31ST CHRISTOF HEYNS AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION

THE BRITISH UNIVERSITY IN EGYPT

25 – 30 JULY 2022, CAIRO, EGYPT

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER BETWEEN

NGO ASHANTE

AND

THE REPUBLIC OF FOYALAN

MEMORIAL FOR THE APPLICANT

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AfCLR	African Court Law Reports
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
AUCC	African Union Convention on Cybersecurity and Personal Data Protection
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
cf	Compare
ECtHR	European Court on Human Rights
GHG	Greenhouse Gases
IACtHR	Inter–American Court on Human Rights
ILC	International Law Commission
ILO	International Labour Organization
NGO	Non–Governmental Organization
NO.	Number

PCIJ	Permanent Court of International Justice
UN	United Nations
UN HCHR	Office of the United Nations High Commissioner for Human Rights

INTERPRETATION

1. *The African Charter means* the African Charter on Human and Peoples' Rights.
2. *The Commission means* the African Commission on Human and Peoples' Rights.
3. *The Court means* the African Court on Human and Peoples' Rights.
4. *The Court's Protocol means* the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.
5. *The UN Supplemental Protocol on Women and Child Trafficking means* the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crimes.
6. *The Maputo Protocol means* the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

TABLE OF AUTHORITIES

A. INTERNATIONAL TREATIES

Supplementing the United Nations Convention against Transnational Organized Crimes (Adopted 15 November 2000, entered into force 25 December 2003)

B. INTERNATIONAL DECLARATIONS AND RULES

1. Rules of the African Court on Human and Peoples' Rights (Adopted 28 September 2020 at Arusha, Tanzania)

C. INTERPRETATIVE GUIDELINES OF TREATY MONITORING BODIES

1. UN HCHR, Fact Sheet No. 36, Human Rights and Human Trafficking, 2014

D. CASES OF THE AFRICAN COURT

1. African Commission v Kenya (Ogiek Case) [2017] 2 AfCLR 9
2. African Commission v Libya [2016] 1 AfCLR 153
3. Josiah v Tanzania [2019] 3 AfCLR 83
4. Kijiji Isiaga v Tanzania [2018] 2 AfCLR 218
5. Lohe Issa Konaté v Burkina Faso [2014] 1 AfCLR 314
6. Mariam Kouma and Another v Mali [2018] 2 AfCLR 237
7. Mtikila v Tanzania (reparations) [2014] 1 AfCLR 72
8. Mulindahabi v Rwanda [2019] 3 AfCLR 367
9. Mussa and Mangaya v Tanzania [2019] 3 AfCLR 629
10. Norbert Zongo v Burkina Faso [2014] 1 AfCLR 219
11. Tanganyika Law Society and Others v Tanzania [2013] 1 AfCLR 34
12. Thomas v Tanzania [2015] 1 AfCLR 465
13. Yogogombaye v Senegal [2009] AHRLR 315

E. CASES OF THE AFRICAN COMMISSION

1. Center for Minority Rights Development and Another v Kenya [2009] AHRLR 75
2. Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt II [2011] AHRLR 90
3. Jawara v Gambia [2000] AHRLR 10
4. Lawyers for Human Rights v Swaziland [2005] AHRLR 66
5. Majuru v Zimbabwe [2008] AHRLR 146
6. Sangonet v Tanzania [2010] AHRLR 113
7. Zimbabwe Lawyers for Human Rights and Another v Zimbabwe [2008] AHRLR 120

F. OTHER INTERNATIONAL CASES

1. Assanidze v Georgia [2004] Application No 715/03 (ECtHR)
2. Center for Human Rights and RADDHO v Senegal [2015] Application No 001/2012 (ACERWC)
3. Chorz´ow Factory [1928] PCIJ Series A, No. 17 (PCIJ)
4. Guengueng and Others v Senegal [2006] AHRLR 56 (CAT)
5. Gomes Lund v Brazil, 24 November 2010 (IACtHR)

G. NATIONAL LEGISLATIONS

1. Namibia Criminal Procedure Act 2004
2. Zimbabwe Criminal Procedure and Evidence Act
3. South African Criminal Procedure Act 1977
4. UK Prosecution of Offences Act 1985

H. NATIONAL COURT DECISIONS

1. Pennsylvania Department of Labour and Industry v Chester No 1583, CD 2019

I. BOOKS AND OTHERS

1. Crawford J, *The ILC's Articles on State Responsibility* (Cambridge 2002)
2. Ngalwana V, 'Commissions of Inquiry: A Positive or Negative Intervention?'<https://www.anchoredinlaw.net/wpcontent/uploads/2019/02/Commissions-of-Inquiry-1.pdf>accessed 14 May 2022
3. Onoria H, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 AHRLJ 1
4. Meta's Ad Review Process and Policies<https://www.facebook.com/policies/ads/> accessed 8 June 2022

QUESTIONS PRESENTED

The Court is respectfully invited to adjudge:

1. Whether the Court has jurisdiction and the case is admissible.

2. Whether Foyalan violated the African Charter and other international human rights law by placing a ban on traditional charcoal.

3. Whether Foyalan violated the African Charter and other international human rights law by failing to hold Braun Inc. and Ansom accountable for human trafficking.

4. Whether Foyalan violated the African Charter and other international human rights law by failing to hold Meta the parent company of Facebook and Instagram accountable for facilitating domestic servitude and sexual enslavement.

SUMMARY OF ARGUMENTS

JURISDICTION AND ADMISSIBILITY

The Applicant submits that the Court has material, personal, temporal and territorial jurisdiction to hear the matter. Concerning admissibility, the Applicant submits that local remedies were exhausted in the case of the ban on traditional charcoal. Further, the Applicant contends that in the case of human trafficking, the local remedies rule does not apply because local remedies in Foyalan are unavailable, ineffective and insufficient. In the case of the domestic servitude and sexual enslavement, the Applicant submits that the pursuit of local remedies will be an exercise in futility.

MERIT A

The Applicant submits that Foyalan violated the African Charter and ACRWC because the ban on traditional charcoal was unjustified and thus breached the right to culture of the Nolo people and undermined the best interest of the Nolo children.

MERIT B

The Applicant submits that Foyalan violated the African Charter, ACRWC, Maputo Protocol and the CEDAW by failing to properly investigate and duly prosecute Ansom and Braun Inc. for human trafficking.

MERIT C

The Applicant submits that Foyalan violated the African Charter, AUCC, ACRWC and Maputo Protocol by failing to hold Meta, the parent company of Facebook and Instagram, accountable for facilitating domestic servitude and sexual enslavement.

ARGUMENTS

I. JURISDICTION AND ADMISSIBILITY

A. JURISDICTION OF THE COURT

Rule 49(1) of the African Court Rules mandates the Court to conduct a preliminary examination of its jurisdiction. In *Mariam Kouma and Another v Mali,*[1] the Court held that according to its rules, it must satisfy itself that it has material, personal, temporal and territorial jurisdiction. The Applicant submits that the Court has jurisdiction on all four bases of jurisdiction.

(1) Material Jurisdiction

Article 3(2) of the Court's Protocol grants the Court material jurisdiction in all matters concerning the application and interpretation of the African Charter, the Protocol and other relevant human rights instruments ratified by the Respondent State. The Applicant contends that the Court has material jurisdiction because the ban on traditional charcoal,[2] the failure to hold Braun Inc. and Ansom accountable for human trafficking and the failure to hold Meta accountable for facilitating domestic servitude and sexual enslavement,[3] call for the interpretation and application of the African Charter, the Court's Protocol, AUCC, CEDAW, Maputo Protocol and ACRWC ratified by Foyalan.[4]

[1] [2018] 2 AfCLR 237 [25].

[2] Facts, para 9.

[3] Facts, paras 12–15, 23, 24.

[4] Facts, para 5.

(2) Personal Jurisdiction

Concerning personal jurisdiction, Article 5(3) of the Court's Protocol allows NGOs with observer status before the Commission to institute actions directly before the Court if the State against whom the action is brought has made the Optional Declaration under Article 34(6) of the Court's Protocol.[5] Since Foyalan has ratified the Court's Protocol,[6] made the Optional Declaration,[7] and deposited it,[8] allowing NGOs with observer status before the African Commission such as NGO Ashante[9] to sue in the Court, it is submitted that the Court has personal jurisdiction.

(3) Temporal Jurisdiction

Regarding temporal jurisdiction, the rule is that the alleged violations must have occurred after the dates the African Charter, the Court's Protocol and the Optional Declaration under Article 34(6) of the Court's Protocol, came into force for the Respondent.[10] Concerning the human trafficking[11] and Meta's facilitation of domestic servitude and sexual enslavement,[12] since the events leading to the alleged violations occurred after

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[5] See *Yogogombaye v Senegal* [2009] AHRLR 315 [34].

[6] Facts, para 5.

[7] ibid.

[8] ibid.

[9] Facts, para 11.

[10] *African Commission v Kenya (merits)* [2017] 2 AfCLR 9 [64].

[11] Facts, paras 12–15, 23.

[12] Facts, paras 12–15, 24.

Foyalan had ratified the African Charter, the Court's Protocol and made the Optional Declaration,[13] the Court has temporal jurisdiction. Although Foyalan deposited the Optional Declaration under Article 34(6) of the Court's Protocol on 16 June 2020[14] long after the ban on traditional charcoal on 1 January 2020,[15] the Applicant contends that the Court has personal jurisdiction. In *Kijiji Isiaga v Tanzania,*[16] the Court held that where the alleged violation is continuing, the Court will still have personal jurisdiction though it may have occurred before the dates that the African Charter, the Court's Protocol or the Optional Declaration enters into force for the Respondent. Therefore, since the ban on traditional charcoal is presently subsisting, the Court has personal jurisdiction.

(4) Territorial Jurisdiction

On territorial jurisdiction, the Court held in *Konaté v Burkina Faso,*[17] that it would have territorial jurisdiction over a case if the alleged violations occurred in the territory of the Respondent State. Since the alleged violations[18] occurred within Foyalan, the Court has territorial jurisdiction.

Accordingly, the Applicant submits that the Court has jurisdiction to hear the application.

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[13] Facts, para 5.

[14] ibid.

[15] Facts, para 9.

[16] [2018] 2 AfCLR 218 [37].

[17] [2014] 1 AfCLR 314 [41].

[18] Facts, paras 9, 12–15.

B. ADMISSIBILITY OF THE APPLICATION

Article 6(2) of the Court's Protocol mandates the Court to rule on the admissibility of cases, taking into account the provisions of Article 56 of the African Charter. An application is inadmissible if it does not meet all the requirements in Article 56 of the African Charter.[19] In this case, it is the local remedies requirement, which is in contention.

(a) Exhaustion of Local Remedies

Article 56(5) of the African Charter and Rule 50(5) of the Court's Rules provide that for a communication to be admissible, an Applicant must exhaust all local remedies (ordinary judicial remedies) in the Respondent State.[20] In *African Commission v Libya,*[21] the Court held that the Applicant must exhaust local remedies where they are available, effective and sufficient unless they are unduly prolonged. Local remedies are available if they can be pursued without impediment; they are effective if they offer a prospect of success; and they are sufficient if they are capable of redressing the violations.[22] On these bases, the Applicant submits that (1) local remedies were exhausted in case of the ban on traditional charcoal; and (2) the requirement to exhaust local remedies should be waived in the cases of the human trafficking, domestic servitude and sexual enslavement.

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[19] *Sangonet v Tanzania* [2010] AHRLR 113 [46].

[20] *Mussa and Mangaya v Tanzania* [2019] 3 AfCLR 629 [35].

[21] [2016] 1 AfCLR 153 [67].

[22] *Jawara v Gambia* [2000] AHRLR 107 [32].

(1) Local Remedies were Exhausted in case of the Ban on Traditional Charcoal

In *Josiah v Tanzania,*[23] the Court held that an application is admissible if the Applicant has pursued ordinary judicial remedies to the apex court of the Respondent State. The facts reveal that NGO Ashante in March 2020 challenged the ban on traditional charcoal in the High Court and obtained judgment.[24] However, the decision of the High Court was overturned by the Supreme Court in August 2021 following an appeal by the government.[25] To the extent that Foyalan law does not allow for any further right of appeal beyond the Supreme Court,[26] the Applicant submits that local remedies were exhausted in the circumstances.

(2) The Requirement to Exhaust Local Remedies should be waived in the cases of the Human Trafficking, Domestic Servitude and Sexual Enslavement

Regarding the issue of human trafficking, the Applicant argues that considering the egregious nature of the violations, only criminal prosecution can adequately remedy the violations, which in the instant case, is unattainable. Under Foyalan law the Prosecutor is the sole person mandated to prosecute offences and to appeal decisions in respect of such prosecutions.[27] The Applicant observes that the Prosecutor charged and prosecuted

[23] [2019] 3 AfCLR 83 [38].

[24] Facts, para 11.

[25] ibid.

[26] Facts, para 4. See also, Judiciary Act of Foyalan 1999 (Annex I), art 12.

[27] Facts, para 23.

Ansom for human trafficking in the Criminal Division of the Libre Regional Court,[28] a court known for corruption, bribery and sharp practice.[29] The court inexcusably dismissed the evidence of the Prosecutor's witnesses, Mariama and Masa, and acquitted Ansom.[30] After this the Prosecutor, though aware of the court's error, failed to appeal the decision.[31] Since under Foyalan law, only the Prosecutor can appeal the decision of a criminal trial,[32] the Applicant and the victims of the violations were incapacitated to commence an appeal. Gleaning from these, it is obvious that local remedies are unavailable, ineffective and insufficient in the Respondent State. Following the failed prosecution of Ansom,[33] the Applicant instituted a civil action in the High Court for human trafficking.[34] The court dismissed the case holding that the allegations were unfounded.[35] The Applicant being a diligent entity appealed to the Supreme Court but the court refused to entertain the matter and recommended the establishment of a Commission of Inquiry.[36] On 1 October 2021, the President set up a Commission of Inquiry and tasked it to provide recommendations

[28] Facts, para 22.

[29] Facts, para 4.

[30] Facts, para 23.

[31] ibid.

[32] ibid.

[33] ibid.

[34] Facts, para 24.

[35] ibid.

[36] ibid.

about how to address human trafficking in Foyalan.[37] However, it has been defunct for eight months since its inception.[38] In *Norbert Zongo v Burkina Faso,*[39] the Court noted that an Applicant must not exhaust local remedies if its pursuit will be unduly prolonged. Local remedies are unduly prolonged if they cannot be pursued within reasonable time.[40] In *Majuru v Zimbabwe,*[41] the Commission held that six months is the standard threshold in determining the reasonableness of time subject to the peculiar circumstances of each case.[42] Therefore, since the Commission of Inquiry is under resourced and has been unfunctional for eight months,[43] waiting on its findings if any, will be unduly prolonged. Further, the Applicant argues that the Commission of Inquiry being a creature of the President is subjected to the exclusive direction, control and whims of the President. In *Lawyers for Human Rights v Swaziland,*[44] the Commission held that the requirement to exhaust local remedies will be waived if the body providing the remedy is a creature of the executive that is allegedly responsible for the violations complained of. On this premise, assuming, *arguendo,* that the Commission of Inquiry finalizes its work anytime

[37] Facts, para 24.

[38] ibid.

[39] [2014] 1 AfCLR 219 [106].

[40] *Mulindahabi v Rwanda* [2019] 3 AfCLR 367 [32].

[41] [2008] AHRLR 146 [109].

[42] cf *Mariam Kouma* (n 1) [37].

[43] Facts, para 24.

[44] [2005] AHRLR 66 [27].

soon, there will still be a problem with enforcement as this is at the discretion of the President. Clearly, this gives the Applicant a slim chance to obtain remedies to redress the violations. Consequently, it will be an exercise in futility for the Applicant to await the findings of the Commission of Inquiry. In any event, the Applicant observes that the Commission of Inquiry can only make recommendations and not afford judicial remedies.[45] In principle, the Applicant has a duty to exhaust only ordinary judicial remedies in the Respondent State as was held by the Court in *African Commission v Kenya (Ogiek Case)*.[46] To this end, since the Commission of Inquiry can only make recommendations, the duty to exhaust does not arise. Therefore, the Applicant submits that the requirement to exhaust local remedies must be waived in this case.

Concerning the issues of domestic servitude and sexual enslavement, the facts show that the Prosecutor refused to charge Meta, the parent company of Facebook and Instagram, under Article 67(2) of the Cybercrime Act 2019 on the unjustified grounds that the ads had been removed from the platforms.[47] Further, the facts reveal that there is an avenue for private prosecution if the Prosecutor refused to press charges.[48] Be that as it may, the Applicant contends that the institution of private prosecution would have been an exercise

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[45] See Vuyani Ngalwana, 'Commissions of Inquiry: A Positive or Negative Intervention?'<https://www.anchoredinlaw.net/wpcontent/uploads/2019/02/Commissions-of-Inquiry-1.pdf>accessed 14 May 2022.

[46] [2017] 2 AfCLR 9 [97].

[47] Facts, para 22.

[48] ibid.

in futility. It is trite learning that in common law countries, private prosecutions are conducted under the fiat of the State Prosecutor who can enter a *nolle prosequie* to discontinue the prosecution or withdraw the case from the trial court.[49] In the instant case, Foyalan is a common law country.[50] Moreso, the Prosecutor is unjustifiably, disinterested in pressing charges against Meta. Consequently, it is highly probable that an attempt by the Applicant to undertake private prosecution will rear a swift discontinuance intervention by the Prosecution. In the *Ogiek Case* supra*,* the Court ruled that where it is obvious that an attempt by the Applicant to exhaust local remedies will be an exercise in futility, the requirement to exhaust them would be waived.[51] Therefore, the requirement to exhaust local remedies must also be waived in this case.

Accordingly, the Applicant submits that the matter is admissible.

[49] See for example, Namibia Criminal Procedure Act 2004, ss 5, 11; Zimbabwe Criminal Procedure and Evidence Act, ss 13, 16; South Africa Criminal Procedure Act 1977, art 8(2), 13; UK Prosecution of Offences Act 1985, s 6.

[50] Facts, para 4.

[51] cf Henry Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 AHRLJ 1, 7.

II. SUBMISSIONS ON THE MERITS OF THE CASE

A. THE BAN ON TRADITIONAL CHARCOAL

Article 1 of the African Charter obligates State Parties to protect the rights enshrined under the Charter.[52] Admittedly, in doing so, a State is allowed the discretion to limit the rights of persons on grounds of 'collective security, morality and common interest'.[53] Even so, a limitation is justified if it is necessary and proportional.[54] The Applicant submits that the ban on traditional charcoal is unjustified because it is unnecessary and disproportional [1]. Therefore, it violates the right to culture of the Nolo people [2]; and undermines the best interests of the Nolo children [3].

(1) <u>The Ban on Traditional Charcoal is Unnecessary and Disproportional</u>

To satisfy the bipartite requirements of necessity and proportionality, an action limiting the rights of persons must be shown to advance public interest, to be the least restrictive action, and not to destroy the essence of rights guaranteed under the African Charter.[55] These conditionalities are conjunctive in nature.[56] The Applicant contends that though the ban seeks to obviate the impact of traditional charcoal on the climate,[57] (i) it is not the

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[52] See also, *Thomas v Tanzania* [2015] 1 AfCLR 465 [135].

[53] African Charter, art 27(2).

[54] *Tanganyika Law Society and Others v Tanzania* [2013] 1 AfCLR 34 [107.1].

[55] *Konaté* (n 17) [149].

[56] *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* [2008] AHRLR 120 [176] (ACHPR).

[57] Facts, paras 8, 9, 10.

least restrictive measure; and (ii) it destroys the essence of rights guaranteed under the African Charter.

i. The ban is not the least restrictive measure

The Applicant argues that rather than the abrupt ban on traditional charcoal, the government could have enrolled a phasal plan to gradually ban the making and use of traditional charcoal. *First,* since traditional charcoal is made from wood logs and coconut shells,[58] the government could have limited production to only coconut shells. This would have reduced the 'carbon–sink'.[59] *Second,* while at this, the government could have then enrolled a diversion program to create alternative employment for the Nolo people and afterwards ban the production of traditional charcoal totally. In that case, the ban would not have impacted the livelihood of the Nolo people. *Third,* the government could have then rolled out the use of fuel–efficient stoves for cooking, heating and other domestic purposes at the household levels. This would have reduced the emission of GHG and thus preserve the climate. Accordingly, the ban is not the least restrictive measure.

ii. The ban destroys the essence of rights guaranteed under the African Charter

The traditional charcoal is the sole source of livelihood for the Nolo people and the health, educational and social needs of their children depend on it.[60] Also, parents pass on the skills and knowledge to their children.[61] Obviously, the Nolo people have culturalized the

[58] Facts, para 7.

[59] Facts, para 8.

[60] Facts, para 7.

[61] ibid.

art of making traditional charcoal. Accordingly, their rights to work, health, education, culture and cultural development, as guaranteed by the African Charter,[62] stems from the subsistence of the traditional charcoal. Therefore, to ban traditional charcoal is to eternally impede the enjoyment of these rights. In fact, for 26 months (1 January 2020 – 10 February 2022) since the ban was promulgated, the government has not rolled or evinced an intention to roll out any diversion program to create alternative sources of livelihood for the Nolo people.[63] Clearly, it follows that the ban destroys the essentials of the rights of the Nolo people.

Therefore, the Applicant submits that the ban on traditional charcoal is unjustified.

(2) The Violation of the Right to Culture

Article 17(2) of the African Charter guarantees the right to culture. In the *Ogiek Case,* the Court explained that the duty to protect the right to culture encompasses the manner in which a group engages in certain economic activities and produces items for survival.[64] Similarly, in the *Endorois Case,*[65] the Commission noted the right to culture includes the particular way of life associated with the use of land resources. On this basis, the Applicant argues that to extent that the ban is unjustified, and also considering that the

[62] See African Charter, arts 15, 16(1), 17(1)(2), 22(1).

[63] Facts, paras 9, 10, 25.

[64] *Ogiek Case* [179].

[65] *Center for Minority Rights Development and Another v Kenya* [2009] AHRLR 75 [243].

Nolo people have culturalized the art of making traditional charcoal,[66] Foyalan has breached the right to culture of the Nolo people.

(3) The Ban undermines the Best Interests of the Nolo Children

Article 4 of the ACRWC provides that the best interests of the child shall be paramount in all decisions taken by any person or authority. In *Center for Human Rights and RADDHO v Senegal*,[67] the ACERWC held that the best interests principle requires that State Parties take measures that safeguard children's rights and contribute effectively to the well–being and holistic development of children. In the instant case, since the proceeds from the traditional charcoal business are used to cater for the educational, health and social needs of the Nolo children,[68] the ban clearly impedes the children's access to these amenities and thus, undermines their best interests.

Accordingly, Foyalan violated the African Charter and ACRWC by banning traditional charcoal.

[66] Facts, para 7.

[67] [2015] Application No 001/2012 [34].

[68] Facts, para 7.

B. THE FAILURE TO HOLD BRAUN INC. AND ANSOM ACCOUNTABLE FOR HUMAN TRAFFICKING

The Applicant submits that by failing to hold Braun Inc. and Ansom accountable for human trafficking, Foyalan has failed to protect Bourama, Massa, Alima, Omoma, Mariama and others against human trafficking [1]. Consequently, Foyalan violated rights guaranteed under the African Charter [2].

(1) Foyalan has Failed to Protect Bourama, Massa, Alima, Omoma, Mariama and others against Human Trafficking

Under Article 29 of the ACRWR, State Parties are obligated to protect children from human trafficking. Similarly, Article 4(2)(g) of the Maputo Protocol and Article 6 of the CEDAW also guarantee the rights of women to protection against human trafficking. Human trafficking refers to the recruitment or receipt of persons by means of fraud or payment of consideration for sexual exploitation, forced labour or slavery.[69]

Where there is an allegation of a wrong within the territory of a State, that State must promptly and diligently conduct an exhaustive investigation into the matter and prosecute the perpetrators, failing which it will be held responsible.[70] In *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt II*,[71] the Commission held that a mere claim that there is insufficient information on the matter to warrant investigation and

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[69] UN Supplemental Protocol on Women and Child Trafficking, art 3(a).

[70] *Gabriel Shumba v Zimbabwe* [2012] Application No 288/04 [153].

[71] [2011] AHRLR 90 [163].

subsequent prosecution, cannot justify a State's omission to investigate allegations of wrongs within its territory. On these bases, the Applicant argues that Foyalan breached its obligation to protect Bourama, Massa, Alima, Omoma, Mariama and others from human trafficking because (i) Foyalan failed to conduct effective investigations, and (ii) Foyalan has failed to duly prosecute Ansom for human trafficking.

i. Foyalan failed to conduct effective investigations

The facts show that after series of pressure from Pastor John,[72] Suame, the Libre Police Chief under whom the site manager of Braun Inc. works directly,[73] referred the matter to the labour inspector under the Ministry of Labour.[74] It is a notorious rule that a labour inspector is only tasked to ensure corporate compliance within a State.[75] Thus, a labour inspector lacks investigative powers to gather evidence of a wrong within a State.[76] Nonetheless, Suame referred the matter to the inspectorate despite the grievous nature of the matter.[77] Clearly, this was an incompetent reference. On receiving the matter, the labour inspector notified Ansom of his visit to the company.[78] This enabled Ansom to put his affairs in order. The girls were hidden and the boys were sternly threatened to keep

[72] Facts, para 16.

[73] ibid.

[74] ibid.

[75] See ILO Labour Inspection Convention 1947, art 3.

[76] *Pennsylvania Department of Labour and Industry v Chester*, No 1583, CD 2019.

[77] Facts, para 16.

[78] ibid.

mute.[79] As a result, the labour inspector found no evidence of wrong at Braun Inc. On further pressure by Pastor John,[80] Suame tasked unscrupulous officer Bob to do the investigation.[81] Though officer Bob found no traces of wrong at Braun Inc., on leaving, he received an 'honorarium' from Ansom,[82] a man who is a prime suspect. This 'honorarium' influenced officer Bob and subsequently, he informed Ansom of the impending investigations that was to be led by Suame.[83] Consequently, Ansom covered all his traces by sending all the girls away.[84] But for these lapses the investigations would have uncovered the atrocities at Braun Inc. Thus, Foyalan failed to conduct effective investigations into the allegations of human trafficking.

ii. Foyalan failed to duly prosecute Ansom for human trafficking

When Ansom was prosecuted for human trafficking,[85] the Libre Regional Court acquitted him on the obscure basis that the evidence of the Prosecutor's witnesses, Mariama and Massa, were inadmissible.[86] Mariama had lived with the boys,[87] witnessed their plight and

[79] Facts, para 16.

[80] Facts, para 20.

[81] ibid.

[82] ibid.

[83] Facts, para 22.

[84] ibid.

[85] ibid.

[86] Facts, para 23.

[87] Facts, paras 14, 15, 16.

had even been a victim of the sexual wrath of some of the boys.[88] Though this could have been corroborated by the paternity test she requested, the test was never conducted.[89] Despite these weighty facts, the court casted aspersion on her moral character and dismissed her evidence.[90] Aside Mariama's evidence, the court also dismissed the evidence of Massa on the unfounded excuse 'he was a minor and was suffering from an acute trauma of unknown origin'.[91] This conclusion was not based on any certified medical evidence. Granted that Massa, a minor, suffered from acute trauma, his evidence was admissible under Article 12(2) of Foyalan's Evidence Act 1981 since he told the court the same facts as he had earlier proffered to Mariama.[92] Clearly, the court erred in dismissing the evidence of Mariama and Massa and although this warranted an appeal, the Prosecutor (with the sole authority to appeal) failed to appeal the decision.[93]

Therefore, the Applicant submits that Foyalan has failed to protect Bourama, Massa, Alima, Omoma, Mariama and others from human trafficking.

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[88] Facts, para 15.

[89] Facts para 21.

[90] Facts, para 23.

[91] ibid.

[92] Facts, paras 19, 23.

[93] Facts, para 23.

(2) Foyalan Violated Rights under the African Charter

The UN HCHR has opined that human trafficking entails the violation of a bundle of rights such as the rights to dignity, liberty and freedom of movement.[94] On this basis, the Applicant argues that by failing to hold Braun Inc. and Ansom accountable for human trafficking in the face of repeated sexual assault, rape, forced labour and restricted movement,[95] Foyalan has breached the rights to dignity, liberty and freedom of movement guaranteed by the African Charter under Articles 5, 6 and 12(1) respectively.

Accordingly, Foyalan violated the African Charter, ACWRC, Maputo Protocol and CEDAW by failing to hold Ansom and Braun Inc accountable for human trafficking.

[94] UN HCHR, Human Rights and Human Trafficking (Fact Sheet No 36) 2014, p 4.

[95] Facts, paras 13, 15.

C. THE FAILURE TO HOLD META THE PARENT COMPANY OF FACEBOOK AND INSTAGRAM ACCOUNTABLE FOR DOMESTIC SERVITUDE AND SEXUAL ENSLAVEMENT

The Applicant submits that by failing to hold Meta accountable, Foyalan has breached its duty to protect Alima, Omoma, Mariama and the recruited young men against domestic servitude and sexual enslavement [1]. Therefore, Foyalan violated their right to dignity guaranteed by the African Charter [2].

(1) Foyalan Breached its Duty to Protect Alima, Omoma, Mariama and the Recruited young men against Domestic Servitude and Sexual Enslavement

Article 18(3) of the African Charter obligates State Parties to protect the rights of women and children guaranteed in international conventions. Article 4(1) of the Maputo Protocol and Articles 15 and 27 of the ACRWC obligate State Parties to protect women and children from forced labour and sexual exploitation including domestic servitude[96] and sexual enslavement respectively.[97] In cybersecurity context, Article 25(1) of the AUCC requires State Parties to legislate against cybercrimes such as child pornography and unsolicited online nudities.[98] More importantly, State Parties are duty–bound to prosecute juridical persons who facilitate cybercrimes.[99] On these bases, the Applicant argues that Foyalan failed to protect the girls and the recruited young men from domestic servitude

[96] ILO Forced Labour Convention 1930 (No 29), art 2(1).

[97] See text to note 69.

[98] AUCC, art 29(3)(a).

[99] AUCC, art 30(2).

and sexual enslavement because despite Meta's facilitation, Foyalan failed to charge and prosecute Meta.

From the facts Ansom fraudulently advertised on Facebook for the employment of live–in maids with a monthly salary of 10,000 Foyas.[100] This was intended to solicit young girls to gratify the sexual escapades of the young boys already recruited.[101] Admittedly, the contents of the ad were unsuggestive of any malice or probable exploitation.[102] Nonetheless, the Applicant contends that in accordance with Meta's ad review policy,[103] Meta should have checked the facts undergirding Ansom's ad before allowing same to feature on its Facebook platform. It could be gleaned that Meta did not do that. Had it done that, it would have discovered that Ansom's ad was a façade to perpetrate sexual exploitation on the young girls being recruited. Consequently, given that Alima, Omoma and Mariama, aged 15, 17 and 18 respectively, were recruited through the ad on Facebook,[104] Meta facilitated the subsequent sexual enslavement that they suffered.

Digressing from this, when Ansom recruited Alima, Omoma and Mariama, he forcibly took nude pictures of them and advertised them on Facebook and Instagram for seven months

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[100] Facts, para 14.

[101] Facts, para 13.

[102] Facts, para14.

[103] Meta's Ad Review Process and Policies<https://www.facebook.com/policies/ads/> accessed 5 June 2022.

[104] Facts, para 14.

with the aim of recruiting more young men for forcible and payless work at Braun Inc.[105] Again, it appears that Meta did not observe its review policy on nudity.[106] Had it reviewed the contents of the ad, it would have discovered its vulgarity and prevented its publication. As a result of the publication, more young men were recruited by Ansom through Facebook and Instagram over the seven-month period during which the ad subsisted.[107]

These events warranted the prosecution of Meta for facilitating cybercrimes. Yet, Foyalan refused to charge Meta on the phony excuse that the ad had been removed by Meta and as such could not be charged under Article 67(2) of its Cybercrime Act 2019. The Applicant contends that while general international law allows states a margin of appreciation in respect of matters within their territories, a state cannot invoke its internal laws as a justification for not observing international obligations.[108] On this premise, even though the removal of the ad may seemingly justify the non–prosecution of Meta under Foyalan law, given that the effects of the two ads have already been actualized, prosecution was ripe in the circumstances.

Therefore, for failing to prosecute Meta, Foyalan has breached its duty to protect Alima, Omoma and Mariama and the recruited young men against sexual enslavement and domestic servitude.

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[105] Facts, para 15.

[106] See text to note 103.

[107] Facts, para 15.

[108] See *Guengueng and Others v Senegal* [2006] AHRLR 56 [5.6] (CAT).

(2) The Violation of the Right to Dignity

Article 5 of the African Charter guarantees the right to dignity. By this, State Parties are obligated to protect persons from all forms of exploitation, degrading and inhumane treatment such as sexual assault, rape, forced labour and torture.[109] The Applicant argues that since Foyalan failed to prosecute Meta, it violated the right to dignity of Alima, Omoma, Mariama and the recruited young men.

Accordingly, Foyalan violated the African Charter, AUCC, ACRWC and Maputo Protocol by failing to hold Meta accountable for facilitating domestic servitude and sexual enslavement.

[109] *Egyptian Initiative for Personal Rights and Interights* (n 71) [201], [202].

III. SUBMISSIONS ON REPARATIONS

Under international law, 'any breach of an engagement involves an obligation to make reparation'.[110] Thus, by Article 27(1) of Court's Protocol, where a violation of human or peoples' rights is established, the Court shall make orders to remedy the violation, including the payment of fair compensation, restitution, rehabilitation or guarantees of non–repetition.[111]

Compensation lies to address pecuniary losses like loss of profit and employment opportunities,[112] and moral injuries like loss of dignity, psychological harm and inconvenience,[113] occasioned by the violation. Regarding restitution, it seeks to restore the victims to their pre–violation status.[114] Concerning rehabilitation, it lies to provide medical and psychological care and education to victims of the violation.[115] Finally, an order of guarantees of non–repetition may lie to compel a Respondent State to properly investigate and prosecute the perpetrators of the violations.[116]

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[110] *Chorz´ow Factory* [1928] PCIJ Series A, No. 17 p. 29; James Crawford, *The ILC's Articles on State Responsibility* (Cambridge 2002) 147.

[111] See *Mtikila v Tanzania (reparations)* [2014] 1 AfCLR 72 [27].

[112] *Gomes Lund v Brazil,* 24 November 2010 [287] (IACtHR).

[113] *Mtikila* (n 111) [33]– [36].

[114] *Assanidze v Georgia* [2004] Application No 715/03 [198].

[115] *Center for Human Rights* (n 67) [48], [82].

[116] *Norbert Zongo v Burkina Faso (reparations)* [2015] 1 AfCLR 258 [101]– [111].

To this end, regarding the ban on traditional charcoal, the Applicant requests the Court to (a) order Foyalan to compensate the Nolos for the loss of livelihood, profits and inconvenience; (b) restore the Nolos to gainful employment by lifting the ban on traditional charcoal.

Concerning the human trafficking, domestic servitude and sexual enslavement, the Applicant requests the Court to order Foyalan to (a) rehabilitate the boys and girls for the physical, mental and social trauma suffered from the forced labour, sexual assault and rape; (b) investigate and prosecute Ansom and Braun Inc. and Meta for human trafficking and for facilitating domestic servitude and sexual enslavement respectively; (c) compensate the victims for distress and psychological harm.

CONCLUSION AND PRAYERS

In light of the foregoing submissions, the Applicant respectfully prays the Court to find, adjudge and declare:

1. That the Court has jurisdiction and the case is admissible.

2. That the ban on traditional charcoal by Foyalan violates the African Charter and other international human rights law.

3. That Foyalan violated the African Charter and other international human rights law by failing to hold Braun Inc. and Ansom accountable for human trafficking.

4. That Foyalan violated the African Charter and other international human rights law by failing to hold Meta accountable for facilitating domestic servitude and sexual enslavement.

Respectfully submitted,

Counsel for the Applicant.

31ST CHRISTOF HEYNS AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION

THE BRITISH UNIVERSITY IN EGYPT

22 – 29 JULY 2022, CAIRO, EGYPT

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER BETWEEN

NGO ASHANTE

AND

THE REPUBLIC OF FOYALAN

MEMORIAL FOR THE RESPONDENT

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AfCLR	African Court Law Reports
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
AUCC	African Union Convention on Cybersecurity and Personal Data Protection
AUILR	American University International Law Review
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
cf	Compare
FIDH	International Federation for Human Rights
GHASC	Ghana Supreme Court
GHG	Greenhouse Gases
IACtHR	Inter–American Court on Human Rights
ILC	International Law Commission
ILO	International Labour Organization
IPCC	Intergovernmental Panel on Climate Change

NGO	Non–Governmental Organization
NO.	Number
PCIJ	Permanent Court of International Justice
UN	United Nations
UN HCHR	Office of the United Nations High Commissioner for Human Rights
WHO	World Health Organization
ZHR	Zimbabwe Human Rights

INTERPRETATION

1. *The African Charter means* the African Charter on Human and Peoples' Rights.
2. *The Commission means* the African Commission on Human and Peoples' Rights.
3. *The Court means* the African Court on Human and Peoples' Rights.
4. *The Court's Protocol means* the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.
5. *The UN Supplemental Protocol on Women and Child Trafficking means* the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crimes.
6. *The Maputo Protocol means* the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

TABLE OF AUTHORITIES

A. INTERNATIONAL TREATIES

1. African Charter on Human and Peoples' Rights (Adopted 27 June 1981 at Nairobi, Kenya, entered into force 21 October 1986)

2. African Charter on the Rights and Welfare of the Child (Adopted 11 July 1990 at Monrovia, Liberia, entered into force 29 November 1999)

3. African Union Convention on Cybersecurity and Personal Data Protection (Adopted 27 June 2014 at Malabo, Equatorial Guinea)
4. ILO Forced Labour Convention (Adopted 28 June 1930 at Geneva, Switzerland, entered into force 1 May 1932)
5. Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (Adopted in 1998 at Ouagadougou, Burkina Faso, entered into force 2004)
6. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Adopted 1 July 2003 at Maputo, Mozambique, entered into force 25 November 2005)
7. UN Convention on the Elimination of All Forms of Discrimination Against Women (Adoption 18 September 1979 at New York City, entered into force 3 September 1981)

1. UN Supplemental Protocol on Women and Child Trafficking means the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children,

Supplementing the United Nations Convention against Transnational Organized Crimes (Adopted 15 November 2000, entered into force 25 December 2003)

B. INTERNATIONAL DECLARATIONS AND RULES

1. Rules of the African Court on Human and Peoples' Rights (Adopted 28 September 2020 at Arusha, Tanzania)

C. INTERPRETATIVE GUIDELINES OF TREATY MONITORING BODIES

1. UN HCHR, Fact Sheet No. 36, Human Rights and Human Trafficking, 2014

D. CASES OF THE AFRICAN COURT

1. African Commission v Kenya (Ogiek Case) [2017] 2 AfCLR 9
2. African Commission v Libya [2016] 1 AfCLR 153
3. Diakité Couple v Mali [2017] 2 AfCLR 118
4. Forum of Conscience v Sierra Leone [1998]
5. Jonas v Tanzania [2017] 2 AfCLR 101
6. Josiah v Tanzania [2019] 3 AfCLR 83
7. Kijiji Isiaga v Tanzania [2018] 2 AfCLR 218
8. Laurent Metongnon and Others v Benin [2022] Application No. 031/ 2018
9. Lohe Issa Konaté v Burkina Faso [2014] 1 AfCLR 314
10. Mariam Kouma and Another v Mali [2018] 2 AfCLR 237
11. Mtikila v Tanzania (reparations) [2014] 1 AfCLR 72.
12. Mulindahabi v Rwanda [2019] 3 AfCLR 367
13. Norbert Zongo v Burkina Faso [2014] 1 AfCLR 219

14. Tanganyika Law Society and Others v Tanzania [2013] 1 AfCLR 34

15. Yacouba Traoré v Mali [2020] Application No. 010/ 2018

16. Yogogombaye v Senegal [2009] AHRLR 315

E. CASES OF THE AFRICAN COMMISSION

1. FIDH and Others v Senegal [2006] AHRLR 119

2. Gunme and Others v Cameroon [2009] AHRLR 9

3. Jawara v Gambia [2000] AHRLR 107

4. Prince v South Africa [2004] AHRLR 105

5. Tsatsu Tsikata v Ghana [2006] AHRLR 112

6. ZHR NGO Forum v Zimbabwe [2006] AHRLR 128

F. OTHER INTERNATIONAL CASES

1. Chorz´ow Factory [1928] PCIJ Series A, No. 17 (PCIJ)

2. Ricardo Canese v Paraguay [2004] (IACtHR)

3. Rodriguez v Honduras [1988] Series C No. 4 (IACtHR)

4. Silvia Arche and Others v Mexico [2005] Application No. 1176/ 03 (IACtHR)

G. NATIONAL COURT DECISIONS

5. Claude Oppong v Attorney General and Another [2017] GHASC 9

6. Doe v GTE Corporation 347 F 3d 055 (7th Circuit, 199)

H. REPORTS AND OTHERS

1. IPCC, '*Climate Change 2022: Mitigation of Climate Change*' (Working Group III contribution to the Sixth Assessment Report of the IPCC)

2. Meta's Ad Review Process and Policies<https://www.facebook.com/policies/ads/> accessed 8 June 2022
3. Shelton Dinah, 'The Jurisprudence of the Inter–American Court of Human Rights' (1994) 10 *AUILR* 333
4. UN, '*Climate Action Fast Facts*'<https://www.un.org/en/climatechange/science/key-findings>accessed 8 June 2022
5. WHO, '*Climate Change and Health*', 30 October 2021<https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>accessed 8 June 2022
6. WHO, '*Household Air Pollution and Health 2021*', <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>accessed 8 June 2022

QUESTIONS PRESENTED

The Court is respectfully invited to adjudge:

1. Whether the Court has jurisdiction and the case is admissible.

2. Whether Foyalan violated the African Charter and other international human rights law by placing a ban on traditional charcoal.

3. Whether Foyalan violated the African Charter and other international human rights law by failing to hold Braun Inc. and Ansom accountable for human trafficking.

4. Whether Foyalan violated the African Charter and other international human rights law by failing to hold Meta, the parent company of Facebook and Instagram, accountable for facilitating domestic servitude and sexual enslavement.

SUMMARY OF ARGUMENTS

JURISDICTION AND ADMISSIBILITY

The Respondent concedes that the Court has material, personal, temporal and territorial jurisdiction to hear the matter. Concerning admissibility, the Respondent submits that the matter is inadmissible because the local remedies available, effective and sufficient in Foyalan were not exhausted.

MERIT A

Foyalan did not violate the African Charter because the ban on traditional charcoal was justified and thus did not breach the right to culture of the Nolo people nor undermine the best interests of the Nolo children.

MERIT B

It is submitted that Foyalan properly investigated and duly prosecuted Ansom and Braun Inc. for human trafficking, hence has not violated the African Charter, ACRWC, Maputo Protocol and the CEDAW.

MERIT C

The Respondent submits that it did not violate the African Charter, AUCC, ACRWC and Maputo Protocol by refusing to hold Meta, the parent company of Facebook and Instagram, accountable for facilitating domestic servitude and sexual enslavement.

ARGUMENTS

I. JURISDICTION AND ADMISSIBILITY

A. JURISDICTION OF THE COURT

Rule 49(1) of the African Court Rules mandates the Court to conduct a preliminary examination of its jurisdiction. In *Mariam Kouma and Another v Mali,*[1] the Court held that according to its rules, it must satisfy itself that it has material, personal, temporal and territorial jurisdiction. The Respondent concedes that the Court has jurisdiction on all four heads.

(1) Material Jurisdiction

Article 3(2) of the Court's Protocol grants the Court material jurisdiction in all matters concerning the application and interpretation of the African Charter, the Protocol and any other relevant human rights instruments ratified by the Respondent State. The Respondent concedes that the Court has material jurisdiction because the ban on traditional charcoal,[2] the alleged failures to hold Braun Inc. and Ansom accountable for human trafficking and Meta accountable for facilitating domestic servitude and sexual enslavement,[3] call for the interpretation and application of the African Charter, the Court's Protocol, AUCC, CEDAW, Maputo Protocol and ACRWC ratified by Foyalan.[4]

[1] [2018] 2 AfCLR 237 [25].

[2] Facts, para 9.

[3] Facts, paras 12–15, 23, 24.

[4] Facts, para 5.

(2) Personal Jurisdiction

Concerning personal jurisdiction, Article 5(3) of the Court's Protocol allows NGOs with observer status before the Commission to institute actions directly before the Court if the State against whom the action is brought has made the Optional Declaration under Article 34(6) of the Court's Protocol.[5] Since Foyalan has ratified the Court's Protocol,[6] made the Optional Declaration,[7] and deposited it,[8] allowing NGOs with observer status before the African Commission such as NGO Ashante[9] to sue in the Court, the Court has personal jurisdiction.

(3) Temporal Jurisdiction

Regarding temporal jurisdiction, the rule is that the alleged violations must have occurred after the dates the African Charter, the Court's Protocol and the Optional Declaration under Article 34(6) of the Court's Protocol, came into force for the Respondent State.[10] Since the events leading to the alleged human trafficking,[11] domestic servitude and sexual enslavement,[12] occurred after Foyalan had ratified the African Charter, the Court's

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[5] See *Yogogombaye v Senegal* [2009] AHRLR 315 [34].

[6] Facts, para 5.

[7] ibid.

[8] ibid.

[9] Facts, para 11.

[10] *African Commission v Kenya (merits)* [2017] 2 AfCLR 9 [64].

[11] Facts, paras 12–15, 23.

[12] Facts, paras 12–15, 24.

Protocol and made the Optional Declaration,[13] the Court has temporal jurisdiction. Although Foyalan deposited the Optional Declaration on 16 June 2020,[14] long after the ban on traditional charcoal on 1 January 2020,[15] the Respondent concedes that the Court has personal jurisdiction. In *Kijiji Isiaga v Tanzania,*[16] the Court held that where the alleged violation is continuing, the Court will still have personal jurisdiction though it may have occurred before the dates that the African Charter, the Court's Protocol or the Optional Declaration enters into force for the Respondent. Therefore, since the ban on traditional charcoal is subsisting, the Court has personal jurisdiction.

(4) Territorial Jurisdiction

On territorial jurisdiction, the Court held in *Konaté v Burkina Faso,*[17] that it would have territorial jurisdiction over a case if the alleged violations occurred in the territory of the Respondent State. Since the alleged violations[18] occurred within Foyalan, the Court has territorial jurisdiction.

Accordingly, the Respondent concedes that the Court has jurisdiction to hear the application.

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[13] Facts, para 5.

[14] ibid.

[15] Facts, para 9.

[16] [2018] 2 AfCLR 218 [37].

[17] [2014] 1 AfCLR 314 [41].

[18] Facts, paras 9, 12–15.

B. ADMISSIBILITY OF THE APPLICATION

Article 6(2) of the Protocol mandates the Court to rule on the admissibility of cases, taking into account the provisions of Article 56 of the Charter. In *Beneficiaries of Norbert Zongo et al v Burkina Faso,*[19] the Court held that an application is inadmissible if it does not meet all the requirements in Article 56 of the African Charter. The contentious one in this case is the requirement to exhaust local remedies.

Article 56(5) of the African Charter and Rule 50(5) of the Court's Rules provide that a communication is admissible if the Applicant exhaust all local remedies in the Respondent State. The purpose of exhausting local remedies is to afford the Respondent State an opportunity to redress the alleged violations and to prevent the Court from being a court of first instance.[20] Based on these, the Respondent concedes that local remedies were exhausted in the case of the ban on traditional charcoal [1] but contends that despite local remedies being available, effective and sufficient in Foyalan [2], the Applicant failed to exhaust them in the cases of the alleged human trafficking, domestic servitude and sexual enslavement [3].

(1) Local Remedies were Exhausted in the case of the Ban on Traditional Charcoal

An application is admissible if the Applicant has pursued local remedies to the apex court of the Respondent State.[21] In *Jonas v Tanzania,* the Court held that the application was admissible because the Applicant had appealed against his conviction in the Court of

[19] [2013] 1 AfCLR 197 [84].

[20] *African Commission v Kenya (merits)* [2017] 2 AfCLR 9 [94].

[21] *Josiah v Tanzania* [2019] AfCLR 83 [38].

Appeal, which was the highest court in Tanzania.[22] In the instant case, NGO Ashante challenged the ban on traditional charcoal in the High Court and obtained judgment in March 2020.[23] However, in August 2021, the Supreme Court, Foyalan's apex court, overturned the decision of the High Court following an appeal by the government.[24] Accordingly, local remedies in Foyalan were pursued and exhausted by the Applicant.

(2) Local Remedies are Available, Effective and Sufficient in Foyalan

In *Jawara v Gambia,*[25] the Commission noted that for local remedies to be exhausted, they must be available, effective and sufficient. Local remedies are available if the complainant can pursue them without impediments; they are effective if they offer a prospect of success; and are sufficient if they are capable of redressing the complaint.[26]

The test of availability is fulfilled in that local remedies in Foyalan are readily accessible. Foyalan has a well–organized and effectively functioning five–tier court system with the Supreme Court being the highest court of appeal in all matters.[27] The High Court adjudicates on the bill of rights and is the court of first instance for all human right matters

[22] [2017] 2 AfCLR 101 [44].

[23] Facts, para 11.

[24] ibid.

[25] [2000] AHRLR 107 [31].

[26] *African Commission v Libya* [2016] 1 AfCLR 153 [67].

[27] Facts, para 4.

with the right of further appeal to the Court of Appeal and to the Supreme Court.[28] There are no burdening conditions that one must fulfil before granted access to any of the courts in Foyalan. All persons, natural and legal, can readily access the High Court in any of the six regions in Foyalan to seek redress for any human right violation.[29] This is evident from the suit that NGO Ashante brought in the High Court to challenge the ban on traditional charcoal.[30]

Regarding effectiveness, bringing claims before the local courts offered a prospect of success. There are equal chances of either succeeding or losing in a suit. For instance, the High Court in June 2020 expeditiously heard and ruled in favour of NGO Ashante regarding the suit challenging the ban on traditional charcoal.[31] Although Ansom was not found guilty for human trafficking by Libre Regional Court, the Respondent observes that this was due to the lack of credible evidence to incriminate Ansom.[32] Accordingly, this one incident cannot muddle the effectiveness of local remedies in Foyalan. [33]

Regarding sufficiency, the local remedies in Foyalan were capable of redressing the alleged violations. Under Foyalan law, both civil and penal remedies exist. On civil

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[28] Facts, para 4.

[29] ibid.

[30] Facts, para 11.

[31] ibid.

[32] Facts, para 23.

[33] See Shelton Dinah, 'The Jurisprudence of the Inter–American Court of Human Rights' (1994) 10 *AUILR* 333, 345.

remedies, this is seen from the decision of the High Court in favour of NGO Ashante on the legality of the ban on traditional charcoal.[34] Though on appeal, the Supreme Court ruled against NGO Ashante,[35] that does not automatically imply that civil remedies are insufficient in Foyalan.[36] Ansom was prosecuted for human trafficking,[37] depicting evidence of penal remedies in Foyalan. The fact that Ansom was not convicted does not imply that penal remedies are insufficient in Foyalan. Assuming, *arguendo*, if there was enough evidence to corroborate the Prosecutor's evidence, Ansom would have been convicted, imprisoned and fined. Thus, ending the ordeal of the victims of the alleged violations. *Pro tanto,* local remedies are sufficient in Foyalan.

Consequently, local remedies in Foyalan are available, effective and sufficient.

(3) <u>The Applicant failed to Exhaust Local Remedies in the cases of the Human Trafficking, Domestic Servitude and Sexual Enslavement</u>

In the case of the human trafficking, the Respondent notes that Ansom was prosecuted for human trafficking in the Libre Regional Court.[38] However, because no credible and admissible evidence was adduced, the court found him not guilty.[39] Subsequently, the Applicant instituted a civil claim in the High Court alleging various breaches of the bill of

[34] Facts, para 11.

[35] ibid.

[36] cf Shelton (n 33).

[37] Facts, para 22.

[38] ibid.

[39] Facts, para 23.

rights.[40] Again, for the lack of evidence, the High Court dismissed the suit.[41] On further appeal, the Supreme Court being committed to unravelling the root cause of the matter recommended that the President set up a Commission of Inquiry to gather more credible evidence on the matter.[42] Acting in haste in accordance with the court's recommendation, the President set up a commission.[43] While the Commission of Inquiry eagerly began investigations and even subpoenaed witnesses and documents,[44] the Applicant impetuously brought the instant application.[45] In principle, local remedies encapsulate not only judicial remedies but also, administrative remedies.[46] In *Tsatsu Tsikata v Ghana,*[47] the Commission held that a matter is inadmissible if it is pending before an authorized body in the Respondent State. Likewise, in *Laurent Metongnon and Others v Benin*[48] and *Yacouba Traoré v Mali,*[49] the Court established that 'exhaustion of local remedies implies not only that the Applicant utilizes local remedies, but also that the Applicant awaits the outcome thereof'. Accordingly, to the extent that the matter is still pending before the

[40] Facts, para 24.

[41] ibid.

[42] ibid.

[43] ibid.

[44] ibid.

[45] Facts, para 25.

[46] *FIDH and Others v Senegal* [2006] AHRLR 119 [44].

[47] [2006] AHRLR 112 [39].

[48] [2022] Application No 031/2018 [51].

[49] [2020] Application No 010/2018 [41].

Commission of Inquiry,[50] which is an authorized administrative body,[51] the present application is inadmissible. The Respondent admits that the Commission of Inquiry has been defunct for some time. Nonetheless, the Applicant is not exonerated of its duty to exhaust local remedies in Foyalan. In *Silvia Arche and Others v Mexico,*[52] the IACtHR held that where the factors accounting for the prolongation of local remedies are not directly attributable to the Respondent State, the requirement to exhaust them would not be waived.[53] Since the defunctness of the commission is due to the dire consequences of COVID–19 on Foyalan's economy,[54] the requirement to exhaust cannot be waived in that the delay is unimputable to Foyalan. Therefore, local remedies were not exhausted.

Concerning the domestic servitude and sexual enslavement case, the facts reveal that under Foyalan law, if the Prosecutor refuses to press charges, a private prosecution can be instituted.[55] The rule is that where local remedies are available, an Applicant must at least attempt to exhaust them.[56] In this case, despite the fact that Foyalan law allowed for private prosecution, the Applicant did not even endeavor to explore it. In *Mulindahabi v Rwanda*,[57] an application was declared inadmissible because the Applicant did not

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[50] Facts, para 24.

[51] See generally, *Claude Oppong v Attorney–General and Another* [2017] GHASC 9.

[52] [2005] Application No 1176/03 [26]– [28].

[53] FIDH, 'Admissibility of Complaints before the African Court: Practical Guide' (2016) 56.

[54] Facts, para 24.

[55] Facts, para 22.

[56] *Diakité Couple v Mali* [2017] 2 AfCLR 118 [53].

[57] [2019] 3 AfCLR 367 [30]– [36].

attempt to exhaust local remedies available in Rwanda. To this end, the Respondent argues that the instant case is inadmissible.

Accordingly, the Respondent submits that the application is admissible in respect of the ban on traditional charcoal but inadmissible in the cases of the human trafficking, domestic servitude and sexual enslavement.

II. SUBMISSIONS ON THE MERITS OF THE CASE

A. THE BAN ON TRADITIONAL CHARCOAL

Admittedly, under Article 1 of the African Charter, State Parties have the duty to protect the rights guaranteed by the Charter. However, provided it is necessary and proportional,[58] a State may limit the rights of persons on grounds of 'collective security, morality and common interest'.[59] Moreso, State Parties have a greater duty to preserve the right of persons to life, health and satisfactory environment.[60] Based on these, the Respondent submits that the ban on traditional charcoal is necessary and proportional because it preserves the essentials of the right to life,[61] health and satisfactory environment of Foyalans [1]. Therefore, it does not violate the right to culture of the Nolos [2] nor undermines the best interests of the Nolo children [3].

(1) <u>The Ban on Traditional Charcoal is Necessary and Proportional</u>

The test of necessity is fulfilled if the limitation is compelled by public interest, social importance and outweighs the need for the enjoyment of the right restricted.[62] On the other hand, the test of proportionality is satisfied if there is a fair balance between the protection of the rights of persons and the wholistic interest of the society.[63] The Applicant

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[58] *Tanganyika Law Society and Others v Tanzania* [2013] 1 AfCLR 34 [107.1].

[59] African Charter, art 27(2).

[60] African Charter, arts 4, 16(1), 24.

[61] The fulcrum of all other rights: *Forum of Conscience v Sierra Leone* (1998) [19].

[62] *Ricardo Canese v Paraguay,* 31 August 2004 [96] (IACtHR).

[63] *Konaté* (n 17) [149].

contends that the tests of necessity and proportionality have been meet in the circumstances.

i. The ban satisfies the test of necessity

In its recent report on climate change, the IPCC observed that the rise in climate temperature is as a result of the increased emissions of the GHG which is caused *inter alia,* by deforestation resulting from agriculture and charcoal production.[64] Also, the WHO has reported that climate change poses a greater risk to human health, livelihood and the economy of countries.[65] It causes respiratory and cardiovascular diseases, heat related illnesses resulting in death, poverty, increased hunger, drought, forced displacement and loss of species.[66] Indeed, over 930 million (constituting 12% of the world's population) expend at least 10% of their household income on health care because of worsening climate conditions.[67] Even more disturbing is the catastrophic impact of climate change on the economy of countries. It is estimated that Africa lost $1.4 billion in revenue in 2018 because of climate change, and this heightened poverty in Africa.[68] With specific

[64] IPCC, '*Climate Change 2022: Mitigation of Climate Change*' (Working Group III contribution to the Sixth Assessment Report of the IPCC) 790.

[65] WHO, '*Climate Change and Health*', 30 October 2021<https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>accessed 8 June 2022.

[66] UN, '*Climate Action Fast Facts*'<https://www.un.org/en/climatechange/science/key-findings>accessed 8 June 2022.

[67] See text note 65.

[68] IPCC, '*Climate Change 2022: Mitigation of Climate Change*' 2583.

reference to the production and use of charcoal, each year, close to four million people die prematurely from illness attributable to household air pollution from inefficient cooking practices including charcoal.[69] Taking these into account, the Respondent argues that the ban on traditional charcoal is necessary to safeguard the environment, climate system and the lives, health and well–being of the Nolo people and Foyalans at large.

ii. The ban meets the test of proportionality

As argued above, the ban is necessary to safeguard the right to life, health and satisfactory environment of Foyalans. Considering this fact and also that currently, Foyalan's economy is impoverished owing to the dire consequences of the COVID–19,[70] to allow the continuous production and use of traditional charcoal in Foyalan will occasion greater destitution to Foyalan's economy, environment, and the health and life of its people. Thus, the ban obviates Foyalan of greater hardship that could result from worsening climate conditions. Clearly, on a scale, the benefits of the ban substantially outstrip its effect on the Nolo people. Though since the institution of the ban, Foyalan has not rolled out any diversion programme to create alternative employment for the Nolo people, it is submitted that since the duty to create employment is an incident of economic rights, its realization is subject to the economic situation in Foyalan.[71] In *Prince v South Africa*,[72] the Commission noted that by the doctrine of margin of appreciation, a state, in

[69] WHO, '*Household Air Pollution and Health 2021*', <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>accessed 8 June 2022.

[70] Facts, para 2.

[71] cf *Gunme and Others v Cameroon* [2009] AHRLR 9 [206].

[72] [2004] AHRLR 105 [51].

protecting the rights of its citizens, may do so having regard to its peculiar social, economic and political situation. As such, given the present sickened economy of Foyalan, the lack of a diversion programme does not make the ban disproportional. Therefore, the Applicant submits that the ban on traditional charcoal is justified.

(2) The Alleged Violation of the Right to Culture

The Respondent acknowledges its obligation to refrain from taking any action that interferes with people's right to culture contrary to Article 17(2) of the African Charter. The Respondent however contends that the ban on traditional charcoal is justified and therefore does not violate the right to culture of the Nolo people.

(3) The Ban advances the Best Interests of the Nolo Children

Article 4 of the ACRWC provides that the best interests of the child shall be paramount in all decisions taken by any person or authority. Children are the most vulnerable victims of climate change and its impact.[73] Therefore, since the Nolo children provide direct labour to their parents in producing the traditional charcoal,[74] the Respondent argues that the ban advances the best interest of the Nolo children. This is because it saves them from dire consequences of poor health and substandard quality of life resulting from the making and use of traditional charcoal and worsened climate temperature.

Accordingly, Foyalan has not violated the African Charter and ACRWC by banning traditional charcoal.

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[73] *Climate Change and Health* supra.

[74] Facts, para 7.

B. THE FAILURE TO HOLD BRAUN INC. AND ANSOM ACCOUNTABLE FOR HUMAN TRAFFICKING

The Respondent submits that Foyalan has not failed to protect Bourama, Massa, Alima, Omoma, Mariama and others against human trafficking [1]. Consequently, Foyalan has not violated rights guaranteed under the African Charter [2].

(1) Foyalan has not failed to Protect Bourama, Massa, Alima, Omoma, Mariama and others against Human Trafficking

The Respondent acknowledges its duty under Article 29 of the ACRWC and Articles 4(2)(g) and 6 of the Maputo Protocol and CEDAW respectively to protect children and women from human trafficking. Indeed, forming part of the duty to protect is the obligation to conduct investigations into allegations of human trafficking and make reparations. However, a state is only responsible for wrongs committed by private citizens if the state fails to conduct diligent and effective investigations.[75] In *Rodriguez v Honduras,*[76] the IACtHR ruled that in determining whether a state has discharged its due diligence obligations in respect of private violations, consideration must be given to the efforts that the State has exerted in conducting the investigations and holding the perpetrators accountable. Based on these, the Respondent argues that Foyalan has not failed to protect Bourama, Massa, Alima, Omoma, Mariama and others from human trafficking because (i) it has conducted and is still conducting effective investigations, and (ii) it duly prosecuted Ansom for human trafficking.

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[75] See *ZHR NGO Forum v Zimbabwe* [2006] AHRLR 128 [145].

[76] [1988] Series C No 4.

i. Foyalan has conducted and is still conducting effective investigations

Foyalan has conducted three different investigations into the allegations of human trafficking levelled against Ansom and Braun Inc. *First,* the Labour Inspector conducted an inspection on the premises of Braun Inc. but found no evidence of sex work, hazardous work or anything immoral as alleged.[77] Admittedly, the labour inspector put Ansom on notice before conducting the inspection.[78] However, this was in compliance with his duty to notify an employer or his representative before an inspection visit as dictated by international labour standards.[79] *Second,* a night raid conducted by the Department of Labour's Anti-Slavery Unit at Braun Inc.'s fishery was fruitless as no incriminating evidence was found as alleged.[80] *Third,* the Police Chief, Suame conducted investigations at Braun Inc.'s shed where the girls were allegedly held.[81] Again, no evidence was found to corroborate the allegations.[82] In his bid to get to the root of the alleged human trafficking, Suame sent out missing alerts to find the missing girls but without success.[83] Though Officer Bob, regrettably, informed Ansom of Suame's visit to Braun Inc.,[84] the Respondent argues that that in itself should not singularly overshadow

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[77] Facts, para 16.

[78] ibid.

[79] See ILO Inspection Convention, 1947 (No 81), art 12(2).

[80] Facts, para 17.

[81] Facts, para 22.

[82] ibid.

[83] ibid.

[84] ibid.

the diligent, prompt and serious posture of Foyalan in investigating the allegations of human trafficking. In *ZHR NGO Forum v Zimbabwe,*[85] the Commission noted that the mere fact that an investigation yielded an ineffective result or no result does not establish lack of due diligence by a state. Thus, despite the slight lapses in the investigative process, Foyalan has diligently and effectively conducted investigations into the allegations of human trafficking.

Aside the series of investigations already undertaken, Foyalan, as an assiduous state, has currently, set up a Commission of Inquiry to investigate and provide recommendations on how to deal with human trafficking in Foyalan if any.[86] The Commission has begun subpoenaing witnesses and documents.[87] This clearly proves Foyalan's unwavering commitment towards protecting persons from human trafficking if any exist in Foyalan.

ii. Foyalan duly Prosecuted Ansom for human trafficking

The facts show that the Prosecutor prosecuted Ansom for human trafficking relying on the testimonies of Mariama and Masa.[88] Mariama and Masa's evidence were dismissed for lack of credibility.[89] Mariama's evidence consisted partly of a series of hearsay in that

[85] [2006] AHRLR 128 [158] (emphasis added).

[86] Facts, para 24.

[87] ibid.

[88] Facts, para 22.

[89] Facts, para 23.

she was not a first–hand witness of the alleged drowning of Kofi.[90] All she proffered were told to her by Masa, a minor who suffers from acute trauma,[91] that impairs his mental faculties and his ability to recollect past events. Even the evidence of her pregnancy was not corroborated. Truthfully, Mariama requested for a paternity test.[92] Nonetheless, the paternity test would have only proved the father of her baby and would not have established any direct nexus to the circumstances under which she became pregnant except obscure conjectures. If Mariama's story was true, she could have requested the court to subpoena Mukwe, the supposed employee of Braun Inc. who took her to the hospital,[93] to corroborate her testimony. Although, unintelligently, the trial judge condescended on Mariama's moral character,[94] that did not in any way form the basis for rejecting her testimony as clearly Mariama's testimony was uncorroborated. Consequently, the Libre Regional Court was justified in dismissing Mariama and Masa's testimonies and thus, Ansom was duly prosecuted.

Therefore, the Respondent submits that Foyalan has not failed to protect Bourama, Massa, Alima, Omoma, Mariama and others from human trafficking.

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[90] Facts, para 19.

[91] Facts, para 23.

[92] Facts, para 21.

[93] Facts, para 19.

[94] Facts, para 23.

(2) The Alleged Violations of Rights under the African Charter

Foyalan acknowledges that human trafficking entails the violation of a bundle of rights such as the rights to dignity, liberty and freedom of movement.[95] However, since Foyalan has not failed to protect Bourama, Massa, Alima, Omoma, Mariama and others from human trafficking, it has not breached the rights to dignity, liberty and freedom of movement guaranteed by the African Charter under Articles 5, 6 and 12(1) respectively.

Accordingly, Foyalan has not violated the African Charter, ACWRC, Maputo Protocol and CEDAW by failing to hold Ansom and Braun Inc. accountable for human trafficking.

[95] UN HCHR, Human Rights and Human Trafficking (Fact Sheet No 36) 2014, p 4.

C. THE FAILURE TO HOLD META, THE PARENT COMPANY OF FACEBOOK AND INSTAGRAM, ACCOUNTABLE FOR DOMESTIC SERVITUDE AND SEXUAL ENSLAVEMENT

The Respondent argues that Foyalan was justified in refusing to hold Meta accountable because Meta did not facilitate the alleged domestic servitude and sexual enslavement [1] and thus, is immune under Foyalan law [2]. Consequently, Foyalan has not failed to protect Alima, Mariama, Omoma and the supposed recruited young men from domestic servitude and sexual enslavement [3].

(1) Meta did not Facilitate the Domestic Servitude and Sexual Enslavement

A State has the discretion to prescribe laws in fulfilment of its human rights obligations, taking into account its social, economic, and political situation.[96] In compliance with its international obligations,[97] Foyalan has enacted the Cybercrime Act 2019 that defines the conditions under which an internet intermediary such as Meta will be held liable for cybercrimes like publishing online, nudities of persons without consent.[98] By Article 67(2) of the Act, an internet intermediary commits an offence if it knowingly holds, publishes or caches an illegal material. Thus, in the instant case, Meta would have committed an offence if it knowingly allowed Ansom or other persons to use its platforms to perpetrate domestic servitude and sexual enslavement. Ansom's first ad was a call for applications

[96] *Prince* (n 72).

[97] Article 25(1) of the AUCC require that States legislate on cybersecurity.

[98] Cybersecurity Act 2019 of Foyalan (Annex I), art 67.

for live–in maids.[99] This was posted in English Language and there was nothing suggestive of any possible exploitation to warrant Meta to prevent its publication.[100] The second ad was done in the native Foyalani language and could not be detected by Meta's algorithms.[101] Clearly, Meta did not knowingly allow Ansom to use its platforms to publish the 'illegal ads'. In *Doe v GTE Corporation,*[102] it was noted being just a carrier of information, an internet intermediary must not be held liable for unknowingly transporting illegal information. Accordingly, since Meta did not know of the illegality in Ansom's ads, it did not facilitate the domestic servitude and sexual enslavement.

(2) Meta is Immune under Foyalan Law

The AU Cybersecurity Convention requires that States legislate and enforce laws against cybercrimes such as child pornography and unsolicited online nudity.[103] Even so, while observing human rights, States enjoy the discretion to define the conditions under which legal persons such as Meta will be charged and prosecuted for cybercrimes.[104] Consequently, in determining whether Foyalan should have charged and prosecuted Meta, a cursory analysis of Foyalan's Cybersecurity Act is apposite. Under Article 67(2) of the Act, an internet intermediary is immune for holding or caching an illegal material if

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[99] Facts, para 14.

[100] Facts, para 14.

[101] Facts, para 15.

[102] 347 F 3d 055 (7th Circuit, 1999)

[103] AUCC, art 29(3)(a).

[104] AUCC, art 25(1)(3).

(a) it has a robust prohibitive privacy policy; (b) it does not receive any financial benefits directly attributable to the illegal material; (c) it lacks knowledge on the illegal nature of the material; and (d) it swiftly removes the material on being aware of its illegal nature. The Respondent contends that all these conditions were met under Foyalan law. *First,* Meta prohibits the nonconsensual sharing of intimate images.[105] *Second,* Meta obtains direct financial benefits from only paid ads on its platforms.[106] Ansom's ads even if they generated any revenue to Meta, are indirect as they were not arranged "paid–for advertisements" between Meta and Ansom. *Third,* Ansom's first ad was unsuggestive of any illegality. His second ad which was in the native Foyalani language was undetected by Meta's algorithms.[107] Thus, Meta had no knowledge of the illegal character of the two ads. *Fourth,* Meta swiftly removed the ads on realizing their illegal objectives.[108] Based on these, any purported prosecution would have undermined Meta's right to fair trial contrary to Article 7 of the African Charter. Bearing in mind the duty to uphold the right to trial in fighting cybercrimes,[109] must Foyalan prosecute Meta though it is immune? Certainly not. Thus, Foyalan holds the view that by observing the right to fair trial,

[105] Meta's Ad Review Process and Policies<https://www.facebook.com/policies/ads/> accessed 5 June 2022.

[106] ibid.

[107] Facts, para 18.

[108] ibid.

[109] See AUCC, art 25(3).

prosecution must be based on founded liability. Therefore, Meta is immune under Foyalan law.

(3) <u>Foyalan has not Failed to Protect Alima, Mariama, Omoma and other young men from Domestic Servitude and Sexual Enslavement</u>

Article 18(3) of the African Charter obligates State Parties to protect the rights of women and children guaranteed in international conventions. Article 4(1) of the Maputo Protocol and Articles 15 and 27 of the ACRWC require that States protect women and children against forced labour and sexual exploitation including domestic servitude[110] and sexual enslavement respectively.[111] To the extent that Meta did not facilitate the alleged domestic servitude and sexual enslavement and thus, was immune, the Respondent submits that it has not failed to protect the girls and young men against domestic servitude and sexual enslavement.

Accordingly, Foyalan has not violated the African Charter, AUCC, ACRWC and Maputo Protocol by refusing to hold Meta accountable for facilitating domestic servitude and sexual enslavement.

[110] ILO Forced Labour Convention 1930 (No 29), art 2(1).

[111] UN Supplemental Protocol on Women and Child Trafficking, art 3(a).

III. SUBMISSIONS ON REPARATIONS

Admittedly, 'any breach of an engagement involves an obligation to make reparation'.[112] Thus, by Article 27(1) of Court's Protocol, where a violation of human or peoples' rights is established, the Court shall make orders to remedy the violation, including the payment of fair compensation, restitution, rehabilitation or guarantees of non–repetition.[113]

However, since in this matter, there is no violation of any obligation under the treaties Foyalan has ratified, the Respondent requests that (a) the Court declines the Applicant's prayer for reparation and (b) the Court orders the Applicant to bear all the cost incurred by the Respondent in this matter.

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[112] *Chorz´ow Factory* [1928] PCIJ Series A, No. 17 p. 29; James Crawford, *The ILC's Articles on State Responsibility* (Cambridge 2002) 147.

[113] See *Mtikila v Tanzania (reparations)* [2014] 1 AfCLR 72 [27].

CONCLUSION AND PRAYERS

In light of the foregoing submissions, the Respondent respectfully prays the Court to find, adjudge and declare:

1. That the Court has jurisdiction and the case is inadmissible.

2. That the ban on traditional charcoal by Foyalan does not violate the African Charter and other international human rights law.

3. That Foyalan has not violated the African Charter and other international human rights law by failing to hold Braun Inc. and Ansom accountable for human trafficking.

4. That Foyalan has not violated the African Charter and other international human rights law by failing to hold Meta accountable for facilitating domestic servitude and sexual enslavement.

Respectfully submitted,

Counsel for the Respondent.