



Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant  
Comit  Africano dos Direitos e Bem-Estar da Crian as  
لجنة الخبراء الإفريقية المعنية بحقوق الطفل ورفاهه



**ACERWC**  
African Committee of Experts on  
the Rights & Welfare of the Child

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

**Communication No: 0012/Com/001/2019**

**Decision No 002/2022**

**Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of  
Tanzanian girls)**

**v**

**United Republic of Tanzania**

**Original- English**

**Decision on Communication No: 0012/Com/001/2019**  
**In the matter between**

**Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of  
Tanzanian girls)**

**v**

**United Republic of Tanzania**

**I. Submission of Communication and Summary of Proceedings**

1. The Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (the Committee/ACERWC) received a Communication dated 17 June 2019 pursuant to article 44 of the African Charter on the Rights and Welfare of the Child (the Charter/ACRWC). The Communication is submitted by the Legal and Human Rights Centre and the Centre for Reproductive Rights (on behalf of Tanzanian girls) (the Complainants) against the United Republic of Tanzania (the Respondent State). Receiving the Communication, under Section III of the Committee's Revised Guidelines for Consideration of Communication (the Revised Communications Guidelines), the Secretariat of the Committee conducted a preliminary review and registered the submission as Communication No: 0012/Com/001/2019. In line with the Revised Communications Guidelines, the Committee followed the subsequent proceeding in considering the Communication:

- The Communication was duly transmitted to the Respondent State on 25 June 2019,
- The Respondent State submitted its submission on the admissibility of the Communication on 01 October 2019, which the Committee rejected for procedural reasons;
- The Respondent State re-submitted its response on 27 August 2020,
- The Committee transferred the submission of the Respondent State to the Complainants.
- The Complainants submitted their observations on the response of the Respondent State on 31 August 2020.
- The Committee deliberated on the admissibility of the Communication on 01 September 2020, during its 35<sup>th</sup> Ordinary Session held virtually from 31 August to 08 September 2020 and declared the Communication admissible.
- The Admissibility Ruling was sent to the Parties on 03 November 2020 and the Respondent State was requested to submit its arguments on the merits.
- The Respondent State submitted its arguments on the Merit on 12 February 2021.
- The Complainants submitted their response to the arguments of the Respondent State on 30 March 2021.
- On 15 March 2021, the Committee received an *amicus curiae* application from the United Nations Human Rights Council's Working Group on Discrimination against Women and Girls. The Committee approved the request, and the *amicus curiae* submitted its briefing on 15 June 2021.
- The Committee invited the parties for a hearing during its 37<sup>th</sup> Ordinary Session, which was later postponed to the 38<sup>th</sup> Ordinary Session on 22 November 2021, in

the presence of the Complainants, the Respondent State, the amicus curiae and the Deponents of the affidavits submitted.

- The hearing of the Deponents was postponed to the 39<sup>th</sup> Ordinary Session held from 21 March to 01 April 2022 due to procedural issues. The hearing of the Deponent of Affidavit 2 was held on 29 March 2022 in the presence of the Deponent, the Complainants, and the Respondent State.
- The Respondent State submitted a Circular issued by the Ministry of Education, Science and Technology on 04 July 2022 as it relates to measures undertaken by the Respondent State regarding the issues raised in this Communication.

## **II. Summary of alleged facts**

2. The Complainants allege that primary and secondary school girls are subjected to forced pregnancy testing and expulsion from schools in events where they are found pregnant or married. While acknowledging that the exact number of children expelled from schools for reasons of pregnancy or marriage is unknown, the Complainants submit that Tanzania's 2013 Basic Education Statistics provides that 2433 primary schoolgirls and 4705 secondary schoolgirls dropped out of school due to pregnancy in 2012. Moreover, the Complainants allude to reports from Human Rights Watch that over 15,000 girls drop out of school every year due to pregnancy. It is also submitted that the study conducted by one of the Complainants, Center for Reproductive Rights, provides that over 55,000 female students dropped out of school due to pregnancy between 2003 and 2011.
3. The Complainants allege that mandatory pregnancy testing is practiced in almost all public schools subjecting girls as young as 11 years of age to pregnancy testing. It is submitted that the testing does not follow any standard and sometimes painful methods, such as poking, are applied to check for pregnancy by school personnel. The Complainants allege that pregnancy testing is undertaken without the consent of the girls and most often the results are not communicated to the girls but rather shared with school staff without the consent of the girls. Girls are also required to take a pregnancy test when they enrol in schools.
4. The allegation of the Complainants provides that girls who are found to be pregnant before being enrolled will not be accepted to schools and those girls who are found to be pregnant in the school year are expelled from schools. The Complainants allude to the fact that neither pregnancy testing nor expulsion of students due to pregnancy is prescribed by the Education Regulations. The Complainants provide that pregnancy is not included as a ground for expulsion in the Education (Expulsion and Exclusion of Pupils from School) Regulation 2002 G.N. No. 295 of 2002, however, school administrators interpret pregnancy to be an offence against morality which is one of the grounds of expulsion under the Regulation. The Complainants also indicate that some school administrators expel pregnant girls from school claiming that it is government policy. As expulsion is a universal practice in public schools, girls who find out about their pregnancy by themselves drop out of school to escape the humiliation and stigma they will be subjected to if school administrators find out about their pregnancy during mandatory testing. Moreover, the Complainants submit that the expulsion and exclusion of pregnant schoolgirls has no exception such as in cases

where girls fall pregnant due to sexual abuse or incest even in cases where police reports can be produced to that effect.

5. The Communication further alleges that married girls are not allowed to register or remain in school once married and this is vividly provided by Section 7(b) of the Respondent State's Regulation on Expulsion and Exclusion of Pupils. The Complainants submit that the Education (Imposition of Penalties to Persons who marry or Impregnate a School Girl) Rules 2003, G.N. No. 265 of 2003 penalizes anyone who marries or impregnates a schoolgirl. The Communication highlights that this contradicts the laws of the Respondent State as the Marriage Act allows girls as young as 14 to get married. The Communication also indicates that there is a court decision which rules against setting the age of marriage for girls below 18 as unconstitutional but has not entered into force due to an ongoing appeal on the decision of the High Court.
6. Moreover, the Complainants allege that the expulsion and exclusion policy of the Government is permanent as schoolgirls are not readmitted to the public school after delivery. School girls expelled due to pregnancy or marriage can only be readmitted to private or vocational training schools. The Complainants further allege that these options are not always accessible or limit the education path girls wish to pursue. While noting that since 2014 the Education and Training Policy has incorporated a provision which provides that students who left school for any reason should be readmitted, the Complainants submit that this has never been implemented. The Communication also submits that statements by high-level officials of the Respondent State, including the then President, have alluded to the fact that the Government of the Respondent State will intensify its effort to expel students who fall pregnant and to ensure their non-readmission to schools. The Complainants also submit affidavits of girls who have been denied to re-enter school after giving birth due to the statements of the officials, mainly the President.
7. The Communication includes facts that school personnel usually report pregnancies as the Child Act and the Ministry of Education Rules prescribe penalties against those who impregnate girls. The Complainants submit that such reports subject girls to unlawful detention or harassment as they are often detained or harassed until they expose the identity of the person who impregnated them. Furthermore, the Communication alleges that girls who fall pregnant due to sexual abuse are exposed to the same risk of detention and harassment, subjecting them to secondary victimisation. The Complainants refer to the assessment undertaken by the Tanzanian Commission on Human Rights and Good Governance to allege that children are detained in harsh conditions, denied visits by caregivers, and subjected to delayed case hearings. The Communication, therefore, asserts that girls are being detained when they refuse or are unable to testify against who impregnated them, although being pregnant by itself is not provided as a crime. The Communication cites the statement of the Regional Commissioner, who ordered regional and district commissioners of education to arrest pregnant girls who refused to identify the person who impregnated them. Following the order, the Communication alleges 55 pregnant schoolgirls were arrested in Tandahimba District. Such practices and policies discourage pregnant girls or parents from seeking information or assistance, including

reporting cases of sexual abuse, especially in cases where the perpetrators are unknown. Even when the perpetrators are known, the Complainants allege that proper investigation is not carried out to prosecute them.

8. The Communication finally alleges that girls in the Respondent State are deprived of access to sexual reproductive health information and services to prevent unplanned pregnancies. Pregnant girls are not provided with pregnancy-related services such as information on family planning and transmittable diseases. The Complainants allege that lack of information and services on sexual reproductive health issues has resulted in a high rate of teenage pregnancy and unsafe abortion, as well as a disproportionate risk of teenage pregnant girls' death in the Respondent State. The number of adolescent girls who fall pregnant is higher among those with lower education, lower income and girls in rural areas. The Complainants claim that there is a lack of comprehensive sexual education in schools as sexuality education mainly focuses on abstinence and is provided at the secondary education level, where girls are already sexually active. In addition, girls are not provided with any sexual reproductive health services or information during mandatory pregnancy testing, such as contraception options or prevention of sexually transmitted diseases. The sexual reproductive health services available in the Respondent State are not youth-friendly; hence, girls are not encouraged to access such services even when available. The Communication submits that lack of information and services on sexual reproductive health results in unwanted and unplanned pregnancy of girls who are then forced to leave their education due to pregnancy. It is also increasing the number of unsafe abortions among adolescent girls, which is also exacerbated by the restrictive abortion law of the Respondent State.

### **III. The Committee's analysis of admissibility**

9. The Committee's analysis of the admissibility of a Communication is guided by article 44 of the Charter and the Revised Communication Guidelines. According to article 44 of the Charter and Section I (1) of the Revised Communication Guidelines, non-governmental organisations legally recognized by one or more of the Member States of the African Union or State Party to the Charter or the United Nations, among others, can submit a Communication before the Committee. The Committee notes that LHRC is a non-governmental organisation registered in Tanzania and holds an observer status before the Committee since March 2019; similarly, the Center for Reproductive Rights is an international non-governmental organisation which has a regional office in Nairobi and has an observer status before the Committee since November 2018. Considering that the Complainants fulfil the requirement to access the Committee as they are registered in Member States of the African Union and noting that their application is filed on behalf of pregnant and married schoolgirls, the Committee accepts the standing of the Complainants to submit the case.
10. The Committee, in analysing the admissibility of the Communication, assesses whether the conditions of admissibility provided under Section IX (1) of the Communications Guidelines are fulfilled. After considering the argument of the Complainants and the Respondent State, the Committee has identified three

contentious issues that need to be analysed in line with the requirement listed in the Revised Communication Guidelines; these are:

- i. Whether or not the Communication raises matters pending settlement by another international body;
- ii. Whether the Complainants have exhausted local remedies and whether they should be exempted from exhausting local remedies;
- iii. Whether the communication is presented within a reasonable time after exhaustion of local remedies.

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

11. Section IX (1) (c) of Revised Communication Guidelines states that a Communication is admissible if it 'does not raise matters pending settlement or previously settled by another international body or procedure in accordance with any legal instruments of the Africa Union and principles of the United Nations Charter'. The Respondent State submits that the same issue is raised before the Special Mechanisms of the Human Rights Council, hence it falls within the exclusionary requirement of 'matter pending before another international procedure'. Based on the requirement in Section IX (1) (c) of the Revised Communications Guidelines and the submission of the Respondent State, the Committee notes that the key issue of investigation is the nature of the adjudicating body where the current Communication is pending to be settled, which is the procedure within the Special Mechanisms of the Human Rights Council.

12. While examining the matter, the Committee notes that understanding the background importance of having the requirement mentioned above as a condition for considering the admissibility of a case is crucial. The Committee recognises that States should not be subjected to similar international and regional judicial or quasi-judicial procedures on similar alleged violations. The Committee further recognises that having various international judicial or quasi-judicial organs should not be used to create a hierarchy among such organs where one can appeal against the other. As stated in the admissibility ruling of the case *Project Expedite Justice and others v The Sudan*, the Committee notes that such requirements under its Guidelines are provided to prevent conflicting decisions and ensure the efficiency of transnational tribunals.<sup>1</sup> Such admissibility criterion plays a role in ensuring 'certainty and finality of international adjudications'.<sup>2</sup> The same has been upheld by the African Commission on Human and Peoples' Rights, from whose jurisprudence the Committee can draw inspiration in line with article 46 of the Charter, where the Commission held that the rationale behind having such requirement of admissibility is 'to desist from faulting member states twice for the same alleged violations of human rights....and ensures that no State may be sued or condemned for the same alleged violation of human rights'.<sup>3</sup> The Committee further reiterates the Commission's elucidation that the requirement is a principle that

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<sup>1</sup> ACERWC, Communication No 0011/Com/001/2018, Decision on Admissibility No 01/2019, *Project Expedite Justice and others v The Sudan*, para 33.

<sup>2</sup> Frans Viljoen, 'International Human Rights Law in Africa,' 2012, 2<sup>nd</sup> ed, Oxford University Press, 321.

<sup>3</sup> ACHPR, Communication 260/2002, *Bakweri Land Claims Committee v Cameroon*, (2004), para 52.

guarantees the *res judicata* status of decisions issued by international and regional organs mandated to adjudicate human rights cases.

13. In line with the above, regarding the current Communication, the Committee notes that the requirement of 'pending settlement or has been settled by another body' shall be understood to say that the case in question should be pending or already settled by a body that has the mandate to reach a decision that binds that State concerned. The spirit and wording of Section IX (1)(C) of the Revised Communication Guidelines is clear that it is not referring to all kinds of mechanisms available at international or regional levels, rather it is referring to procedures that are capable of redressing a violation as it uses the term 'settlement'. In its admissibility ruling on the case of *Project Expedite Justice and others v The Sudan*, where the Respondent State argued that the same matter is pending before another procedure as the United Nations Security Council was considering the issue, the Committee held that '[f]or the Committee to consider any other procedure as considering or having settled a matter, the body or procedure must be able to address in substance the rights given to the child by the African Children's Charter. Hence, the organ or body in question must have a mandate comparable to the Committee.'<sup>4</sup> Since the UN Security Council does not have a mandate comparable to the Committee; the Committee decided that the matter cannot be regarded as pending before another international procedure and therefore dismissed the argument of the Respondent State in the stated case. Drawing inspiration from other jurisdictions, the Committee refers to the decision of the Human Rights Committee (HRC) on the *Celis Laureano v Peru* case, where the HRC held that international settlement for admissibility does not include extra-conventional procedures that are tasked with assessing or reporting on certain human rights violations in specific territories.<sup>5</sup> More similar to the case at hand, in the *Madoui V Algeria* case, the HRC declared the case admissible, although the same issue has been submitted before the UN Working Group on Enforced or Involuntary Disappearances as such mechanisms are not what are meant by international settlement under its Optional Protocol.<sup>6</sup> Likewise, the African Commission on Human and Peoples' Rights outlined that a case is deemed settled if it is considered by an international treaty body or adjudication mechanism.<sup>7</sup> The Commission further mentions that consideration by another international procedure entails a procedure that 'is capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations' and hence matters considered by the UN Security Council or Human Rights Council are not precluded from being entertained by the Commission.

14. The Committee also notes that the mandate of the Special Rapporteurs or Working Groups of the Human Rights Council is limited to sending communications to the

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<sup>4</sup> ACERWC, Communication No 0011/Com/001/2018, Decision on Admissibility No 01/2019, *Project Expedite Justice and others v The Sudan*, para 37

<sup>5</sup> Human Rights Committee (HRC), Communication 540/1993, *Celis Laureano v Peru*, (25 March 1996), para 7.1

<sup>6</sup> HRC, Communication 1495/2006, *Zohra Madoui (represented by counsel, Nassera Dutour) v Algeria* Decided at 94th session, 28 October 2008, CCPR/C/94/D/1495/ 2006 para 6.2.

<sup>7</sup> ACHPR, Communication 279/03, *Sudan Human Rights v The Sudan*; ACHPR, Communication No 296/05 *Centre on Human Rights and Evictions v The Sudan*, May 2009, para 104.

concerned State in a form of letters or reports and requesting the State to respond to the same.<sup>8</sup> The Special Mechanisms then report their communications and the replies of States to the Human Rights Council. As such, they do not have the mandate to issue any form of relief or decision on the complaints they receive. If the Committee considers the current communication, it cannot be said that the Respondent State is being subjected to an international procedure more than once on the same matter as no decision or relief was or can be issued to the victims by the above-mentioned special mechanisms.

15. The Respondent State relied on various cases in substantiating its argument that the case is pending before another procedure including the *Mpaka-Nsusu v Zaire* case and *Interights v Eritrea and Ethiopia* case of the African Commission among others. However, the Committee notes that the jurisprudences in which the Respondent State relied are not similar to the case at hand. The *Mpaka-Nsusu v Zaire* case was declared inadmissible by the African Commission because it was already considered by the Human Rights Committee which is a treaty body with a quasi-judicial human rights mandate similar to the Commission.<sup>9</sup> The Commission in the *Interights v Eritrea and Ethiopia* case did not declare the case inadmissible; rather admitted the case and suspended the consideration until the Claims Commission make a decision.<sup>10</sup>
16. Based on the above, the Committee decides that the complaints that have been submitted to the Special Rapporteur on Education and the Working Groups on Discrimination against Women in Law and Practice do not qualify as matters 'pending settlement or previously settled' under Section IX (1) (c) of the Guidelines, hence the Committee is not prevented from considering the Communication.

*ii. Whether the Complainants have exhausted local remedies, and whether they should be exempted from exhausting local remedies*

17. The second issue concerning admissibility in the current Communication is the requirement of exhaustion of local remedies. The Committee notes, Section IX (1) (d) of the Revised Communication Guidelines provides that a Communication is admissible, among others, if submitted 'after having exhausted available and accessible local remedies, unless it is obvious that this procedure is unduly prolonged or ineffective'. While the Complainants argue that local remedy has been unduly prolonged and is not available and effective, the Respondent State, referring to the previous cases, argues that local remedies are indeed available and effective. Examining the matter in contestation, the Committee refers to the long-established principle that only judicial remedies that are 'available, effective, and sufficient' should

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<sup>8</sup> UN-OHCHR, 'Special Procedures of the Human Rights Council' <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> (accessed 17 August 2022).

<sup>9</sup> ACHPR, Communication No. 15/88 *Mpaka - Nsusu Andre Alphonse v. Zaire*, para 2; HRC, Communication No. 157/1983, *Andre Alphonse Mpaka-Nsusu v Zaire*, Twenty Seventh Session.

<sup>10</sup> ACHPR, Communications 233/99- 234/99: *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia and Interights (on behalf of Pan African Movement and Inter African Group) / Eritrea* para 55.



be exhausted.<sup>11</sup> The availability of a local remedy is assessed in terms of the ability of the Complainants to make use of the remedy in their case.<sup>12</sup> The rationale behind the requirement of exhaustion of local remedies is not to create an impediment to access to redress at supranational level, but rather to make sure that States are given the information about the alleged violations and an opportunity to redress such violations within their available means. States should be given ample notice about the violation that is occurring before being called at international or regional level to account for those violations.<sup>13</sup> Moreover, Complaints are required to exhaust local remedies because local remedies are 'cheaper, quicker, and more effective'.<sup>14</sup> However, treaty bodies like this Committee may entertain a case without a local remedy being exhausted to the end when such remedy is unduly prolonged<sup>15</sup> even though a remedy is available or could be effective if pursued.

18. In the current Communication, it is submitted that one of the Complainants has attempted to exhaust local remedies since 13 September 2012 when the case was initially filed at the High Court of Tanzania and the High Court gave its decision on 04 August 2017, 5 years after the submission of the case. It was further submitted that even though the Complainants filed a notice of appeal at domestic level on 14 August 2017, the Court of Appeal has not given them a hearing date until this case was filed before the Committee in 2019. The Committee believes that time is of a crucial essence of local remedy particularly for children as their best interests demand it and also they have a limited period to enjoy the rights accorded to children as such rights are prescribed by time. As the Committee, in the children of *Nubian Descents Case* pronounced, a court proceeding that is pending for over 6 years is not in line with the obligation of States to take proactive action and give immediate attention to the realisation of children's rights.<sup>16</sup> Likewise in the case, *Minority Rights Group International and other v Mauritania*, the Committee found that four years of the pending case at an appeal stage without any decision amounts to an unduly prolonged domestic remedy, hence the Committee concluded such instance forms a sufficient ground for exemption from the exhaustion of local remedies requirement.<sup>17</sup> Referring to the practice with other jurisdictions, the Committee notes that a similar approach is followed by various international and regional bodies. The Human Rights Committee has declared that a proceeding that lasted 6 years at the domestic level is an unduly prolonged local remedy which makes a case admissible at the Committee without

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<sup>11</sup> ACERWC, Communication 002/2009 *Institute for Human Rights and Development in Africa (IHRDA) and other v Kenya*, para 28; ACHPR, Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, (May 2000), para 31.

<sup>12</sup> ACHPR, Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, (May 2000), para 33.

<sup>13</sup> ACHPR, Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Oct 2001) para 38; ACHPR, Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Te'moins de Jehovah v Zaire* (Oct 1995) para 37.

<sup>14</sup> ACHPR, Communication 299/05, *Anuak Justice Council v Ethiopia* (May 2006), para 48.

<sup>15</sup> ACERWC, Communication No 002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and other v Kenya* (March 2011) para 32; Guidelines for Communications, section IX (1)(d).

<sup>16</sup> ACERWC, Communication No 002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and other v Kenya* (March 2011) para 33-34.

<sup>17</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 Mauritania*, (2017), para 28.

needing to wait for the final result of the court proceeding.<sup>18</sup> The Inter-American Human Rights Court has held that a case that has taken 5 years or more since the initial process can result in exemption of the requirement of local remedies.<sup>19</sup> The Committee is cognizant of the fact that there is no fixed amount of years to say that a local remedy is unduly prolonged, rather it is decided on a case-by-case basis giving due regard to the rights of children at stake. The Committee, while drawing inspiration from the above-mentioned cases, is in no way attempting to prescribe a definitive amount of time for what needs to be considered as an 'unduly prolonged local remedy'. It is the view of the Committee that the amount of time and the nature of the right invoked along with the best interests of the child should determine whether a local remedy is unduly prolonged or not.

19. In the current Communication, the Committee notes that the domestic remedy has taken over 7 years in total and the appeal has taken 2 years without the Court fixing a date for a hearing of the case. Given the time that has lapsed during the consideration of the case by the High Court and the rights of children at stake, the Complainants should no more be subjected to wait for the decision of the Court of Appeal whose proceeding so far has not demonstrated to be any faster. The right to education that is being alleged to have been violated is an essential right for children, which has a long-lasting effect on the well-being of children. Education determines the future of children and a domestic proceeding that is prolonged on such fundamental right should not be regarded as a remedy that should be sought till the end process. The Committee, therefore, holds the view that the domestic remedy is unduly prolonged.

20. The Committee does not find the argument of the Respondent State acceptable where it relies on previous cases of the Committee namely *Ahmed Bassiouny v Arab Republic of Egypt* and *Sohaib Emad v Arab Republic of Egypt* in arguing that local remedies are effective. The Committee would like to differentiate between the case at hand and the abovementioned two cases invoked by the Respondent State. Both in the *Ahmed Bassiouny* and the *Sohaib Emad* cases the Committee declined the communication as the Complainants were anticipating the ineffectiveness of the local remedy by relying on previous cases or merely casting doubts without trying to exhaust any remedy at the local level.<sup>20</sup> However, in the present case, the Committee notes that the Complainants have attempted to engage the domestic courts and waited for 5 years to get a decision from the High Court, and appealed to the Court of Appeal which took a long time to fix the hearing date. Such practices entail that the domestic remedy is proved to be unduly prolonged while the State has been given ample time to address the violation. Hence, it is the view of the Committee that the Complainants' argument is not based on mere anticipation, but rather on proven records of unduly prolonged domestic proceedings. The Committee reiterates, that

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<sup>18</sup> HRC, Communication 1085/2002, *Louisa Bousroual (on behalf of Salah Saker) v Algeria* (15 March 2006), para 8.3.

<sup>19</sup> Inter-American Court of Human Rights (IACtHR), *Genie-Lacayo v. Nicaragua*, Merits, para 81; IACtHR, *Las Palmeras v. Colombia*, preliminary objections, para 38.

<sup>20</sup> ACERWC, Communication No 008/Com/002/2016, *Sohaib Emad v Arab Republic of Egypt*, (2017) para 18; ACERWC, Communication No 009/Com/001/2016, *Ahmed Bassiouny v Arab Republic of Egypt*, (2017) para 24 and 30.

one of the reasons for the exhaustion of local remedies is to give notice to the concerned State about the alleged violations so that it gets the opportunity to address the allegation. In this regard, the Committee, in addition to the local remedies sought by one of the Complainants, refers to the attempts by various international and regional interventions that have drawn the attention of the Respondent State on the same matter covered in the current Communication. In this regard, the Committee particularly refers to the joint letter of urgent appeal by the Committee and the African Commission on Human and Peoples' Rights sent to the Respondent State regarding the right to education of pregnant girls on 21 July 2017 with Ref: ACHPR/LPROT/SM/652/17 regarding the school attendance by pregnant girls and young mothers in the Respondent State. In such circumstances, the Committee takes a strong view that it is against the best interests of the girls in the Respondent State to subject them to prolonged domestic proceedings on a matter that the Government of the Respondent State is well aware of. Moreover, the Committee declines the argument of the Respondent State that resorting to international human rights mechanisms without finalising cases at the domestic level is against the subsidiarity principle of transnational systems. The Committee is duly cognizant that regional and international mechanisms are subsidiary to domestic systems and such principle is reflected under its Revised Communications Guidelines prescribing exhaustion of local remedies as one criterion for admissibility of any communication. However, as explained earlier, this criterion is not without exception and the exceptions in no way compromise the principle of subsidiarity.

21. Concerning the submission of both parties on the availability of domestic remedy, the Committee makes reference to some of the instances where the remedies have been rendered to be unavailable including when the power or competence of the local courts have been ousted by decrees or any form of decisions; when there is fear for life if the case is brought before local courts,<sup>21</sup> and when the remedies available are non-judicial or are discretionary.<sup>22</sup> The Respondent State argues that the attempt of the Complainants to seek remedy is proof that remedy is available and cited cases where courts ruled favourably in cases that involved systematic issues like child marriage. The Committee takes the view that exemptions to exhaustion of local remedies are assessed on a case-by-case basis. The African Commission, as well as the Inter-American Court of Human Rights, have both indicated the same, that the availability and effectiveness of a local remedy is assessed on a case-by-case basis.<sup>23</sup> A remedy may be available according to the general principle or practice of the Respondent State, however, if the Complainants are not able to use it in their circumstances, it may be regarded as unsuitable for the case.<sup>24</sup> While the Committee is convinced that a remedy may be available in the Respondent State for cases like

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<sup>21</sup> ACHPR, Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, (May 2000), para 34-35.

<sup>22</sup> H Onoria 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 African Human Rights Law Journal, 5; ACERWC, Communication No 002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and other v Kenya* (March 2011) para 30.

<sup>23</sup> ACHPR, Communication 299/05, *Anuak Justice Council v Ethiopia* (May 2006), para 49; Inter American Court of Human Rights, *Fairén-Garbi and Solís-Corrales v. Honduras*, Preliminary Objection, para 89.

<sup>24</sup> Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, Preliminary Objection, 1999.

the current one, it, however, notes that the remedy is unjustifiably and unduly prolonged which makes it not suitable for the Complainants to pursue.

*iii. Whether the Communication is presented within a reasonable time after exhaustion of local remedies.*

22. The third issue on admissibility relates to time. The Respondent State submits that the Communication does not satisfy the requirement under Section IX (1) (e) of the Revised Communication Guidelines which requires complaints to be submitted within a reasonable time after exhausting local remedies. The notion of this requirement is to ensure that Complainants who allege violations act with due diligence in pursuing their cases. The requirement aims at preventing delays in reaching out to international bodies after exhausting local remedies the main goal being to prevent what is known as 'abuse of the right to submission' in other jurisdictions.<sup>25</sup> Even though there is no provided time under the Revised Communication Guidelines on the number of years within which cases should be submitted before the Committee after the period of exhaustion of local remedies, the Committee draws inspiration from the approach of the Human Rights Committee where it says no delay is acceptable without reasonable justification.<sup>26</sup> Hence, given this rationale of the provision under the Guidelines, the argument of the Respondent State that the case is premature and hence not submitted within a reasonable time is misguided and out of the context of the requirement under Section IX (1) (e).

23. 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.

24. For the forgoing reasons, the Committee finds that the present Communication is admissible as per its requirements under article 44 of the Charter and Section IX (1) of the Guidelines for Consideration of Communications.

#### **IV. Submission on the Merits of the Communication**

##### **The Applicants' Submission on the Merits**

25. The Complainants allege that the United Republic of Tanzania has failed to uphold its obligation to respect, protect, and fulfil the rights of Tanzanian girls as envisioned under the African Charter on the Rights and Welfare of the Child (herewith 'the ACRWC,' 'the Charter,' or 'the African Children's Charter'), to which the Respondent State is a Party to, through the following conduct:

- a) Enforcing mandatory pregnancy testing in schools;
- b) The expulsion of pregnant and married learners from schools;
- c) The denial of re-entry to schools after childbirth;

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<sup>25</sup> Article 3 of Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966.

<sup>26</sup> HRC, Communication 767/1997, *Mr Vishwadeo Gobin v Mauritius* (16 July 2001), para 6.3.

- d) The illegal detention of pregnant girls; and
- e) The failure to provide children with reproductive and sexual health information services- leading to early pregnancies.

26. The Complainants allege that the following rights of girls have been violated by the Republic of Tanzania:

- a) The right to education (Article 11)
- b) The right to equality and non-discrimination (Article 3)
- c) The right to be protected from harmful social practices and stereotypes (Article 21)
- d) The principle of the best interests of the child (Article 4)
- e) The right to health as it includes the right to access sexual and reproductive health services (Article 14)
- f) The right to privacy and dignity (Article 10)
- g) The right to be free from cruel, inhuman, and degrading treatment (Article 16)
- h) The right to general measures of implementation (Article 1)

### **The Respondent State's Submission on the Merits**

27. The Respondent State in its part submits that none of the provisions of the Charter raised by the Complainants have been violated. The Respondent State submits that it has endeavoured to ensure access to education by providing free primary and secondary education despite its limited resources. The submission of the Respondent State highlighted that the Republic of Tanzania retains a margin of appreciation regarding the circumstances and conditions prevailing within the State Party in terms of the provision of education. The Respondent State argues that it has the prerogative to limit the rights of schoolgirls to education if it aims at achieving a certain result. The Respondent State mainly argues that it has the responsibility to promote African values and morality and it retains the discretion to determine what is moral or immoral in the education sector. Accordingly, the Respondent State submits that sexual relations among children is against African values and morality as such it should be discouraged by the expulsion of pregnant and married girls. Therefore, the Respondent State submits that the limitation of rights introduced against the girls in the communication is carried out to achieve a legitimate aim which is considered 'relevant and sufficient.'

### **V. Third-Party Intervention**

28. The United Nations' Human Rights Council's Working Group on Discrimination against Women and Girls filed an *amicus curiae* brief in relation to this Communication, for consideration by the ACERWC in line with section XVII (2) of the Committee's Revised Guidelines for the Consideration of Communications. Respecting all pertinent protocols, this brief sought to highlight the international human rights norms and standards relevant to this Communication and the related international obligations of the Respondent State in this Communication. The briefing of the *amicus curia* focused on the rights to equality and non-discrimination, the right to education, the right to health, and the right to be protected from gender-based violence. For each of these issues, the Working Group outlined all relevant international human rights norms and

standards found in international and regional instruments, General Comments, and other soft laws for the Committee's consideration.

## **VI. Issues for investigation by the ACERWC**

29. Following the arguments made by all the parties involved in the Communication, the Committee has framed the following issues as matters of deliberation and investigation to inform its Decision:

- a) Whether the Respondent State has adopted a policy and practice which has resulted in forced pregnancy testing of schoolgirls and the expulsion of pregnant and married girls from schools with no re-entry opportunities;
- b) Whether the act of the Respondent State is a violation of the various rights of children and its state obligations in the African Charter on the Rights and Welfare of the Child; and
- c) Whether the applicants are entitled to any remedies.

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

The Committee considers and analyses the alleged violations in the orders submitted in the Communication.

### **Alleged violation of article 16 of the ACRWC on cruel, inhuman, and degrading treatment**

30. The Complainants have argued that mandatory pregnancy testing and the expulsion of pregnant and married girls inflict physical and mental suffering upon them and amount to cruel, inhuman, and degrading treatment under article 16 of the Charter. They also allege that the illegal detention of pregnant girls, who in some cases are survivors of sexual violence, to extract information about who impregnated them, constitutes a further violation of article 16. The Respondent State has argued that there is no evidence of such treatment and that its measures comply with article 16 of the Charter. Furthermore, the Respondent State has argued that it cannot be held responsible for the conduct of private actors where the State cannot be shown to have instigated this conduct.

31. The issues for determination by the Committee regarding whether the practices of mandatory pregnancy testing and expulsion and the illegal detention of pregnant girls who are sometimes also survivors of sexual violence amount to cruel, inhuman and degrading treatment. It is also necessary to determine whether the State can be held responsible for the conduct of private actors in this context.

32. At the outset, it must be stated that the Committee has previously ruled that the State is responsible for acts that violate article 16 which are perpetrated by private actors where the State has not acted to prevent or investigate such acts, so long as it can be shown that representatives of the State knew or had reasonable grounds to believe

such acts were occurring.<sup>27</sup> The Respondent State's submissions are clear that the enforcement of pregnancy testing and expulsion have been employed throughout schools as part of the State's efforts to discourage children from having sexual relations. Whereas the Respondent State alleges that it was not aware the illegal detention of pregnant girls had been occurring, it had been widely reported on and brought to the State's attention by the Complainant and its national human rights institution.<sup>28</sup> Furthermore, the police act on behalf of and are employed by the State and its alleged conduct is, therefore, a matter of State responsibility. The State thus had reasonable grounds to believe these illegal detentions were occurring and had an obligation in exercise of its responsibilities to investigate this matter.

33. Article 16 of the Charter obliges all State Parties 'to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment.' The Committee, in determining what amounts to cruel, inhuman, and degrading treatment, draws inspiration from the African Commission.<sup>29</sup> The African Commission endorsed the definition of cruel, inhuman, and degrading treatment as a treatment that causes mental or physical harm.<sup>30</sup> Furthermore, gender-based violence is a form of cruel, inhuman and degrading treatment and includes 'physical and psychological acts committed against victims without their consent or under coercive circumstances.'<sup>31</sup> The Committee acknowledges the psychological harm and physical pain experienced by girls forced to undergo pregnancy tests as well as the humiliating manner in which many girls were subsequently expelled amounts to practices that are cruel, inhuman, and degrading treatment.

34. The Charter recognises that, concerning illegal detention, the "last resort" and "shortest period of time" principles entail that strict limitations on deprivation of liberty (pre-trial and as a sentence) should be put in place and that alternatives to custody must be legislatively enshrined to ensure that custody is used as a last resort.<sup>32</sup> Considering the illegal detention of pregnant girls, which was employed to extract information from them, the UNCRC has previously been explicit that 'no child shall be deprived of his/her liberty unlawfully or arbitrarily,' and that the deprivation of liberty

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<sup>27</sup> ACERWC, Communication No 003/Com/001/2012, *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*, para 66.

<sup>28</sup> Complainant's submissions on admissibility and merits, para 37; Commission for Human Rights and Good Governance, 'Inspection Report for Children in Detention Facilities in Tanzania IX-XI' (2011).

<sup>29</sup> Article 46 of the ACRWC empowers the Committee to draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

<sup>30</sup> ACHPR, Comm. 105/93, 128/94, 130/94, *Media Rights Agenda v. Nigeria*, Decision, 152/96 (ACmHPR, Oct. 31, 1998) para 71.

<sup>31</sup> ACHPR, General Comment 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para 58.

<sup>32</sup> ACERWC General Comment on State Party Obligations 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, section 5.3.2, page 24-25.

should be used only as a measure of last resort when concerning children who are in conflict with the law.<sup>33</sup> In this instance, the girls being detained are not suspected of having committed any crime under Tanzanian law, but rather as survivors of the crime of impregnating a schoolgirl under Section 60A of the Education Act as amended by the Miscellaneous Amendment Act No. 2 of 2016. The detention of persons who have not committed nor are suspected of having committed a crime violates the principle of illegal detention encapsulated above. This detention constitutes an unjustifiable infringement on the girls' dignity and physical integrity because it violates their dignity as well as their physical and mental integrity as children.<sup>34</sup>

35. The preamble of the ACRWC mandates State Parties to provide children with 'legal protection in conditions of freedom, dignity, and security.' Furthermore, article 16(2) of the Charter mandates the development of protective measures to ensure children are not subjected to cruel, inhuman, and degrading treatment. Girls who are survivors of criminal acts require extensive legal protection in the conditions stipulated under the Charter. The Respondent State has not respected its obligation to provide children with legal protection in conditions of freedom, dignity and security as far as it has failed to; properly investigate suspected illegal detentions, and to prevent such illegal detentions from occurring. The Committee finds this to be a violation of article 16.
36. Finally, the Committee must consider the impact of illegal detention on survivors of sexual violence. This Committee has previously stated that rape is the worst form of sexual abuse and is severely physically and psychologically damaging to children.<sup>35</sup> In the context of survivors of sexual violence, it is necessary to note that sexual violence is itself- a form of cruel, inhuman, and degrading treatment and a violation of article 16 of the Charter.<sup>36</sup> Subjecting girls who are survivors of sexual violence to illegal detention is thus a continuation of the cruel, inhuman, and degrading treatment they have already suffered. The UNCRC has cautioned against this and explains that this is a compounded and additional trauma for survivors of sexual violence.<sup>37</sup>
37. The Committee notes that the forced pregnancy testing, expulsion of the pregnant girls, and their illegal detention is cruel, inhuman, and degrading treatment and subjects them to further trauma if these girls are survivors of sexual violence. The Respondent State has violated article 16 of the Charter in all instances.

### **Alleged violation of Article 11 of the ACRWC on the right to education**

38. The Complainants allege that the Respondent State's Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No. 295 of 2002 explicitly provides for the expulsion of married girls under Section 7(b) and is used to expel pregnant girls on the ground of morality. The Complainants also submit that these girls

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<sup>33</sup> UNCRC, General Comment No. 24, para 85.

<sup>34</sup> ACERWC, Communication No. 006/Com/002/2015, *IHRDA and Finders Group Initiative on behalf of TFA v. Cameroon*, para 68.

<sup>35</sup> ACERWC, Communication No. 006/Com/002/2015, *IHRDA and Finders Group Initiative on behalf of TFA v. Cameroon*, para. 71.

<sup>36</sup> As above.

<sup>37</sup> UNCRC, General Comment No.13, para 51.



are expelled with no chance of re-entry, hence, the policy is a violation of the right to education as provided under article 11 of the Charter. The Complainants further submit that forced pregnancy testing of schoolgirls, which is practiced in schools, is against the principle of article 11(2)(b). The Respondent State argues that its policy of forced pregnancy testing and expulsion of pregnant and married girls is guided by an African value that does not encourage sexual relations of children. The Respondent State further argues that it has the margin of appreciation to limit the right to education on the ground of morality by relying on *Handyside v UK and Abdulaziz v UK* cases of the European Court of Human Rights and argues that it has the mandate to determine what is moral and immoral in its territory. Regarding the issue of forced pregnancy testing, the Respondent State argued that it is not a 'forced' testing but rather a 'mandatory' pregnancy testing and further submitted that there is no proof that the mandatory pregnancy testing has resulted in school dropouts to indicate that it is a violation of the Right to Education. The Respondent State also submits that it provides Complementary Basic Education (COBET) as well as Integrated Community Based Adult Education (ICBAE) as alternative education programs for children who are not in the regular education system.

39. Following the observation of the submissions of both parties, the Committee identifies issues for analysis with regards to the alleged violation of article 11 of the ACRWC which are:

- Whether or not the expulsion of pregnant and married girls from schools with no chance of re-entry violates article 11 of the Charter;
- Whether or not forced/mandatory pregnancy testing in schools violates the right to education as provided under article 11 of the Charter; and
- Whether or not the Respondent State's measures of mandatory testing and expulsion of pregnant and married girls can be justified by the doctrine of margin of appreciation.

40. The Committee notes, that the right to education is an inherent right of all children, recognized under the African Charter on the Rights and Welfare of the Child (ACRWC) and other international and regional instruments. Article 11 of the ACRWC provides for the right to education of all children, and it sets out the aim of education, States obligation towards the realization of children's right to education as well as special measures that should be undertaken to support certain groups such as girls and gifted children. More specifically, article 11(6) of the Charter provides, 'States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education based on their individual ability'. Moreover, the Committee notes that article 11(5) and (6) of the Charter provide for education for all with no condition being attached. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) indicates that the promotion of the enrolment and retention of girls in education and prevention of any exclusion from education, which amounts to discrimination in education is the

obligation of States in fulfilling the right to education.<sup>38</sup> States are required to take measures such as reviewing laws and policies that facilitate the expulsion of pregnant girls and ensure there are no restrictions on their return following childbirth.<sup>39</sup> Furthermore, the Committee and the African Commission on Human and Peoples' Rights have stipulated that States have to undertake measures to encourage pregnant girls to continue with their education and, more specifically ensure that there is retention and re-entry of pregnant and married girls, and where they are unable to return to schools, to provide them with alternative education programs.<sup>40</sup> The UN Committee on the Rights of the Child (UNCRC) has also provided that expulsion of girls from school based on pregnancy is a discriminatory act which should be prohibited and that adolescent mothers should be provided with an opportunity to continue with their education.<sup>41</sup>

41. While assessing the issue of the expulsion of pregnant and married girls with no re-entry, the Committee prescribes that the responsibility of States in realizing the right to education includes the obligation to promote, respect, protect and fulfil education.<sup>42</sup> The obligation of States to respect the right to education entails that States should not interfere with the right to education of girls, rather they should provide enabling policies, allocate budgets and fulfil the right to education of girls. Furthermore, the education that is being provided by States should be provided with respect for human rights and fundamental principles set out in human rights instruments.<sup>43</sup> Therefore, schools should be free from any kind of violence, abuse, and deprivation of rights. Any pre-condition set to access education that is not in line with human rights standards is a violation of the right to education as inherently the right to education is provided for every child.
42. The Respondent State's argument that its policy on pregnant and married girls being carried out is in line with article 11(2)(c) of the Charter which stipulates that education should be geared toward the preservation of African morals is not founded within the general principles of the Charter. First, article 11(2)(c) vividly highlights that only 'positive' African morals, values and cultures should be strengthened through education. In addition, positive African morals, values, and cultures are premised on tolerance, consultation and dialogue and are not to be interpreted to include practices harming the child and violating the Charter.<sup>44</sup> Second, this specific sub-provision

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<sup>38</sup> ACHPR, Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 25 November 2005. UNESCO, Article 1 of the Convention Against Discrimination in Education, 14 December 1960.

<sup>39</sup> CEDAW, General Recommendation No. 36 on the right of girls and women to education, UN Doc. CEDAW/C/GC/36, 27 November 2017, para 24.

<sup>40</sup> ACERWC and ACHPR, Joint General Comment on Ending Child Marriage, 2017, para 31.

<sup>41</sup> UNCRC, General Comment no. 15 on the right of the child to the enjoyment of the highest attainable standard of health, UN Doc. CRC/C/GC/15, 17 April 2013, para. 56; UNCRC, General Comment no. 4 on adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4, 21 July 2003.

<sup>42</sup> ACERWC, Communication No 003/Com/001/2012, *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*, para 47.

<sup>43</sup> Article 11(2)(b) of the ACRWC.

<sup>44</sup> ACERWC, General Comment no. 3 on the responsibilities of the child, para 76-80.

needs to be read in line with the whole context of article 11 whose aim is to accord all children the right to education and which also provides specific support to pregnant girls to continue their education under article 11(6). Third, article 11(2)(c) should also be read in line with the general principles of the Charter which include among others, the best interests of the child, and the principle of non-discrimination. Fourth, the argument of the Respondent State that sexual relations among children is not an African value and that the policy aims to discourage sexual relations is not acceptable. The fact that no distinction is made among children who fall pregnant due to sexual abuse and exploitation is a manifestation that the policy's intent is not mainly aimed at discouraging sexual relations. Moreover, the promotion of a certain value cannot be achieved by establishing rules and policies that are not in conformity with the Charter. The retention of pregnant and married girls in school is a requirement set forth by the Charter under article 11(6) and forms part of the institutional measures that should be undertaken to implement article 21 of the ACRWC.<sup>45</sup> The Committee would also like to draw inspiration from a very similar case that was considered by the Community Court of Justice of the Economic Community of West African States (ECOWAS) in the case of *WAVES and CWS-SL v the Republic of Sierra Leone* where the Complainants alleged that the ban of pregnant schoolgirls from attending schools in Sierra Leone was a violation of human rights provisions in various instruments including article 11 of the Charter. In dealing with the case, the Court held that the Respondent State violated the right to education of girls through the ban which was found to be discriminatory.<sup>46</sup> The Court further highlighted that the segregation of pregnant girls and not considering their choice to continue their regular education and leaving them with only the option of alternative schools was stigmatization and punishment of pregnant girls.<sup>47</sup> Accordingly, the Committee is of the view that the policies and practices that the Respondent State has put in place to expel pregnant and married girls from schools go against the rights protected under article 11 of the Charter, hence amounts to a violation of the right to education of Tanzania girls.

43. Regarding the issue of pregnancy testing of schoolgirls, the Committee is of the view that the terminology of 'mandatory' testing contains the same meaning as 'forced' since the girls have no option of refusing the test to access education. The Committee is of the view that no proof is required as to an increase in drop-out of school to establish that forced pregnancy testing is a violation of the right to education. Any form of unlawful requirement to access and continue education and any violation of children's rights that occurs in schools and curtails education is, in and by itself, a violation of the right to education. Forced or mandatory pregnancy testing to access education is a pre-condition that is not aimed at fostering education, rather it violates the right to dignity, freedom from torture and the right to privacy of children. Therefore, the Committee finds that mandatory pregnancy testing is a violation of article 11 of the ACRWC.

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<sup>45</sup> ACERWC and ACHPR, Joint General Comment on Ending Child Marriage, 2017, para 42.

<sup>46</sup> *Women Against Violence and Exploitation in Society and Child Welfare Society- Sierra Leone*, Community Court of Justice of ECOWAS, Judgment no /ECW/CCJ/Jud/37/19, page 27-28.

<sup>47</sup> As above.

44. Analysing the issue of the doctrine of the margin of appreciation and whether the Respondent State can justify its policy and practices of the expulsion of pregnant and married girls as well as mandatory pregnancy testing of schoolgirls, the Committee examines the meaning and scope of the doctrine- margin of appreciation.
45. The doctrine of the Margin of Appreciation is provided for in the preamble to the European Convention on Human Rights (ECHR) as introduced by Protocol 15 which amended the preamble to the ECHR. The provisions require parties to the ECHR to follow the principle of subsidiarity, to exercise their primary responsibility to secure the rights and freedoms in the ECHR and the Protocols thereto, to engage in a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights (ECtHR). In essence, the Margin of Appreciation doctrine allows States leverage in the fulfilment of their obligations under the human rights instrument in a manner that does not defeat the promotion and protection of the rights of an individual.<sup>48</sup>
46. The doctrine of the margin of appreciation entails that States should have the discretion to interpret and apply some of the elements of the provisions of the European Convention on Human Rights in fulfilling their obligations therein.<sup>49</sup> The European Court in the *Handyside v The United Kingdom* case indicated that article 10(2) of the Convention provides for a margin of appreciation for states in ensuring the right to freedom of expression<sup>50</sup> as it provides for certain ground for the limitation of the right and certain conditions for the enjoyment of the right. Furthermore, it alluded to the fact that the margin of appreciation does not accord states unlimited power of appreciation but rather it is understood and implemented along with the 'European Supervision'.<sup>51</sup> Furthermore, the Court explained that any margin of appreciation that states have should be applied for a legitimate aim and only if it is necessary for a democratic society.<sup>52</sup> The *Handyside case* illustrates that the ECHR is the basis or the floor as the unqualified minimum guarantee of human rights which a State is not able to go below, an area which lies above the basis or floor, within which the State may elect to exercise discretion on condition that its decision is above the floor.<sup>53</sup> In this instance, the State Party may exercise its margin of appreciation as long as it is not violating its obligations or the rights under the ACRWC.

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<sup>48</sup> S. Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights,' Council of Europe, 2000, 5.

<sup>49</sup> L.R. Helfer 'Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime' (2008) 19(1) *European Journal of International Law* 125 at 128. Yourow (1996) 13. See Holmer O 'Decoding the margin of appreciation doctrine in its use by the European Court of Human Rights' available at <http://www.diva-portal.org/smash/get/diva2:661681/FULLTEXT01.pdf> 17- 26 (accessed 25 August 2022). Arai-Takahashi Y *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002) 2. Kratochvil J 'The inflation of the margin of appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324 at 327.

<sup>50</sup> *Handyside v The United Kingdom*, para 48.

<sup>51</sup> As above, para 49.

<sup>52</sup> As above.

<sup>53</sup> Nanima, R. D. (2018). A critique of the jurisprudence of the African commission regarding evidence in relation to human rights violations: A need for reform? (Unpublished University of the Western Cape PhD Thesis) 186-187.

47. In the *Belgian Linguistic Case*, the Court also highlighted that the nature of the right alleged to have been violated is a factor that should be taken into account in assessing the margin of appreciation.<sup>54</sup> The African Commission on Human and Peoples' Rights has also adopted a similar approach whereby it has indicated that any form of restriction on a right provided under the African Charter on Human and Peoples' Rights has to be consistent with the Charter and States' obligation under human rights laws.<sup>55</sup> The Committee notes that the Respondent State relies on *Abdulaziz, Cabales and Balkandali v. The United Kingdom case*<sup>56</sup> in arguing that it has even wider discretion in delivering on its positive obligations. The Committee notes that the European Court indeed alluded to the fact that States have wider discretion in fulfilling their positive obligation as due regard should be given to the specific circumstances of the persons involved.<sup>57</sup> However, the Committee notes that the Respondent State relied on the case with the wrong understanding of the decision of the European Court. The case relates to legally settled immigrants in the United Kingdom who wish to be joined by their spouses. One of the allegations includes discrimination based on sex as the law of the United Kingdom made it easier for male immigrants to be joined by their partners than female immigrants. The European Court held that the discrimination on the grounds of sex on immigration issues which the United Kingdom attempted to justify was not construed within the ambit of the doctrine of the margin of appreciation.<sup>58</sup> The European Court, in its jurisprudence, has also indicated that 'whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the safeguards available to the individual will be especially material in determining whether the Respondent State has when fixing the regulatory framework, remained within its margin of appreciation'.<sup>59</sup>

48. The Committee notes that elements of article 11 in general and article 11(1) in particular leave no room for limitation or condition in the application of the rights provided, hence the argument of the Respondent State on the application of the margin of appreciation goes against the protected right of education under the African Children's Charter. Moreover, article 11 (3)(d)(e) and 11(6), provide clear obligations by requiring State to take special measures in respect of girls and prevent drop-out of school as well as to support girls who fall pregnant while in school. Disregarding this obligation, the Respondent State has introduced policies and practices which exclude pregnant and married girls from public schools and has introduced mandatory pregnancy testing in schools the outcome of which results in expulsion with no re-entry. These policies and practices are not contested by the Respondent State but rather defended on the grounds of morality. The Committee stresses that no argument

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<sup>54</sup> Case Relating to Certain Aspects of the Laws on the Use Of Languages in Education in Belgium v. Belgium (*Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64*), 9 February 1967.

<sup>55</sup> ACHPR, *Civil Liberties Organisation (in respect of the Bar Association) v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)], para 16; Comm No. 212/98, *Amnesty International v Zambia*, para 50; *Article 19 v Eritrea*, para 92.

<sup>56</sup> *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 15/1983/71/107-109, Council of Europe: European Court of Human Rights, 24 April 1985.

<sup>57</sup> As above, para 67.

<sup>58</sup> As above, para 78-83.

<sup>59</sup> *Oršuš and others V. Croatia*, Application no. 15766/03, European Court of Human Rights, 16 March 2010, para 181-185.

of morality or margin of appreciation can justify a policy and practice which is against the explicit provisions of the Charter. Therefore, the Committee does not accept the justification of the Respondent State based on the doctrine of margin of appreciation.

49. The expulsion and the prohibition of re-entry of pregnant and married girls is another form of the perpetuation of the negative societal attitude towards the same group of girls including stigmatization and segregation that is deeply entrenched in most African communities. However, the Committee strongly believes that education should be used as a tool to address such negative attitudes and not perpetuate or conform to such attitudes. Furthermore, providing education to such disadvantaged groups should have been part of the education strategy of the State Party by providing them with the necessary support and affirmative action to overcome the disproportionate impact of their situations. Nevertheless, the Respondent State adopted a policy that excludes such disproportionately affected girls from education. Accordingly, the Committee finds the Respondent State in violation of article 11 of the Charter through its policy of expulsion of pregnant and married girls from schools as well as introducing a condition of mandatory/forced pregnancy testing to be enrolled in schools. Furthermore, the re-entry policy of the Respondent State is a violation of the right to education which requires the States to make education accessible to all.

#### **Alleged violation of article 3 of the ACRWC on the right to non-discrimination**

50. The Complainants submit that the practice of forced pregnancy testing in schools; the expulsion of pregnant and married students; prohibition of re-entry after childbirth; and the illegal detention of pregnant girls violates girls' right to equality and non-discrimination based on various prohibited grounds including sex, age, health status (pregnancy), marital status, socio-economic status, and geographical location. The Respondent State argues that differential treatment is discriminatory only if it is based on proscribed grounds and serves no objective. The submission of the Respondent State provides that expulsion of married and pregnant girls serves the objective of deterrence of such behaviours which is against African values. Furthermore, the Respondent State submits that pregnancy testing is done on all teenage schoolgirls, hence, it is not discriminatory.

51. Regarding the alleged violation of article 3 of the ACRWC, the Committee focuses on analysing the following issues:

- If the expulsion of pregnant and married girls with no re-entry by the Respondent State can be justified within the scope of limitation of rights or if it amounts to discrimination under article 3 of the ACRWC;
- If the forced pregnancy testing of schoolgirls is discrimination under article 3 of the ACRWC;
- If the detention of pregnant girls is discrimination under article 3 of the ACRWC; and
- If socio-economic status and geographical location were grounds for discrimination based on the facts of the case and the meaning of article 3 of the ACRWC.

52. The principle of the right to non-discrimination under the Charter is one of the general principles of the Charter. The right to non-discrimination is a substantive right by itself but it is also used in the interpretation and implementation of all the provisions of the Charter. Article 3 states that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognized 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 or other status.

53. The reading of the right to non-discrimination under article 3 of the Charter has three complementary elements which are differential treatment, interference, and rights and freedoms within the Charter. These three elements are essential aspects of the right to non-discrimination, not only under the Charter but also the UN Convention on the Rights of the Child and international law.<sup>60</sup> From the onset, the Committee notes that the right to non-discrimination is an absolute right as the wordings of the provision do not include a 'balancing test' which gives room for States to justify an act which amounts to differential treatment on the prohibited grounds and which impairs the enjoyment of the rights under human rights laws.<sup>61</sup> Even though the right to non-discrimination is an absolute right, States may claim the necessity of defence to justify differential treatment.<sup>62</sup> However, any differential treatment can only be justified if it is reasonable and objective and aims to achieve a purpose which is legitimate under the Charter.<sup>63</sup> Accordingly, complainants who allege a violation of the right to non-discrimination are required to prove the differential treatment on the prohibited grounds in the enjoyment of any right, and it is up to the Respondent State to provide a justification or an explanation on how the differential treatment advances the rights contained in the Charter.<sup>64</sup> Other international human rights monitoring bodies like the Committee on Economic, Social and Cultural Rights state that "Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant,<sup>65</sup> unless the justification for differentiation is reasonable and objective."<sup>66</sup>

54. In the present Communication, there is no contestation as to the existence of differential treatment based on the pregnancy and marital status of girls in education. It is also clear that the differential treatment has resulted in the infringement of the right to education and other rights. However, the Respondent State submits that the differential treatment of pregnant and married girls serves a legitimate objective. A differential treatment amounts to discrimination if it does not have an objective or reasonable justification and there is no proportionality between the aim sought and

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<sup>60</sup> Bruce Abramson, 'A Commentary on the United Nations Convention on the Rights of the Child: Article 2 The Right to Non-Discrimination,' Martinus Nijhoff Publishers, 2008, page 29; HRC, General Comment no. 18 on non-discrimination, 1989, para 7.

<sup>61</sup> As above (Abramson), 40.

<sup>62</sup> As above, 45.

<sup>63</sup> HRC, General Comment no. 18 on non-discrimination, para 13. See also

<sup>64</sup> ACERWC, Communication No 002/Com/002/2009, *IHRDA and OSI v the Republic of Kenya*, para 56.

<sup>65</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/20 (2009), para. 10.

<sup>66</sup> As above, para 13

the means employed to achieve the objective or the justification.<sup>67</sup> For any defence of the State to be justified, the differential treatment should be absolutely necessary to achieve what has been raised as an objective.<sup>68</sup> Therefore, this begs the question as to whether the differential treatment of pregnant and married girls in school policies and practices is absolutely necessary to achieve the deterrence of sexual relations among children as argued by the Respondent State. A restriction on a right is said to be absolutely necessary if there is no other alternative to achieve the intended objective and if the measure taken is the least restrictive compared to the other available options.<sup>69</sup> The Committee notes that the expulsion of and denial of re-entry of pregnant and married girls in school is by no means a necessary measure to deter sexual relationships among adolescents. It is a clear contradiction with article 11(6) of the Charter. The Committee, in the *Minority Rights Group International and other v Mauritania* case, has pronounced that any differential treatment based on a ground that is prohibited by the Charter is a violation of article 3.<sup>70</sup> Moreover, the Committee notes that most cases of teenage pregnancy and child marriage are a result of deep-rooted gender-based violence against children. Children who are married should be treated as victims of systemic gender-based discrimination or other factors that result in child marriage. The Committee also acknowledges that systemic discrimination embraces both intentional and effects-based discrimination, and acknowledges the individual and collective, institutional and structural dimensions of discrimination that inculcate unfair treatment, exclusion of individuals because of their status, and differential treatment, based on their sex, age, race, national or ethnic origin, or religion.<sup>71</sup>

55. Children who fall pregnant while in school are also girls who need the support of the State. However, the Committee is mindful that most teenage pregnancies are a result of complex socio-economic factors that need to be addressed. The Committee, in its decision on the *IHRDA and other v Cameroon* case, stated that 'the social subordination of women that is causing and sustaining gender-based violence is by itself gender-based discrimination of women'.<sup>72</sup> The act of the Respondent State whereby it is expelling pregnant and married girls perpetuates such negative and discriminatory attitudes which result in child marriage and teenage pregnancy. Furthermore, it affirms the societal attitude that discriminates and stigmatises pregnant girls. The Respondent State can resort to various measures to prevent teenage pregnancy and marriage among schoolgirls. The Committee strongly asserts that the adoption of such measures is required from the State as part of its obligation under the Charter. The Committee would also like to highlight that the prevention of

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<sup>67</sup> ACHPR, Comm. No. 313/05 (2010), *Kenneth Good v. Republic of Botswana*, para 219.

<sup>68</sup> ACHPR, Comm. No 211/98, *Legal Resources Foundation v Zambia*, para 67.

<sup>69</sup> *Ms. X v. Argentina*, Case 10.506, Report No. 38/96, Inter-Am.C.H.R., OEA/Ser.LV/II.95 Doc. 7 rev. at 50 (1997) para 73-75; Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Article 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para 46.

<sup>70</sup> ACERWC, Communication No 007/com/003/2015, *Minority Rights Group International and SOS-Esclaves v the Republic of Mauritania*, 2017, para 61.

<sup>71</sup> Sheppard, C. (2009). Systemic Discrimination and Gender Inequality in P Mendes, E., Srighanthan, S., & Mendes, E. P. (2009). *Confronting discrimination and inequality in China: Chinese and Canadian perspectives* (p. 233).

<sup>72</sup> ACERWC, Communication No. 006/com/002/2015, *Institute of Human Rights and Development in Africa and Finders Groups Initiatives on behalf of TFA v The Republic of Cameroon*, 2018, para 61.



sexual relations among adolescents is not an internationally recognized obligation of the State. Countries in Africa have different ages for sexual consent ranging from 12 years to 18 years. Moreover, the Committee has taken a position that consensual and non-exploitative sexual relations among adolescents should be decriminalized.<sup>73</sup> Furthermore, the exclusion of pregnant and married girls from schools with no opportunity for re-entry creates a vicious cycle of gender-based discrimination as these girls will be excluded from the benefits of education. This is because education is not only a substantive right, but the enjoyment of the right to education also facilitates the realization of other rights of children and the elimination of discrimination against girls.<sup>74</sup> Additionally, article 1(f) of the Maputo Protocol provides that discrimination against women includes any form of discrimination against women from the enjoyment of their rights regardless of their marital status. Therefore, the expulsion of pregnant and married girls with no re-entry amounts to discrimination based on sex, marital status, and health status (pregnancy) within the meaning of article 3 of the ACRWC, and further entrenches gender-based discrimination.

56. Concerning the issue of the mandatory pregnancy testing of schoolgirls, the Committee believes that it is a differential treatment based on sex as the mandatory testing and the subsequent expulsion target only girls. Mandatory pregnancy testing is differential treatment on the ground of sex and interferes with the right to education, the right to privacy, and the health of girls among others. Moreover, the mandatory pregnancy testing presumes that all girls who fall pregnant have committed an immoral act which is a perpetuation of structural gender-based discrimination which subjects girls to scrutiny on their sexuality although they are victims of sexual abuse. Hence, mandatory pregnancy testing also amounts to discrimination under the scope of article 3 of the Charter.
57. Regarding the detention of pregnant girls, the Committee has found that the detention is occurring to question pregnant girls about who impregnated them (see the finding of the Committee on the alleged violation of article 16 of the ACRWC). The Committee also notes that the detention of pregnant girls is discrimination based on their gender, age, and health status (pregnancy) as they are being targeted on these grounds while having committed no crime.
58. On the issue of discrimination on the grounds of socio-economic status and geographic location through the denial of re-entry of pregnant and married schoolgirls, the Committee notes that the Complainants argue that the result of the policy disproportionately affects girls living in economically disadvantaged families, as well as rural and remote areas. While the Committee is cognizant of the structural discrimination against children living in economically disadvantaged, rural and remote areas, in this present case, the Respondent State has not subjected children living in economically disadvantaged or rural and remote areas to differential treatment of any kind. The expulsion and non-re-entry of pregnant and married girls as well as the

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<sup>73</sup> ACERWC, General Comment No. 7 on article 27 of the ACRWC, para 50.

<sup>74</sup> CESCR, General Comment no. 13 on the right to education, UN Doc. E/C.12/1999/10, 8 December 1999; CEDAW, General Recommendation no. 36 on the right of girls and women to education, UN Doc. CEDAW/C/GC/36, 27 November 2017.

forced pregnancy testing, which are the differential treatments, in this case, are applied across the country. The Complainants have not provided evidence as to the fact that pregnancy testing or expulsion are more prevalent in rural or remote areas for the Committee to find discrimination based on geographic location.

59. The Committee, therefore, finds the Respondent State in violation of article 3 of the Charter on the right to non-discrimination through its expulsion of pregnant and married girls, denial of re-entry, mandatory pregnancy testing of schoolgirls, and detention of pregnant girls on the grounds of sex, age, health status (pregnancy), marital status.

### **Alleged violation of article 21 of the ACRWC on the Protection against Harmful Practices**

60. The Complainants allege that the mandatory pregnancy testing, the subsequent expulsion of pregnant and married girls, and the detention of pregnant girls are guided by stereotypes on the role of girls and that their moral status is determined by their virginity, hence violating article 21. The Respondent State argues that the Complainants have a wrong understanding of article 21 and that it is undertaking various campaigns to end teenage pregnancy and empower girls.

61. Following the consideration of submissions of both parties, the Committee identifies the following issues under the alleged violation of article 21:

- Whether or not the mandatory pregnancy testing, the expulsion of pregnant and married girls, and the detention of girls amount to a violation of article 21 of the ACRWC; and
- Whether or not the measures are undertaken by the State to eliminate teenage pregnancy and to empower girls are sufficient measures under article 21 of the ACRWC.

62. Article 21 of the Charter does not provide for a definition of harmful practices, it rather provides certain grounds for the prohibition of harmful practices. It states that any practice that affects the welfare, dignity, development health, and life of the child and is discriminatory on prohibited grounds should be eliminated.<sup>75</sup> Article 21(2) explicitly prohibits child marriage and betrothal of children. The Committee, in further elaborating article 21(1) of the Charter, adopted the definition of harmful practices provided by the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women.<sup>76</sup> The two Committees have identified 4 criteria for defining a harmful practice. Accordingly, practices amount to harmful practices if:

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<sup>75</sup> Article 21(1) of the ACRWC.

<sup>76</sup> Committee on the Rights of the Child and Committee on the Elimination of Discrimination against Women, Joint General Recommendation/General Comment No. 31 on the Rights of the Child on harmful practices, November 2014, para 15.

- *they “constitute a denial of the dignity and/or integrity of the individual” and a violation of their human rights*
- *they constitute discrimination limiting the capacity of girls to fully participate in society*
- *they are practices that “are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors*
- *they are “imposed on women and children by family members, community members or society at large” regardless of the victim’s lack of or inability to consent.*

63. Moreover, article 1(g) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa defines harmful practices as ‘all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity. Furthermore, article 5(a) of the Convention on the Elimination of Discrimination Against Women puts an obligation on States to take measures to eliminate and practice founded on the inferiority of girls and stereotyped role of girls.

64. The Committee notes that the mandatory pregnancy testing of girls and their expulsion from school when found pregnant or married impairs the enjoyment of their rights under the Charter and that such practice is discriminatory within the ambit of article 3 of the Charter and violates the right to dignity, freedom from torture, and the right to privacy of girls, among others. Moreover, the Committee stresses that schoolgirls who are married and fall pregnant are victims of a larger pattern of gender-based discrimination which the Respondent State is required to address by taking the necessary safeguards through law and practice as well as providing redress to victims. Article 21(2) explicitly prohibits child marriage and puts an obligation on States to eliminate the practice. The Respondent State is required to adopt laws, policies, and other administrative measures to prevent child marriage and teenage pregnancy and ensure that child marriage is prohibited by law with no exception.<sup>77</sup> Moreover, the Respondent State has the obligation to undertake institutional measures toward the elimination of child marriage and such institutional measures should also include measures of redress to girls already married which includes assistance to continue with their education.<sup>78</sup> Hence, married schoolgirls are victims of a violation of their rights under the Charter and should be provided support. Nevertheless, the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No. 295 of 2002 explicitly provides that a married student will be expelled from school. Moreover, the expulsion of pregnant schoolgirls based on the morality clause of the Expulsion policy is guided by the notion that all pregnant girls have committed an immoral act. By the same token, the illegal detention of pregnant girls is practised on the same notion that pregnant girls have contributed to the alleged criminal act. The Committee notes that such grounds are based on harmful stereotypes and practices that discriminate against girls. Moreover, the discrimination has resulted in the violation of the rights of the affected girls which makes the practices qualify as harmful as per the

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<sup>77</sup> ACERWC and ACHPR, Joint General Comment on Ending Child Marriage in Africa, 2017, para 18.

<sup>78</sup> As above, para 42.

definition of the Charter as well as other international human rights instruments. The Committee concurs with the African Court on Human and Peoples' Rights that the failure of State Parties to ensure compliance with the minimum age of marriage set at 18 is a violation of article 21 of the Charter.<sup>79</sup> Moreover, the policy and the practice of the Respondent State subject victims to secondary victimization and hinder the apprehension of perpetrators of sexual violence by shifting the blame on the victims.

65. Concerning the measures, the Respondent State is undertaking to eliminate harmful practices and teenage pregnancy, the Committee acknowledges the efforts undertaken by the Respondent State towards the elimination of harmful practices. However, in this particular case, the Committee notes that the measures undertaken against pregnant and married girls and the mandatory pregnancy testing of schoolgirls are not in conformity with the measures that should be undertaken to eliminate harmful practices in line with the provisions and principles of the Charter.
66. Therefore, the issue of mandatory pregnancy testing, expulsion of pregnant and married girls with no re-entry, and the detention of pregnant girls are results of negative stereotypes which are harmful practices, and further perpetuate harmful practices prohibited under article 21 of the ACRWC. The Committee, hence, finds the Respondent State in violation of article 21 of the ACRWC.

#### **Alleged violation of article 4 of the ACRWC on the best interests of the child**

67. The Complainants have alleged that the Respondent State, through its acts and omissions, has failed in its obligation to consider the best interests of girls who are forced to undergo mandatory pregnancy testing; are expelled from school for being pregnant or married, and are denied re-entry to these schools thereafter. The Respondent State alleges that the best interests of girls who fall pregnant and have children before they have finished their schooling are to be removed from school and, further, that keeping pregnant and married learners in school will negatively impact their peers and society.
68. The issues under investigation require that the Committee considers what the best interests of the child entail in these instances and whether the Respondent's State's acts of mandatory pregnancy testing, expulsion and denial of re-entry are in line with the best interests of the children affected. Finally, the way these practices violate the best interests of the child must be expanded upon so that these violations will not be repeated.
69. The best interests of the child, as stated in article 4 of the Charter, shall be the primary consideration 'in all actions undertaken by any person or authority' as it concerns children. Furthermore, the Committee's General Comment No. 5 states that 'there are

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<sup>79</sup> ACHPR, Application 046/2016, *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*, Judgment, 11 May 2018, para 78.

no conditions attached to this principle which could dilute its scope, reach or standard of application.’<sup>80</sup>

70. The Committee notes that the determination of the best interests of the child requires an in-depth consideration of the multiple competing elements and interests of each child concerned. The best interests of the child are three-fold in that it is a substantive right, an interpretative principle, and a rule of procedure.<sup>81</sup> The principle of the best interest of the child should guide the interpretation of all the rights in the Charter.<sup>82</sup> As a rule of procedure, article 4(2) of the Charter pertains in this instance to the expulsion of a pupil from school as an administrative proceeding and requires that a child implicated in such proceedings must be allowed to have their views heard. This is a core component of the best interests of the child as a procedural rule, which- at a minimum- requires the consideration of the impact on the child concerned before making decisions which affect them.<sup>83</sup> It follows that a child forced to have a pregnancy test and then expelled as a result is rendered extremely vulnerable to further violations of their civil, economic, social, and cultural rights.

71. Considering the practice of forcing schoolgirls to undergo mandatory pregnancy testing in schools, it is trite that any form of testing that a child is forced to undergo cannot be in that child’s best interests. From the evidence provided in the affidavits and the Complainant’s submissions on the merits, it is shown that no efforts were made to obtain the views of nor to provide information to the girls before these mandatory pregnancy tests were conducted. Children- when in situations where their health and well-being are implicated- should be provided ‘with adequate and appropriate information to understand the situation and all the relevant aspects concerning their interests, and be allowed, when possible, to give their consent in an informed manner.’<sup>84</sup> The Complainants further submitted that the procedure was painful and traumatic for some girls, including some of the Deponents of the affidavits. The practice of mandatory pregnancy testing has also been shown to involve publicly announcing results- in cases where the child was found to be pregnant- to shame the child concerned. Beyond mandatory testing being a clear violation of article 4 of the Charter, this practice is a violation of this provision at every point in the process through which mandatory pregnancy testing is undertaken, including the events before and after the test. The entire practice should thus be eliminated.

72. In addition, the practices of expelling girls from school due to pregnancy or marriage, and subsequently denying these girls re-entry to school are also contended as being a violation of article 4 of the ACRCW. Article 4 of Tanzania’s Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 stipulates:

‘Article 4: expulsion of a pupil from a school may be ordered where—  
a) the persistent and deliberate misbehaviour of the pupil is such as to endanger the general

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<sup>80</sup> ACERWC, General Comment No. 5, para 4.2.

<sup>81</sup> UNCRC, General Comment No. 14, para 6.

<sup>82</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 Republic of Mauritania*, para 66.

<sup>83</sup> UNCRC, General Comment No. 14 para 6(c).

<sup>84</sup> UNCRC, General Comment No. 14, para 77.

discipline or the good name of the school; or  
b) the pupil has committed a criminal offence such as theft, malicious injury to property, prostitution, drug abuse or an offence against morality whether or not the pupil is being or has been prosecuted for that offence;  
c) a pupil has entered into wedlock.'

73. Whereas it is not explicitly stipulated that girls may be expelled for pregnancy, this is the only legal basis which could have been utilised for a practice that has routinely occurred in the Respondent State. The Committee has previously emphasised that ensuring a child's holistic development is central to the consideration of their best interests.<sup>85</sup> Furthermore, it is always in the best interests of the child to have access to quality education free of charge.<sup>86</sup> It is thus not in the best interests of the child to be expelled due to being pregnant or married, as it prevents their access to quality education, which is immensely detrimental to their holistic development and future opportunities.
74. The Committee, acknowledging that the best interests as a right, rule, and principle should be used flexibly and be adapted upon the consideration of the specific circumstances of each child, finds that the conduct of mandatory pregnancy testing, expulsion, and denial of re-entry of pregnant and married girls is a violation of article 4 of the Charter.

#### **Alleged violation of article 14 of the ACRWC on the right to health**

75. The Complainants allege that the Republic of Tanzania's acts and omissions constitute a violation of article 14 of the Charter through the enforcement of mandatory pregnancy testing in schools, the subsequent expulsion of pregnant learners, through the failure to facilitate the provision of comprehensive sexuality education to children, and through the absence of youth-friendly health services, and reproductive health services for survivors of sexual violence. The Respondent State argues that appropriate measures have already been taken in all these respects and that it is compliant with the Charter.
76. The issues under investigation by the Committee include whether there is sufficient evidence to prove the alleged conduct and omissions have occurred in the Republic of Tanzania and if these practices constitute a violation of article 14 of the Charter. Furthermore, it remains to be determined whether the alleged absence of appropriate measures- such as comprehensive sexuality education and youth-friendly sexual and reproductive health services- is also a violation of the Charter.
77. Article 14 of the Charter guarantees every child 'the right to enjoy the best attainable state of physical, mental, and spiritual health,' and outlines a range of measures State Parties are obliged to undertake to ensure the full implementation of the right to health

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<sup>85</sup> ACERWC, Communication No 003/Com/001/2012, *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*, para 34-5.

<sup>86</sup> UNCRC, General Comment No. 14, para 79.

of all children under their jurisdiction.<sup>87</sup> Pertinent to this Communication are provisions mandating ‘appropriate health care for expectant and nursing mothers’.<sup>88</sup> and the development of ‘preventive health care and family life education and provision of services.’<sup>89</sup> The Committee has also developed a General Comment on Sexual Exploitation, and a Joint General Comment with the African Commission on Child Marriage, which further outline the scope of girls’ rights to sexual health services and protection.

78. The Maputo Protocol defines its scope of application as including girls.<sup>90</sup> Article 14 of the Protocol outlines States’ obligations regarding girls’ rights to health and reproductive rights and General Comment No. 2 of the African Commission further elaborates on these obligations.<sup>91</sup> These rights include ‘the right to control their fertility, the right to decide the number of children and the spacing of children, the right to choose any method of contraception, and the right to have family planning education.’<sup>92</sup> This is also stipulated in aspirations 4 and 6 of Agenda 2040, as well as target 3.7 of the United Nations’ Sustainable Development Goals (SDGs).

79. The relevant criteria for measuring the performance and implementation of healthcare obligations are availability, accessibility, acceptability, and quality.<sup>93</sup> These criteria are implicated differently in the context of the provision of child-friendly services and extend to include the provision of safe, and confidential abortion services.<sup>94</sup>

80. The Respondent State is under a duty to facilitate a safe and supportive environment for adolescents with an emphasis on the duty of schools in this regard.<sup>95</sup> This includes ensuring sufficient access to information, skills development, counselling, and health services, particularly in terms of the provision of sexual and reproductive health information and services.<sup>96</sup> This should be premised on fostering ‘positive and supportive attitudes towards adolescent parenthood’ and developing ‘policies that will allow adolescent mothers to continue their education.’<sup>97</sup>

81. The Committee agrees with the African Commission that the right to health includes the right to control one’s health and body and the right to be free from interferences.<sup>98</sup>

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<sup>87</sup> Article 14 of the ACRWC.

<sup>88</sup> Article 14(2)(e) of the ACRWC.

<sup>89</sup> Article 14(2)(e) of the ACRWC.

<sup>90</sup> Article 1(k) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 25 November 2005.

<sup>91</sup> General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

<sup>92</sup> As above, 2.

<sup>93</sup> UNCRC, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), para 112.

<sup>94</sup> General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, para 53.

<sup>95</sup> UNCRC, General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, para 13-16.

<sup>96</sup> As above, para 24.

<sup>97</sup> As above.

<sup>98</sup> ACHPR, Communication 379/09: *Monim Elgak, Osman Hummeida, and Amir Suliman (represented by FIDH and OMCT) v Sudan* (2015) para 134.

The enforcement of mandatory pregnancy testing in schools does not respect the right to health in this regard.

82. The Complainant's allegation that the State Party has failed to uphold its obligation to facilitate the provision of comprehensive sexuality education to children must also be considered. The affidavits of the Deponents indicate that these affected children were not receiving comprehensive sexuality education, even though this is included in the national curriculum. For example, the Deponent in affidavit two testified:

'That when I was in school, I was not taught about pregnancy, avoiding pregnancy, condoms, contraception, or avoiding HIV etc. These things were to be taught from Form three and I was expelled in Form two.'

The Deponent in affidavit one also states:

'That during the time when I was at school, we were not provided with adequate information on how we can prevent a pregnancy. We were told that if a girl goes with a boy, she will get pregnant and we should not be hanging out with boys.'

While the Respondent State, in its submissions, outlines several measures to provide sex education to children, it is concerning that the affidavits indicate that this is not being realised on the ground.

83. The fulfilment of the right to health includes the facilitation of access to information and services and the Joint General Comment of the African Commission and Committee on Ending Child Marriage explicitly provides for the inclusion of sexuality education.<sup>99</sup> In a case concerning the ban of pregnant learners from schools in Sierra Leone, the ECOWAS Court called for the integration of sexual and reproductive rights into school curricula as an effective measure to address the negative impacts of teenage pregnancy on children.<sup>100</sup> The African Commission further stresses the importance of information and education on family planning/contraception and safe abortion for women, especially adolescent girls, and young people.<sup>101</sup>
84. Commending the efforts that the State has already made, the Committee reiterates that obligations on State Parties are 'obligations of result' and a commitment to the fulfilment of any right must be concretely demonstrated through action and subsequent impact.<sup>102</sup> As has been shown in the affidavits, the obligation of result has not been fulfilled in this regard, and the Respondent has failed to demonstrate that the measures to facilitate the provision of adolescent-friendly sexual and reproductive health services have been implemented. Recognising 'that the right to health operates

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<sup>99</sup> Joint General Comment of the ACHPR and the ACERWC on Ending Child Marriage (2017), para 36.

<sup>100</sup> ECW/CCJ/JUD/37/19 *Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (CWS SL) (On Behalf of Pregnant Adolescent School Girls in Sierra Leone) v. Sierra Leone*, 33.

<sup>101</sup> ACHPR, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 51-2.

<sup>102</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 Republic of Mauritania*, para 54.



directly or indirectly as a prerequisite to all other human rights;<sup>103</sup> this obligation has not been upheld by the Respondent State.<sup>103</sup> Furthermore, the practices of mandatory pregnancy testing and expulsion as measures to curb teenage pregnancy represent a failure by the Respondent State to respect the standards outlined for the fulfilment of children's rights to sex education and health services. Not only do the practices of mandatory pregnancy testing and the expulsion of children for being pregnant need to be eliminated, but the full implementation of the provision of comprehensive sexuality education and child-friendly sexual and reproductive health services must be realised.

85. With further regard to the issue of providing health services to survivors of sexual violence, the Committee notes that teenage pregnancy is often caused due to rape and exploitation. Furthermore, child marriage, which constitutes another ground for girls' expulsion from school in Tanzania, is a form of sexual violence which renders girls more vulnerable to being subjected to other forms of sexual violence without any channels to seek help.<sup>104</sup> The Committee further recognises the African Commission's Guidelines on Combating Sexual Violence and Its Consequences in Africa, which outlines the medical support which should be afforded to survivors of sexual violence.<sup>105</sup>
86. The Respondent State's policy of forcing girls to undergo mandatory pregnancy testing and subsequently expelling them does not consider the especially damaging effect this would have on girls who are survivors of sexual violence. Furthermore, the law on abortion in Tanzania does not allow a person to have an abortion where that pregnancy resulted from rape. Article 14(2)(c) of the Maputo Protocol requires State Parties to authorise 'medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother.'
87. The Committee notes that the prevalence of teenage pregnancy among schoolgirls is a result of a lack of sexual reproductive health services and comprehensive sexuality education for children and adolescents. In some instances, it is also a result of the lack of services available for survivors of sexual violence. Furthermore, the Committee notes that the lack of such services also forces schoolgirls to resort to unsafe abortion which further endangers their life, survival, and development.
88. The practice of enforcing mandatory pregnancy testing on schoolgirls and subsequently expelling them from schools is a violation of article 14 of the ACRWC. In light of the evidence provided, it is also clear that the comprehensive implementation of the State Party's obligation to facilitate the provision of sex education to children has not been realised. The Respondent State has violated article 14 of the Charter through this omission. The Committee finds furthermore that the Respondent State has also violated article 14 of the Charter by failing to provide child-

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<sup>103</sup> ACHPR, Communication No. 323/06, *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013) para 261.

<sup>104</sup> ACHPR, Guidelines on Combating Sexual Violence and Its Consequences in Africa at 15; Joint General Comment of the ACHPR and the ACERWC on Ending Child Marriage (2017), para 12.

<sup>105</sup> ACHPR, Guidelines on Combating Sexual Violence and Its Consequences in Africa, 26.

friendly health services, as well as sexual and reproductive health services to survivors of sexual violence.

### **Alleged violation of article 10 of the ACRWC on the right to privacy**

89. The Complainants allege that the practices of mandatory pregnancy testing and the illegal detention of pregnant girls violate their right to privacy regarding the right to privacy's indivisibility from the rights to dignity and physical integrity. The Complainants further argue that the practices of imposing mandatory pregnancy testing and the expulsion of girls are both unlawful and arbitrary and cannot be justified as necessary or carefully tailored preventative or disciplinary measures. The Respondent State stresses the fair balance that must be struck between the competing interests of the individual and the community. The Respondent further alleges that it is due diligence in the investigation of a crime to question the victim and that there is no evidence of illegal detentions occurring in the State Party.

90. In determining whether the Respondent State has violated article 10 of the Charter, the Committee must consider whether the practices of mandatory pregnancy testing and the illegal detention of pregnant girls are violations of the right to privacy. The available evidence must be considered to determine whether the Respondent State has violated the right to privacy in this regard.

91. Article 10 of the Charter states that:

No child shall be subject to arbitrary or unlawful interference with his or her privacy, family home, or correspondence, or to attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interferences or attacks.

92. While the requirement that no interference may be unlawful envisages that such interference should be prescribed by law, the requirement that no such interference may be arbitrary foresees that this interference cannot compromise any other rights in the Charter.<sup>106</sup> Rather, for interferences not to be arbitrary, they must be deemed to be reasonable.<sup>107</sup> Reasonableness requires that the measures taken are responsive to context, are not discriminatory, and do not infringe any rights.<sup>108</sup> There must also be a balance between the goal sought and the means employed for this goal to be achieved.<sup>109</sup>

93. The right to privacy is further implicated in the manner in which consent is (or is not) obtained in matters concerning a child's health.<sup>110</sup> Children should be allowed to give their prior informed consent before and while undergoing any medical procedure,

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<sup>106</sup> CCPR, General Comment No. 16, para 4.

<sup>107</sup> As above.

<sup>108</sup> Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 44.

<sup>109</sup> As above, para 46.

<sup>110</sup> UNCRRC, General Comment No. 4, para 29.

including being tested for pregnancy.<sup>111</sup> Furthermore, the provision of these services must be confidential and conducted by trained healthcare professionals.<sup>112</sup> The disclosure of results should also be done only with the express consent of the child.<sup>113</sup> In a note by the UN Secretary-General on the Right to Health, the implications of compulsory testing on human rights were explained such that mandatory testing, regardless of the opportunity to consent, is a clear violation of rights.<sup>114</sup>

94. It has been established that children were routinely forced to undergo pregnancy testing in the absence of any legal requirement, with no prior information and without any opportunity to refuse. On many occasions, these tests were conducted by teachers or in a manner whereby children were not allowed to speak to the healthcare professionals involved. Furthermore, the results of the pregnancy tests were disclosed in a manner intended to publicly humiliate the girls who had fallen pregnant.

95. The Inter-American Commission on Human Rights held that the vaginal inspection of a 13-year-old child every time she wanted to visit her family in prison subjects her to serious psychological damage and results in shame and anguish and further decided that the practice violates the right to privacy and dignity of the child.<sup>115</sup> Considering how the practices of mandatory pregnancy testing violate an array of children's rights, it is clear that this interference is arbitrary in addition to being unlawful. The Committee is of the view that the mandatory pregnancy testing of schoolgirls, the failure to facilitate prior, informed consent, and the public announcement of their results is an unlawful, and arbitrary infringement on their privacy.

96. With regards to the practice of the illegal detention of pregnant girls to extract information from them, the Respondent alleges that it is not aware of the practice occurring. However, the Respondent also argues that it is a necessary component of due diligence to question pregnant girls to find and prosecute the person who impregnated them. While the Committee takes note of the Respondent's commitment to exercising due diligence in the investigation of suspected crimes, it is concerning to note that the reports of illegal detentions of pregnant girls within the Respondent State have not been subjected to the same level of scrutiny. The Complainants have demonstrated in their submissions that such detentions had been occurring on a routine basis, and were being reported on regularly.<sup>116</sup> Furthermore, Tanzania's Commission for Human Rights and Good Governance has also reported on the occurrence of such illegal detentions within the Respondent State.<sup>117</sup> The State is under an obligation to investigate and act to prevent any such violation.<sup>118</sup> In light of

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<sup>111</sup> UNCRC, General Comment No. 4, para 29.

<sup>112</sup> UNCRC, General Comment No. 4, para 36.

<sup>113</sup> UNCRC, General Comment No. 4, para 7.

<sup>114</sup> Note by UN Sec Gen on Right to Health, 2009: 27.

<sup>115</sup> *Ms. X v. Argentina*, Case 10.506, Report No. 38/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 50 (1997), para 93.

<sup>116</sup> Complainant's submissions on admissibility and merits, para 37.

<sup>117</sup> Commission for Human Rights and Good Governance, 'Inspection Report for Children in Detention Facilities in Tanzania IX-XI' (2011).

<sup>118</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 Republic of Mauritania*, para 52.

the evidence provided, it is clear that the practice of illegally detaining pregnant girls is unjustifiable in any context.<sup>119</sup> It is thus an unlawful and arbitrary interference with the right to privacy.

97. It is furthermore concerning that consensual sexual activities between adolescents are criminalised in the Respondent State, when this is out of alignment with accepted standards for respecting the right to privacy of the child.<sup>120</sup> Article 10 of the ACRWC has been violated in all respects.

### **Alleged violation of article 1 of the ACRWC on the obligation of States Parties**

98. The Complainants in the present Communication allege that the Respondent State has not taken comprehensive legislative measures to prevent the violation of the rights of pregnant and married schoolgirls despite the various notice it has been given regarding the ongoing violation. The Complainants allege that the Respondent State has failed to investigate the matter and take action. The Respondent State argues that it has undertaken to sever legislative measures and that the other practices are justifiable limitations of rights.

99. The Committee therefore investigates:

- If there is a failure to undertake legislative and other measures as provided under article 1 of the ACRWC; and
- If the justification provided by the Respondent State relieves its obligation under article 1 of the ACRWC.

100. Article 1 of the Charter requires State Parties to the Charter to undertake legislative and other measures towards the realization of the provisions of the Charter as well as to discourage any practice that is inconsistent with the Charter. In further explaining the meaning of legislative measures, the Committee previously provided that States should adopt national laws and policies, and undertake a continuous review of the laws and policies to assert their compliance with the Charter.<sup>121</sup> The Committee also provided that the element of protection of children from any form of abuse or degrading treatment is an essential element to fulfilling article 1 of the Charter.<sup>122</sup> Moreover, State Parties should adopt proactive measures to discourage practices that contravene the provisions of the Charter including addressing the underlying factors.<sup>123</sup> More so, the Committee and other international human rights jurisprudences assert States Parties' obligation in the realization of human rights entails an obligation of result, not an obligation of diligence.<sup>124</sup> Therefore, the Committee is of the view that the due

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<sup>119</sup> UNCRC, General Comment No. 24, para 85.

<sup>120</sup> UNCRC, General Comment No. 20, para 39.

<sup>121</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 Republic of Mauritania*, para 47.

<sup>122</sup> As above, para 48.

<sup>123</sup> ACERWC, General Comment no 5 on State Party Obligations under the ACRWC and Systems Strengthening for Child Protection, para 7.1.

<sup>124</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 Republic of Mauritania*, para 54;

diligence of the Respondent State is assessed by the result it has achieved through the legislative and other measures it has taken concerning the respective issue.

101. The Respondent State, in this case, has taken legislative measures on the issues alleged, however, the measures are alleged to be regressive. The Respondent State has failed to harmonize its age of marriage and also has failed to prevent child marriage as already discussed above. In addition, the Respondent State has adopted the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No. 295 of 2002 which expels pregnant and married girls from schools. This policy does not discourage practices that hinder the realization of the provisions of the Charter. The Committee is of the view that the policy protects perpetrators as it outcasts and stigmatises victims of sexual violence including child marriage. The result of the policy is a clear violation of the provisions of the Charter as pregnant and married girls are deprived of their numerous rights in the Charter including their right to education and health services.

102. Regarding the limitation of rights argument alleged by the Respondent State, the Committee would like to refer to its previous findings stated above that the limitation imposed by the Respondent State is against the provisions of the Charter which ensure the right to education of pregnant girls, protection of children from harmful practices, and the right to sexual reproductive and health rights and services. Furthermore, the Committee in its abovementioned analysis has provided that such limitations are not justifiable or necessary as various alternative measures which ensure the protection of children can be adopted. Community engagement, making health services available such as contraception, prevention of child marriage, and investigation and prosecution of sexual abuse cases are among the few alternatives available. In undertaking any measure to implement the Charter, the Respondent State is not allowed to disregard its existing obligation under the Charter. From the reading of Article 1(2), it can be noted that the provisions of the Charter provide for the minimum standards to be adopted by States. Article 1(2) states 'Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.' Therefore, the Charter serves as a minimum standard from which State Parties should not deviate but rather can go beyond in protecting children.

103. The Committee notes that the Respondent State has been informed about the violation of the rights of schoolgirls as a result of the practices raised in this Communication yet failed to rectify and take action by reviewing its policy. The joint letter of urgent appeal of the Committee and African Commission on Human and Peoples' Rights that was sent to the Respondent State on 21 July 2017 with Ref: ACHPR/LPROT/SM/652/17 regarding the school attendance by pregnant girls and young mothers in the Respondent State is one of the notices that was given to the

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ACHPR, *Association of Victims of Post Electoral Violence and Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) para 110-111 ; *De Cubber v Belgium*, application 9186/80, European Court of Human Rights, judgment, 26 October 1984, para 35.

Respondent State about the matter. Yet, the Respondent State has not undertaken any measures.

104. Therefore, the Committee finds the Respondent State in violation of its obligations under article 1 of the Charter.

### **VIII. Recent developments**

105. The Committee was informed by the Respondent State that in November 2021, the Ministry of Education, Science and Technology issued a circular which allowed pregnant girls to be re-admitted to formal schools. The Committee notes that this development came after the Communication was submitted before the Committee on 17 June 2019. Therefore, the Committee is cognizant that the circular developed by the Respondent State is a recent development which took place after the filing of the Communication and that this development does not hinder the Committee from finding violations in the current Communication. However, the Committee also finds it relevant to engage the Circular as the scope of the Circular might be relevant to the operational part of its decision.

106. The Circular which the Respondent State referred to during the hearing and submitted to the Committee is called 'Education Circular Number 02 of the Year 2021 on School Re-entry for Primary and Secondary School Student's Dropout for Various Reasons'. It is issued by the Ministry of Education, Science and Technology on 24 November 2021. Section 2.0 of the Circular States that the Circular aims to ensure access to education for all children including students who dropped out of school due to pregnancy. Section 3.0 of the Circular provides that girls who dropped out of school due to pregnancy will be re-admitted to schools within 2 years from the time they dropped out. In addition, Section 4.0 of the Circular provides limitations of the Circular by stating that students who were expelled from schools due to criminal cases or with conduct endangering peace at school are excluded from the opportunity provided by the Circular to continue education in formal schools.

107. Considering the Content of the Circular, and the nature of the current Communication, the Committee observes the following points:

- a. The Circular does not address most of the issues raised in this Communication which are mandatory pregnancy testing, the expulsion of pregnant and married girls, denial of re-entry to schools, and detention of pregnant schoolgirls. The Circular only addresses the situation of girls who dropped out due to pregnancy.
- b. The wordings of the Circular are not clear about the situation of children who were expelled from schools due to pregnancy as it only refers to those who dropped out. Given the fact that the expulsion of pregnant schoolgirls was justified by the interpretation of the word 'morality' in the Education Regulation, the Committee notes the importance of adopting comprehensive and vivid Circular laws.
- c. The Circular has a time limitation and only allows those who dropped out two years before the Circular. This excludes all schoolgirls on whose behalf the Communication is submitted as the Communication was filed in June 2019 while

the application of the Circular operates on girls who dropped out starting from November 2019.

- d. The exclusion of children who have been expelled from schools due to criminal cases also negates the purpose of the Circular as it relates to this Communication. Wedlock is a ground for expulsion from schools in the Education Regulation, hence, the Circular can be used to deny the re-admission of married schoolgirls.
- e. The Circular does not have a clause about repealing the Education Regulation or other inconsistent rules and policies. Moreover, there is no indication that the Circular takes precedence over the Regulation.

108. Considering the above-mentioned issues on the Circular, the Committee is of the view that the Circular does not address the issues raised in this Communication.

## **IX. Decision of the Committee**

109. Based on the foregoing analysis, the Committee finds the Respondent State in violation of its obligations under article 1 (obligation of states parties), article 3 (non-discrimination), article 4 (best interests of the child), Article 10 (protection of privacy) article 11 (education), Article 14 (health and health services), Article 16 (protection against child abuse and torture), and article 21 (protection against harmful social and cultural practices). The Committee, therefore, recommends for the Respondent State to:

- Immediately prohibit mandatory pregnancy testing in schools and health facilities and publicly announce the prohibition;
- Review the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No. 295 of 2002 and in doing so remove wedlock as a ground of expulsion and provide an indication that the moral ground of expulsion should be interpreted narrowly and should not apply in cases of pregnancy of schoolgirls;
- Undertake concrete steps to prevent the expulsion of pregnant and married girls from schools including by providing laws and policies on the same;
- Remove any policy of non-re-entry of schoolgirls including girls who have drop-out of school due to pregnancy or wedlock;
- Immediately re-admit schoolgirls who have been expelled due to pregnancy and wedlock and provide special support programmes to compensate for the lost years and ensure better learning outcomes for the returned girls;
- Provide clear guidance to school administrators that girls who drop out of school due to pregnancy or wedlock with their preference are allowed to come back to school with no preconditions;
- Investigate the cases of detention of pregnant girls and immediately release detained pregnant girls who are being interrogated to reveal who impregnated them and stop such kinds of illegal arrests of pregnant girls;
- Provide sexuality education for adolescent children and provide child friendly sexual reproductive and health services;
- Undertake extensive sensitization of teachers, health care providers, police and other actors with regards to the protection that should be accorded to pregnant and married girls;

- Undertake proactive measures towards the elimination of child marriage and other harmful practices that affect girls including by taking measures to address the underlying factors such as gender-based discrimination, poverty, and negative customary and societal norms;
- Create a conducive reporting and referral mechanism for survivors of sexual violence including child marriage, and provide psychosocial support, rehabilitation and reintegration services for the survivors;
- Investigate and prosecute perpetrators of sexual violence and child marriage;
- Take action against any actors who conduct forced pregnancy testing of any kind, or who discriminate against girls on the grounds of their pregnancy or marital statuses such as expulsion and detention; and
- Provide special support to pregnant and married girls to continue their education in a school of their choice and based on their consent.

110. As per Section XXI (1) of the Revised Communication Guidelines of the Committee, the Government of Tanzania 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 39<sup>th</sup> Ordinary Session held virtually from 21 March to 01 April 2022




**Honourable Joseph Ndayisenga**  
**Chairperson of the African Committee of Experts on the Rights and Welfare of the Child**