



ACERWC
African Committee of Experts on
the Rights and Welfare of the Child

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

Comitê Africano dos Direitos e
Bem-Estar da Crianças

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

Ruling on Admissibility

Communication No: 0016/Com/004/2020

Decision on Admissibility No: 002/2021

**Author: African Centre for Justice and Peace Studies (ACJPS)
(on behalf of Ms Umjumah Osman Mohamed)**

Against: The Republic of Sudan

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 24 June 2020 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 the African Centre for Justice and Peace Studies (ACJPS) on behalf of Umjumah Osman Mohamed (the Complainant). According to Section IX (2) (i) of the Revised Guidelines on Consideration of Communications by the ACERWC (the Revised Communication Guidelines), the Committee transmitted a copy of the Communication to the Respondent State party on 16 July 2020. The State Party submitted its response in December 2020.

ii. Summary of alleged facts

2. The Complainant is a Sudanese national born on 6 June 2000 in Khashm el Girba town in Kassala State, Eastern Sudan. It is alleged that in 2016, the Complainant was raped by Mr Tarig Idriss Daoud, an adult who also resides in Khashm el Girba town in Kassala state, Eastern Sudan. As a result of the rape, the Complainant got pregnant. It is further submitted that the matter was reported by the Complainant's father, Mr Osman Mohamed on 31 August 2016 at Khashm el Girba police station.
3. The Complainant alleges that investigations were carried out by the Prosecution Attorneys Bureau and the case was referred to the Child Court since the Complaint was 16 years at the time of the alleged offence.
4. The Communication alleges that on 20 September 2017, the case was heard before the Child Court and Mr Tarig Idriss Daoud was convicted for rape and sexual abuse of a child under Article 45(b) and (c) of the Child Act 2010 respectively. It is alleged that he was sentenced to 20 years imprisonment and a fine of 20 thousand Sudanese pounds.
5. It is submitted that in 2017 Mr Tarig Idriss Daoud appealed against his conviction to the Appeal Court under Appeal Case Number 9 of 2017 and on 29 October 2017, the Appeal Court passed a ruling where it upheld the decision of the Child Court.

6. The Complainant indicates that Mr Tarig Idriss Daoud appealed against the decision of the Appeal Court to the High Court in 2018 under case number 12 of 2018. It is alleged that the High Court overturned the decision of the previous courts and acquitted Mr Tarig Idriss Daoud of rape on grounds that the complainant is not a child in accordance with the definition in Article 3 of the Criminal Act 1991 which states that an adult is a person whose puberty has been established by definite natural features and has completed fifteen years of age and whoever attains eighteen years of age is an adult even if the features of puberty do not appear. The Complainant alleges that the court used an ambiguous determination of childhood as 'attainment of puberty' in accordance with Article 3 of Sudan's Criminal Act 1991 to rule that the complaint is not a child thus her case should not have been heard by the Child Court.
7. It is alleged that the High Court further held that being an adult who understood the sexual act, both the complainant and Mr Tarig Idriss Daoud should instead be tried for the offence of adultery (*zina*) under Section 145(1) (a) of the Criminal Act 1991 by the Criminal Court.¹ It is further alleged that the High Court also directed the Criminal Court to grant bail to Mr Tarig Idriss Daoud pending his trial for adultery.
8. The Communication alleges that the Complainant filed for a review of the decision of the High Court by the High Court Review Chamber and in 2019 the High Court Review Chamber approved the ruling of the High Court stating that it is in line with Sudanese and Sharia law.
9. It is alleged that thereafter, the Complainant petitioned before the Constitutional Court to annul the decision of the High Court on grounds that it was unconstitutional because it violates Article 27(1) and 31 of the 2005 National Interim Constitution,² and it was contrary to Article 4 of the Child Act 2010 which defines a child as a person below the age of 18. The Complainant alleges that

¹ Zina is defined under Article 145 (1) of the Criminal Act 1991 as : "There shall be deemed to commit adultery :- (a) every man, who has sexual intercourse with a woman, without there being a lawful bond between them; (b) every woman, who permits a man to have sexual intercourse with her, without there being a lawful bond, between them"

² Article 27 (1) of the 2005 National Interim Constitution provides that "The Bill of Rights is a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the Corner stone of social justice, equality and democracy in the Sudan" whilst Article 27 (3) states that, "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill".

on 11 December 2019, the Constitutional Court in its ruling agreed with the decision of the High Court and dismissed the petition. It is further alleged that the Constitutional Court held that the decision of the High Court was in line with the Sudanese legislation and the 2005 Interim National Constitution.³

10. It is alleged that Umjumah Osman Mohamed is thus currently awaiting trial for the crime of adultery before the Criminal court. The Complainant alleges that since pregnancy is conclusive proof of adultery under Article 62 of the Evidence Act 1994, the Complainant will be convicted and eventually subjected to 100 lashes pursuant to Article 145 of the Criminal Act 1991. The Complainant alleges that pregnancy rebuts the legal and constitutional presumption of innocence and immediately shifts the burden of proof to her to prove her innocence.
11. Based on these facts, the Complainant alleges that the Republic of Sudan has violated the rights guaranteed under the Charter, particularly article 1, 2, 3, and 16 as well as rights guaranteed under the African Charter on Human and Peoples' Rights, particularly article 3,5, and 7.

iii. Applicant's submission on admissibility

12. The Complainant submits that the Communication fulfils the requirement of admissibility under Section IX (1) of the Revised Communications Guidelines. The complainant focuses on all the requirements provided for in section IX (1) of the Revised Communication Guidelines.
13. The Complainant submits that the Communication is brought in conformity with the provisions of the Charter and the Constitutive Act of the African Union. The Complainant submits that the Communication alleges specific provisions of the Charter that have been violated by the Republic of Sudan and which Sudan has undertaken to respect by virtue of articles 3 (h) and 4 (m) of the Constitutive Act.
14. The Complainant further submits that the Communication is not exclusively based on information obtained from the media. The Complainant submits that the information contained in the Communication is supported by unofficial

³ The 2005 National interim constitution does not define a child but states that, "the "state shall protect the rights of the child as set forth in international and regional agreements ratified by Sudan."

translations of the laws of Sudan, the 2019 Constitutional Charter for the Transitional period, the decision of the High Court and the petition submitted to the Sudanese Constitutional Court.

15. The Complainant further submits that the Communication is not before any other investigation, procedure or international human rights mechanism. Further, the question of violation of Umjumah –Osman Mohamed’s rights has not been submitted to any other international tribunal or adjudicating body for determination.
16. The Complainant submits that all the local remedies available have been exhausted. The Complainant submits that after the High Court over turned the decision of the Child Court and the Appeal Court, the Complainant applied for a review of the decision of the High Court by the High Court Review Chamber. In 2019, the High Court Review Chamber passed a ruling that agreed with the High Court. Thereafter, the complainant petitioned the Constitutional Court to hold the decision of the High Court unconstitutional. Unfortunately, on 11 December 2019, the Constitutional Court passed a judgment that the decision of the High Court is constitutional.
17. Furthermore, the Complainant submits that the Communication is presented within a reasonable period after the exhaustion of local remedies. The Complainant submits that after the High Court (Kassala and Red Sea Chamber) overturned the decision of the Appeal Court, the Complainant filed for a review of the decision of the High court by the High Court Review Chamber in 2017. The High Court Review Chamber upheld the decision of the High Court and thereafter, the complainant lodged a Constitutional petition to have the decision of the High Court pronounced unconstitutional on grounds that it deprived the complainant of protections granted to a child under Article 4 of the Child Act 2010. On 11 December 2019, the Constitutional Court dismissed the petition on the grounds that the ruling of the High Court was in line with the Constitution and Sudanese law.
18. Lastly, the Complainant submits that the wording used in the Communication is not offensive. The Complainant submits that the Communication has not been cast in any offensive language or suggests any offensive language and the language used was carefully chosen and the document deals with legal arguments rather than political motives.

19. Based on these submissions, the Complainant seeks that the Communication be declared admissible.

iv. Respondent's submission on admissibility

20. In its response to the arguments of the Complainant on the admissibility of the Communication, the Respondent State submits that the Communication is not admissible as it does not fulfil the conditions listed below under the Revised Communication Guidelines. The Respondent State's arguments are based on three issues.

21. Firstly, the Respondent State submits that the Communication is not compatible with the provisions of the Constitutive Act of the African Union and the African Children's Charter. The Respondent State argues that there is an emphasis on the support of all African Union Institutions to the Member States without intervention into the internal affairs of such States and without interfering with the administration of justice. In that regard, the Respondent State argues that the Complainant's incident is an isolated individual incident that has not been repeated in such a large and systematic manner to render a violation that obligates the State to assume the stance of the defender of committing or the recurrence of such violations. The Respondent State further argues that the case is still pending before the national courts and has not been finalised and therefore the submission of the Communication should be deemed as a blatant interference in the provisions, measures and procedures of the domestic judiciary and is contrary to the Constitutive Act of the African Union.

22. Secondly, the Respondent State submits that the Communication does not satisfy the requirement that a Communication should not raise cases pending before another international body. The Respondent State argues that the case is pending before the Criminal Court in the city of Khashm el Girba hence the Complainant's actions in taking fear as a reason to resort to international institutions is unwarranted. The Respondent State further submits that no final decision was issued on the case, no appeal of the final decision was filed, and the decision has not become *res judicata* yet. The Respondent State emphasizes that the decision of the Criminal Court has not been passed and in any event, it may exonerate the Complainant or apply the provisions of the Child

Act of 2010. The Respondent State therefore submits that the fear of the likelihood of the sentence of flogging being passed on the Complainant notwithstanding the form of the decision of Court that might exonerate her, according to the recently introduced Amendments to the Criminal Code abolishing the flogging penalty, renders such fears groundless.

23. Thirdly, the Respondent State submits that the Complainant has not exhausted all the local remedies. The Respondent State argues that the Communication does not indicate that the Complainant filed a complaint to the National Commission of Human Rights and no advisory decision was issued prior to its dissolution in September 2020, knowing that the Commission is an independent human rights entity that was established in accordance with the 2007 Paris Principles on establishing independent national human rights mechanism. The Respondent State submits that such a Commission is recognised by the African Union and United Nations and enjoys the status of an advisory mechanism by several similar mechanisms. The Respondent State further argues that the Complainant did not lodge a complaint to the General Grievances and Corrections Corporation established in Sudan as an internal remedy path to be resorted to after the exhaustion of other justice and judiciary mechanisms. The Respondent State submits that the General Grievances and Corrections Corporation is deemed a supervisory body monitoring the judiciary and justice institutions performance and their enforcement of the National Sudanese law and international and regional obligations of Sudan, in particular in the domain of human rights.

24. Based on these submissions, the Respondent State seeks that the Communication be dismissed for lack of fulfilling admissibility requirements.

v. The Committee's analysis on admissibility

25. In analysing the admissibility of the Communication, the Committee relies on article 44 of the Charter and the Revised Communication Guidelines. The provisions of article 44 of the Charter and Section I (1) of the Revised Communication Guidelines stipulate that 'non-governmental organisations legally recognized by one or more of the Member States of the African Union or State Party to the Charter or the United Nations, among others can submit a

Communication before the Committee.’ The Committee notes that ACPJS is a registered non- governmental organization working to monitor and promote respect for human rights and legal reform in Sudan and is making the application on behalf of a Sudanese national. Moreover, Sudan is a state party to the Charter as it ratified the Charter in 2008. Furthermore, in terms of Section I (4) (a) of the Revised Communication Guidelines, the Committee’s jurisdiction is determined by the complainant’s age at the time of the alleged violation. Although the complainant is 20 years old, the Committee notes that she was 16 at the time of the alleged violation. As such, the Committee holds that the Complainant has *locus standi* to submit the case.

26. The admissibility of a Communication determined based on the conditions of admissibility provided under Section IX (1) of the Revised Communications Guidelines. Therefore, the Committee assesses whether or not the Communication meets those conditions. From the Complainant and the Respondent State’s submissions on admissibility, the Committee has identified three issues that require analysis namely;
- a) Whether or not the Communication is compatible with the provisions of the Constitutive Act of the African Union and the African Children’s Charter;
 - b) Whether or not the Communication raises matters pending settlement by another international body; and
 - c) Whether or not the Complainant has exhausted local remedies, and whether the Complainant should be exempted from exhausting local remedies.

A. Whether or not the Communication is compatible with the provisions of the Constitutive Act of the African Union and the African Children’s Charter

27. Section IX (1) (a) of the Revised Communication Guidelines provides that a Communication is admissible if ‘it is compatible with the provisions of the Constitutive Act of the African Union and the African Children’s Charter.
28. The Respondent State has invoked the principle of non-intervention into the internal affairs of States and argues that the Communication does not meet this requirement. The Committee however acknowledges that ‘ once a State commits itself to a treaty or its membership of an organisation, that act implies agreement to be bound by decisions from these institutions that are responsible

for implementing and giving effect to the treaty.¹⁴ The Committee further acknowledges that 'by ratifying the African Children's Charter, states automatically accept the competence of the Committee to 'receive' individual and inter-state communications.'¹⁵ Article 1 of the Charter places an obligation on Member States to recognise the rights, freedoms, and duties enshrined in the Charter, and by ratifying the Charter, the Respondent State bound itself to the provisions of the Charter, including this obligation. Further, the Respondent State bound itself to the mandate of the Committee to promote and protect the rights enshrined in the Charter provided in article 42 of the Charter. This also includes the mandate to receive Communications against Sudan, relating to matters covered by the Charter as stipulated in article 44 of the Charter.

29. The Committee notes that the principle of non-intervention is not absolute as it is subject to limitations and there are exceptions to the principle. Indeed, the Committee acknowledges that under international law, particularly article 2(7) of the Charter of the United Nations, the principle 'concerns the duty not to intervene in matters within the domestic jurisdiction of any State', and this implies that States should be given an opportunity to redress violations within their own system. However, in the report of the UN Secretary General '*In Larger Freedom: Towards Development, Security and Human Rights for All*', the Secretary General, while acknowledging that the responsibility to protect citizens lies first and foremost with each individual state, stressed that 'if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian, and other methods to help protect the human rights and well-being of civilian populations.'¹⁶ Drawing from these sentiments, the Committee is of the view that the principle of non-intervention does not entirely preclude intervention and in the event that a particular state fails to redress violations in its own system, intervention is warranted.
30. The Committee notes from the Communication that the Respondent State was given an opportunity to remedy the alleged violations at the national courts but

⁴ G M Wachira, *Sovereignty and the 'United States of Africa' Insights from the EU*, Institute for Peace Studies (June 2007), 2.

⁵ F Viljoen, *International Human Rights Law in Africa* (2012) 399.

⁶ Report of the UN Secretary-General '*In larger freedom: towards development, security and human rights for all*' 2005, para 135.

it is alleged that the Respondent State failed to do so. The Applicant has thus approached the Committee for redress and refusal by the Committee to deal with the matter on the basis of the principle of non-interference will be undermining the objectives and purpose of the Charter. While giving regard to the concept of State sovereignty and non-interference in terms of article 4(g) of the Constitutive Act, the Committee acknowledges that intervention is required in order to protect and promote children's rights. The Respondent State cannot therefore seek to absolve itself from the obligations of the Charter by invoking the principle of non-interference.

31. The Committee notes that the substantive requirement of compatibility with the AU Constitutive Act and the Charter entails the necessity that complainants make reasonable claims that articles of the Charter have been violated. The Committee reiterates its decision in the *Talibés* case where it held that the condition of compatibility with the AU Constitutive Act and the Charter is met if a Communication alleges violations of the African Children's Charter.⁷ The same was stated by the Committee in its admissibility ruling of *Ahmed Bassiouny v Egypt*,⁸ where the Committee held that in order to be accepted by the Committee, a communication should show prima facie violation of the provisions of the African Children's Charter. The Committee notes that the present Communication alleges violation of specific provisions of the Charter (articles 1, 2, 3, and 16) and is therefore brought in conformity with the provisions of the Charter and the Constitutive Act of the African Union.
32. In light of the above, the Committee notes that the Communication fulfils the requirements of section IX (1) (a) of the Revised Communication Guidelines on compatibility with the Constitutive Act and the Charter.

B. Whether or not the Communication raises matters pending settlement by another international body

33. Section IX (1) (c) of the Revised Communication Guidelines provides that a Communication is admissible if it does not raise matters pending settlement or previously settled by another international body or procedure in accordance

⁷ ACERWC, Communication No 003/Com/001/212, *The Centre for Human Rights (University of Pretoria) and another v The Government of Senegal*, para 18.

⁸ ACERWC, Communication No 009/Com/001/2016, *Decision on Admissibility No 002/2017, Ahmed Bassiouny v Egypt*, para 18.

with any legal instruments of the African Union and principles of the United Nations Charter.

34. The Committee makes reference to its admissibility ruling in the case of *Legal and Human Rights Center and Center for Reproductive Rights (on behalf of Tanzanian Girls) v Tanzania* where it stated that the intention of this condition is to avoid subjecting States to similar international and regional judicial or quasi-judicial procedures on similar alleged violations.⁹ As stated in the same admissibility ruling, the Committee further acknowledges that a hierarchy should not be created among the various international judicial or quasi-judicial organs where one can appeal against the other.¹⁰ Furthermore, as held in the Committee's admissibility ruling in the case *Project Expedite Justice and others v Sudan*, the Committee notes that 'such requirement is provided to prevent conflicting decisions and ensure efficiency of transnational tribunals.'¹¹
35. On the basis of this requirement and the Respondent's State submission, the Committee notes that the key issue of determination in this Communication is the nature of the adjudicating body where the Respondent State alleges that the matter is pending. The provisions of section IX (1) (c) of the Revised Communication Guidelines are straightforward as they refer to matters pending before 'international' bodies or procedures and not 'national' bodies or procedures.
36. The Committee notes that the Sudanese Criminal Court is not an international body hence the Respondent State's argument is misplaced and would only affect the condition of exhaustion of local remedies, which the Committee will address in detail below.
37. The Committee notes that there is no other indication to the effect that the matters raised in the present Communication are pending settlement or have been previously settled by another international body or procedure in accordance with any legal instruments of the AU and principles of the UN

⁹ ACERWC, Communication No 0012/Com/001/2019, Decision on Admissibility No 001/2020, *Legal and Human Rights Center and Center for Reproductive Rights v United Republic of Tanzania*, para 21.

¹⁰ As above.

¹¹ ACERWC, Communication No 0011/Com/001/2018, Decision on Admissibility No 01/2019, *Project Expedite Justice and others v The Sudan*, para 33.

Charter. In light of that, the Committee holds that the Communication fulfils the requirements of section IX (1) (c) of the Revised Communication Guidelines.

C. Whether the Complainant has exhausted local remedies, and whether the Complainant should be exempted from exhausting local remedies.

38. Section IX (1) (d) of the Revised Communication Guidelines provides that a Communication is admissible if submitted ‘after having exhausted available and accessible local remedies, unless it is obvious that this procedure is unduly prolonged or ineffective.’ As this Committee in the *Children of Nubian descent* 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 to be the first port of call to address alleged violations at the domestic level.’¹² Drawing from the Respondents State’s argument, the Committee will determine whether or not the Complainant has failed to exhaust local remedies by failing to submit the case to the National Human Rights Commission and the General Grievances and Corrections Corporation.
39. Drawing from its jurisprudence in the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v. The Government of Kenya (Children of Nubian descent case)*, the Committee reiterates that what is envisaged under the Revised Guidelines with regards to the exhaustion of local remedies is that ‘extra-ordinary remedies of a non-judicial nature do not fall within the notion of local remedies and need not necessarily be exhausted for a communication to be declared admissible.’¹³ This position has also been adopted by the African Commission on Human and Peoples’ Rights in the case of *Cudjoe v Ghana* where it was stated that the requirement of the rule of exhaustion of local remedies is that only ordinary judicial remedies need to be exhausted.¹⁴ The African Court on Human and Peoples’ Rights in its jurisdiction and admissibility ruling in the case of *Hamad Mohamed Lymbaka v the Republic of Tanzania*,¹⁵

¹² ACERWC, Communication No 002/Com/002/2009, *The Institute for Human Rights and Development in Africa and another (on behalf of children of Nubian descent in Kenya) v The Government of Kenya* para 26.

¹³ As above, para 30.

¹⁴ ACHPR, Communication 221/1998, *Cudjoe v Ghana*, (1999), para 14.

¹⁵ AC+HPR, Application 010/2016, *Hamad Mohamed Lyambaka v The Republic of Tanzania*, para 39.

also held that an applicant is not compelled to exhaust remedies that are non-judicial in nature.

40. Judicial remedies can be understood as remedies that are ‘provided by independent tribunals on a non-discretionary basis according to law and provide remedies as a matter of right and in a binding and enforceable manner.’¹⁶ As noted by the Human Rights Committee in the case of *Brough v Australia*, the Committee recognises that administrative bodies or National Human Rights Commissions that meet all of these standards may constitute appropriate domestic remedies as well.¹⁷ In the event that such bodies do not meet these standards, for example as a result of their issuing non-binding recommendations, or as a result of failure to issue their holdings according to clear legal rules, or due to other characteristics that give them a less-than judicial character, they do not constitute remedies that must be exhausted.¹⁸
41. The Committee notes that the National Human Rights Commission of Sudan has a status of an advisory mechanism, while the General Grievances and Corrections Corporation is a supervisory body monitoring the judiciary and justice institutions’ performance and enforcement of the national laws as well as the international and regional obligations of Sudan. In that regard it is clear that these two bodies do not provide remedies that are binding and enforceable and are thus non-judicial in nature hence the Complainant cannot be compelled to approach these bodies.
42. The Committee notes from the alleged facts of the Communication that after the High Court overturned the decision of the Child Court and the Appeal Court, the Complainant approached the High Court Review Chamber and upon being disgruntled with the decision of the High Court Review Chamber, the Complainant approached the Constitutional Court. The Sudanese Constitutional Court is the custodian of the Constitution and is the highest court on matters dealing with the constitutionality of laws and provisions in accordance with the Constitution. In that regard, the Complainant exhausted all local remedies available.

¹⁶ C Roberts, *Admissibility of Complaints before the African Court* Practical Guide (2016), 37.

¹⁷ Human Rights Committee, (HRC) Communication 1184/2003, *Brough v Australia*, (17 March 2006), para 8.6.

¹⁸ D Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, (2008), 5.

43. Regarding the Respondent State's argument that the matter is pending before the Criminal Court, the Committee notes that the Respondent State is referring to the adultery matter which is yet to be heard by the Criminal Court. The Committee notes that the subject matter of the Communication is the decision of the High Court, the High Court Review Chamber, and the Constitutional Court of Sudan in respect of the rape matter, which decision is alleged, to have a bearing on the victim as she will be prosecuted for adultery before the Criminal Court. The Committee sees no reason why the Complainant should be expected to wait for the adultery trial which is a result of the decisions of the other courts, to be completed before approaching the Committee.
44. In light of that, the Committee holds that the Complainant exhausted all local remedies available and therefore the Communication fulfils the requirement of exhausting local remedies provided in section IX (1) (d) of the Revised Guidelines.
45. As to the other conditions of admissibility, the Committee does not observe any irregularity and no contention has been raised by any of the parties to the Communication.

vi. Decision on admissibility

46. 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 fulfilled all the admissibility conditions laid down in the Committee's Revised Guidelines on Consideration of Communications; and it is accordingly declared admissible.

Adopted in March 2021 during the 37th Ordinary Session of the ACERWC

Honorable Joseph Ndayisenga

Chairperson of the African Committee of Experts on the Rights and Welfare of the Child