



Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant  
Comité Africano de Peritos os Direitos e Bem-Estar da Criança  
لجنة الخبراء الإفريقية المعنية بحقوق الطفل ورفاهه



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**THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE  
OF THE CHILD**

**(ACERWC)**

**DECISION ON THE COMMUNICATION SUBMITTED BY AFRICAN CENTRE FOR  
JUSTICE AND PEACE STUDIES (ACJPS) (ON BEHALF OF MS UMJUMAH  
OSMAN MOHAMED) AGAINST THE REPUBLIC OF THE SUDAN**

**Communication No: 0016/Com/004/2020  
Decision No: 003/2022**

**Original: English**

## **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 was submitted by the African Centre for Justice and Peace Studies (ACJPS) (the Complainant) on behalf of Umjumah Osman Mohamed. 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.
2. During its 37<sup>th</sup> Ordinary Session held on 15-26 March 2021, the Committee considered the admissibility of the Communication and following the deliberation on the requirements of admissibility, the Committee declared that the Communication is admissible. The ruling was forwarded to the parties on 14 July 2021 (Ref: ACE/OL/10/185.21) and the Respondent was advised to submit its argument on the merits within 60 days. The Respondent did not submit its arguments on merits within the 60 days and further Note Verbals dated 06 September 2021 (Ref: ACE/OL/222.21) and 12 October 2021 (Ref: ACE/OL/10/240.21) was forwarded, reminding the Respondent to submit the arguments on merits to enable the Committee to deliberate on the hearing during its 38<sup>th</sup> Ordinary Session on the 15<sup>th</sup> to the 26<sup>th</sup> of November 2021. The Respondent did not submit the arguments on merits and other Note Verbals were sent to the Respondent (ACE/OL/10/007.22; ACE/OL/10/083.22; ACE/OL/10/308.22; ACE/OL/10/389.22) dated 20 January 2022, 28 February 2022; 15 September 2022; and 2 November 2022 respectively; reminding the Respondent to submit the arguments on merits. Despite these efforts, the Committee did not receive a response from the Respondent, hence the decision to proceed considering the question of the merits without the response and presence of the Respondent State in terms of section XII (1) of the Revised Communication Guidelines.

## **ii. Summary of alleged facts**

3. Umjumah Osman Mohamed 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, Umjumah Osman Mohamed 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, Umjumah Osman Mohamed got pregnant. It is further submitted that the matter was reported by the Umjumah Osman Mohamed's father, Mr. Osman Mohamed on 31 August 2016 at Khashm el Girba police station.

4. The Complainant alleges that investigations were carried out by the Prosecution Attorneys Bureau and the case was referred to the Child Court since Umjumah Osman Mohamed was 16 years at the time of the alleged offence.
5. 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.
6. 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.
7. 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 Umjumah Osman Mohamed 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 Umjumah Osman Mohamed is not a child thus, her case should not have been heard by the Child Court.
8. It is alleged that the High Court further held that being an adult who understood the sexual act, both Umjumah Osman Mohamed 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.<sup>1</sup> 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.
9. 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.

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<sup>1</sup> 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"

10. 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,<sup>2</sup> 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 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.<sup>3</sup>
11. 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, Umjumah Osman Mohamed 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 Umjumah Osman Mohamed to prove her innocence.

### **The Complaint**

12. 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. Admissibility**

#### **Applicant's submission on admissibility**

13. 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 in section IX (1) of the Revised Communication Guidelines.
14. 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

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<sup>2</sup> 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".

<sup>3</sup> 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."

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.

15. 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 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.
16. 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.
17. 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.
18. 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 Umjumah Osman Mohamed 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.
19. 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.
20. Based on these submissions, the Complainant seeks that the Communication be declared admissible.

## **Respondent's submission on admissibility**

21. In its response to the Complainant's arguments on the Communication's admissibility, 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.
22. 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 in the internal affairs of such States and without interfering with the administration of justice. In that regard, the Respondent State argues that Umjumah Osman Mohamed'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; 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.
23. 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 Umjumah Osman Mohamed 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 Umjumah Osman Mohamed, notwithstanding the form of the decision of the Court that might exonerate her, according to the recently introduced Amendments to the Criminal Code abolishing the flogging penalty, renders such fears groundless.
24. 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.

25. 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**

26. 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 recognised 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 victim's age at the time of the alleged violation. Although Umjumah Osman Mohamed 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.

27. The admissibility of a Communication is 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's 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**

28. 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.

29. 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.'<sup>4</sup> 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.'<sup>5</sup> 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.

30. 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

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

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



rights and wellbeing of civilian populations.’<sup>6</sup> 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.

31. The Committee notes from the Communication that the Respondent State was given an opportunity to remedy the alleged violations at the national courts but 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.

32. 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.<sup>7</sup> The same was stated by the Committee in its admissibility ruling of *Ahmed Bassiouny v Egypt*,<sup>8</sup> 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.

33. 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**

34. Section IX (1) (c) of the Revised Communication Guidelines provides that a Communication is admissible if it does not raise matters pending settlement or

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<sup>6</sup> Report of the UN Secretary-General ‘In larger freedom: towards development, security and human rights for all’ 2005, para 135.

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

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

previously settled by another international body or procedure in accordance with any legal instruments of the African Union and principles of the United Nations Charter.

35. 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.<sup>9</sup> 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.<sup>10</sup> 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.'<sup>11</sup>

36. 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.

37. 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.

38. 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 Charter. In light of that, the Committee holds that the Communication fulfills 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.**

39. 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

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<sup>9</sup> 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.

<sup>10</sup> As above.

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

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.’<sup>12</sup> 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.

40. 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 ‘extraordinary 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.’<sup>13</sup> 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.<sup>14</sup> 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*,<sup>15</sup> also held that an applicant is not compelled to exhaust remedies that are non-judicial in nature.

41. 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.’<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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<sup>12</sup> 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.

<sup>13</sup> As above, para 30.

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

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

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

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

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

42. 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 noted 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.

43. 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.

44. 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 present 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 Umjumah Osman Mohamed 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 Umjumah Osman Mohamed's adultery trial which is a result of the decisions of the other courts, to be completed before approaching the Committee.

45. 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.

46. 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.

47. On the basis of all the above arguments and analysis, during its 37<sup>th</sup> Ordinary Session which was held on 15 to 26 March 2021, the Committee concluded that the Communication fulfilled all the admissibility conditions laid down in the Committee's Revised Guidelines on Consideration of Communications; and it accordingly declared the Communication admissible.

#### **vi. Submissions on the Merits of the Communication**

##### **The Complainants' submission on merits**

48. The Complainant's allegations are based on the fact that whilst the Constitution and the Child Act 2010 define a child as anyone below 18, article 3 of the Criminal Act 1991 defines a child as "*a person whose puberty has been established by definite natural features and has completed fifteen years of age. Whoever attains eighteen years of age is an adult even if the features of puberty do not appear*". The Complainant argues that the interpretation of this Article has meant that children over the age of 15 have been treated as adults by Sudanese courts and denied protection granted to children under National laws and the ACRWC.

49. The Complainant argues that in accordance with Article 1 of the African's Children's Charter, the Respondent is under an obligation to adopt legislative or other measures as may be necessary to give effect to the provisions of the African Children's Charter and this includes repealing Article 3 of the Criminal Act 1991 and annulling any court decisions that rely on that provision. The Complainant submits that in as much as the Respondent State has enacted the Child Act 2010 in line with the African Children's Charter in defining a child, Article 3 of the Criminal Act 1991 remains unchanged and continues to be applied in the courts of law thus violating Article 1 of the African Children's Charter. By declaring Article 3 of the Criminal Act 1991 to be consistent with the Constitution, the Constitutional Court denied Umjumah Osman Mohamed protections she would have enjoyed as child in the Sudanese laws, the Charter and other International instruments to which Sudan is a state party.

50. The Complainant further argues that Umjumah Osman Mohamed has been discriminated on the basis of age as the High Court in its decision held that Umjumah Osman Mohamed is an adult who should not be tried in the Child Court but before the Criminal Court. The Complainant argues that denying Umjumah Osman Mohamed the right to be heard by the Child Court like any other child amounts to discrimination. Further the Complainant argues that the failure of the Respondent to protect Umjumah Osman Mohamed from sexual abuse and to effectively prosecute the perpetrator amounts to discrimination. Further, the presumption of *zina* on grounds of pregnancy by the High Court puts Umjumah Osman Mohamed in a disadvantageous position compared to Mr. Tarig Idriss Daoud as Umjumah Osman Mohamed must bring evidence that (a) Mr. Tarig Idriss Daoud committed *zina* and that (b) she committed *zina* without consent. Failure to prove either (a) or (b) means that Mr. Tarig Idriss Daoud walks free from punishment, but Umjumah Osman Mohamed is still subject to 100 lashes.

51. Lastly, the Complainant argues that the decision of the High Court to acquit Mr. Tarig Idriss Daoud of rape and instead charge Umjumah Osman Mohamed with adultery amounted to failure by the Respondent to protect Umjumah Osman Mohamed from torture, inhuman and degrading treatment and sexual abuse, thus a violation of Article 16 of the Children's Charter. It is argued that the Respondent State failed to ensure prosecution of the perpetrator when the High Court presumed consent by Umjumah Osman Mohamed (much as this was irrelevant

under Article 3 of the Criminal Act 1991 because Umjumah Osman Mohamed was a child) on grounds that she had reached puberty and therefore was old enough to understand sexual intercourse. The High Court also failed to remedy Umjumah Osman Mohamed for the violation she suffered but instead directed for her to be prosecuted for adultery. The Complainant also argues that the corporal punishment that Umjumah Osman Mohamed will be subjected to after conviction for adultery also amounts to torture.

**vii. The Committee's analysis on the merits of the alleged violations**

**i. Alleged violation of article 1 on obligations of state parties**

52. The provisions of article 1 of the African Charter on the Rights and Welfare of the Child stipulate that State Parties to the African Children's Charter shall recognise the rights, freedoms and duties enshrined in the Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter. The Committee notes that the Respondent, as a State party to the African Children's Charter has a legal obligation to take legislative and other necessary measures in protecting children from child abuse.

53. As the Committee stated in its decisions in the cases of *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem against the Government of the Republic of Mauritania*,<sup>19</sup> and *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (A minor) against the Government of the Republic of Cameroon*,<sup>20</sup> 'the obligation to take legislative measures recognises actions to promote and protect the rights of the child and needs a clear foundation in national legislation, as well as accompanying policies and guidance that support its implementation'. The Committee also notes in its General Comment on State Party Obligations under the Charter, that 'the direct reference to legislative measures in Article 1 of the Charter requires the timely enactment and continuous review of national legislation and administrative guidance to ensure their compatibility with relevant international norms and related standards on the rights of the child.'<sup>21</sup>

54. It is also the position of the Committee that as part and parcel of the legislative obligation drawn from article 1 of the Charter, legislative provisions concerning

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<sup>19</sup>ACERWC, Communication No 007/Com/003/2015, *Minority Rights Group International and SOS-Esclaves (on behalf of Said Ould Salem and Yarg Ould Salem) v The Government of the Republic of Mauritania* para 47.

<sup>20</sup>ACERWC, Communication No 006/Com/002/2018, *Institute for Human Right and Development in Africa and Finders Group Initiative (on behalf of TFA (A minor)) v the Government of the Republic of Cameroon* para 43.

<sup>21</sup>ACERWC General Comment No 5 on "State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection (2018) 19.

child protection are required.<sup>22</sup> As such, in order to fulfill the obligations under article 1 of the Charter, it is essential for State parties to have in place legislation that emphasizes children's right to be protected from all forms of abuse, neglect, maltreatment and degradation.

55. It is the Committee's stance that article 1 of the African Children's Charter gives the Charter a legally binding character and a violation of any of the rights provided in the Charter is a violation of article 1. This position has also been adopted by other African human rights treaty bodies in the interpretation of other human rights instruments. In a case decided by the African Commission on Human and Peoples' Rights regarding state party obligations under article 1 of the African Charter on Human and Peoples' Rights, the Commission held that 'a violation of any provisions of the Charter automatically means a violation of article 1'.<sup>23</sup>

56. The Complainant argues that the Respondent is under an obligation to adopt legislative and other measures as may be necessary to give effect of the provisions of the African Children's Charter and this includes repealing article 3 of the Criminal Act and annulling any court decisions that relies on the provisions of the Criminal Act. The Complainant further argues that by declaring article 3 of the Criminal Act consistent with the Constitution, this denied Umjumah Osman Mohamed protection she would have enjoyed as a child.

57. The Committee notes that the Republic of Sudan has a Constitution and the Child Act that defines a child as a person below the age of 18. This therefore means that the Government of Sudan gave recognition to the provisions of the Charter (particularly article 2 which defines a child as an individual below the age of 18 years), and incorporated the provisions into its domestic law. However, the provisions of article 3 of the Criminal Act of the Respondent State which defines an adult as a person whose puberty has been established by definite natural features and has completed fifteen years of age and the decision of the Constitutional Court that these provisions are consistent with the Constitution of Sudan restricted the enjoyment of the rights guaranteed to children under the Criminal Act and other Sudanese Laws, and, by implication, the rights enshrined in the African Children's Charter. The Committee is of the view that when the Respondent ratified the Charter in 2005, it was incumbent on the Respondent State to demonstrate good faith and annul the provisions of article 3 of the Criminal Act. Further, the Constitutional Court had to demonstrate good faith as well and amend article 3 of the Criminal Act to bring it in conformity with the with the provisions of the African Children's Charter.

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<sup>22</sup>ACERWC General Comment No 5 on "State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection (2018) 19.

<sup>23</sup>ACHPR, Communication No. 147/95, 149/96 [2000], *Jawara v The Gambia* para 46.

58. The Committee draws inspiration from the African Commission on Human and People's Rights in the case of *Lawyers for Human Rights v Swaziland*,<sup>24</sup> where the Commission held that by ratifying the African Charter on Human and Peoples' Rights without at the same time taking appropriate measures to bring domestic laws in conformity with it, the respondent's action defeated the very object and spirit of the Charter. In the same vein, it is the opinion of the Committee, that the Respondent's failure to adopt legislative measures or other measures (in this instance reviewing article 3 of the Criminal Act) to give effect to the provisions of the African Children's Charter, particularly article 2 which defines a child as every human being below the age of 18 defeats the object and spirit of the African Children's Charter and thus violating article 1 thereof.

59. The Committee notes that on 13 July 2020, the Sudanese Official Gazette published Law No.12 of 2020 amending some provisions of the Criminal Code including article 3 which now defines an adult as everyone who has completed 18 years of age. Whilst the Respondent State is commended for the amendment, in line with its obligations under the African Children's Charter, it is noted that the amendment was done after the alleged offence was committed against Umjumah Osman Mohamed, thus the previous provisions of the Criminal Code violated the rights of Umjumah Osman Mohamed.

60. The Committee therefore finds the Respondent State in violation of article 1 of the African Children's Charter.

## **ii. Alleged violation of article 2 on the definition of a child**

61. Article 2 of the African Children's Charter defines a child as every human being below the age of 18 years. In that regard, the African Children's Charter sets out a uniform age at which childhood ends,<sup>25</sup> and it guarantees all persons below 18 the enjoyment of all rights under it while at the same time ensuring that young people enjoy favorable provisions in States where adulthood is attained earlier.<sup>26</sup>

62. The Committee notes that there are no exceptions to the definition of the child in the African Children's Charter and this has been emphasized in the *Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage* that a child means a human being under the age of 18 years, even if majority is attained earlier under national law.<sup>27</sup>

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<sup>24</sup> ACHPR, Communication 251/2002 [2005], *Lawyers for Human Rights v Swaziland* para 51.

<sup>25</sup> DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child 2002 (10) *The International Journal of Children's Rights* 157

<sup>26</sup> Chirwa 158.

<sup>27</sup> *Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage* (2017) 4.



63. In the present Communication, the Committee notes that whilst the Respondent State has enacted the Child Act which defines a child as every person who is not above the age of eighteen, the Criminal Act defines an adult as ‘a person whose puberty has been established by definite natural features and has completed fifteen years of age. Whoever attains eighteen years of age is an adult even if the features of puberty do not appear.’ This was noted again by the Committee in its Concluding Observations and Recommendations that were issued after the consideration of Sudan’s State Party Report during the Committee’s 20<sup>th</sup> Ordinary Session held in 2012 that ‘there are other definitions of a child in certain existing laws, namely, the 1991 Criminal Law.’<sup>28</sup> The Complainant argues that the interpretation of this article has meant that children over fifteen have been treated as adults in the courts of Sudan and are denied protection granted under national laws and the African Children’s Charter.

64. The Committee notes from the allegations that although Umjumah Osman Mohamed was aged sixteen when she was raped, the High Court overturned the decisions of the *courts a quo* and acquitted Mr. Tarig Idriss Daod of rape on the grounds that Umjumah Osman Mohamed was not a child in accordance with the definition in Article 3 of the Criminal Act. The High Court Review Chamber and the Constitutional Court upheld this decision.

65. The Committee thus notes that such a definition of an adult in the Criminal Act is inconsistent with the definition of the child provided in Article 2 of the African Children’s Charter and the definition may be used to deny children the rights under the Sudanese national laws and above all, the rights contained in the African Children’s Charter. Again, whilst the Committee notes that the provisions of article 3 of the Criminal Code have since been amended, the rights of Umjumah Osman Mohamed were violated by the previous provisions of the Criminal Code as she was treated like an adult yet she was 16 years old and was denied the rights and protection she should have enjoyed as a child.

66. The Committee therefore finds that the Respondent State is in violation of article 2 of the African Children’s Charter by virtue of its definition of adult in Article 3 of the then Criminal Act.

### **iii. Alleged violation of article 3 on non-discrimination**

67. Article 3 of the African Children’s Charter provides for children’s right to non-discrimination. It stipulates that ‘every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth

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<sup>28</sup> ACERWC, Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of Sudan on the initial report on implementation of the African Charter on the Rights and Welfare of the child, page 2, available at [https://acerwc.africa/wp-content/uploads/2018/14/CO\\_Sudan\\_eng.pdf](https://acerwc.africa/wp-content/uploads/2018/14/CO_Sudan_eng.pdf) .

or other status.’ The Committee echoes that this right has been identified as one of the cardinal principles that underpin the effective implementation of the African Children’s Charter and therefore actually bears a specific role in the rights and welfare of children.

68. The Complainant argues that the Respondent has violated article 3 of the African Children’s Charter on two grounds, that is, discrimination as to age, and discrimination as a victim of rape. The Committee will therefore fully deliberate on the alleged discrimination on these two grounds separately.

### ***Discrimination as to age***

69. The Complainant argues that the decision of the High Court to treat Umjumah Osman Mohamed as an adult, denying her the right to be heard by the Child Court like any other child, amounts to discrimination as to age.

70. The Committee notes that the provisions of article 3 of the African Children’s Charter does not explicitly prohibit discrimination on the basis of age. The Committee is of the view that the listed grounds of discrimination in the African Children’s Charter are indicative, hence can be extended to other grounds, as is apparent from the phrase ‘or other status’ at the end of the list. The Committee, therefore, holds that the list of grounds for discrimination provided for in the African Children’s Charter are not exhaustive, and children can be discriminated against on other grounds as well, and in this instance, age. Further, the Committee is of the view that the African Children’s Charter is supposed to apply to ‘every child’, and hence independently of age. In that regard, an individual should not be discriminated against because they are (or are not) in a certain age group.

71. According to a commentary on article 2 of the Convention on the Rights of the Child (non-discrimination), there are three elements of discrimination and these are 1) treating the right holder differently on certain grounds; 2) when doing so will impair the right-holder’s enjoyment of; 3) another right.<sup>29</sup> In applying these elements to the present communication, the Committee notes that although Umjumah Osman Mohamed was still a child as per the definition of a child under the ACRWC and the Sudan Constitution and Child Act, Umjumah Osman Mohamed was treated differently because she had completed 15 years and she had reached puberty. Umjumah Osman Mohamed was treated like an adult and was subjected to prosecution for adultery, thereby impairing the enjoyment of her other rights such as the right to be protected from abuse and sexual exploitation. Umjumah Osman Mohamed could not also enjoy other rights enjoyed by all other children in Sudan due to her age and her pubertal status.

72. The Committee reiterates that there are no exceptions to the definition of a child in the African Children’s Charter hence the exceptions imposed by article 3 of the

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<sup>29</sup>B Abramson *A commentary on the United Nations Convention on the Rights of the Child, Article 2: the right of non-discrimination* (2008)18.

then Criminal Act of Sudan (puberty and completing 15 years) is tantamount to discrimination.

73. The Committee therefore finds that the Respondent State is in violation of article 3 of the African Children's Charter due to its actions in treating Umjumah Osman Mohamed due to her age and pubertal status.

***Discrimination as a victim of rape***

74. The Complainant alleges that the failure of the Respondent State to protect the Umjumah Osman Mohamed from sexual abuse and to effectively prosecute the perpetrator amounted to discrimination as a victim of rape and thus resulted in the violation of article 3 of the African Children's Charter. The Committee denote that by using the term 'discrimination as to rape', the Complainant was trying to highlight that failure by the Respondent State to protect Umjumah Osman Mohamed from sexual abuse infringes the protection from gender-based discrimination and that the gender-based violence that was suffered by Umjumah Osman Mohamed is a form of gender based discrimination.

75. The Committee notes that whilst the provisions of article 3 of the ACRWC prohibit gender-based discrimination, the provisions do not portray rape as a form of gender-based discrimination. As the Committee held in its decision in the *TFA* case, in assessing whether rape amounts to gender based discrimination, the Committee draws inspiration from other relevant international human rights instruments and organs, in line with article 46 of the African Children's Charter.

76. The Committee makes reference to General Recommendation No. 35 of the UN Committee on the Elimination of All Forms of Discrimination against Women, updating General Recommendation No.19 which provides that gender based violence is a form of violence perpetrated against a woman or that disproportionately affects women.<sup>30</sup> The Committee notes that rape is a form of gender based violence, and in the present communication, Umjumah Osman Mohamed is a victim of gender based violence which disproportionately affected her and was an impediment to her enjoyment of her right to freedom from degrading treatment.

77. A further reading of the General Recommendation 35 indicates that gender-based violence is linked to gender-based discrimination. The General Recommendation provides that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated.' Further, gender based violence is a critical barrier to the 'achievement of substantive equality between women and men and to the

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<sup>30</sup>Committee on the Elimination of Discrimination against Women General Recommendation No.35 on gender based violence against women, updating general recommendation No.19 CEDAW/C/GC/35 para 1.

enjoyment by women of their human rights and fundamental freedoms'.<sup>31</sup> The Committee notes that gender based violence is a result of discriminatory societal and cultural beliefs and attitudes that portray women as inferior individuals. Gender based violence is when violence is perpetrated against women due to their status of women and rape is a form of gender based violence. Gender based violence disproportionately affects women, leading to gender based discrimination and thus violates the principle of non-discrimination.

78. Although the alleged discriminatory act was perpetrated by an individual, the Respondent State did not fulfill its obligation to protect Umjumah Osman Mohamed from such acts by shifting the blame to her and subjecting her to prosecution for adultery, instead of convicting and sentencing the perpetrator. As was held by the Inter American Court of Human Rights in *Cf. González et al. ("Cotton Field") v. Mexico*,<sup>32</sup> the State's failure to investigate alleged violence against women violates the principle of non-discrimination and impunity on cases of violence against women perpetuates similar violence and constitutes discrimination. The same position was held by the UN Committee on the Elimination of All Forms of Discrimination against Women in *X and Y v Georgia*,<sup>33</sup> wherein the CEDAW Committee found a violation of article 1 of CEDAW (non-discrimination) because the Respondent State in the case failed to take legislative measures to protect the victim from domestic violence. The CEDAW Committee held that States are responsible for private actors if they fail to protect women from violence caused by private actors or if they fail to investigate and prosecute perpetrators. In the present Communication, although the gender based violence which amounts to gender based discrimination was not caused by the Respondent State, the Respondent failed to show due diligence in deciding to acquit the perpetrator of the rape. The Respondent State is thus accountable.

79. In assessing whether the above explanation suggests that there was a violation of article 3 of the African Children's Charter, the Committee notes that article 3 of the Charter states that every child is entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter, regardless of their sex, among other things. As the Committee held in the *Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (A minor) against the Government of the Republic of Cameroon* case, this provision implies that if a child is not able to avail from the protection of the Charter just because the child concerned is of a certain sex, there is a violation of the right to non-discrimination. In the present case, Umjumah Osman Mohamed was sexually abused due to her sex. The sexual abuse committed against her has restricted her from enjoying the protection provided in the Charter, namely protection against abuse and torture and freedom from sexual exploitation. Umjumah Osman Mohamed has further failed to get any legal remedy and is being subjected to prosecution for adultery. Further, the Committee notes that pregnancy is

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<sup>31</sup> CEDAW Committee General Recommendation 35, para 10.

<sup>32</sup> IACtHR, *González et al. ("Cotton Field") v. Mexico* (16 November 2009) para 163 and 400.

<sup>33</sup> UN CEDAW Committee, Communication No. 24/2009, *X and Y v Georgia*, para 9.7.

conclusive proof of adultery hence the burden of proof shifts to Umjumah Osman Mohamed, which in the Committee's view is discrimination based on the grounds of sex.

80. The Committee therefore finds that the Respondent State is in violation of article 3 of the African Children's Charter due to its failure to prosecute the discriminatory act, that is rape and teenage pregnancy, which was suffered by Umjumah Osman Mohamed and its actions in subjecting her to prosecution for the crime of adultery.

**iv. Alleged violation of article 16 on protection against child abuse and torture**

81. Article 16 of the African Charter on the Rights and Welfare of the child provides for the protection of children against child abuse and torture. State parties to the African Children's Charter are encouraged to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

82. The Complainant submits that the decision to acquit Mr. Tarig Idriss Daoud of rape and charging Umjumah Osman Mohamed with adultery amounted to failure to protect Umjumah Osman Mohamed from abuse and torture. The Complainant further submits that the corporal punishment that Umjumah Osman Mohamed will be subjected to in the event that she is convicted for adultery also amounts to torture.

83. As was held by the Committee in *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (A minor) against the Government of the Republic of Cameroon*, the goal of article 16 of the ACRWC is to protect the dignity and mental integrity of children.<sup>34</sup> Although the ACRWC does not provide a definition for 'torture or degrading treatment or punishment', the ACERWC General Comment on article 27 of the African Children's Charter states that child sexual exploitation and abuse can amount to a form of torture or cruel, inhuman, or degrading treatment.<sup>35</sup> Inspiration can be further drawn from the African Commission on Human and Peoples' Rights in the case of *Media Rights Agenda v Nigeria* where it was held that the term cruel, inhuman or degrading treatment or punishment is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.<sup>36</sup> The Committee also makes reference to the UN Human Rights Committee General Comment No. 20 on article 7 of the Covenant on Civil and Political Rights (CCPR)

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<sup>34</sup>ACERWC, Communication No 006/Com/002/2018, Institute for Human Right and Development in Africa and Finders Group Initiative (on behalf of TFA (A minor)) v the Government of the Republic of Cameroon para 68.

<sup>35</sup> ACERWC General Comment No. 7 on article 27 'Sexual Exploitation' (2021) para 19.

<sup>36</sup> ACHPR, Communication No. 224/98 [2000] Media Rights Agenda and Others v Nigeria para 71.

where the Human Rights Committee notes that ‘the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.’<sup>37</sup> Further, the UN Human Rights Committee notes in its General Comment No. 28 on equality of rights between men and women that in complying with article 7 of the CCPR ( torture, cruel, inhuman, or degrading punishment or treatment) States are required to have in place laws and practices with regard to domestic and other types of violence against women, including rape.<sup>38</sup> The Committee notes that rape is a form of violence against women and its physical and psychological impacts constitutes degradation of girls as envisaged in article 16 of the Charter. The Committee also notes that the effects of rape and bearing a child are closely enmeshed, and together have a profound effect on women and girls.<sup>39</sup>

84. In terms of article 16 (2), Member States are required to adopt protective measures to protect children against child abuse and torture. These measures include the establishment of special monitoring units to provide the necessary support for the child and those who have the care of the child. This support also includes psycho-social support and other form of support necessary to deal with the physical and psychological effects of abuse on children. States also have an obligation to adopt other forms of prevention and for identification, reporting, referral investigation, treatment, and follow up of instances of child abuse and neglect. This includes thorough investigation of cases of abuse and ensuring that the victims are remedied.

85. The Committee reiterates that the obligation of State Parties to protect children from abuse and torture arises even if the violation is a result of an individual. This principle has been applied by the UN Committee against torture for States Parties’ failure to prevent and protect victims from gender-based violence such as rape, domestic violence, female genital mutilation, and trafficking.<sup>40</sup>

86. The African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* stated that human rights standards impose positive obligations on States to prevent and sanction private violations of human rights and that acts by non-state actors can generate responsibility of the State because of the State’s lack of due diligence to prevent the violation or for not providing remedies for the victims.<sup>41</sup>

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<sup>37</sup>UN Human Rights Committee CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) 10 March 1992, para 5

<sup>38</sup>UN Human Rights Committee General Committee (HRC) CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) 29 March 2000, CCPR/C/21/Rev.1/Add.10, para11.

<sup>39</sup>H. Liebling *et al* ‘Women and Girls Bearing Children through Rape in Goma, Eastern Congo: Stigma, Health and Justice Responses (2012) IV Itupale Online Journal of African Studies, 22.

<sup>40</sup>UN Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties CAT/C/GC/2, 24 January 2008, para 18.

<sup>41</sup>ACHPR, Communication No. 245/02 [2006], *Zimbabwe Human Rights NGO Forum v. Zimbabwe* para 143.

87. Considering the nature of the case at hand, the Committee further deems it fit to highlight that children are protected from abuse and torture not only under article 16 of the Charter but also under article 27 which provides that States Parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse. As noted by the Committee in its General Comment on article 27, sexual abuse is a subcategory of Child Sexual Exploitation and Abuse (CSEA) and sexual abuse is defined as ‘the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent...’.<sup>42</sup> The General Comment further provides that the obligations in article 27 are reinforced by those contained in article 16, which deal with the protection of the child from all forms of torture, inhuman or degrading treatment and abuse, including sexual abuse.<sup>43</sup>

88. In the present Communication, Umjumah Osman Mohamed was raped by an individual and despite her age and the evidence that she was raped, the Respondent State has not ensured the prosecution of the perpetrator and to adequately remedy Umjumah Osman Mohamed. Instead, the High Court and the Constitutional Court acquitted the perpetrator and Umjumah Osman Mohamed was charged with adultery. The Committee notes that pregnancy is conclusive proof of adultery in terms of article 62 of the Sudanese Evidence Act hence Umjumah Osman Mohamed might be convicted of adultery. Article 146 (1) (b) of the Sudanese Criminal Act stipulates that whoever commits the offence of adultery shall be punished with 100 lashes, where the offender is not married’. This is a violation of article 16 of the ACRWC. Whilst the Committee notes and appreciates that article 47 (b) of the Criminal Act which permitted whipping of juveniles was repealed by Law 12 of 2020, however, article 146 (1) (b) has not been repealed thus individuals convicted of adultery can be still subjected to whipping (100 lashes).

89. The Committee has reiterated in the Mauritania Case<sup>44</sup> and its Concluding Observations and Recommendations issued to most Member States that corporal punishment should be abolished in all settings. It is noted in the present case that should Umjumah Osman Mohamed be convicted of adultery, she might be subjected to 100 lashes, thus exposing her to torture and degrading treatment.

90. The Committee therefore finds the Respondent state in violation of article 16 and 27 of the African Children’s Charter.

## **v. Alleged violations of other instruments**

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<sup>42</sup> ACERWC General Comment No. 7 on article 27 ‘Sexual Exploitation’ (2021) para 20.

<sup>43</sup> ACERWC General Comment No. 7 on article 27 ‘Sexual Exploitation’ (2021) para 34.

<sup>44</sup> ACERWC, Communication No 007/Com/003/2015, Minority Rights Group International and SOS-Esclaves (on behalf of Said Ould Salem and Yarg Ould Salem) v The Government of the Republic of Mauritania para 88.

91. The Committee notes that the Complainant has highlighted alleged violations under Articles 3 (equality before the law), 5 (right to dignity) and 7 (right to a fair hearing) of the African Charter on Human and Peoples' Rights.

92. The Committee notes that article 46 of the African Children's Charter provides that the Committee shall draw inspiration from other international human rights treaties and instruments adopted by the United Nations and by African Countries. Whilst this provision means that the Committee draws inspiration from these instruments in interpreting the Charter including in the consideration of Communications, the Committee's mandate does not extend to finding violations of these and other instruments and it can thus only find violations on provisions of the African Children's Charter. Alleged violations on equality before the law, dignity and right to a fair hearing have been merged and dealt with under violation of article 1, 3, and 16 of the African Children's Charter in the Committee analysis.

93. The Committee can thus not find violations under articles 3, 5 and 7 of the African Charter on Human and Peoples' Rights.

#### **vi. The Committee's analysis on request for Compensation**

94. The Applicants in their submissions requested that the Committee orders the Respondent State to pay monetary compensation to Umjumah Osman Mohamed. The Committee requested the Applicants to provide justification for the amount claimed and a written submission was submitted to the Committee, highlighting that the rape has resulted in physical harm, mental harm, financial losses, effects on education, effects on family and justice.

95. In assessing whether Umjumah Osman Mohamed should be compensated for the alleged violations of her rights, the Committee draws inspiration from its jurisprudence in *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (A minor) against the Government of the Republic of Cameroon* where it was held that 'rape causes a deep and long lasting psychological, mental and physical damage, that attracts reparation in the form of monetary compensation, among others.'<sup>45</sup> The Committee further draws inspiration from the jurisprudence of other human rights treaty bodies and notes the positive trend of ordering a determined amount of monetary reparation to victims of human rights violations.<sup>46</sup>

96. The African Court has reiterated that the right to reparations for the breach of human rights obligation is a fundamental principle of international law and a State that is responsible for an international wrong is required to make full reparation for

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<sup>45</sup>ACERWC, Communication No 006/Com/002/2018, Institute for Human Right and Development in Africa and Finders Group Initiative (on behalf of TFA (A minor)) v the Government of the Republic of Cameroon para 81.

<sup>46</sup>See for instance ACtHPR, Application No. 022/2017, Harold Mbalanda Munthali v Republic of Malawi (2022).



the damage caused.<sup>47</sup> As was held by the African Court on Human and Peoples' Rights in *Rev Christofer R. Mitikila v United Republic of Tanzania*, the Committee is also of the view that 'one of the fundamental principles of contemporary international law on State responsibility that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation.'<sup>48</sup>

97. The African Court on Human and Peoples' Rights considers that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered.<sup>49</sup> The Committee thus adopts this approach in deliberating the claim for compensation.

98. In the present case, the Committee has found the Respondent in violation of articles 1,2,3, 16 and 27 of the African Children's Charter, and thus it is responsible for the wrongful act against Umjumah Osman Mohamed. Further, Umjumah Osman Mohamed has suffered prejudice from the Respondent's failure to protect her against discrimination, abuse and torture, as well as sexual exploitation.

99. The Committee notes that when assessing the amount of damages to be awarded as compensation, the various circumstances of a given violation are taken into consideration. In the present case, Umjumah Osman Mohamed was 16 years old when she was raped by the perpetrator and the rape resulted in pregnancy. Rape and teenage pregnancy undoubtedly have negative impacts on Umjumah Osman Mohamed's future as she will have to live with the trauma of being raped and having a child at an early age as a result of the rape. The Committee notes from the additional information submitted by the Complainants that Umjumah Osman Mohamed is suffering from post-traumatic stress disorder, and she further dropped out of school as a result of the pregnancy and thus cannot secure employment and fend for her child.

100. Taking into account these circumstances, the Committee considers that damages are warranted and deems the sum of \$100 000 United States Dollars to be a fair amount of compensation for the non-pecuniary harm suffered by Umjumah Osman Mohamed.

## **vii. Decision of the African Committee of Experts on the Rights and Welfare of the Child**

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<sup>47</sup>ACtHPR, Application No. 006/2012, African Commission on Human and Peoples' Rights v Republic of Kenya, para 36.

<sup>48</sup>ACtHPR, Application No. 009/2011 and No. 011/2011, *Rev Christofer R. Mitikila v United Republic of Tanzania*.

<sup>49</sup>ACtHPR, Application No. 006/2016, *Mgosi Mwita Makungu v United Republic of Tanzania*, para 21.

101. For the reasons given above, the ACERWC finds the Respondent State in violation of its obligations under article 1 (obligations of state parties), article 2 (definition of a child), article 3 (non-discrimination), article 16 (protection against child abuse and torture), and article 27 (sexual exploitation) of the African Charter on the Rights and Welfare of the Child.

102. The African Committee of Experts on the Rights and Welfare of the Child therefore recommends the Government of the Republic of Sudan to:

- i) Undertake all necessary legislative, administrative, social, educational and other measures to ensure that children in Sudan are protected from child sexual abuse and other forms of abuse;
- ii) Undertake all necessary legislative, administrative, social, educational and other measures to ensure that corporal punishment is banned in all settings;
- iii) Ensure that the perpetrator is prosecuted for the crime of rape against Umjumah Osman Mohamed and ensure effective remedy for her;
- iv) Drop any charges against Umjumah Osman Mohamed and halt any punishment that Umjumah Osman Mohamed may be subjected to;
- v) Conduct awareness raising and sensitization among judges, prosecutors, police officers and other stakeholders in the justice and child protection sector about the new provisions of the amended Criminal Law Act; and
- vi) Pay a sum of \$100 000 United States Dollars to Umjumah Osman Mohamed as compensation for the non-pecuniary damage she suffered as a result of the above-mentioned violations

#### **viii. Reporting on implementation**

103. As per Section XXI (1) (i) of the Revised Communication Guidelines of the Committee, the Government of Sudan shall report to the Committee on all measures taken to implement the decision of the Committee within 180 days from the date of receipt of the Committee's decision.

**Done at the 40<sup>th</sup> Ordinary Session of the ACERWC  
21 November- 02 December 2022**

*Wilson de Almeida Adão*

**Hon. Wilson Almeida Adão  
Chairperson of the African Committee of Experts  
on the Rights and Welfare of the Child**

