subject of legal proceedings, shows the ineffectiveness of the domestic remedies available.

7.7 The author notes that the State party failed to take into account his best interests on four occasions: (a) when it decided to consider him an undocumented person and to make him undergo age determination tests even though he had provided identity documents that

constituted full proof of his age and identity; (b) when he was not placed under guardianship or in a centre for minors as a precautionary measure pending the Public Prosecution Service's issuance of its decree, as recommended in the unaccompanied foreign minors protocol; (c) when his refusal to undergo tests was considered evidence that he was an adult; and (d) when his application for a review of the decree of majority was rejected, after he had received his passport.

7.8 The author explains that the State party violated his right to preserve his identity by attributing to him and recording on his asylum identity card a date of birth that does not match the date shown on the identity documents issued by the authorities of his country of origin. He notes that, according to both Spanish legislation and Supreme Court case law, documents issued by the authorities of a country of origin constitute authoritative proof of a foreign national's identity.[13]

7.9 Lastly, the author requests that the Committee require the State party to recognize all the rights to which he would have been entitled as a minor under Spanish domestic law, including by granting him a residence permit, since he was not placed under guardianship and was therefore prevented from obtaining the residence permit that is granted to young persons who reach the age of majority after being placed under guardianship.

Additional information submitted by the State party

8.1 On 27 August 2018, the State party reported that decision No. 188/2018 of 26 February 2018 of section 1 of the Madrid Provincial High Court, concerning the criminal investigation into the alleged offences of identity theft and falsification, reads as follows:

On 19 April 2017, staff of Fundación Raíces placed at the disposal of the Madrid municipal police a person who said his name was M.T., stating in their letter that he was a minor and providing a series of public documents from Côte d'Ivoire in which his date of birth was recorded as 31 December 1999. Once police checks had been carried out, it was concluded that the aforementioned M.T. had provided false documents and that the framework protocol on unaccompanied foreign minors would therefore not be followed. Fundación Raíces filed a complaint, signed by L.R. and E.F., on behalf of M.T. with the Committee on the Rights of the Child. As a result, the chief prosecutor for minors agreed to reopen the inquiry and a hearing was held on 6 June; the hearing was attended by a person other than M.T. who was accompanied by the lawyer A.E.S. This person submitted the relevant documents and when the photograph was checked against him, the prosecutor had doubts as to whether it was the same person. An expert analysis of the identity card was carried out and the card was found to be false.

8.2 The State party notes that it has therefore been established that: (a) the author, who is an adult, initially provided false documents to the municipal police in order to claim that he was a minor; (b) following the submission of a communication to the Committee claiming that he was a minor, the prosecutor himself summoned the author to offer him the opportunity to have his age reassessed in the event that there were new circumstances or documents to support his claim; (c) this hearing was attended by a member of Fundación Raíces who was representing the author and a person who was not the author but rather a minor seeking to impersonate him; and (d) an analysis carried out as a result of the prosecutor's suspicions confirmed that there had been an attempt to impersonate the author.

Third-party submission[14]

9. On 12 November 2018, the French Ombudsman made a third-party submission on the issue of age determination and detention in centres for adults pending expulsion.[15]

[13] The author cites article 4 of Organic Act No. 4/2000 and judgment No. 368/2015 of the Civil Division of the Supreme Court (section 1, 18 June 2015, reasons 3 and 4).

[14] This submission concerns communications Nos. 17/2017, 21/2017 and 27/2017, which have been registered with the Committee.

[15] A summary of the French Ombudsman's submission can be found in *N.B.F. v. Spain* (CRC/C/79/D/11/2017), paras. 8.1–8.6.

Author's additional comments

10.1 In comments submitted on 28 March 2019, the author reports that, on 18 February 2019, the Madrid Provincial High Court dismissed the objection as to jurisdiction that had been filed by his lawyer with the aim of having the case tried by the juvenile courts.[16] However, on 11 March 2019, Madrid Criminal Court No. 18 upheld the objection as to jurisdiction in a decision, stating that "since it has been established that the accused was a minor in April 2017, the juvenile courts have jurisdiction over the case".[17] The author notes that the decision reflects the fact that the passport was recognized as valid by the Public Prosecution Service during the oral proceedings.

10.2 The author concludes that this decision confirms that: (a) when he entered Spain and sought asylum and throughout his stay, until 31 December 2017, he was a minor; (b) the State party recognized for a second time that he was a minor, given that the Spanish authorities had previously acknowledged the validity of the date of birth shown on his passport by changing the date of birth shown on his asylum card; and (c) the Public Prosecution Service refused to recognize a valid passport and, as a result, the author was not duly protected and could not exercise his rights as a minor.

State party's additional comments

11.1 In comments submitted on 1 April 2019, the State party reports that the decision of 11 March 2019 of Madrid Criminal Court No. 18 puts an end to the proceedings, as it establishes that the author was a minor at the time of the events in question. The decision states that "during the plenary session, a certificate issued by the Embassy of the Republic of Côte d'Ivoire in the Kingdom of Spain was presented, in which it is stated that biometric passport No. 17AL64055, issued to M.T. on 16 July 2017 by the competent authorities of the biometric passport office of Côte d'Ivoire, was processed by the Embassy of Côte d'Ivoire in Madrid, Spain, on 20 April 2017, is genuine and meets the general standards for biometric passports".

11.2 According to the State party, the fact that the national judicial authorities recognized the author's date of birth as 31 December 1999 shows that, at the time when the communication was submitted to the Committee, the available domestic remedies had not been exhausted. The State party therefore requests that the communication be declared inadmissible on the grounds that effective domestic remedies had not been exhausted at the time of submission.

Issues and proceedings before the Committee

Consideration of admissibility

12.1 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 to the Convention on the Rights of the Child on a communications procedure, whether the communication is admissible.

12.2 The Committee notes the State party's argument that, at the time of submission, the author had not exhausted the available domestic remedies because: (a) he could have applied to the Public Prosecution Service for additional testing; (b) he could have requested a review of any Autonomous Community decision finding that he was not a minor, under article 780 of the Civil Procedure Act; (c) he could have challenged his removal order before the administrative courts; and (d) he could have initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015. In addition, the State party maintained that the fact that the author was recognized as a minor in the decision of 11 March 2019 of Madrid Criminal Court No. 18 shows that the author had not exhausted the available domestic remedies.

[16] Decision of the Madrid Provincial High Court, doc. 55.

[17] Decision of Madrid Criminal Court No. 18.

12.3 However, the Committee also notes the author's argument that he was not notified of the steps taken by the police and the Public Prosecution Service in connection with the determination of his age until after the submission of his complaint to the Committee. In particular, he did not have access to the decree of majority until 5 September 2018, that is, more than three months after it had been issued and only after he had repeatedly requested a copy from the Public Prosecution Service. The Committee notes that the author applied to the Public Prosecution Service for a review of the decree of majority and submitted a copy of the passport that had been duly issued to him by the Embassy of Côte d'Ivoire in Madrid, but his application was rejected on 6 November 2017. The Committee also notes the author's argument that, since the Office for Refugee Assistance did not provide written confirmation of its refusal to allow him to apply for asylum as a minor, he was unable to initiate any domestic proceedings in order to assert his right to seek international protection.

12.4 The Committee considers that, in the context of the author's imminent expulsion from Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order cannot be considered effective.[18] The Committee notes that the State party has not specified that the remedies to which it refers would have suspended the author's deportation. Accordingly, the Committee concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

12.5 The Committee is of the view that the author has sufficiently substantiated his claims under articles 2, 3, 8, 12, 20 and 22 of the Convention, relating to the failure to give consideration to the best interests of the child, the fact that his legal representative was not allowed to accompany him during the age determination process, and the failure to appoint a guardian, which prevented him from applying for asylum as a minor. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

13.1 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.

13.2 One of the issues before the Committee is whether, in the circumstances of the present case, the process of determining the age of the author, who stated that he was a minor and provided various identity documents to prove it (namely, his birth certificate, his certificate of nationality, his identity certificate and later his passport), violated his rights under the Convention. In particular, the author has claimed that the best interests of the child were not taken into account during the process, since he was not duly informed of the steps taken to determine his age and his legal representative was not allowed to accompany him during the age determination process.

13.3 The Committee recalls that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights set out in the Convention flows from that determination. It is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, the person should be given the benefit of the doubt and treated as a child. Accordingly, the Committee recalls that the best interests of the child should be a primary consideration throughout the age determination process.[19]

13.4 In the present case, the Committee notes the State party's argument that the author was considered to be an adult by the authorities because: (a) he voluntarily declared that he was an adult when he arrived in Spain; (b) he clearly looked like an adult; (c) he refused to undergo medical age determination tests; and (d) the identity documents provided by the

[18] *N.B.F. v. Spain*, para. 11.3.
[19] *N.B.F. v. Spain*, para. 12.3.

author were not adequate proof of his identity. The Committee also draws attention to joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, which states that identity documents should be considered genuine unless there is proof to the contrary.[20] The Committee notes that the authorities of the State party were of the view that the birth certificate and the certificate of nationality provided by the author could not be considered proof that he was a minor because they did not contain biometric data, the date of birth on the certificate of nationality had been altered and the fingerprint on the identity certificate did not correspond to that of the author. However, the Committee also notes that the author submitted to the authorities of the State party, on several occasions, the receipt from the Embassy of Côte d'Ivoire in Madrid showing that he had applied for a passport, the certificate from the Embassy showing that his passport was being processed, and his passport once he had received it. The Committee recalls that the burden of proof does not rest solely with the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.[21] In the present case, the Committee notes the author's argument that if the State party had doubts as to the validity of the documents submitted, it should have contacted the consular authorities of Côte d'Ivoire to verify the author's identity, which it did not do. The Committee notes that the authorities of the State party only contacted the consular authorities to verify the authenticity of the passport when the author had already been declared an adult.

13.5 The Committee also notes the author's allegations that he was not allowed to be accompanied by his legal representative, who would have defended his interests as a possible unaccompanied child migrant, during the age determination process that led to the issuance of a decree of majority. The Committee emphasizes that States parties should allow all young persons claiming to be minors to be represented by a legal representative of their choice or appoint a qualified legal representative and an interpreter where necessary, as soon as possible on their arrival and free of charge. The Committee is of the view that the provision of a representative for such persons during the age determination process is an essential guarantee of respect for their best interests and their right to be heard.[22] Failure to do so constitutes a violation of articles 3 and 12 of the Convention, as the age determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

13.6 In the light of the foregoing, the Committee considers that the age determination procedure undergone by the author, who claimed to be a child and provided evidence to support this claim, was not accompanied by the safeguards needed to protect his rights under the Convention. Given the circumstances of the present case, in particular the fact that he was not accompanied by a representative during this procedure and the fact that the State party rejected as evidence the documents provided by the author, including his passport, without clearing up any doubts with the consular authorities of Côte d'Ivoire, the Committee is of the view that the best interests of the child were not a primary consideration in the age determination procedure undergone by the author, contrary to articles 3 and 12 of the Convention.

13.7 The Committee must also determine whether the fact that the author could not apply for asylum as a minor violated his rights under the Convention. The Committee notes the author's allegations that: (a) he tried four times to lodge an asylum application with the Office for Refugee Assistance as a minor but was not allowed to do so because he did not have a guardian; (b) the Office never issued a written decision on the matter; and (c) the fact that he was unable to apply for asylum put him at risk of expulsion. The Committee notes the State party's claim that there was no evidence that the author's return to his

[20] Para. 4.

[21] See, inter alia, Human Rights Committee, *El Hassy v. Libyan Arab Jamahiriya* (CCPR/C/91/D/1422/2005), para. 6.7, and *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3.

[22] *N.B.F. v. Spain*, para. 12.8.

country of origin, where he had personal and family ties, would have put him at risk of irreparable harm, nor would it have constituted an exceptional circumstance. However, the Committee notes that the author finally obtained an asylum card, after being forced to claim that he was an adult even though he had an original passport that proved he was a minor.

13.8 In this regard, the Committee recalls its general comment No. 6, which stipulates that:

> States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations.
>
> ...
>
> In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.[23]

The Committee considers that the fact that the author was not assigned a guardian to enable him to apply for asylum as a minor, even though he had official documents proving that he was a minor, deprived him of the special protection that should be afforded to unaccompanied minor asylum seekers and put him at risk of irreparable harm in the event of return to his country of origin, in violation of articles 20 (1) and 22 of the Convention.

13.9 The Committee also notes the author's allegations that the State party violated his rights insofar as it altered elements of his identity by attributing to him an age and a date of birth that did not match the information on the documents submitted to the Spanish authorities. The Committee considers that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements thereof. In this case, the Committee notes that the State party claims that the birth certificate and the certificate of nationality provided by the author could not be considered proof that he was a minor because they did not contain biometric data, the date of birth on the certificate of nationality had been altered and the fingerprint on the identity certificate did not match that of the author. The Committee also notes that the author informed the authorities several times that he had applied for a passport at the Embassy of Côte d'Ivoire in Madrid and provided them with a copy of it once it had been issued. The Committee considers that the State party failed to respect the author's identity by rejecting as evidence the birth certificate and passport submitted by the author, without verifying the information they contained with the authorities of his country of origin. Consequently, the Committee finds that the State party violated article 8 of the Convention.

13.10 Having found a violation of articles 3, 8, 12, 20 (1) and 22 of the Convention, the Committee does not consider it necessary to examine whether the same facts constitute a separate violation of article 2 of the Convention.

13.11 Lastly, the Committee notes the author's claims concerning the State party's failure to implement the interim measure of recognizing him as a minor, offering him due protection and enabling him to apply for asylum through a legally appointed guardian or representative. The Committee recalls that, by ratifying the Optional Protocol, States parties undertake an international obligation to comply with the interim measures requested under article 6 of the Optional Protocol, which, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.[24] In the present case, the Committee notes the State party's argument that the author's transfer to a child protection centre might have posed a serious risk to the children in those centres. However, the Committee notes that this argument is based on the premise that the author was an adult. The Committee considers that the greater risk would be to send someone who may be a child to a centre that is reserved for individuals who have been

[23] Paras. 33 and 36.

[24] *N.B.F. v. Spain*, para. 12.11.

recognized as adults. The Committee also notes that the State party never assigned a guardian to the author to enable him to apply for asylum as a minor and did not accept his claims as to his date of birth until after he had reached the age of majority. Consequently, the Committee considers that the failure to implement the requested interim measure in itself constitutes a violation of article 6 of the Optional Protocol.

13.12 The Committee on the Rights of the Child, acting under article 10 (5) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, finds that the facts before it disclose a violation of articles 3, 8, 12, 20 (1) and 22 of the Convention and article 6 of the Optional Protocol.

14. The State party should therefore provide the author with effective reparation for the violations suffered, including by giving him the opportunity to regularize his administrative status in the State party, taking due account of the fact that he was an unaccompanied minor when he first sought to apply for asylum. 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 all procedures for determining the age of young persons claiming to be minors are in line with the Convention and, in particular, that in the course of these procedures: (i) the documents submitted by the young person concerned are taken into consideration and, if issued or authenticated by the relevant State authority or embassy, accepted as genuine; and (ii) the young person concerned is assigned a qualified legal representative or other representatives without delay and free of charge, any private lawyers chosen to represent the young person are recognized and all legal and other representatives are allowed to assist the young person during the age determination procedure;

(b) Ensure that young unaccompanied asylum seekers claiming to be under 18 years old are assigned a competent guardian as soon as possible to enable them to apply for asylum as minors, even if the age determination procedure is still pending;

(c) Develop an effective and accessible redress mechanism that allows young unaccompanied migrants claiming to be under 18 years old to apply for a review of any decrees of majority by the authorities in cases where the age determination procedure was not accompanied by the safeguards needed to protect the best interests of the child and the right of the child to be heard;

(d) Provide training to immigration officers, police officers, members of the Public Prosecution Service, judges and other relevant professionals on the rights of asylum-seeking and other migrant children and, in particular, on the Committee's general comments Nos. 6, 22 and 23.

15. The Committee recalls that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Convention or the two substantive Optional Protocols thereto.

16. 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 present Views and to disseminate them widely.