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# Remedies for child rights violations in African human rights systems

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## SUMMARY

This article provides an overview of remedies for child rights violations in the African Human rights system. Principally the focus is on the communications procedure under the Africa Charter on the Rights and Welfare of the Child (ACRWC). However, the process under the African Court on Human and Peoples' Rights is referred to, as are possibilities at the level of regional courts. The impact of the decisions on communications handed down to date is discussed, as are the remedies that the Committee of Experts on the Rights and Welfare of the Child has fashioned. Implementation of recommendations is a theme throughout the article.<sup>1</sup> Challenges and areas for improvement are reflected upon, and a conclusion of the current state of play is provided.

## 1 Introduction to the Communications procedure under the ACRWC

The ACRWC has now been ratified by 50 member states of the African Union, and the communications procedure is open to all of them. The Charter itself provides a built-in mechanism establishing a communications procedure, modelled on that provided for under the African Charter on Human and Peoples' Rights. Hence, article 44 forms the basis for this aspect of enforcement of the mandate of the African Committee of Experts on the Rights and Welfare of the Child, the body set up to monitor the implementation of the Charter.<sup>2</sup> Article 44 reads as follows:

1. The Committee may receive a communication from any person, group or non-governmental organisation recognized by the African Union, by

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1 Mezmur and Kahbila "Follow-up as a 'choice-less choice': towards improving the implementation of decisions on communications of the African Children's Committee" 2018 *African Human Rights Yearbook* 212 have observed as follows: "Follow-up has been found to be important, because it has a huge potential to influence implementation and also nurture the much needed political will. It has been argued that follow-up and implementation require a 'multitiered approach and a coalition of actors' at both national and international levels. While follow-up could be undertaken by both state and non-state actors, the role played by human rights treaty bodies is crucial to improving states' compliance with decisions on communications."

a member state, or the United Nations relating to any matter covered by this Charter.

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

However, these brief provisions have been much more fleshed out in the Committee's Revised *Guidelines for the Receipt of a Communication*.<sup>5</sup> Indeed, it was the lack of comprehensive guidelines in the first place<sup>4</sup> that led to the delayed responses to the first two communications received by the African Committee of Experts on the Rights and Welfare of the Child in 2005, namely those in the *Uganda People's Defence Force* case<sup>5</sup> and in the *Nubian Children* case.<sup>6</sup>

The original Guidelines did not provide much assistance in fashioning remedies upon a finding of a Charter rights violation. Writing in 2015, when only two decisions had been completed by the Committee, I wrote as follows:

As far as remedies are concerned, the Guidelines are silent on what measures the Committee could institute or impose upon finding a violation of a Charter right. Given the fact that, as an international treaty body, it lacks any 'teeth' to implement a recommendation within the confines of a sovereign state or to force a country to abide by a finding, the usual route would be to issue advice to the infringing government about the violation and possibly elaborate on the measures, if any, that the Committee would like to see as corrective action.<sup>7</sup>

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2 This is additional to other powers accorded the Committee, such as receiving State Party reports, conducting investigative missions, and formulating General Comments. See, in general, Sloth-Nielsen "Children's Rights Litigation in the African Region: Lessons from the Communications Procedure Under the ACRWC" in Liefwaard and Doek (eds) *Litigating the Rights of the Child* (2015).

3 These were adopted in 2014 and again in 2020. Guidelines on Conduct of Investigations and Revised Guidelines on Communications were adopted at the August 2020 session (ACERWC/ RPT(XXXV) para 109).

4 The initial requirement was that the communication had to be submitted in English and in French. Moreover, there were delays in communication between the Secretariat of the Committee and the complainants. See Sloth-Nielsen (2015). *Michelo Hunsungule and others (on behalf of children in Northern Uganda) v The Government of Uganda* Decision no 001.Com/001/2005 was submitted in 2005 and a finding was only handed down in 2013. See Fawole "Revisiting *Michelo Hunsungule and others (on behalf of the Children of Northern Uganda) v Uganda*: a case commentary" 2020 *African Human Rights Yearbook* 415.

5 As above.

6 *Institute for Human Rights and Development in Africa and Open Society Initiative on behalf of Children of Nubian descent in Africa* Decision no 002/Com/002/2009.

7 Sloth-Nielsen (2015) 257. It will be discussed later whether this observation still holds true.

## 2 Current Guidelines for the receipt of a communication

The Guidelines<sup>8</sup> develop a set of admissibility criteria concerning the author, the requirement that the communication fulfils the requirements of the Charter, that domestic remedies have been exhausted and that the complaint is not being considered by another investigation, procedure or international regulation. Nor may the wording be offensive, or based exclusively on information circulated by the media, and the communication must be presented within a reasonable time after the national appeal process has been exhausted. Steps taken to exhaust domestic remedies must be provided, or the impossibility or ineffectiveness of such measures explained.<sup>9</sup>

The information needed to accompany the communication is detailed, and the complainant(s) are requested to outline the remedies they seek for the alleged violation(s). Where a communication reveals serious or massive violations or in cases of emergency, the Secretariat shall immediately notify the Committee for consideration of any provisional measure. Provisional measures are dealt with in section VII of the Guidelines and can be requested without prejudice to any determination on the admissibility or merits of the communication.<sup>10</sup> A joinder of communications based on similar facts may be ordered by the ACERWC on its own motion or at the request of one of the parties.<sup>11</sup> Communications may be withdrawn by a complainant at any stage,<sup>12</sup> or discontinued at the instance of the Committee.<sup>13</sup>

The Guidelines make provision for both written submissions, also by the responding government, and oral hearings.<sup>14</sup> This can be a step taken by the Committee itself, or at the request of one of the parties.<sup>15</sup> Witnesses and experts may be called to provide evidence. They can be called by the committee or at the request of one of the parties – but whosoever calls the witness bears the cost.<sup>16</sup> Hearings may be held in open or closed session, as the Committee deems appropriate.<sup>17</sup> The Committee may also decide to accept or solicit interventions by parties

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8 Guidelines for consideration of communications and monitoring implementation of decisions <https://www.acerwc.africa/en/page/guidelines-consideration-communications-and-monitoring-implementation-decisions> (last accessed 2022-11-23).

9 S11 (3)(i).

10 SVII (2)(v).

11 SVI (1).

12 SVIII (1).

13 SVII (2).

14 SIX (2)(vi) and XI (1) and (2).

15 SXI (5).

16 SXI (5)(iv).

17 SXVIII(iv). Previously hearings were held only in closed session. Deliberations of the Committee upon the merits remain in closed session and are confidential.

other than the complainant and the respondent state that it considers will provide it with information relevant to making a decision on a communication.<sup>18</sup> The Committee is mandated to take effective measures to ensure the effective and meaningful participation of the child or children affected by the communication.<sup>19</sup>

The Guidelines make provision for an amicable settlement, either under the auspices of the Committee or at the request of any of the parties. The process may be facilitated by one or more of its members.<sup>20</sup>

Section XX of the Guidelines provides (maybe unusually) for the Committee to review its own decisions on admissibility or on the merits. This could be for specified reasons, such as the discovery of decisive new facts or evidence; the Committee erred in its application and interpretation of the Charter or any other relevant instrument; or by reason of the existence of any other compelling reason impelling the Committee to review a decision with a view to ensuring fairness, justice and protection of the rights and welfare of children.

As these are discussed subsequently in this article with reference to specific decisions, implementation of Committee decisions is also worthy of mention; there is a substantial section of the Guidelines dealing with implementation.<sup>21</sup> The Committee requires an implementation report from the state party found to have violated the Charter within 180 days of the date of receipt of the Committee's decision. Failure by a state party to submit such reports will trigger reminders, and if needs be, referral to the Assembly of the African Union. Implementation hearings can be convened if the Committee feels that a report on implementation "lacks clarity" or is "unsatisfactory".<sup>22</sup> This shall take place in one of the sessions following the submission of the report. The outcome of the implementation hearing is the issuance of guiding recommendations that enable the respondent state to fully implement the decision of the Committee.<sup>23</sup> Further monitoring is provided for beyond the hearing itself, and to this end, a rapporteur from within the Committee must be appointed for each communication. This is described by Skelton as a supervisory mandate.<sup>24</sup>

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18 SXVIII(1). This is in addition to receiving *amicus curiae* briefs from natural or legal persons other than parties to the Communication – SXVIII (2).

19 SXI (6).

20 SXIII.

21 SXXII.

22 SXVIII(2)(i); Mezmur "No second chance for first impressions: The first amicable settlement under the African Children's Charter" 2019 *African Human Rights Law Journal* 72 records that hearings on the implementation of decisions on communications on amicable settlements included an engagement with the delegation of the government of Malawi, with the government Kenya in the context of the Children of Nubian descent case, as well as a delegation of the government of Senegal in relation to the Talibé decisions (p 83).

23 SXVIII (4).

24 A Skelton "Complaints and Remedies" in Liefwaard and Doek (eds) *Litigating the Rights of the Child* (2015).

### 3 Remedies

According to Black's law dictionary, remedies are "[a] means through which a right is either enforced or the violation of a right is prevented, redressed or compensated".<sup>25</sup> Courts can make a variety of decisions or orders. For instance, they can order restitution; order the issuing of public apologies; make findings that duty-bearers acted wrongfully and prescribe actions to be taken to remedy this; and bring perpetrators of human rights violations to justice.<sup>26</sup> They can make declarations of rights, declarations that a law, policy or practice is unconstitutional, and mandatory and structural interdicts.<sup>27</sup> Reparations are means used by a State in breach to repair the consequences of a violation.<sup>28</sup> The major forms of reparation include restitution,<sup>29</sup> compensation,<sup>30</sup> rehabilitation,<sup>31</sup> satisfaction,<sup>32</sup> and guarantees of non-repetition.<sup>33</sup> The use of restitution serves to restore to their original state before the violations occurred. This may include the restoration of the enjoyment of rights such as the restoration of liberty; the return to one's place of residence; the restoration of employment; and the return of property.<sup>34</sup> Compensation, on the other hand, deals with economically assessable damage. Rehabilitation deals with the medical, psychiatric, psychological and related care for victims.<sup>35</sup> In addition to their being victim-specific, remedies may aim to prevent the recurrence of rights violations by, for example, ordering changes in the law. Remedies in international law are

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- 25 Black's Law Dictionary 6th ed (1990) 1294. Some of the material that follows in this article draws from a paper presented in 2019 at the University of the North West by Dr Robert Nanimbo, senior lecturer, University of the Western Cape and a current member of the ACERWC.
- 26 African Child Policy Forum *Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa* (2020) 15.
- 27 Black's Law Dictionary (1990) 30-31.
- 28 Shelton "Remedies in International Human Rights Law" (2005) 7.
- 29 Rule 19 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law.
- 30 Rule 20.
- 31 Rule 21. Rehabilitation as a form of reparation includes medical, psychological, legal and social services
- 32 Rule 22.
- 33 Rule 23. The Basic Principles recommend the use of guarantees of non-repetition; largely aimed at requiring the State to take steps to ensure the prevention of the re-occurrence of the violations. These have been used by some international human rights bodies including the Rome Statute of the International Criminal Court.
- 34 A/RES/60/147 art 9, para 19.
- 35 As above para. 21. The victim may be a direct or indirect victim. For instance, Principle 8 of the Basic Principles states that "victim" comprises not only direct, but also indirect victims. Victims may include the immediate family members or dependents of the direct victim who suffered the harm (art 9, para 8).

governed by either procedural or substantive connotations.<sup>36</sup> As will be illuminated, while the procedural connotations are engaged before the tribunal considers the merits of the matter, the substantive aspects inform the findings at the conclusion of the matter.<sup>37</sup> It remains to be discussed how the ACERWC has approached the question of remedies where it has found a violation.

The sufficiency of a remedy is guided by its accessibility, affordability, timeliness and effectiveness.<sup>38</sup> The African human rights system has reiterated this principle and narrowed down the conditions to three aspects. In *Jawara v Gambia*, the African Commission stated that the remedy has to be available, effective and sufficient.<sup>39</sup> These perspectives point to the ability of the remedies to precisely offer adequate redress to a victim.<sup>40</sup> This position is also reiterated by other regional human rights bodies that require that a remedy should be sufficiently certain not only in theory but also in practice.<sup>41</sup>

## 4 Remedies in the jurisprudence of the ACERWC

### 4.1 The *Ugandan Peoples Defence Force case*<sup>42</sup>

*Michelo Hansungule & Others (on behalf of the Children of Northern Uganda) v Uganda (Children of Northern Uganda)* was the first communication that the Committee received and the second decision that the Committee finalised. This decision considered whether the government of Uganda (the respondent) violated several rights of the children of Northern Uganda from 2001 to 2005. The complaint related to the use of child soldiers by the Ugandan People's Defence Force during the period when an insurgency was perpetrated by the Lord's Resistance Army. The African Children's Committee found that the respondent

36 Before the substantive and procedural aspects are engaged, it should be noted that various international instruments recognise this right. For instance, art 9(5) of the International Covenant on Civil and Political Rights provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The same is in art 5(5) of the European Convention on Human Rights and art 85(1) of the Rome Statute of the International Criminal Court.

37 These are usually referred to as conditions for admissibility of complaints or communications and as remedies at the conclusion of merits.

38 International Covenant on Economic, Social and Cultural Rights; The Domestic Application of the Covenant: 03/12/98; CESCR General Comment 9, E/C.12/199824, para 9.

39 African Commission on Human and Peoples' Rights Communication Nos. 147/95 and 149/96 (2000) para.31

40 For the concepts of availability, effectiveness and sufficiency of a remedy, see *Anuak Justice Council v Ethiopia* Communication 299/2005 paras 51–52, and the ACERWC's decision in *MRG and Anor v Mauritania* Communication 7/2015, para 23.

41 Council of Europe/ European Court of Human Rights *Practical Guide on Admissibility Criteria* (2014) para 72.

42 Fawole 2020 *African Human Rights Yearbook* 415.

violated its obligation under articles 1(1) and 22 of the African Children's Charter.<sup>43</sup> Article 1(1) provides for the general obligation of States to recognise the rights freedoms and duties enshrined in the Charter, whilst article 22 contains the clauses specifying the protections to be accorded children in times of armed conflict, including the general obligation to take all necessary measures to ensure that 'no child shall take a direct part in hostilities'.

The Committee recommended that the Government of Uganda should enact a provision making it a crime to recruit persons under the age of 18 years. It recommended that standard operating procedures for the reception and handover of children separated from armed groups and armed forces be produced and that a child-centred disarmament, demobilisation, and reintegration program should urgently be established, collaborating with the African Union, United Nations, and others. A National Action Plan should be developed and implemented regarding birth registration. It was recommended that measures be taken to ensure that conclusive proof of age be provided before a person may enter into the armed forces and others. A central recommendation was that while the need may arise for children to assume some kind of responsibility for rights violations they have committed, the Government of Uganda should rely on measures other than criminal prosecution and detention.<sup>44</sup>

The due diligence standard in international law requires a state to prevent, investigate, prosecute, punish and provide remedies for violations of human rights.<sup>45</sup> In the words of the African Children's Committee, applied in this case, the due diligence standard means, "that the compliance of a [s]tate party is assessed against the backdrop of the efficacy of the implementation measures."<sup>46</sup> The Committee linked an element of the due diligence standard concerning article 22 of the African Children's Charter to the issue of remedies. It stated that a state must provide reparations to child victims of armed conflict when the violations "can be attributed to the State, [or] even when substantive breaches originate in the conduct of private persons."<sup>47</sup>

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43 No violation was found in respect of the other rights that were claimed to have been violated.

44 Discussed in Skelton (2015).

45 These elements are discussed at length in Fawole 2020 *African Human Rights Yearbook* 423-424.

46 ACERWC "General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (art 1) and systems strengthening for child protection" (2018) 15.

47 As above para 51. See too Fawole (2020) 429.

## 4 2 The *Nubian children case*<sup>48</sup>

In this communication, it was alleged that the Kenyan government had been denying citizenship to children of Nubian descent. The Committee recommended that reforms be enacted to provide for such children acquiring nationality at birth and that existing children of Nubian descent be granted Kenyan nationality. It also recommended that a strategy be devised to ensure that affected communities have the highest standard of health and education (preferably through consulting with affected communities), a standard which had been denied to Nubian children. Finally, the Committee required that the Kenyan government report on progress made in implementing the recommendations.

Reporting to the Committee in August 2020<sup>49</sup> concerning the Nubian children's communication, the Kenya delegation indicated that Nubian children have been integrated into the community. According to the delegation, Nubian children do not have any issues related to birth certificates and are attending their schools. A children officer in Kibera<sup>50</sup> is working closely with the community leaders from the Nubian community to allow their integration into the community.

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48 *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of children of Nubian Descent in Kenya v Kenya* (Decision NO. 002/Com/002/2009).

49 35th session of the African Committee of Experts on the Rights and Welfare of the Child, 31 August – 08 September 2020 para 86. Reporting three years earlier at the 29<sup>th</sup> session in May 2017 on the same issue, the Government of Kenya said that it had adopted the following measures: "making of the descendants of migrants and stateless persons and migrants and stateless persons eligible for registration for citizenship according to the 2010 Constitution, opening an 8 year window of registration of children up to 29 August 2019, putting in place a monitoring plan in health facilities to ensure that every birth is registered at any maternal health outlets, conducting accelerated mobile registration, establishment of a guideline on orphan and vulnerable children, reengineering the education management information system, sensitisation of religious leaders on birth registration, distribution of registration guidelines to registration agents, ensuring that government registers all births as soon as they occur irrespective of any circumstance, subsidising secondary school education, capitation increase in 2014/15 academic year, including fruits and vegetables in school feeding programs, health facilities development, commencing free child delivery services, including HIV/AIDS education in the school curriculum and making the principle of non-discrimination central to issues of health and education." 29<sup>th</sup> Session of the African Committee of Experts on the Rights and Welfare of the Child 2<sup>nd</sup> – 9<sup>th</sup> May 2017, para 57.

50 The district in Nairobi where most of the Nubian children reside.



### 4.3 The *Talibes* case<sup>51</sup>

In this communication it was alleged that the Government of Senegal was not taking sufficient measures to protect children in Senegal who were being sent away to private religious schools where, it emerged, they were abused, made to beg on the streets for many hours a day, kept in appalling conditions, received no medical treatment when ill or hurt, and received no education – all covered by rights protected in the Charter. Arguing that several of their rights had been violated, including the rights to life, survival and development; the right to education; the right to leisure, recreation and cultural activities; the right to health and health services; the prohibition of child labour; protection against child abuse and torture; protection against harmful cultural practices; and the prohibition of the sale, trafficking and abduction of children, the complainants demanded a series of remedies.

The Committee found that all these rights had indeed been violated. It made a range of recommendations, which included sending the children back to their families; establishing minimum norms and standards regulating conditions at private schools of this kind; and ensuring that all perpetrators of child trafficking, abduction, and the sale of children, along with those who force children to beg, be brought to justice. The Committee also called for the training of duty bearers and cooperation with UN agencies to address challenges surrounding this group of children and a spectrum of others.<sup>52</sup>

At the 29th Session of the ACEWRC, the Committee considered the progress made by the Senegalese government in implementing the recommendations it made in the *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense Des Droits de l'homme (Senegal) v The Government of Senegal* case, where children had been denied the right to education and been made to beg for a living.

Measures that had been taken by the state included budgetary allocations; the signing of bilateral agreements for the return of children to their homes; the acceleration of the adoption of a child-rights code; creating three new child-rights courts; drafting a curriculum for the schools that had deprived the children of education; setting up timeframes, norms and standards for the schools; and strengthening medical coverage for the children.<sup>53</sup>

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51 *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine Pour la Defence des Droits de L'homme (Senegal) v Government of Senegal* ACRWC 003/Com/001/2012.

52 ACPF (2020) notes that “Importantly, this decision did not prescribe how the Government of Senegal should go about its response. For instance, it did not say that legislative reform had to be undertaken or that administrative measures were required” 89.

The government spokesperson continued that certain positive results had been seen. There was an increase in the rate of children in school and a better quality of education, 1147 children were withdrawn from the street and 2344 *Talibé* children were enrolled in health units. However, challenges were faced in the process of implementation. One of the major challenges holding back the implementation of the recommendations was deeply rooted harmful traditional values. The spokesperson expressed the strong desire of the Government of Senegal to ensure the full implementation of the ACERWC's recommendations and to create a Senegal where no child has to beg.<sup>54</sup>

#### 4 4 The *Cameroon case*<sup>55</sup>

In *Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon*, the facts indicated that the minor who was 10 years old at the time, was a victim of rape on three occasions by a prominent and influential person in the community. Although the case was registered with the police, the police delayed the investigations, and the file was dismissed by the court. The mother of the victim appeared on a radio talk show to express her grievance about the way the case was mismanaged. This led to charges of judicial defamation being brought against her. Amongst others, the complainants alleged that article 1(1) (relating to the nature of the State obligation), article 3 (non-discrimination) and article 16 (Protection against Child Abuse and Torture) of the African Charter on the Rights and Welfare of the Child had been violated by the Republic of Cameroon due to its failure to investigate the crime of rape committed against TFA.

In its finding, the ACERWC again used the concept of “due diligence”. It stated that realisation of children's rights required a proactive approach, and immediate attention and action to avoid ineffective investigations, especially in sexual offence cases. As such the failure to institute a trial in a reasonable period and an unduly prolonged appellate process shows a lack of due diligence which is not in the best interests of the child.

The ACERWC therefore awarded monetary compensation to the tune of “50 million CFA for the pain, suffering and harm to her dignity, including physical, mental and emotional trauma”.<sup>56</sup> It was also required that the perpetrators be subjected to the court system, and that legislation be enacted and implemented to deal with sexual violence against children.<sup>57</sup>

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53 29th Session of the African Committee of Experts on the Rights and Welfare of the Child 2017 para 62.

54 As above para 63.

55 Communication No. 006/Com/002/2015.

56 Cameroon decision para 81.

57 Para 84.

Reporting subsequently to the ACERWC on efforts towards implementation, the delegation of the Government of Cameroon, provided an update.<sup>58</sup> With regards to the first recommendation of the Committee pertaining to the prosecution of the perpetrator, the delegation informed the Committee that the Court of Appeal had overturned the decision of the High Court on 20 March 2021 and the case is now referred back for retrial by the High Court, which currently is at the stage of preliminary inquiry. Concerning the decision of the Committee on the compensation of 50 million CFA to the victim, this had not yet been implemented, but it is being worked on by an inter-ministerial Committee. The delegation alluded to the fact that 500,000 CFA has been provided by the Government pending the payment of the full compensation to support TFA. The delegation stressed that due to its support, TFA is now attending school. Reporting on the Committee's recommendation to adopt legislation on sexual violence, the delegation informed the ACERWC that no law has been adopted, but various policy documents are crafted on child protection including the national policy document on child protection which also has an action plan, and the national policy on early childhood development.

The representative highlighted that judges and prosecutors are trained on protection of human rights during pre- and in-service trainings in two modules, namely protection of children's rights and policy for minors and that police are trained on techniques of investigation to establish whether children are victims. In relation to the recommendation to establish child-specific police units and court benches, the Government provided that no such unit or bench has been established; however, there are focal persons in the police and some judges handle child issues even if not appointed as judges for child courts. Moreover, the government informed the Committee that it has implemented the recommendation to provide support to survivors and particularly in the current case, TFA had received psychosocial support through a social worker assigned by the Ministry of Social Affairs. Additionally, it was reported that Cameroon had undertaken measures to continue awareness creation on the eradication of sexual violence including on the celebration of national day on the elimination of violence against women, and sensitising community leaders on child marriage.<sup>59</sup>

Nevertheless, the applicants countered most of these assertions. After hearing both parties on the status of the implementation of its decision and recommendations, the Committee noted that some aspects of its recommendations have been implemented, however, there is a lack of implementation of most of its decisions.<sup>60</sup> The Committee therefore requested the Government of Cameroon to provide a timeline and roadmap for the implementation of all of its recommendations, mainly

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58 Report of the 37th Session of the African Committee of Experts on the Rights and Welfare of the Child (2021) para 95.

59 As above.

60 As above.

the payment of the compensation and the enactment of legislation to eradicate sexual violence; to provide evidence on the reported decision of the Court of Appeal and also a timeline for the court proceeding of the retrial; and to ensure that the trainings are targeted towards not only knowledge but also the behaviour and demeanour of the police and judges while dealing with issues of child protection.<sup>61</sup> The Government was requested to report on the status of the implementation of the decision bi-annually.

#### 4 5 The *Mauritania* case<sup>62</sup>

In *Minority Rights Group International and SOS Enclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, the complainants claimed that the minors who were born to a mother from the Haratine slave class automatically and allegedly became slaves to the El Hassine family.<sup>63</sup> The minors worked as slaves, they were subjected to long hours of work, corporal punishment and only ate left-over food.<sup>64</sup> The charges against the perpetrators returned an unsatisfactory decision that the State Prosecutor did not engage by way of appeal.<sup>65</sup> The complainants claimed that their rights to education,<sup>66</sup> and an effective remedy were violated. In addition, they alleged the State's violation of its obligations under the ACRWC, the right against non-discrimination, the best interests of the child, and the right to survival and development.<sup>67</sup> The other alleged violations included the rights to education, leisure, recreation and cultural activities, protection from economic exploitation and protection against harmful social and cultural practices. Furthermore, the other alleged violations related to the right to the prevention of the sale, trafficking and abduction of children in terms of the ACRWC.<sup>68</sup>

The ACEWRC stated that a State's implementation of its obligations under article 1 of the ACRWC should be informed by the right to protection of children from abuse, neglect, maltreatment and degradation. As such all measures, (including legislative, administrative, and judicial measures) should be adopted and implemented in the spirit of protection of the children.

The ACERWC recognised that the due diligence principle is key to the State's implementation of its obligations under article 1 of the ACRWC.<sup>69</sup> As earlier stated, due diligence is translated in the form of how States prevent and investigate human rights violations, and how they prosecute

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61 As above para 97.

62 No. 007/Com/003/2015.

63 Mauritania decision para 6.

64 Mauritania decision para 7

65 Mauritania decision paras 9-11.

66 Mauritania decision para 8.

67 Mauritania decision para 12.

68 The child victims did testify at a hearing, and in addition to this, there was an in-country investigation.

69 Mauritania decision para 52.

and punish perpetrators.<sup>70</sup> The ACERWC indicated a lack of due diligence on the part of the State Party including the failure to take measures to prevent slavery and to free children from the vice,<sup>71</sup> and the failure to take proactive measures to investigate the violation and ensure effective prosecution and punishment of the perpetrators. Other areas that show a lack of due diligence included the failure to effectively implement laws,<sup>72</sup> or provide for remedies that effectively address the violations.<sup>73</sup> The ACERWC ordered restitution to restore the identity of the complainants and other persons who are held as slaves, through the grant of adequate documentation such as birth certificates.<sup>74</sup> Satisfaction as a form of reparation was employed to recommend the prosecution of the perpetrators and State collaboration with stakeholders including civil society organisations.<sup>75</sup> The ACERWC also recommended that the State grant adequate compensation for violation of the right to education,<sup>76</sup> and the subjection of the complainants to slavery, but did not specify an amount.<sup>77</sup> The ACERWC granted the State 180 days within which to report on measures taken to implement the decision.

At an implementation hearing following the consideration of the State Party report, the Mauritanian government reported that by 2019, the two boys were in their last year of high school, that compensation of 3 million Mauritanian Ougiyas had been paid to the victims, and that Delegation confirmed that the training and capacity building programs include the judiciary, public prosecutors, and the police from all parts of the country. The delegation informed the Committee that the Government had adopted the necessary measures to implement the decision of the Committee by holding the perpetrators responsible, providing identity cards for the victims and that the sentence of the perpetrators is being reviewed through an appeal. The delegation highlighted that, in collaboration with CSOs, Mauritania has established a road map to end slavery which also has an action plan.<sup>78</sup>

Noteworthy in the Mauritania case is the lengthy and detailed list of recommendations issued as a remedy. These total more than 12 in number and include not only measures aimed at ameliorating the plight of the two boys concerned, but also to address structural barriers to ending slavery in the country, such as undertaking a baseline survey to identify all children in slavery so as to be able to intervene.<sup>79</sup>

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70 Mauritania decision para 54.

71 Mauritania decision paras 55 and 58.

72 Mauritania decision para 63.

73 Mauritania decision para 70 on Art 1; para 73 on Art 5(2); para 75 on Art 11; para 81 on Art 15; para 88 on Art 16; and para 92 on Art 21.

74 Mauritania decision para 98(B).

75 Mauritania decision para 98(L).

76 Mauritania decision para 98(C).

77 Mauritania decision para 98(G).

78 34th Session of the African Committee of Experts on the Rights and Welfare of the Child, 25 November – 05 December (2019) paras 110-113.

79 Mauritania decision para 98(J).

#### 4 6 *Africa Centre for Justice and Peace studies and People's Legal Aid Centre v Government of the Republic of Sudan*<sup>80</sup>

This case concerns the failure of the government of Sudan to grant nationality to a girl whose mother was Sudanese, but whose father was from recently independent South Sudan. In Sudan, nationality was conferred through a father. Finding that Sudan was in violation of its non-discrimination obligation under article 3 of the Charter, as well as articles 6(3) and (4) on the right to nationality and the prevention of statelessness, the Committee made a series of recommendations. Specifically, these included remedying the legal status of the affected victim, revising its Nationality Act to ensure that children born to Sudanese mothers automatically obtain Sudanese nationality, ensuring that children born to South Sudanese parents are not discriminated against in their quest to obtain Sudanese nationality where the child demonstrates a clear link with the Sudanese state, ensuring that Sudanese nationality is not revoked unless there is sufficient evidence that the child has acquired another nationality, and ensuring that there are procedural safeguards in determining, conferring and revoking Sudanese nationality.

The Committee did not find a violation of the complainant's right to protection of the family, since there was only a risk of separation were she to be deported, and this "cannot be equated with the actual violation of the right".<sup>81</sup> Moreover, the Committee declined to award compensation on the basis that no specific request was made, and no evidence showing actual damage was adduced before it.<sup>82</sup>

### 5 Friendly settlement<sup>83</sup>

The first communication which was settled in this way concerned *IHRDA v Government of Malawi*.<sup>84</sup> It concerned children aged 16–18 years who were not being afforded the protections given to them by the ACRWC. More specifically, an alleged violation of article 1 (on the nature of state parties' obligations), article 2 (on the definition of a child) and article 3 (on the prohibition of discrimination) were caused by the fact that the Constitution of Malawi, which provides in section 23(5) that "[f]or the purposes of this section, children shall be persons under sixteen years of age", was not compliant with the definition of a child under the Charter, which set this as a person aged below 18 years. Further, it was alleged that the distinction made in the Constitution between children below 16

80 Communication 005/Com/001/2015, finding of April 2015.

81 Sudan decision para 102.

82 Sudan decision para 104.

83 See in general Mezmur 2019 *African Human Rights Law Journal* 72.

84 Communication 004/Com/001/2014.

years of age and those between 16 and 18 years violated the prohibition of non-discrimination in article 3 of the African Children's Charter.<sup>85</sup>

The ACERWC in 2015 declared the communication admissible. However, before proceeding on the merits the Committee was approached by the two parties indicating that they would like to resort to an amicable settlement. Mezmur notes that this procedure may help to "reduce potential tensions that may arise during contentious proceedings" and that it also allows for "more room for constructive dialogue between the parties."<sup>86</sup>

The settlement indicated that the Malawian government would endeavour as far as possible to amend its Constitution and all other relevant laws to ensure that this group was protected. There was also a reporting obligation attached. The settlement was not particularly prescriptive and gave the Government of Malawi the space to make decisions as it saw fit to correct the defect. The Malawian Constitution was amended in February 2017 by s 23(6), of the Constitution (Amendment) Act 3 of 2016.<sup>87</sup>

Writing specifically about child marriage, Mezmur states that the amicable settlement does not appear to have considered reparation options for past victims of the violations related to early and child marriage.<sup>88</sup>

A second friendly settlement was reached in *Project Expedite Justice v The Republic of the Sudan*.<sup>89</sup> While the Committee remained seized with the Communication, the complainants, through a letter dated on 31 August 2020, submitted a request for the matter to be settled amicably.

85 The Child Care Protection and Justice Act, 22 of 2010, which is the most comprehensive piece of legislation for children in Malawi, in section 2 provides a definition of the child as contained in section 23(5) of the Constitution.

86 Mezmur 2019 *African Human Rights Law Journal* 72.

87 As above 74. Mezmur noted in 2019 that apart from amending the constitutional provision, the government had promised the further harmonisation of subsidiary laws to comply with its obligations under international law as one of the elements of the amicable settlement, but that there is no evidence that other subsidiary laws had been harmonised by the set deadline.

88 Mezmur 2019: 'While almost the whole gamut of reparations, including compensation, is highlighted as a possibility, states as a minimum are 'obliged to provide all victims of child marriage reparation in at least the forms of restitution and rehabilitation'. With respect to restitution, pregnant girls or those who have children can be assisted to 'have an opportunity to continue their education on the basis of their individual ability'. In respect of rehabilitation, services such as legal aid, access to healthcare and medical services, and alternative vocational training, should be provided to restore, as far as possible, the victim's physical, mental, social and full inclusion in society': p 77 (referring to the Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage (2017) para 24.

89 Communication No. 0011/COM/001/2018

Following the consultation, the Committee deliberated on the request and noted that the Parties were in agreement to settle the matter amicably and agreed to facilitate negotiations.<sup>90</sup> Political change in the Sudan had brought about this change of direction.

At its 39<sup>th</sup> meeting in November 2021, a report of an investigative mission in the South Kordofan and Blue Nile regions of the Republic of the Sudan to assess the situation of children affected by armed conflict and to identify the progress achieved so far in terms of the implementation of the amicable settlement reached was agreed.<sup>91</sup> During the visit, the Delegation observed the magnitude of the challenges that exist in the two regions which hampers the fulfilment of the terms of the settlement, as well as the progress that has been achieved. A detailed exposition of the current situation on the ground was documented.

## 6 Joinder

The Committee decided to join Communication No: 0017/Com/005/2020 with Communication No: 0015/Com/003/2020, as the two Communications were brought by the same group of applicants, they allege similar patterns of violations and request for similar remedies. No further information is available, as the ACERWC does not release the contents of communications until they have been found admissible.

## 7 African Court on Human and People's Rights

In *Association pour le progrès et la défense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*<sup>92</sup> it was alleged that on 3 August 2009, the National Assembly of Mali, by majority, passed Act No 2011-087 establishing the Family Code (PFC). This draft was the outcome of lengthy review of the former Marriage and Guardianship Code 1962. Amongst other complaints was that the code violated the minimum age of marriage at 18 years set by the African Charter on the Rights and Welfare of the Child,<sup>93</sup> by setting the minimum age for contracting marriage at eighteen for boys and sixteen (16) for girls. The Applicants further indicate that the impugned law allows for special exemption for marriage from fifteen (15) years, with the father's or mother's consent for the boy, and only the father's consent, for the girl. The Court agreed

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90 November 2019 report Paras 92-94. August 2020 report para 112.

91 <https://www.acerwc.africa/wp-content/uploads/2021/09/Final-report-of-the-Republic-of-The-Sudan-r.pdf>.

92 Application 046/2016.

93 A violation of arts 1(3), 3 and 21 was alleged. An alleged violation of the obligation to eliminate traditional practices and attitudes that undermine the rights of women and children art 2(2) of the Maputo Protocol, 5(a) of the Convention on the Elimination of Discrimination of All Women and 1(3) of the ACRWC was also in issue.



that it lies with the Respondent State to guarantee compliance with the minimum age of marriage, which is 18 years, and the right to non-discrimination; that having failed to do so, the Respondent State has violated article 6(b) of the Maputo Protocol and articles 2, 4 (1) and 21 of the Children's Charter.

A further ground for the complaint was that, according to the new Family Code, children born out of wedlock do not have the right to inheritance and that they may be accorded inheritance only if their parents so wish and the conditions set out in article 751 of the Family Code have been met. This, the applicants averred, violated article 4(1) of the Children's Charter, and article 3 thereof which prohibits all forms of discrimination.

Noting that the best interests of the child required in matters of inheritance as stipulated under article (1) of the Children's Charter in any procedure, were not taken into account by the Mali legislator at the time of elaboration of the Family Code, the Court found that the Islamic law currently applicable in Mali in matters of inheritance and the customary practices are not in conformity with the instruments ratified by the Respondent State. A violation of articles 3 and 4 of the Children's Charter was hence declared.

Finally, the failure to eliminate the traditional practices that undermine the rights of women and girls, and children born out of wedlock, especially early marriage, the lack of consent to marriage, and the unequal inheritance provisions were alleged all to be in contravention of article 1(3) of the Children's Charter. Referring specifically to article 21(1) of the Charter, the Court concluded that the Respondent State has violated its international commitments.

The remedy ordered included that the Respondent State has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.<sup>94</sup> Additionally, the Court requested the Respondent State to comply with its obligations under article 25 of the Charter<sup>95</sup> with respect to information, teaching, education and sensitisation of the population.

## 8 ECOWAS Court of Justice

The ECOWAS Court has dealt with several child rights violations. In a case concerning Côte d'Ivoire,<sup>96</sup> the Court ordered that the government of the Republic of Côte d'Ivoire be held liable for the violation of the rights of a girl who was excluded from benefiting from the estate of her late

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<sup>94</sup> Mali decision para 130.

<sup>95</sup> Art 25 of the Charter on Human and Peoples' Rights (Banjul Charter) stipulates that State Parties have the duty "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding obligations and duties are understood".

father. The court in its judgment in the suit filed by Dame Marie Ajami on behalf of her under-aged daughter ordered the government to pay 250 million CFA in damages for violating her right to equality before the law.

The Court also ordered the Ivoirian government to amend its legislation concerning paternity and affiliation to align it with its obligation under article 1 of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. The African Children's Charter was evidently not referred to.

Earlier, in 2009, the ECOWAS Court had declared that all Nigerians are entitled to education as a legal and human right. The Court said that the right to education can be enforced before the Court and dismissed all objections brought by the Federal Government (FG), through the Universal Basic Education Commission (UBEC), that education is "a mere directive policy of the government and not a legal entitlement of the citizens." The decision followed a suit instituted by the Socio-Economic Rights and Accountability Project (SERAP) against the Federal Government and UBEC, alleging the violation of the right to quality education.<sup>97</sup> Seemingly, reliance was placed on the African Charter on Human and Peoples' Rights, and not the Children's Charter.

In a third matter, decided in 2019, the ECOWAS Court ordered Sierra Leone to revoke its policy banning pregnant girls from schools.<sup>98</sup> In its judgment on *Suit No. ECW/CCJ/APP/22/18 - Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone*, handed down on 12 December 2019, the Court held that Sierra Leone's practice of establishing separate educational facilities for pregnant girls was an institutionalised discrimination against them and a violation of the right to equal education for all children, implicating, amongst others, the African Charter on the Rights and Welfare of the Child. The remedy fashioned by the Court included ordering Sierra Leone to immediately revoke the policy banning pregnant girls from mainstream school; to abolish the schools established separately for pregnant girls; to develop strategies, programmes and nationwide campaigns focusing on reversing negative societal attitudes that support discrimination and bias against pregnant girls attending school, which foster the violation of their right, as well as the right of teenage mother, to continuing education; to develop strategies, programmes and nationwide campaigns to enable

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96 Vanguard "Child Rights Violation: ECOWAS Court Orders Cote d'Ivoire to pay 2CFA 50m, amend laws <https://www.vanguardngr.com/2020/07/child-rights-violation-ecowas-court-orders-cote-divoire-to-pay-cfa-250m/> (last accessed 2022-11-23).

97 Relief Web "ECOWAS Court says Nigerians Have Legal Right to Education" <https://reliefweb.int/report/nigeria/ecowas-court-%20A0says-nigerians-have-legal-right-education> (last accessed 2022-11-23).

98 IHRDA "ECOWAS Court Orders Sierra Leone to Revoke Policy Banning Pregnant Girls From Mainstream School" <https://www.ihrda.org/2019/12/ecowas-court-orders-sierra-leone-to-revoke-policy-banning-pregnant-girls-from-mainstream-school/> (last accessed 2022-11-23).

teenage mothers to attend school; and to integrate sexual and reproductive health education into the school curricula.<sup>99</sup>

Further, in 2021 the ECOWAS Court handed-down judgment in favour of the plaintiff in suit no ECW/CCJ/APP/27/19-*Fodi Mohammed v Niger*. The case pertains to the enslavement of Fodi by a family since her childhood for over 30 years, during which she was equally given to different marriages from which she bore children who were also given into slavery. Legal proceedings were initiated before the local courts in Niger on behalf of one of Fodi's daughters, requesting freedom, but the prosecutor trivialised the matter and treated it as a misdemeanour, with no reparation considered for the victims.

The Court found the Republic of Niger in violation of the right of Fodi and her children to dignity, and their right to fair trial. The Court also finds that Niger has failed in its duty to protect Fodi and her family, as well the best interest and the right to development of her children, referring amongst others to the African Children's Charter. The Court ordered Niger to pay compensation worth overall 63,000,000 FCFA (about USD 114,500) to Fodi and her six children (all minors aged between 4 and 15 at the time of filing the case in June 2019). In October 2021, it was reported that as of 25 October 2021, the Republic of Niger had paid reparation worth 30 million FCFA (about USD 53,000) to the slavery victims, as a step towards implementing the judgment.<sup>100</sup>

## 9 Conclusions

According to the ACPF, although the

revised Guidelines are silent about the remedial powers of the ACERWC communications procedure, the related jurisprudence is mounting up and demonstrates how the procedure is being used both to cure rights violations for those directly affected and to bring about systemic change.<sup>101</sup>

The discussion here has shown that a wide range of remedies has been adopted in response to complaints received. They include reparations, requests for legislative reform, training of justice sector staff, and public awareness raising. The discussion also indicates that bodies other than the ACERWC have been approached in regard to rights violations. The remedies that they have put in place should not be overlooked.

Informally, it appears that the remedies that the ACERWC has issued are by and large drawn from the applicants' requests. It is therefore helpful for applicants to be detailed and specific in their prayers for

<sup>99</sup> As above.

<sup>100</sup> IHRDA "Niger Begins Implementing ECOWAS Court Decision in Slavery Case- Pays Reparation Worth 30 Million FCFA" <https://www.ihrda.org/2021/10/niger-begins-implementing-ecowas-court-decision-in-f-m-slavery-case-pays-reparation-worth-30-million-fcfa/> (last accessed 2022-11-23).

<sup>101</sup> The Guidelines here refer to the previous iteration of 2014.

remedies. A recent example demonstrating such an approach is to be found in a recently submitted communication, yet to be adjudicated upon, the University of Pretoria and the IHRDA have asked, in the context of children accused of witchcraft in Nigeria, that the ACERWC hold

Nigeria responsible for the said allegations, and to urge Nigeria to ensure effective prosecution for witchcraft accusations. They also request the ACERWC to demand that Nigeria should put in place a series of structural measures to end this phenomenon, such as adopting legal and policy framework criminalising and prohibiting discrimination and persecution on the basis of witchcraft accusations, ensuring education for children who are victims of witchcraft accusations, carrying out sensitization on the ills of the phenomenon, and providing interim support measures such as foster homes for child victims in order to ensure their care and rehabilitation.<sup>102</sup>

Similarly, in a communication submitted on the same day against Cameroon on behalf of 10 victims, it has been alleged that Cameroon has failed in its duty to adopt legislative measures to protect girls from child marriage, to safeguard the best interest of the child, to prevent discrimination against women and girls, to guarantee girls' right to education, and their right to development and protection from all forms of violence, as provided for by the ACRWC and other human rights instruments ratified by Cameroon.

The plaintiffs request the ACERWC to hold Cameroon responsible for the said allegations, and to urge Cameroon to align its Civil Code with international standards on the age of marriage, to compensate the victims in this case for damages suffered, and to put in place several other measures in line with its international obligations in the fight against child marriage.<sup>103</sup>

It is the author's assertion that detailed and specific though the identified remedies might be, there remains scope for a deeper discussion about remedies – possibly the ACERWC could devote a slot at an upcoming meeting to this issue. Items to be discussed include what has been successful, and whether the Committee should engage with remedies beyond those proposed by an applicant.

An identified strength is the implementation follow-up that the Committee has undertaken.<sup>104</sup> This practice gives the communication procedure real teeth – as it seems as though the implicated State Parties by and large do take the recommendations seriously, and endeavour to

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102 IHDRA “IHDRA Partners Sue Nigeria for Failing to Protect Children Accused of Witchcraft” <https://www.ihrda.org/2021/12/ihrda-partners-sue-nigeria-for-failing-to-protect-children-accused-of-witchcraft/> (last accessed 2022-11-23). Admissibility has not yet been decided.

103 IHDRA “IHDRA Apdel Sue Cameroon for Upholding Laws that Enable Child Marriage” <https://www.ihrda.org/2021/12/ihrda-apdel-sue-cameroon-for-upholding-laws-that-enable-child-marriage/> (Last accessed 2022-11-23).

104 See Murray and Long “Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?” 2021 *African Human Rights Law Journal* 836.

give them effect. Recent research concludes that in relation to decisions of the African Commission,

while there has been increased attention paid by the Commission to the issue of monitoring the implementation of its decisions, it nevertheless lacks strategic direction and there is a risk that the momentum and opportunities created by these initiatives will be lost without further strategic and institutional development by the Commission to clarify its role.<sup>105</sup>

The authors also note that the African Commission has in recent times reflected on its role in monitoring the implementation of decisions. In 2017 and 2018 it held two regional seminars on this issue, the first in Dakar in August 2017 and the other in Zanzibar in September 2018. This course of action might be advisable for the ACERWC as well.

The ACERWC would be advised to create a generic follow-up report, placed on its website, in the same vein as the CRC Committee has done.<sup>106</sup> This would make it easier for interested parties to glean an overall picture without having to study session reports individually.

The Committee is currently – at the time of writing – seized with 3 pending communications which have been declared admissible.<sup>107</sup> Before the merits are decided, it would be opportune to reflect on both the nature of the remedies to be adopted, and on the implementation strategy for the future.

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105 As above 837.

106 CRC/C/88/2 tabled 25 October 2021, and available on the CRC Committee website.

107 Against Tanzania and Sudan: 0012/Com/001/2019; 0015/Com/003/2020 and 0016/com/004/2020.