



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



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

Admissibility Ruling
Communication No.: 0024/Com/001/2023
Decision On Admissibility No. 002/24

The Institute for Human Rights and Development in Africa on Behalf of ACM
Vs
The Republic Of Botswana

I. Submission of Communication and Procedure

1. The Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (the Committee/ACERWC) received a communication dated February 28, 2023, according 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 Institute for Human Rights and Development in Africa (IHRDA) on behalf of Ms. ACM (the Complainant) against the Republic of Botswana (the Respondent State).
2. The Secretariat duly transmitted the Communication to the Respondent State on September 7, 2023, requesting the same to submit its arguments on the admissibility of the Communication within 60 days from the date of the request per Section IX(2)(iv) of the Revised Guidelines for the Consideration of Communications and Monitoring Implementation of Decisions (Revised Communication Guidelines). On November 13, 2023, the Respondent State requested an extension of 30 days to submit its arguments. The Respondent State submitted its argument through a Note Verbal dated February 16, 2024. As a result, the Committee considered the admissibility of the Communication during its 43rd ordinary Session as per Section IX (3) of the Revised Communication Guidelines.

II. Summary of Alleged Facts

3. The Complainant alleges that ACM, born in 2003, met her uncle, Dr. Oduetse Oldman Koboto, for the first time on September 29, 2017, when she was 14 years old. ACM's mother requested his assistance that day to transport ACM from Gaborone to Ngwapa Village to celebrate the Independence holidays and take ACM to her grandmother's place in Ngwapa Village. However, Dr. Koboto took ACM to his farmhouse, close to Sefhare village. Once at the farmhouse, the Complainant alleges that he forcefully raped her multiple times that night, which left her with massive physical and psychological pain. The morning after the alleged rape, Dr. Koboto gave ACM some money, which she declined.
4. The Complainant alleges that sometime in December 2017, Dr. Koboto was again asked by ACM's mother to take ACM to Ngwapa village; he once again took her to his farmhouse and raped her. Sometime in December 2018, Dr. Koboto came to Ngwapa village, where ACM was with her grandmother, and asked ACM to come with him to his farmhouse. The Complainant submits that Dr. Koboto raped ACM on two more occasions: sometime in 2019 when he raped her again at his house in Mmatseta, on the outskirts of Gaborone, and on August 22, 2020, when he raped her at his new house in Kgale View multiple times.
5. The Complainant submits that around December 2020, ACM reported the case to the police headquarters in Gaborone, where she was referred to the Broadhurst Police Station. She was taken to the Extension 2 Clinic in Gaborone to undergo medical tests, but it is submitted that the results were not shared with ACM. The doctor informed

ACM that she had contracted a sexually transmitted infection (STI) and gave her some medication to treat it.

6. The Complainant alleges that ACM gave a written statement to the police about being raped by her uncle, and the police took statements from her mother, grandmother, father, sister, and cousin, among others. It is submitted that, due to threatening messages, she pleaded with the police to assist her and was taken to shelter at the Botswana Gender-Based Violence Center. She stayed there for three months until February 2021, when a local newspaper, *The Voice*, published a story about the assault by her uncle, leading to her becoming suicidal.
7. The Complainant alleges that ACM had tried to follow up on the case with the police, but Inspector Makola told her that the case had been passed to the Director of Public Prosecutions (DPP). It is further provided that the DPP told her that her case was not promising, which left her emotionally distressed. The Communication further provides that ACM also alleged that she had not received any counseling or psychosocial support from the state.
8. The Complainant submits that Dr. Oduetse Oldman Koboto is a former police constable, lawyer, public prosecutor, and Environmental and Climate Change Specialist at the United Nations Development Programme and has been the Permanent Secretary of Botswana's Ministry of Environment, Natural Resources Conservation, and Tourism since August 2020.

III. The Complaint

9. The Complainant submits that the Respondent State has violated the following provisions of the African Charter on the Rights and Welfare of the Child due to failure and refusal to investigate and prosecute the alleged perpetrator:
 - Article 1(1) (Obligations of State Parties)
 - Article 3 (Non-Discrimination)
 - Article 16 (Protection against Child Abuse)

IV. Admissibility

A. Complainant's Submission on Admissibility

10. The Complainant submits that the Communication meets the admissibility requirements under Section IX (1) of the Revised Communications Guidelines. It is submitted that there are impediments to the exhaustion of local remedies by which the victim has approached the local authorities in Botswana, who have the obligation to investigate and prosecute her ordeal but have failed to effectively investigate the case and prosecute the perpetrator.

11. The Complainant alleges that the Respondent State has failed to adequately address the alleged violations of human rights, demonstrating that the domestic remedies were insufficient or ineffective to address the violations. The Complainant submits that the Respondent State's failure to take appropriate action to investigate and remedy the situation is evident from the DPP's response, which indicates that the Complainant's case is not promising.
12. Additionally, the Complainant argues that the prolonged nature of the remedy process necessitates a more flexible approach to the Committee's rule on exhausting local remedies. This flexibility, according to the Complainant, is crucial because children should not be left in a legal limbo for extended periods due to formalistic legal procedures, which would negatively impact their well-being.
13. Furthermore, the Complainant alleges that the communication is submitted promptly. In this instance, obstacles have been placed in the victim's path preventing her from utilizing the domestic remedies to which she is entitled.
14. Based on these submissions, the Complainant requests that the Committee declares the communication admissible.

B. Submission of the Republic of Botswana on Admissibility of the Communication

15. In its response, the Respondent State outlines the legal frameworks for handling cases involving children. It also describes how different departments, including the Administration of Justice offices, the Department of Social Development, the Department of Health Services, the Directorate of Public Prosecution, and the Botswana Police Service, handle and monitor child cases with extreme caution and care, always putting the child's best interests first.
16. The Respondent State asserts that the case involves several isolated incidents of alleged sexual violations spanning from 2017 through 2020, occurring in multiple locations. Given these circumstances and considering that the Complainant, ACM, was a minor at the time, the Respondent State emphasizes the importance of conducting a thorough and diligent investigation into each alleged incident to gather necessary evidence in the best interests of ACM and the public. Consequently, the Respondent State provides that the office of the Director of Public Prosecutions (DPP) has prepared an indictment and forwarded it to the investigating officer handling ACM's case. The investigating officer will serve the indictment to the accused perpetrator and proceed with arranging for his appearance in court for arraignment.
17. The Respondent State also submits the existence of tangible complaint mechanisms available in Botswana, such as the Office of the Ombudsman, among others, relevant

to the ACM's case. Furthermore, the Respondent State contends that it would be premature to assert that there has been an injustice while there are accessible, effective, and efficient domestic remedies and when not all available domestic remedies have been exhausted. Accordingly, the Respondent State requests that the Committee declares the communication inadmissible for non-exhaustion of local remedies.

C. The ACERWC's Analysis and Decision on Admissibility

18. The Committee notes that the current Communication is submitted according to Article 44 of the African Children's Charter, which gives the Committee the mandate to receive and consider complaints from "any person, group or non-governmental organization recognized by the Organization of the African Unity, Member States, or the United Nations on matters covered by the Charter".
19. Furthermore, Section I (1) of the Revised Communication Guidelines stipulates that 'non-governmental organizations legally recognized by one or more of the Member States of the African Union or State Parties to the Charter or the United Nations, among others, can submit a Communication before the Committee.' The Committee notes that the Complainant's representative -IHRDA- is an organization based in the Gambia and has observer status before the Committee; hence has *locus standi* to submit the case. Moreover, the Respondent State is a State Party to the African Charter on the Rights and Welfare of the Child (Charter) since 10 July 2001.
20. Furthermore, in line with Section I (iv) (a) of the Revised Communication Guidelines, the Committee's jurisdiction is determined by the victim's age at the time of the alleged violation. In the case at hand, the alleged violation happened when ACM was a child, therefore, the Committee assumes jurisdiction over the matter.
21. The admissibility of a Communication is determined based on the conditions provided under the Revised Communications Guidelines. Accordingly, the Committee examines the elements of admissibility in line with the conditions of admissibility provided under Section IX (1) of the Revised Communication Guidelines.
22. The first condition of admissibility set forth under Section IX (1) (a) prescribes that a Communication is compatible with the provisions of the Constitutive Act of the African Union and the Charter. The Committee has previously clarified that a Communication is compatible with the Charter if it reasonably alleges a violation of the same, thereby indicating a clear breach of the provisions of the Charter.¹ The Committee notes that for the content of a Communication to be considered compatible with the concerned instrument, it suffices to prove that the applicant invokes its provisions are presumed

¹ Talibé case (n 2) para 18; See also ACERWC, Communication No 0016/Com/004/2020, African Centre for Justice and Peace Studies (ACJPS) (on behalf of Ms Umjuma Osman Mohamed) v The Sudan, Decision on Admissibility No 002/2021, para 31.

to have been violated.² In the present Communication, the Complainant alleges and establishes prima facie violations of the provisions of the Charter; hence, the submission is compatible with the Constitutive Act of the AU and the Charter.

23. The second requirement relates to the provisions prescribed under Section IX (1) (b) of the Revised Guidelines, which requires that a Communication should not be exclusively based on information disseminated through the media. In the matter at hand, the Complainant submits that the alleged facts presented are not solely reliant on information from media reports. The Complainant presented the first-hand testimony of the victim as a critical piece of evidence for the submission of communications, which in the Committee's view, is instrumental to understand the alleged facts in cases of rape³ and can often be sufficient evidence for submitting a complaint of human rights violations.⁴ Therefore, the Committee notes that the Communication is not solely based on media, but rather contains the testimony of the victim, which is imperative to take into consideration.
24. In accordance with the third condition of admissibility outlined in Section IX (1) (c) of the Revised Communication Guidelines, a Communication should not raise matters pending settlement or previously settled by another international body or procedure by any legal instruments of the African Union and principles of the United Nations Charter. In this regard, the Committee has found no evidence of any pending or previously settled matters about the issues raised in the present Communication. Moreover, the Committee notes that the Respondent State has not contested this aspect in its submission. Accordingly, the Committee decides that the Communication complies with the requirement in Section IX (1) (c) of the Revised Communication Guidelines.
25. Section IX (1) (d) provides the fourth condition of admissibility, which states that a Communication should be submitted after having exhausted available local remedies unless it is evident that this procedure is unduly prolonged or ineffective. The principle of exhaustion of local remedies is an important aspect of promoting respect for national sovereignty and ensuring that disputes are resolved at the local level before they are submitted to regional or international bodies.⁵ This principle recognizes the significance of allowing states to address matters through their legal systems before resorting to

² ACERWC, 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, Communication No: 007/Com/003/2015, Para. 20, See also, ACERWC, Communication No 003/Com/001/2012, The Centre for Human Rights (University of Pretoria) and another v Senegal (herein referred to as Talibé case), para 18.

³ ACERWC, Decision On The Communication Submitted by the Institute For Human Rights and Development in Africa and Finders Group Initiative On Behalf of TFA (A Minor) against the Government the Republic Of Cameroon, Communication No 006/Com/002/201, Para. 17., See also CASE OF M.C. v. BULGARIA, European Court of Human Rights Application no. 39272/98.

⁴ CW v. Gustavo Gonzalez Santos, Appeals Court of Massachusetts, Decided: July 09, 2021

⁵ Robert Doya Nanima, Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations, 2020 De Jure Law Journal, 307-331 (2020), PP. 322-323.

external forums. Furthermore, it helps to prevent the international tribunal from acting as a court of first instance rather than as a body of last resort.⁶

26. The rule of exhaustion of domestic remedies is only applicable when the remedies are 'available,' 'effective,' or 'sufficient.'⁷ A remedy is considered available if the petitioner can pursue it without facing any obstacles and for a remedy to be deemed effective, it must offer a realistic prospect of success in addressing the complaint. Lastly, a remedy is considered sufficient if it is capable of adequately redressing the complaint.⁸ The Committee further emphasizes that the availability of a remedy in general must not be only theoretical, but it should be practically feasible.⁹ If either the availability, accessibility, or effectiveness of the remedy is uncertain or lacking for the specific Complainant at hand, then the local remedy fails to meet the requirements for providing adequate redress and, hence, may not be exhausted.

27. In the case at hand, the victim duly reported her case to the Gaborone Police Headquarters in December 2020, but she was referred to Broadhurst Police Station. Despite this, she persisted in seeking updates on her case, and in November 2021, she contacted Inspector Makola to request feedback from Broadhurst Police Station. Inspector Makola informed her that the case had been forwarded to the Director of Public Prosecutions (DPP) who later informed her that the case was not promising. The Committee notes the various avenues for claiming redress of similar violations provided in the arguments of the Respondent State. However, the facts of the case show that there are impediments to the victim getting access to the remedies, which makes them unavailable and the lack of promising prospects for the investigation of the alleged violations demonstrates the ineffectiveness of the remedy to the specific victim under the Communication. In this regard, the Committee concurs with the African Commission on Human and Peoples' Rights when the State fails to investigate or prosecute those responsible for alleged violations despite having adequate notice of the allegations, the remedies may be considered ineffective, even if they are available in principle.¹⁰ The alleged response from the DPP for the victim also indicated that remedy is not sufficient to redress the allegations of the victim.

⁶ ACHPR, *Obert Chinhamo v Zimbabwe* Application No.307/05, Para. 52.

⁷ ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and others (on behalf of children of Nubian descent) v. Kenya*, Communication No. Com/002/2009, para 28, ACERWC, *Minority Rights Group International and SOS-Esclaves (on behalf of Said Ould Salem & Yarg Ould Salem) v. Mauritania*, Communication No.007/Com/003/2015, para 23

⁸ ACERWC, *Minority Rights Group International and SOS-Esclaves (on behalf of Said Ould Salem & Yarg Ould Salem) v. Mauritania*, Communication No.007/Com/003/2015, Para. 23, see also ACHPR, *Communication 147/95 and 149/96, Sir Dawda K. Jawara v The Gambia*, paras 31 and 32.

⁹ ACERWC, *Minority Rights Group International and SOS-Esclaves (on behalf of Said Ould Salem & Yarg Ould Salem) v. Mauritania*, Communication No.007/Com/003/2015, Para. 23

¹⁰ ACHPR, *Monim Elgak, Osman Hummeida, and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, paras. 60–62; ACHPR, *Article 19 v. Eritrea*, Communication No. 275/03, para. 81

28. Moreover, the Committee notes that the fulfillment of the exhaustion of local remedies requirements is not mandatory if it can be shown that the investigative procedure in a particular case has been unduly prolonged.¹¹ In cases of criminal offenses, the victim's task is not to exhaust domestic remedies, rather, it is the State's obligation to investigate the violations alleged and prosecute the persons involved.¹² In situations where the case was reported but not investigated, Complainants can be exempted from exhausting local remedies.¹³ In the Communication at hand, the Committee notes that more than two years and seven months have lapsed with no progress in the investigation process without plausible justification for the delay. In addition, no evidence shows the due diligence of the Respondent State to investigate the matter. Furthermore, the Respondent State acknowledges the ordinate delay in prosecuting the alleged perpetrator in this case. In this regard, the Committee notes that swift and effective action is vital to mitigate the long-term impact on a child's development prioritizing the well-being of the child and expediting actions to address their best interests. Accordingly, the Committee holds that the Communication submitted is not premature.
29. The Respondent State argues that the Complainant is also required to exhaust other remedies from the Ombudsman, among others. Concerning this matter, the Committee has previously ruled that only judicial remedies are envisaged under the exhaustion of local remedies criteria in the Revised Communication Guidelines.¹⁴ Considering the fact that the Ombudsman is not a judicial organ, the Committee has determined that the victim is not required to exhaust a remedy from the office of the Ombudsman.
30. In light of the above, the Committee holds that the Complainant is exempted from pursuing local remedies to the final stage in line with section IX (1) (d) of the Revised Guidelines.
31. The fifth requirement of admissibility is stipulated under Section IX(1)(e) of the Revised Communications Guidelines provides that a communication must be presented within a reasonable time after exhausting local remedies at the national level, ensuring that

¹¹ ACERWC, Decision On The Communication Submitted By The Institute For Human Rights and Development In Africa And The Open Society Justice Initiative (On Behalf Of Children Of Nubian Descent In Kenya) Against The Government Of Kenya, Para. 31 and 32, See also, Amos O. Enabulele & Bright Bazuaye, Setting the Law Straight: Tanganyika Law Society & anor v. Tanzania and Exhaustion of Domestic Remedies before the African Court. MIZAN LAW REVIEW, Vol. 8, No.1 September 2014, PP. 10

¹² ACHPR, Monim Elgak, Osman Hummeida, and Amir Suliman (represented by FIDH and OMCT) v. Sudan, para. 62

¹³ Amos O. Enabulele & Bright Bazuaye, Setting the Law Straight: Tanganyika Law Society & anor v. Tanzania and Exhaustion of Domestic Remedies before the African Court. MIZAN LAW REVIEW, Vol. 8, No.1 September 2014, PP. 10

¹⁴ ACERWC, The Centre for Human Rights (University Of Pretoria) And La Rencontre Africaine Pour La Defense Des Droits De L'homme (Senegal) Vs Government Of Senegal, Decision: N° 003/Com/001/2012(Talibé case) para 23; ACERWC, Communication No 002/Com/002/2009, 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 case (herein referred to as Nubian case), para 30 Human Rights Committee, Vicente, et al. v. Colombia, Communication 612/1995, Views of 29 July 1997, U.N. Doc. CCPR/C/60/D/612/1995, para. 5.2, available at <http://undocs.org/CCPR/C/60/D/612/1995>.

the Complainant acts with due diligence in pursuing their cases.¹⁵ This requirement aims to maintain the communication's credibility and effectiveness in achieving the intended outcome while avoiding rights abuse.¹⁶ The Committee also notes that this section of the Revised Communications Guidelines is intended for situations where remedies are exhausted, not when an exception to the exhaustion rule is invoked.¹⁷ In this regard, the Committee concurs with the jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR) which provides that the rule requiring submission within a reasonable time (Article 56(6) of the African Charter on Human and Peoples' Rights) does not apply when an exception to the exhaustion of local remedies (Article 56(5)) is applicable.¹⁸ The ACHPR further explained that due consideration is given to when domestic remedies were exhausted or when the Complainant became aware that these remedies were insufficient, nonexistent, or ineffective in determining the deadline for submitting a communication, rather than the date the allegations were made.¹⁹ Given the Committee's decision that the current Complainant should not be required to exhaust local remedies, the requirement to submit a communication within a reasonable time after the exhaustion of local remedies is no longer applicable.

32. Based on the information provided in the Communication, the Committee notes that it does not contain any disparaging or insulting language, and therefore, it is in compliance with the requirements under Section IX (1) (f) of the Revised Guidelines.

V. Decision on Admissibility

33. After thoroughly examining all the arguments, the Committee decides that the Communication satisfies all the admissibility conditions outlined in the Revised Guidelines on Consideration of Communications and consequently declares it admissible.

Adopted in April 2024 during the 43rd Ordinary Session of the ACERWC



**Hon. Wilson Almeida Adão
Chairperson**

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

¹⁵ ACERWC, Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v. United Republic of Tanzania, Communication No. 0012/Com/001/2019, para 22.

¹⁶ ACERWC, Communication No: 0012/Com/001/2019, Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania (2022) Para. 22

¹⁷ Admissibility of complaints before the African Court Practical Guide (2016) 27.

¹⁸ ACHPR, Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Eritrea & Ethiopia, Application No.233/99-234/99, para 39.

¹⁹ ACHPR, Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan, para. 71