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Communication 670/17

**Fadhil Al Mawla Husni Ahmed Ismail and 19 Ors
(represented by Freedom and Justice Party of
Egypt)**

v

Arab Republic of Egypt

Adopted by the

African Commission on Human and Peoples' Rights

during the 65th Ordinary Session held from 21 October to 10 November 2019

Banjul, The Gambia



.....
Commissioner Solomon Ayele Dersso
Chairperson of the African Commission
on Human and Peoples' Rights




.....
Ms. Lindiwe Khumalo
Ag. Executive Secretary to the African
Commission on Human and Peoples' Rights

Admissibility Decision of the African Commission on Human and Peoples' Rights

Communication 670/17 – Fadhl Al Mawla Husni Ahmed Ismail and 19 Ors (represented by Freedom and Justice Party of Egypt) v. Arab Republic of Egypt

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 21 November 2017 from the Freedom and Justice Party of Egypt (the Complainant), on behalf of Fadhl Al Mawla Husni Ahmed Ismail and nineteen Others (the Victims).¹
2. The Complaint is submitted against the Arab Republic of Egypt (Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).²
3. The Complainant submits that the twenty Victims were sentenced to death in five different cases before the Egyptian Courts. The Complainant alleges that the Victims have no further right of appeal and that four of these Victims were tried *in absentia*. According to the Complainant, the sixteen Victims who are in custody face imminent execution, and the lives and well-being of the Victims, their families and their lawyers are at imminent risk due to the proceedings in Egypt.
4. The first case relates to the upholding on 07 June 2017 by the Court of Cassation, the highest appellate court in Egypt, of the death sentence verdict of six of the Victims who were accused of murdering Sergeant Abdullah Metwally (the Metwally case), a house guard of one of the judges on the panel of former President Mohamed Morsi's trial. The death sentence was originally imposed on the six Victims by the Criminal Court on 07 September 2015 for establishing and joining a terrorist group, providing the group with weapons and money and murdering Sergeant Metwally.
5. The Complainant alleges that the six Victims were disappeared for periods ranging from three days to three months, were denied legal representation, access to their families and

¹ Alexandria protest killing case: Fadhl Al Mawla Husni Ahmed Ismail; Kafr Al Sheikh bombing case: Ahmed Abd Al Hadi Mohammed Al Sehimy; Sameh Abdullah Mohammed Yousif; Lutfi Ibrahim Ismail Khalil; Ahmed Abd Al Mon'em Salama Ali Salama; Ahmad Al Sayed Abd Al Hamid Mansour; Fakhri Abd Al Latif Radwan Al Agmi; Samah Ahmed Mohammed Abu Shaer; Metwally case: Ahmed Waleed Meshaly; Mahmoud Mamdouh Wahbah; Bassem Mohsen Al Khereby; Ibrahim Yahya Azzab; Abdalrahman Attiya; Kahled Raf'at Gad Askar; Qatar espionage case: Ahmed Ali Abdo Afifi; Ahmed Ismail Thabet Ismail; Mohammed Adel Hamed Keilani; Rabaa Dispersal case: Waleed Al Sayed Habeeb; Yasser Al Asasir Abd Al Mon'em Ismail; Yasser Abd Al Samad Mohammed Abd Al Fattah Shukur.

² Egypt ratified the African Charter on Human and Peoples' Rights on 20 March 1984.



were tortured during interrogations in order to obtain confessions. The Complainant further alleges that the torture included anal rape with a wooden stick, electric shocks, burning with cigarette butts, suspension in stress positions for days and threats that their mothers and sisters would be raped. The Complainant states that the six Victims later retracted their confessions on the basis that it was obtained under torture and that this led to further torture by the National Security Agency (NSA).

6. The Complainant avers that there were also flaws in the manner in which the trial was conducted, including the validity of the evidence produced in Court and the testimony of alleged eyewitnesses. In this regard, the case rested primarily on the Victims' recanted confessions, the Court ignored forensic evidence related to the alleged torture, the rifle produced by the prosecution as the murder weapon did not match the bullets found in the victim, there were a number of discrepancies between the evidence produced and the witness' testimonies, and the main defendant provided evidence that at the time he had undergone surgery which rendered him completely unable to hold a gun.
7. The Complaint further avers that the Court applied recent legal amendments to the appeal system which gives it the discretion not to hear any defence witnesses and which abolishes a previous two-stage appeal process, through which the Court of Cassation could refer cases back to the Criminal Court for retrial. The abolition means that all judgements of the Court of Cassation are final and binding, and the Complainant alleges that this makes it easier for the Court to impose death sentences without effective challenge. Given these amendments, the Complainant avers that it is unlikely that the appeal submitted by the six Victims on 15 June 2017 on the basis of procedural flaws in the trial will be granted. The Victims are allegedly still detained at various locations, held in appalling conditions and denied medical care and family visits.
8. The second case relates to the upholding on 19 June 2017 by the Supreme Military Court of Appeals, the highest military court of appeal, of the death sentence verdict of seven Victims (of which three were sentenced *in absentia*) implicated in the Kafr Al Sheikh stadium bombing which took place in April 2015 in which a room next to the stadium exploded, leaving seven dead and three injured (the Kafr Al Sheikh case). The Complainant states that this case falls under the jurisdiction of the military courts since the passing of a new law which expands the jurisdiction of military courts to all electricity networks, road and bridge networks as well as other buildings, utilities and public property, amongst others.
9. The Complainant avers that all seven Victims were forcibly disappeared for periods ranging from 70 to 90 days, were tortured throughout the period of their detention and



denied access to lawyers. The torture allegedly included assault, suspension by the wrists, electric shocks and threats of rape to their female relatives. The Complainant avers that the records of the National Security Reports for the arrest of two of the Victims who were arrested on 19 and 20 April 2015 respectively, were post-dated by two months in order to cover up the prolonged periods of secret detention. The Complainant states that complaints filed by families of the Victims with the Public Prosecutor's Office following their forced disappearances and torture were not acted upon and the cases closed.

10. The Complainant alleges that the sentence in this case was based solely on the statements obtained under torture and the testimonies of state security officers. The Complainant alleges that the Court failed to consider an expert report on the manner of detonation of the explosives and also ignored eyewitness testimonies which confirmed that the Victims were not present at the scene when the crime took place, as well as the admission by the military investigators that the CCTV footage could not accurately identify the culprits.
11. The third case relates to the upholding on 03 July 2017 by the Court of Cassation of the death sentence verdict of three of the Victims who took part in a sit-in at Rabaa Al Adawiya, which was violently dispersed by the Egyptian security forces (Rabaa Dispersal case). The Complainant alleges that the Victims were arrested and forcibly disappeared, and while in detention, were subjected to severe beatings and electrocution. The Complainant further alleges that the trial was rife with irregularities, including reliance by the Court on information in case papers which had been lost by the prosecutors and failure by the Court to allow the Victims to present their defence witnesses.
12. The fourth case relates to the upholding on 24 April 2017 by the Court of Cassation of the death sentence verdict of one of the Victims for allegedly killing a Coptic man during a protest in Alexandria on 15 August 2013 (Alexandria protest killing case). The Complainant avers that a key eyewitness gave five different accounts of the same incident, and these contradictions were not addressed in the judgement, the Court disregarded stark differences between the account of the arrest told by the defence and the criminal investigation agent and the Court also disregarded an official statement from his employer that the Victim was in fact at work when the crime was committed. The Complainant further avers that the Victim was tortured by the NSA in a failed attempt to get him to confess and that the Court relied solely on the testimony of one witness who was pressured into testifying by an NSA officer.
13. The fifth and final case relates to the upholding on 16 September 2017 by the Court of Cassation of the death sentence verdict of three of the Victims who had allegedly been



charged with unlawfully communicating with a foreign country with the intention of damaging the country's military, political and diplomatic status and its national interest in exchange for receiving money from the State of Qatar (Qatar espionage case). The accusations also allegedly included the possession of reports and documents relevant to issues of national security and membership of an unlawful group.

14. The Complainant avers that the evidence relied on by the Court was mainly secret investigations by national security, eyewitness testimony which lacked any supporting evidence, and the confessions of some of the Victims, which they later withdrew on the basis that they were obtained under torture. The Complainant alleges that this torture included submersion for long periods in freezing cold water, electric shocks, being chained to a metal bedframe upside down and chained in restrictive positions for long periods and whipping. The Complainant alleges that as a result of the torture some of the Victims had fractured ribs and damaged nerves. The Complainant further avers that the Victims' lawyers were not given a chance to present their defence, and that the Court added new charges which had not been investigated by the prosecutors and on which the Victims were never interrogated.
15. The Complainant submits that there is no further right of appeal from the Court of Cassation or the Supreme Military Court of Appeals.

Articles alleged to have been violated

16. The Complainant alleges violation of Articles 4, 6 and 7 of the African Charter.

Prayers

17. The Complainant requests the African Commission on Human and Peoples' Rights (the African Commission) to:
 - (a) Issue provisional measures to direct the Egyptian authorities to suspend the death sentences while the proceedings before the Commission are being held, also that such directions should be extended to the four who have been sentenced in absentia, on the basis that they may be produced;
 - (b) Make a finding that Egypt has violated Articles 4, 6, and 7 of the African Charter in its conduct of the trials and the imposition of the death penalty against the 20 defendants;
 - (c) Make a decision for the Respondent State to set aside the death sentences and comply in full with the rights and guarantees of the African Charter in the present proceedings in Egypt and any future proceedings.

Procedure



18. The Secretariat received the Complaint on 21 November 2017 and acknowledged receipt of the same on 23 November 2017.
19. The Commission decided to be seized of the Communication in the inter-session on 29 November 2017 and granted provisional measures in accordance with Rule 98(4) of its Rules of Procedure. By letter and Note Verbale of the same date, the Parties were informed of this decision and the Complainant was requested to submit on the admissibility of the Communication within two (2) months.
20. The Respondent State in a Note Verbale of 18 December 2017 indicated that they cannot implement the request for provisional measures, as not enough information was provided in the request. In addition, the State raised challenges as to the *locus standi* of the Complainant.
21. In a letter of 02 January 2018 the Complainant informed the Commission that the Respondent State had breached the request for provisional measures by executing four Victims named in this Communication.³ The Secretariat by letter dated 18 January 2018 indicated that this matter would be brought to the attention of the Commission.
22. On 25 January 2018 the Complainant requested for an extension to submit on the admissibility of the Communication, and the Complainant was informed by letter of 01 February 2018 that the Communication would be tabled before the Commission at its next Session. By Note Verbale of 07 February 2018 the Respondent State was informed that the matters raised in its Note Verbale of 18 December 2018 would be tabled before the Commission for consideration.
23. The Complainant's submissions on admissibility were received at the Secretariat on 30 January 2018.
24. The Commission considered the challenge raised by the Respondent State during its 23rd Extraordinary Session, held from 13 to 22 February 2018, and decided to request both Parties to submit on *locus standi* in their admissibility submissions. This decision was transmitted to the Parties on 14 March 2018, in which the Commission also granted the Complainant an additional thirty (30) days within which to submit on admissibility. The same correspondences also informed the Parties that the Respondent State had no justification for the non-implementation of the provisional measures, and the

³The Victims who were executed were Ahmed Abd Al Hadi Mohammed A I Sehirmy, Sameh Abdullah Mohammed Yousif, Lutfi Ibrahim Ismail Khalil and Ahmed Abd Al Mon'em Salama Ali Salama.



Commission reiterated the request for provisional measures in relation to the remaining Victims.

25. By letter dated 22 May 2018, the Complainant proffered additional submissions in relation to its *locus standi*, as requested by the Commission.
26. By letter and Note Verbale of 07 June 2018 the Secretariat acknowledged receipt of the submissions of 30 January 2018 and 22 May 2018 and forwarded the same to the Respondent State, requesting the State to submit on admissibility within two (2) months.
27. The Respondent State on 20 June 2018 indicated that the Commission had not addressed its previous concerns in relation to the Complainant's *locus standi*, and reiterating these concerns. The Secretariat acknowledged receipt on 31 August 2018.
28. By letter and Note Verbale of 16 November 2018, the Commission informed the Parties that the Respondent State had been granted an addition thirty (30) days within which to submit on admissibility, and had been advised that its challenges in relation to the Complainant's *locus standi* is best addressed within the context of the said submissions.
29. By Note Verbale of 19 December 2018, the Respondent State replied, again reiterating its initial concerns in relation to the *locus standi* of the Complainant avowing that its initial concerns "... leave no doubt about the failure of compliance of the Communication with the ACHPR Rules of Procedure, and hence, the Embassy wishes to indicate that the Government of the Arab Republic of Egypt refuses to engage in any further dealings related to the Communication at hand for the above mentioned reasons."
30. By letter and Note Verbale of 08 March 2019, the Parties were informed that the Commission had considered the Respondent State's Note Verbale of 19 December 2018 during its 25th Extraordinary Session and decided to proceed to make a determination on the Admissibility of the Communication, based on the information before it.
31. During its 26^h Extraordinary Session the Commission considered the Communication and decided that it would consider the matter of *locus standi* under Article 56 (1) of the African Charter, and not as a preliminary issue.

Admissibility

The Complainant's Submissions on Admissibility



32. The Complainant submits that this Communication is admissible under the African Charter, noting that the conditions under Article 56 are cumulative. The Complainant submits that this Communication clearly indicates that it is submitted by the Freedom and Justice Party of Egypt, in respect of the Victims sentenced to death. It states that the Communication includes full contact details for both the Complainant and its lawyers and that no question of anonymity arises.
33. The Complainant further states that the Communication is compatible with the African Charter because the facts contained within it are sufficient to demonstrate *prima facie* violations of Articles 4, 5, 6 and 7 of the Charter. The Complainant submits that the Respondent State has been a Party to the African Charter since 1981 and that the matters addressed in the Communication occurred after the Charter became applicable in the territory of the Respondent State.
34. The Complainant submits that it is competent to bring the Communication, as there is nothing in the Charter to limit the definition of Complainant to persons who are victims of the alleged violations, and that the Commission has previously held in *Maria Baes v Zaire*⁴ that the Complainant need not be a national of a State Party to the Charter to submit a Communication.
35. The Complainant respectfully submits that there is nothing disparaging or insulting in the present Communication and that it records factual events.
36. In relation to the requirement that Communications shall be considered if they are not based exclusively on news disseminated through the mass media, the Complainant submits that in the jurisprudence of the Commission this requirement does not prevent Complainants from relying on any material drawn from the mass media, rather that it should not be exclusively based on mass media.⁵ The Complainant submits that in the present case it does not have free access to the proceedings, and that even defense lawyers were barred from accessing the proceedings. Furthermore, the Complainant submits that it has had trouble communicating with lawyers and human rights activists in Egypt.
37. The Complainant, however, submits that the Communication is not exclusively based on news disseminated through the mass media, and also draws on reports from internationally recognized non-governmental organizations, such as Human Rights Watch and Amnesty International; statements of the United Nations and other

⁴ Communication 31/89 - *Maria Baes v Zaire* (1995) ACHPR.

⁵ Communication 147/95-149/96 - *Sir Dawda K. Jawara v The Gambia* (2000) ACHPR para 24.



international organizations in response to the situation in Egypt; and evidence relating to the investigations and faulty trial proceedings obtained by the Complainant, disseminated by defense lawyers of the individuals sentenced to death and imprisonment.

38. In relation to the requirement that Communications shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, the Complainant submits that both itself and the Victims have exhausted all local remedies. In this regard, the Complainant states that the death penalties handed down have all been declared final, given that they have been upheld by the Court of Cassation, the highest court in Egypt. In addition, it is submitted that no presidential pardons were granted in respect of these cases.
39. The Complainant refers to the test for the exhaustion of domestic remedies as set out by the Commission in *Jawara v The Gambia*⁶, as well as clarification in *Alfred B. Cudjoe v Ghana*⁷ that "the internal remedy to which Article 56(5) refers entails a remedy sought from courts of a judicial nature." The Complainant argues that even if a remedy is available, it must also be considered whether it is effective and sufficient. The Complainant also refers to jurisprudence of the European Court of Human Rights, as quoted by the African Court on Human and Peoples' Rights related to the meaning of exhaustion of local remedies.⁸
40. The Complainant refers to the decision of the European Court of Human Rights in *Akdivar and Others v Turkey*, in which it held that situations of "martial law and characterized by severe civil strife" and the "risk of reprisals against the applicants or their lawyers" provide no prospect of success of a domestic remedy, and thus amount to an exhaustion of local remedies.⁹ The Complainant submits that there are clear impediments to the availability of any local judicial remedies, especially in the highly repressive environment, and these remedies are neither effective nor sufficient. The Complainant avers that these fundamental impediments show that any local judicial remedy is not "sufficiently certain not only in theory but in practice."¹⁰

⁶ Communication 147/95-149/96 - *Sir Dawda K. Jawara v The Gambia* (2000) ACHPR para 31.

⁷ Communication 221/98 - *Alfred B. Cudjoe v Ghana* (1999) ACHPR para 13.

⁸ African Court on Human and Peoples' Rights, *Tanganyika Law Society v Tanzania*, Judgement, Application No. 009/2011, 14 June 2013, para 82.

⁹ European Court of Human Rights - *Akdivar and Others v Turkey*, Judgement Application No. 21893/93, 16 September 1996, paras 73-75.

¹⁰ As above, para 52.



41. The Complainant submits that in particular the risks of reprisals against the accused or their defense lawyers show that there is no prospect of successfully pursuing any apparent appellate avenues and that it can, therefore, be concluded that local remedies have been exhausted.
42. In relation to the requirement that Communications shall be considered if they are submitted within a reasonable period from the time when local remedies are exhausted, the Complainant states that the Charter specifies no time limit in this regard. It refers to the time limit of six months after exhaustion of local remedies provided for in the European Convention on Human Rights and the American Convention on Human Rights as relevant in determining what constitutes a reasonable period. In this regard the Complainant states that the Complaint was submitted on 17 November 2017, whereas the dates for the final sentencing of the cases were as follows: a) Alexandria Protest Killing on 24 April 2017; b) Metwally case on 7 June 2017; c) Kafr Al Sheikh Bombing on 19 June 2017; d) Rabaa Dispersal on 3 July 2017; and e) the Qatar Espionage case on 16 September 2017.
43. In relation to the requirement that Communications should not deal with cases that have been settled by the State involved, the Complainant submits that the Respondent State has not settled the case, and that the case has not been submitted to any other international human rights body.
44. In addition to its submissions on Admissibility, the Complainant further requests the Commission to find that the Respondent State is in violation of the provisional measures, which had not been implemented to date, and which were breached in relation to the four individuals that were executed.
45. The Complainant submits that of the twenty death penalties to which this Communication relates, four individuals were executed after the Commission issued the request for provisional measures, four were sentenced in absentia, and thus twelve individuals are facing imminent execution. They request the Commission to refer the matter to the Assembly of Heads of State and Government pursuant to Article 58 of the African Charter and Rule 84(1) of the Commission's Rules of Procedure, and to take whatever other action deemed appropriate to safeguard the rights of those facing execution.
46. The Complainant in its admissibility submissions submits further evidence in relation to the individual cases, which it claims shows the various injustices surrounding the trials and verdicts, and which should be read in conjunction with the original Communication.



47. The Complainant submits that in relation to the Kafr Al Sheikh case, while new evidence has come to light which shows the true perpetrators of the crime, including an admission of guilt in a separate case, the military court refused to admit or investigate this evidence, or to halt the death sentences. The Complainant further avers that it obtained reports from the National Security Agency related to the official investigation in this case, in which it is indicated that no evidence was found when the homes of the accused were searched, to implicate them in the alleged offense, yet they were arrested and detained.
48. The Complainant further submits that in interviews with family members of the Victims who were executed, they related that the Victims had been forcibly disappeared and showed signs of torture. The Complainant avers that several complaints were filed with the Attorney General following the disappearance of the Victims, but that these allegations of kidnapping and torture were not investigated and dismissed on 12 December 2015 without any charges. The Complainant also avers that defense witness testimonies were not mentioned in the final verdict, and that while one Victim took off his shirt during the trial to show wounds that he had sustained to the judge, the judge did not acknowledge the visible signs and failed to take any action.
49. In relation to the Alexandria protest case, the Complainant submits that the wife and daughter of one of the Victims indicated in interviews that there was no evidence to link him to the incident, as he was at his place of work, which is not close to where the incident took place. In relation to the police guard murder case, the Complainant submits that media interviews with friends and family of the Victims indicate that they were not informed about the whereabouts of the Victims after their arrest, and they were held in inhuman conditions.
50. The Complainant also submits "further evidential background" which relates to the Respondent State's human rights record in general, which it submits provides further evidence on the treatment of detainees, those subject to the death penalty and accused of criminal offences in Egypt. This evidence is obtained from public sources, including reports by Human Rights Watch, Amnesty International and the International Federation for Human Rights. In this regard they refer to statistics of documented forced disappearances, similar cases where individuals were executed following flawed trials, as well as indications of mistreatment in prisons, arbitrary detentions, systemic summary executions of those held in detention and detention without trial. The Complainant states that although no official figures are available, at least 1700 people face death penalty in Egypt.



51. The Complainant submits that “the unjust trial practices are symptomatic of the repressive actions against all legitimate opposition in Egypt; conduct which is in violation of the African Charter and international human rights law.” The Complainant further submits that freedom of speech and assembly have been heavily restricted and organizations opposed to the military regime, primarily the Muslim Brotherhood, was banned and labelled a ‘terrorist’ organization in December 2013. The Complainant submits that several of the individual named in this Communication have been, or were thought to be members of the Muslim Brotherhood.
52. The Complainant states that the systemic violations have facilitated and aided the courts to conduct proceedings which ignore all basic fair trial considerations and serve as a means of sentencing opponents of the State to death or long terms in the absence of evidence. The Complainants submits that this should all be taken into account when making a determination on the admissibility and merits of this Communication.

Submissions by the Respondent State on *locus standi*

53. The Respondent State in a Note Verbale of 18 December 2017 raised challenges as to the *locus standi* of the Complainant, stating that it does not have any eligible status to present a Communication to the Commission for the following reasons: (1) the Freedom and Justice Party (the Complainant) has been dissolved by a sentence of the Supreme Administrative Court on 8/4/2014 due to its violation of Article 4 of Rule 40 issued in 1977, regulating the operation of political parties in the Respondent State; (2) the Complainant is a political entity established by the Muslim Brotherhood, which had been declared a terrorist organization by a ruling of the North Cairo Criminal Court on 1/6/2017; and (3) the Communication is brought by a political party, whereas political parties are not included in the Rules of the Procedure of the Commission under Rule 63 (1) which lists the institutions which may request for a matter to be included in the agenda of the Ordinary Session of the Commission. The Respondent State further elected against submitting on Admissibility on the basis that the Complainant lacks *locus standi*.

Additional submissions by the Complainant on the submissions by the Respondent State

54. Following the challenge raised by the Respondent State on the *locus standi* of the Complainant, set out in paragraph 20 above, the Commission requested the Complainant to submit arguments in this regard.
55. In response to the submission by the Respondent State that the Complainant has been dissolved by the Supreme Administrative Court and is a political entity established by



the Muslim Brotherhood, which has been classified as a terrorist organization by the North Cairo Criminal Court, the Complainant submits that the Freedom and Justice Party itself is not a terrorist organization. In addition, the Complainant submits that the Respondent State has classified the Muslim Brotherhood as a terrorist organization despite it being the country's largest opposition movement, according to a report by Human Rights Watch.

56. The Complainant submits that the Respondent State is deliberately targeting and persecuting all those considered to be dissidents and/or members of the Muslim Brotherhood, and that their remarks in this regard is not relevant for the purpose of establishing the admissibility of this Communication. The Complainant states that the African Charter in Article 56 provides that 'Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered' if it meets the admissibility criteria.
57. In relation to the admissibility criteria, the Complainant submits that both the African Charter and the Rules of Procedure are silent as to who may submit a Communication. In this regard they state that Article 56 (1) only requires a Communication to indicate its author, but does not state who the author may be. In addition, the Complainant refers the Commission to its submission on Article 56 (1) in paragraph 33 above, in which it states that there is nothing in the Charter to limit the definition of Complainant to persons who are victims of the alleged violations and refers to jurisprudence of the Commission which held the Complainant need not be a national of a State Party to the Charter to submit a Communication.
58. In relation to the third challenge by the State that political parties are not included in the Rules of the Procedure of the Commission under Rule 63 (1) which lists the institutions which may request for a matter to be included in the agenda of the Ordinary Session of the Commission, the Complainant submits that the Respondent State has misunderstood the Commission's Rules of Procedure. The Complainant states that this rule refers to the ability of State Parties or other specific organizations to request the Commission to discuss a human rights issues as part of its Provisional Agenda at an Ordinary Session of the Commission, in accordance with Rule 32 (2). In contrast, the Complainant submits that it had requested the Commission to adopt provisional measures in accordance with Rule 98 of the Rules of Procedure. The Complainant submits that under Rule 98, the Commission can adopt provisional measures on its own initiative or at the request of a Party to the Communication and thus there is nothing which prevents the Commission from issuing provisional measures irrespective of the Complainant's Communication.



59. In addition, the Complainant quotes the provisions of Articles 32 (2) and 55 (1), stating that Communications may be submitted to the Commission to be considered at its Sessions, by entities other than State Parties, and that there is no further elaboration in the Charter or the Rules as to which types of organizations may submit Communications. The Complainant refers to the jurisprudence of the Commission, which held that groups and organizations can submit Communications for consideration, provided that the conditions of admissibility in Article 56 are met.¹¹ Furthermore, it submits that the Commission has also accepted Communications from organizations on behalf of other organizations.¹²

Commission's Analysis on Admissibility

60. The Commission recalls that Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be admissible, which apply conjunctively and cumulatively.¹³
61. Despite the fact that the Commission requested the Respondent State to submit its arguments and evidence on admissibility in accordance with Rule 105 (2), as well as granting an extension in this regard, the Government of the Arab Republic of Egypt indicated that it will not engage in any further dealings related to this Communication, and submitted arguments only in relation to the *locus standi* of the Complainant. For this reason, the Commission decided to proceed based on the information before it.¹⁴
62. In relation to Article 56 (1), the Complainant submits that this Communication is submitted by the Freedom and Justice Party of Egypt, in respect of the Victims sentenced to death. It states that the Communication includes full contact details for both the Complainant and its lawyers and that no question of anonymity arises. It further states that the Freedom and Justice Party is not a terrorist organization, and that Article 56 (1) does not state who the author of a Communication may be.
63. The Respondent State submits that (1) the Freedom and Justice Party (the Complainant) has been dissolved by a sentence of the Supreme Administrative Court on 8/4/2014; (2)

¹¹ Communication 284/03 – *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v The Government of Zimbabwe* (2009) ACHPR.

¹² Communication 225/98 – *Huri-Laws v Nigeria*, where the Communication was submitted by Huri-Laws, an NGO registered in Nigeria, on behalf of the Civil Liberties Organization, another NGO based in Nigeria (2000) ACHPR.

¹³ See Communication 304/2005 - *FIDH & Others v. Senegal* (2006) ACHPR, para 38.

¹⁴ See Communication 25/89, 47/90, 56/91, 100/93 - *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, les Témoins de Jehovah v. Democratic Republic of the Congo* (1995) ACHPR, para 40. See also Communication 60/91, Communication 159/1996, Communication 276/03 and Communication 292/04;



the Complainant is a political entity established by the Muslim Brotherhood, which had been declared a terrorist organization by a ruling of the North Cairo Criminal Court on 1/6/2017; and (3) the Communication is brought by a political party, whereas political parties are not included in the Rules of the Procedure of the Commission under Rule 63 (1) which lists the institutions which may request for a matter to be included in the agenda of the Ordinary Session of the Commission.

64. The Commission has on previous occasions dealt with the matter of *locus standi* and has established principles in this regard. In *Communication 277/2003 - Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana (DITSHWANELO case)*¹⁵ the Commission confirmed that neither the African Charter nor the Commission's Rules of Procedure contain specific provisions on *locus standi*. It therefore held that the only possible applicable provision is Article 56 (1), which "simply requires that the Communication indicate its author(s), even if they would like to remain anonymous. This provision does not specify which parties have standing before the African Commission."¹⁶ The Commission has thus adopted an exceptionally wide approach to *locus standi*, which according to the *DITSHWANELO case*:¹⁷

places no restriction as to who can bring a Communication before it. As long as the conditions under Article 56 of the African Charter are met by the person standing before it, the African Commission will entertain the Communication. The rationale for the Commission's comparative broader approach to the issue of *locus standi* has been associated with the peculiarity of the African situation, and the perceived generous intent of the African Charter.

65. Finally, the Commission determined that "the African Commission has made it clear through its jurisprudence that the person or NGO filing the Communication need not be a national or be registered in the territory of the Respondent State".¹⁸

66. Despite this permissive approach, there are still limitations to who may bring Communications before the Commission. One implicit requirement under Article 65 (1) is that the "author" must be a person, in order to have standing. Thus a Complaint may be brought by either a natural person or a juridical person¹⁹. In the present case the

¹⁵ Communication 277/2003 - *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (2013) ACHPR.

¹⁶ Communication 277/2003 - *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (2013) ACHPR paras 73-74.

¹⁷ As above, para 81.

¹⁸ As above, para 79.

¹⁹ Also known as artificial person, juridical entity, juridic person, juristic person, or legal person.



Complainant is purported to be the Freedom and Justice Party, which would be a juridical person, as it was a political party with separate legal existence from the natural persons who established it. However, as is clear from the submissions of the Respondent State, the Freedom and Justice Party was dissolved by a sentence of the Supreme Administrative Court in 2014. It is trite law that duties and rights only accrue to juridical persons if they are recognized by law. As there is no evidence provided by the Complainants that the Freedom and Justice Party was subsequently registered in another jurisdiction, the Commission finds that legally it does not exist, and is thus not able to bring a Complaint before the Commission.

67. It should be noted, however, that the situation would have been dealt with differently if the Complainant had been dissolved following the submission of a Complaint against the Respondent State. In the present case three (3) years passed from its dissolution to the submission of the Complaint. However, the decision reached by the Commission in the present Communication would not have applied if its dissolution followed on the submission of the Complaint, as that would lead to a situation where States may dissolve any nationally registered juridical persons which brought a case against it.
68. Having found that the Complainant does not have *locus standi*, the Commission will not analyze the other arguments of the Respondent State in this regard. The Commission thus finds that the requirements under Article 56 (1) have not been met.
69. In relation to Article 56 (2) the Complainant states that the Communication is compatible with the African Charter because the facts contained within it are sufficient to demonstrate *prima facie* violations of Articles 4, 5, 6 and 7 of the Charter, that the Respondent State has been a Party to the African Charter since 1981 and that the matters addressed in the Communication occurred after the Charter became applicable in the territory of the Respondent State. The Commission notes that the Respondent State ratified the Africa Charter in 1984 and the alleged violations occurred in 2017 thus after ratification. Furthermore, the alleged facts as set out in paragraphs 3 to 14 above demonstrate *prima facie* violations. The Commission thus finds that the Complainant has satisfied the requirements under Article 56 (2) of the African Charter.
70. In relation to the requirement in Article 56 (3) the Complainant submits that there is nothing disparaging or insulting in the present Communication and that it records factual events. The Commission has in reading the Complaint not come across anything which would amount to disparaging or insulting language. The Commission therefore finds that the requirements of Article 56 (3) have been met.



71. In relation to Article 56 (4) of the Charter the Complainant submits that the Communication is not exclusively based on news disseminated through the mass media. It submits that the jurisprudence of the Commission does not prevent Complainants from relying on material drawn from the mass media, rather that it should not be *exclusively* based on mass media. The Complainant provides reasons why in this case it partly depends on mass media, including that it does not have free access to the proceedings, that even defense lawyers were barred from accessing the proceedings, and that it has had trouble communicating with lawyers and human rights activists in the Respondent State. However, it states that in addition it also draws on reports from internationally recognized non-governmental organizations, including Amnesty International and Human Rights Watch; statements of the United Nations and other international organizations in response to the situation in Egypt; and evidence relating to the investigations and faulty trial proceedings disseminated by defense lawyers of the Victims.
72. The Commission has held in its jurisprudence that “while it will be dangerous to rely exclusively on news disseminated through the mass media, it would be equally damaging if the African Commission were to reject a Communication because some aspects of it are based on news disseminated through the mass media.”²⁰ Thus it is appropriate to have media sources, as long as they are not relied on exclusively.²¹ The Commission has held that documents of international human rights organizations, including reports and press releases, are sufficient additional information to ensure that allegations are not based exclusively on mass media.²² The Commission has also accepted sources of information from NGOs such as Human Rights Watch and Amnesty International to be compatible with the requirements in Article 56(4).²³ Some evidence has also been disseminated by defense lawyers of the Victims. The Commission thus finds that the Complaint is not based exclusively on news disseminated through the mass media and meets the requirements in Article 56(4).
73. On the question of exhaustion of local remedies under Article 56 (5) the Complainant submits that local remedies have been exhausted as the death penalties handed down are final, given that they have been upheld by the Court of Cassation, the highest court in Egypt. In addition, it is submitted that no presidential pardons were granted in respect

²⁰ Communication 277/2003 - *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (2011) ACHPR para 106. See also Communication 149/96 - *Sir Dawda K Jawara v. Gambia*.

²¹ Communication 259/2002 - *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo* (2015) ACHPR para 40. See also Communication 277/2003 - *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, para 106.

²² Communication 279/03-296/05 - *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) ACHPR para 92.

²³ Communication 467/14 - *Ahmed Ismael and 528 Others v. the Arab Republic of Egypt* (2016) ACHPR para 151.



of these cases. The Complainant refers to the jurisprudence of the Commission and argues that even if a remedy is available, it must also be considered whether it is effective and sufficient. The Complainant also notes that according to the Commission's jurisprudence it is only judicial domestic remedies that have to be exhausted.

74. The Complainant refers to a decision of the European Court of Human Rights which held that situations of "martial law and characterized by severe civil strife" and the "risk of reprisals against the applicants or their lawyers" provide no prospect of success of a domestic remedy, and thus amount to an exhaustion of local remedies. The Complainant avers that several complaints were filed with the Attorney General following the disappearance of Victims in the Kafr Al Sheikh case, but that these allegations of kidnapping and torture were not investigated and were dismissed on 12 December 2015 without any charges. The Complainant also makes reference to the refusal by the Military Court to take into account new evidence, thus denying the reopening of the Kafr Al Sheikh case.
75. The Complainant submits that "the unjust trial practices are symptomatic of the repressive actions against all legitimate opposition in Egypt," and that freedom of speech and assembly have been heavily restricted and organizations opposed to the military regime have been banned. The Complainant thus submits that there are clear impediments to the availability of any local judicial remedies in the present case, due to the highly repressive environment. The Complainant further submits that in particular the risks of reprisals against the accused or their defense lawyers show that there is no prospect of successfully pursuing any apparent appellate avenues and that it can therefore be concluded that local remedies have been exhausted.
76. The Complainant in its original submissions further state in paragraph 7 above, that "recent legal amendments to the appeal system" abolished a previous two-stage appeal process, through which the Court of Cessation could refer cases back to the Criminal Court for retrial, which means that all judgements of the Court of Cassation are final and binding. The Complainant further states that it is therefore "unlikely that the appeal submitted by the six Victims [in relation to the Metwally case] on 15 June 2017 on the basis of procedural flaws in the trial will be granted."²⁴
77. The Commission confirms that from the submissions in this Communication, in four of the five cases referenced,²⁵ the Court of Cassation, the highest appeal court in Egypt, upheld the death penalty and that in a fifth case²⁶ which was subject to military

²⁴ Para 7 above.

²⁵ The Alexandria Protest case, the Metwally case, the Qatar espionage case and the Rabaa dispersal case.

²⁶ The Kafr Al Sheikh bombing case



jurisdiction, the Supreme Military Court of Appeals, the highest military court of appeal similarly upheld the death penalty verdict.

78. The Commission finds that based on the facts as submitted by the Complainant that the Court of Cassation and the Supreme Military Court are the highest Courts and their decisions cannot be appealed, the Victims do not have a further right to appeal the death sentences. The Complainant provides evidence of two other judicial avenues that some of the Victims pursued, first, bringing a request for review based on procedural irregularities, which it stated would not succeed based on the new law on the finality of decisions of the Court of Cassation, and second bringing a separate case before the Attorney General based on the alleged torture and forced disappearances, which has not been investigated. The Commission is of the view that the domestic remedies have been exhausted. The Commission thus finds that the requirements under Article 56 (5) have been met.
79. In relation to the reasonable time period requirement under Article 56 (6) the Complainant refers to the lack of specific time limits specified in the African Charter and the six-months' time limit provided in the European and American Conventions on Human Rights. The Complainant states that the Complaint was submitted on 17 November 2017, whereas the dates for the final sentencing of the cases were as follows: (a) Alexandria Protest Killing on 24 April 2017; (b) Police Guard Murder on 7 June 2017; (c) Kafr Al Sheikh Bombing on 19 June 2017; (d) Rabaa Dispersal on 3 July 2017; and (e) the Qatar Espionage case on 16 September 2017. Therefore, the timeline between exhaustion of local remedies and the submission of the Complaint before the Commission ranges from about seven months to two months. The Commission is of the view that this is a reasonable period and that the Complainant has complied with the requirement under Article 56 (6).
80. The Complainant indicates that in compliance with Article 56 (7), the Respondent State has not settled the case, and that the case has not been submitted to any other international human rights body. The Commission thus finds that the requirement under Article 56 (7) has been complied with.
81. For the reasons set out above, the Commission finds that Article 56 (2), (3), (4), (5), (6) and (7) have been met, but that the Complainant has failed to meet the criteria for Article 56 (1).

Decision of the African Commission on Admissibility

1. In view of the above, the African Commission on Human and Peoples Rights:



- i. Declares the Communication inadmissible for failure to comply with Article 56 (1) of the African Charter; and
- ii. Notifies its decision to the Parties in accordance with Rule 107 (3) of its Rules of Procedure.

Done in Banjul, The Gambia, during the 65th Ordinary Session of the African Commission on Human and Peoples' Right from 21 October to 10 November 2019



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