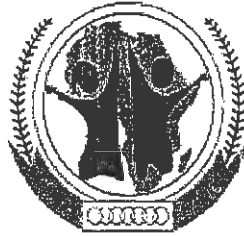


AFRICAN UNION

*African Committee of Experts on the Rights
and Welfare of the Child (ACERWC)*



UNION AFRICAINE

*Comité Africain d'Experts sur les Droits et le
Bien-être de l'Enfant (CAEDBE)*

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THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF
THE CHILD (ACERWC)

ADMISSIBILITY RULING Communication

N2: No. 008/Com/002/2016
Decision on Admissibility N2:001/2017

AUTHOR: Sohaib Emad represented by advocate Dalia Lotty and Samar Emad
AGAINST: Government of Arab Republic of Egypt

I. Submission of Communication

1. The Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (the Committee/ACERWC) received a communication dated 31 March 2016 pursuant to Article 44(1) of the African Charter on the Rights and Welfare of the Child (the Charter/ACRWC). The Communication is submitted by Sohaib Emad represented by advocate Dalia Lotty and Samar Emad, sister of the alleged victim Sohaib Emad (hereinafter "the Complainants"). According to Section IX (2) (I) of the Revised Guidelines on Consideration of Communications by the ACERWC (the Revised Communications Guidelines), the Committee transmitted a copy of the Communication to the respondent State Party.
2. In a letter dated 6 May 2016, the respondent State expressed its views on the proceedings stating that the ACERWC does not have a mandate to proceed with the case because the State party had entered reservations on articles 44 and 45 of the ACRWC. On 30 January 2017, the ACERWC wrote to the State party clarifying and stating that the reservations entered by the state party are not compatible with the purpose and object of the ACRWC. The ACERWC reasoned that the reservations are incompatible with the object and purpose of the treaty, and in particular contrary to article 19(c) of the Vienna Convention, mainly because the provisions subjected to reservation were among the core rationales for the creation of the treaty. Furthermore the Committee explained that placing a reservation on procedural matters of a human rights treaty is generally incompatible with the purpose and objective of the treaty under international human rights law. Following the exchange of this dialogue, the Committee continued with the proceedings of the Communication.

II. Summary of Alleged Facts

3. Sohaib Emad is an Egyptian born on 12 December 1998 and resides in Mansoura City. At the time of his arrest, he was aged 15 and was attending secondary school in Al Terraa Street, in Mansoura City.
4. The Complainants allege that Sohaib took part in demonstrations on the 2014^h anniversary of the 2011 January uprising. Consequently on 11 February 2014, Sohaib Emad was arrested at his house without being informed of any charges and taken to Mansoura Police Station. He remained in the police station for 40 days. He had no access to a lawyer and family members for the first four days. He was allegedly subjected to beating

including kicks and punches in different parts of his body and face to force him to admit to being a member of a gang involved in, burning police vehicles, possession of Molotov cocktails and targeting police officers and academics to kill them. The Complainants allege that, after Mansoura, he was taken to Dekernes Correctional Facilities where he has been held in an inhumane condition until the time of the submission of the communication.

5. The Complainants allege that Sohaib did not have any physical problem before the detention; however, in April 2014 he started suffering from swelling and pain in his right knee for which he did not receive medical treatment until May. The doctor diagnosed him with Rheumatoid and instructed the detaining authorities to administer anti-inflammatory injections once every 3 weeks. According to the Complainants, on 29 August 2014 after the pain became sharper, Sohaib was transferred to Dekernes Hospital for examination to be diagnosed with dislocated knee cap. The examining doctor advised an urgent operation to his knees but he was not transferred for surgery until 29 September 2014. The Complainant allege that the delay in providing him with prompt surgery coupled with poor detaining conditions and absence of care and attention exacerbated his condition. They allege that Sohaib was not provided with sufficient recovery time following the operation and was transferred from hospital to detention 1.5 days after the operation. It was also alleged that the detaining officers did not allow him to have the right amount of medication and treatment prescribed to him. In December 2015, Sohaib started to complain of pain in both knees. It is alleged that following many requests, medical professionals at the premises examined him and claimed that the rheumatoid moves from right to left and that all he needed is painkillers. On 1st January 2016, his family noticed that he walks with difficulty and both knees are red and swollen. A doctor outside prison advised the family that what prevented right knee from recovering is failure to complete treatment and therapy. Sohaib remains deprived from any treatment bar for the painkillers. His family complained to the public attorney and ministry of interior on March 16 but allegedly to no avail. The Complainants argue that due to the conditions in detention, humidity, overcrowding and sleeping on the floor, his left knee now suffers the same fate.

III. The African Committee's Analysis and Decision on Provisional Measure

6. In their submission, the Complainants requested the Committee to intervene immediately and request the government of Egypt to release the child and provide him with treatment before his condition worsens.

7. According to section VII (1) of the Revised Communication Guidelines (hereinafter the Revised Guidelines), the Committee may adopt a provisional measure where it considers that one or more Communications submitted to it or pending before it reveal a situation of urgency, serious or massive violations of the African Children's Charter and the likelihood of irreparable harm to a child or children in violation of the African Children's Charter.
8. The African Court of Human and Peoples' Rights, in the case of The African Commission on Human and Peoples' Rights Vs. The Republic of Kenya, stated that for a provisional order to be issued there needs to be a situation of 'extreme gravity and urgency, as well as a risk of irreparable harm'. In the case of John Lazaro Vs. The Republic of Tanzania as well as in the case of the African Commission on Human and Peoples' Rights Vs. Great Socialist People's Libyan Arab Jamahiriya, the Court looked in to the gravity and urgency of the violation in conjunction with the eminence of an irreparable harm in contrary to rights recognized in the relevant treaty in order to decide the necessity of a provisional measure.
9. In the present communication, the Complainants stated that there is an urgent need for the Committee to intervene immediately to stop the violation of the rights under the Charter. However, the Complainant has not stated the likelihood of an irreparable harm on the enjoyment of the rights under the Charter. In determining the need for a provisional measure, the Committee looks in to the gravity and urgency of the situation, and the irreparable nature and imminence of the harm in question.
10. The Committee has not been provided with adequate evidence that there is a situation of gravity and urgency that can result in an irreparable harm in violation of the rights provided in the Charter. Therefore the Committee does, inspired by the jurisprudence of the Court and in line with its Guidelines, finds that the requirements for issuance of provisional measure are not met.

IV. The African Committee's Analysis and Decision on Admissibility

11. The current Communication is submitted pursuant to Article 44 of the African Children's Charter which allows the Committee to receive and consider complaints from "any person, group or non-governmental organization recognized by the Organization of the African Unity, Member States, or the United Nations on matters covered by the Charter". The Complainants, therefore, have submitted that they have the competence to submit the communication based on this provision. The Complainants also stated that the communication is directed against a State Party to the African Children's

Charter, as the respondent State ratified the ACRWC on the 9th of May 2001, and within whose jurisdictions the alleged violations of the rights enshrined in the Charter have allegedly been committed.

12. As provided under Section IX of the Revised Communication Guidelines, the admissibility of a communication submitted pursuant to Article 44 is, inter alia, subject to the condition of exhaustion of local remedies.

V. Exhaustion of local remedies

13. Section IX Article 1(d) of the Revised Communication Guidelines provides that the author of a communication should exhaust all available and accessible local remedies before it brings the matter to the Committee, unless it is obvious that this procedure is unduly prolonged or ineffective. The issue of exhaustion of local remedies requires detailed consideration. At the outset, under international law a local remedy is understood to be "any domestic legal action that may lead to the resolution of the complaint at the local or national level." As this Committee in Nubian case noted, "one of the main purposes of exhaustion of local remedies, which is also linked to the notion of state sovereignty, is to allow the Respondent State be the first port of call to address alleged violations at the domestic level."
14. International human rights law obliges a person whose rights have been violated to rely on domestic remedies to rectify the wrong before he/she takes the issue to an international tribunal. The idea behind this rule is that the full and effective implementation of international obligations in the field of human rights is intended to boost the enjoyment of human rights and fundamental freedoms at the national level. As the Commission in the case Free Legal Assistance Group, Lawyers Committee for Human Right, Union Interafricaine Des Droits De L'Hommes, Les Temoins De Jehova V. DRC noted, "A government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body."
15. The rule of exhaustion of local remedies is also of a paramount importance since it reinforces the subsidiary and complementary relationship of the international system to domestic system. In principle, neither international tribunal nor regional tribunal like the ACERWC should assume place of first instance court. The fact that international and regional forums like ACERWC should be accessible is undisputable. However, such kind of forums should come in to the picture only as a measure of last resort after the domestic remedies have been exhausted and their failure is apparent.
16. However, from Section IX Article 1(d) of the Revised Communication Guideline, it can be understood that there are exceptional circumstances in which the requirement of exhaustion of local remedies can be left aside. In applying the

rule of exhaustion of local remedies, this Committee takes into account the circumstances of each case, including the general context in which the formal remedies operate and the personal circumstances of the complainant.

17. As established by ACERWC, the requirement to exhaust domestic remedies is only with regard to remedies, which are 'available, effective and sufficient'. The question that begs answer in the present communication is whether it can be concluded that local remedies in the Respondent State are not available, ineffective or insufficient based on the allegations made by the complainant.
18. In the present case, the Complainants did not attempt to exhaust local remedies. The Complainants are arguing that there are no local remedies to be exhausted.
19. In their submission, the Complainant argued that the State is well aware of the series of serious and massive human rights violations occurring and has taken little or no steps to remedy those violations. According to the Complainants, these impediments render local remedies unavailable to the victims.
20. The Complainants further submitted that the Egyptian judiciary has been used by the regime as a tool of repression against many citizens including the vulnerable. Noting that recently a Court has sentenced a four years old child to life imprisonment for allegedly committing a crime 2 years ago and on the basis of other reported incidents, the complainant argued that there is no functioning judicial system in the respondent state.
21. Although the Complainant argued that the State is well aware of the series of serious and massive human rights violations occurring in the respondent state, they did not adduce any evidence to prove this allegation. A mere allegation cannot be held to be adequate enough to the respondent state responsible. From the submission of the Complainants, it cannot be concluded that the state is well aware about the wrongs done to the victim. In this regard, the Committee is not convinced by the submission of the Complainants.
22. On the other hand, as outlined above, the Complainants alleged that there is no functioning judiciary in the respondent state as it has been used by the regime as a tool of repression. Apart from casting vilification on the function of judiciary, the Complainants have not buttressed their argument. In other words, they could not prove sufficiently that this allegation is well founded. In the view of the Committee, the Complainants are simply casting doubts about the effectiveness/existence of the domestic remedies. In the case *A V Australia*,¹ it has been noted that "mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies."

¹ See the UN Human Right Committee *A v. Australia*, Communication No. 560/1993, para 6.4.

23. In the case *Anuak Justice V Ethiopia*² the African Commission held that "it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies." The Commission further underscored that it is not enough for the complainant to cast aspersions on the ability of the domestic remedies of the State due to isolated or past incidences. For instance, the fact that a Court has sentenced a four years old child to life imprisonment for allegedly committing a crime as the Complainants mentioned in their submission, cannot render the whole judiciary dysfunctional as it is one of past incidences. The fact that one court gives such kind of decision does not mean all courts in the respondent state will have the same stand on the same issue. An error committed by the lower court can be corrected by the higher court. In any case the functionality of judiciary of a given state cannot be judged by an isolated incidence or the error committed by one court.

iv. Decision on Admissibility

24. On the basis of all the above arguments and analysis, the African Committee of Experts on the Rights and Welfare of the Child notes and concludes that the Communication submitted by the author has not fulfilled the admissibility conditions as laid down in the Charter and the Committee's Guidelines on Consideration of Communication; it fails to comply with the requirement of exhaustion of local remedies. The Communication is accordingly declared inadmissible.

Done in May 2017



Benyam Dawit Mezmur
Chairperson of the African Committee of Experts on the Rights and Welfare
of the Child

² See *Anuak Justice Council V Ethiopia* Communication no. 299/2005, para 50.