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THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

ARUSHA, TANZANIA



IN THE MATTER BETWEEN

GOZANGA HUMAN RIGHTS ASSOCIATION (GoHRA)

(APPLICANT)

AND

THE STATE OF SENTSIFIA

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

JULY 30, 2023

LIST OF ABBREVIATIONS

ACCNN	African Convention on the Conservation of Nature and Natural Resources
ACmHPR	African Commission on Human and Peoples' Rights
AfCLR	African Court Law Reports
ACPCC	African Union Convention on Preventing and Combating Corruption
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLR	African Human Rights Law Reports
APDF	Association pour le Progrès et la Défense des Droits des Femmes
AU	African Union
BMJ	British Medical Journal
CADE	Convention Against Discrimination in Education
CCJE	Community Court of Justice, ECOWAS
CHR	Center for Human Rights
CHRAJ	Commission on Human Rights and Administrative Justice
CSMR	Centre for Sexual Minority Rights
CWILJ	California Western International Law Journal
ECtHR	European Court on Human Rights
FPB	Foreign Partnership Board
FSHS	Free Senior High School
GoHRA	Gozanga Human Rights Association
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IHRDA	The Institute for Human Rights and Development in Africa
ILC	International Law Commission
IRA	Impositions of Restrictions Act
NGLHRC	National Gay and Lesbian Human Rights Commission
NGO	Non–Governmental Organization
No	Number
OSP	Office of the Special Prosecutor
PCIJ	Permanent Court of International Justice
SERAC	Social and Economic Rights Action Center
SERAP	Socio–Economic Rights and Accountability Project
UIS	UNESCO Institute for Statistics
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Council
UNTS	United Nations Treaty Series
WHO	World Health Organisation
WLR	Weekly Law Report
YILC	Yearbook of the International Law Commission
ZHR	Zimbabwe Human Rights

INTERPRETATION

1. *The African Charter* means the African Charter on Human and Peoples' Rights.
2. *The African Court Rules* means the Rules of Court of the African Court on Human and Peoples' Rights.
3. *The African Charter on Public Values and Principles* means the the African Charter on Values and Principles of Public Service and Administration.
4. *The Articles on State Responsibility* means the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001.
5. *The Commission* means the African Commission on Human and Peoples' Rights.
6. *The Court* means the African Court on Human and Peoples' Rights.
7. *The Court's Protocol or African Court Protocol* means the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.
8. *The Nairobi Guidelines* means the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter.
9. *The Revised ACCNN* means the Revised African Convention on the Conservation of Nature and Natural Resources.

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QUESTIONS PRESENTED

GoHRA respectfully requests the Court to adjudge:

- I. Whether the Court has jurisdiction and the matter is admissible.
- II. Whether Sentsifia violated the African Charter and other international human rights norms by failing to hold Mr Putin Yeungo accountable for illegal mining and Mr Nsana Adongo accountable for corruption.
- III. Whether Sentsifia violated the African Charter and other relevant human rights treaties in its treatment of the children and GoHRA's 20 senior staff members at The Villa.
- IV. Whether Sentsifia violated the African Charter and other relevant international human rights law by its decision to run the FSHS policy only in the 150 less endowed schools.
- V. Whether Sentsifia violated the African Charter and other relevant international human rights law for refusing to register the Center for Sexual Minority Rights under the NGO Registration Act.

SUMMARY OF PLEADINGS

JURISDICTION AND ADMISSIBILITY

GoHRA submits that the Court has jurisdiction to hear the application. On admissibility, GoHRA submits that local remedies were exhausted in the illegal mining and CSMR cases and contends that the requirement to exhaust local remedies should be waived in the cases concerning Nsana's corruption, the street children and GoHRA's 20 senior members, and the FSHS policy because local remedies are inexistent, ineffective and unavailable respectively. Further, GoHRA implores the Court to admit the CSMR case although it was submitted 11 months after the exhaustion of local remedies.

MERIT A

GoHRA submits that Sentsifia violated the African Charter, the African Charter on Public Values and Principles, ACPCC, ICCPR and the Revised ACCNN for failing to prosecute Putin Yeungo for illegal mining and to compensate the victims of the illegal mining, and for failing to investigate and prosecute Nsana for corruption.

MERIT B

GoHRA submits that Sentsifia violated the African Charter, ACRWC and ICCPR by detaining and forcibly vaccinating the children and GoHRA's senior members at The Villa.

MERIT C

GoHRA submits that Sentsifia violated the right to education under the African Charter, ICCPR, ICESCR and UNESCO CADE by discriminatorily limiting the FSHS policy to only the 150 schools.

MERIT D

GoHRA submits that the refusal to register the CSMR under the NGO Registration Act is discriminatory and breaches the freedom of association of the CSMR members.

PLEADINGS

(I) JURISDICTION AND ADMISSIBILITY

A. JURISDICTION OF THE COURT

[1]. In every application before the Court, the Court must conduct a preliminary examination of its jurisdiction,¹ whether contested or not.² In *Mariam Kouma and Another v Mali*,³ the Court held that an application will only be heard if it successively satisfies itself that it has material, personal, temporal, and territorial jurisdiction.⁴ GoHRA submits that the Court has jurisdiction on all bases of jurisdiction to hear the application.

(1) **Material Jurisdiction**

[2]. The Court's material jurisdiction pertains to all matters concerning the application and interpretation of the African Charter, the Court's Protocol and other human rights instruments ratified by the Respondent State.⁵ The Court has material jurisdiction because all the matters submitted by GoHRA,⁶ call for the application and interpretation of the African Charter, the Court's Protocol, the African Charter on Public Values and Principles, ACPCC, ACRWC, UNCRC, UNESCO CADE, ICCPR, ICESCR, and the Revised ACCNN ratified by Sentsifia.⁷

¹ African Court Rules 2020, rule 49(1).

² *Wanjara v Tanzania* [2020] 4 AfCLR 673 [31].

³ [2018] 2 AfCLR 237 [25].

⁴ See also, *Jebra Kambole v Tanzania* [2020] 4 AfCLR 1 [16].

⁵ African Court Protocol, art 3(1).

⁶ Facts, [27].

⁷ Facts, [9].

(2) Personal Jurisdiction

[3]. The Court will have personal jurisdiction in an action instituted by an NGO if that NGO has observer status before the Commission and the state against whom the action is brought has made and deposited the Optional Declaration required under Article 34(6) of the Court's Protocol.⁸ As such, since Sentsifia, a party to the Court's Protocol,⁹ has deposited the Optional Declaration on 5 July 2019,¹⁰ and GoHRA has gained observer status with the Commission in February 2015,¹¹ the Court has personal jurisdiction.

(3) Temporal Jurisdiction

[4]. As far as time is concerned, the Court's jurisdiction extends to only those matters that occur 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.¹² The events leading to the alleged violations in the cases of the street children and GoHRA's senior staff members,¹³ the FSHS policy,¹⁴ and the CSMR¹⁵ occurred after Sentsifia had ratified the African Charter in 2005,¹⁶ the Court's Protocol in

⁸ African Court Protocol, art 5(3); *Yogogombaye v Senegal* [2009] AHRLR 315 [34].

⁹ Facts, [9].

¹⁰ *ibid.*

¹¹ Facts, [8].

¹² *African Commission v Kenya (Ogiek Case)* [2017] 2 AfCLR 9 [64].

¹³ Facts, [19], [22].

¹⁴ Facts, [5], [20].

¹⁵ Facts, [24]–[26].

¹⁶ Facts, [9].

2017,¹⁷ and deposited the Optional Declaration.¹⁸ Therefore, the Court has temporal jurisdiction. Admittedly, Sentsifia deposited the Optional Declaration under Article 34(6) of the Court's Protocol on 5 July 2019,¹⁹ a year after the illegal mining and the emergence of the events of Nsana's corruption, in June 2018.²⁰ Nonetheless, the Court has temporal jurisdiction. In *Kijiji Isiaga v Tanzania*,²¹ the Court held that where the alleged violation is continuous, it will have temporal jurisdiction. An alleged violation is continuous if having occurred earlier, it persists after the dates the African Charter, the Court's Protocol or Optional Declaration enters into force for the Respondent State.²² To this end, since the illegal mining and corruption subsisted even after Sentsifia deposited the Optional Declaration,²³ the Court has temporal jurisdiction.

(4) Territorial Jurisdiction

[5]. The Court will assume territorial jurisdiction if the alleged violations occurred within the territory of the Respondent State.²⁴ Since all the alleged violations emanate from the territory of Sentsifia, the Court has territorial jurisdiction.

[6]. Accordingly, GoHRA submits that the Court has jurisdiction to hear the application.

¹⁷ Facts, [9].

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Facts, [12].

²¹ [2018] 2 AfCLR 218 [37].

²² *Onyango and Others v Tanzania* [2016] 1 AfCLR 507 [66].

²³ Facts, [9], [12]–[15].

²⁴ *Konaté v Burkina Faso* [2014] 1 AfCLR 314 [41].

B. ADMISSIBILITY OF THE APPLICATION

[7]. GoHRA submits that the matter is admissible. Before considering its merits,²⁵ the Court is mandated to determine the admissibility of an application, having regard to the admissibility requirements under Article 56 of the African Charter.²⁶ An application is admissible if it meets all the admissibility requirements.²⁷ In this case, the requirements in contention are exhaustion of local remedies²⁸ and submission within reasonable time.²⁹ Therefore, GoHRA will address them in turn.

I. THE EXHAUSTION OF LOCAL REMEDIES

[8]. For an application to be admissible, an Applicant must exhaust all local remedies (i.e., ordinary judicial remedies) in the Respondent State,³⁰ unless they are unduly prolonged.³¹ However, local remedies must be available, effective and sufficient.³² Accordingly, where local remedies are unavailable, ineffective, insufficient or unduly prolonged, the Applicant will not be required to exhaust them.³³ On these bases, GoHRA submits that local remedies were exhausted in the cases of the illegal mining and the

²⁵ See *Ajavon v Benin* [2020] 4 AfCLR 133 [77]–[112].

²⁶ African Court Protocol, art 6(2).

²⁷ *Urban Mkandawire v Malawi* [2013] 1 AfCLR 283 [33].

²⁸ African Charter, art 56(5).

²⁹ African Charter, art 56(6).

³⁰ *Traore v Mali* [2020] 4 AfCLR 665 [40].

³¹ African Charter, art 56(5).

³² *African Commission v Libya* [2016] 1 AfCLR 153 [67].

³³ *Werema v Tanzania* [2018] 2 AfCLR 520 [40].

CSMR [1]; and that the requirement to exhaust local remedies should be waived in the cases concerning Nsana's corruption, the street children and GoHRA's senior members, and the FSHS policy [2].

(1) Local Remedies were Exhausted in the cases of the Illegal Mining and CSMR

[9]. An application is admissible if ordinary judicial remedies have been pursued to the apex court of the Respondent State.³⁴ *First*, regarding the illegal mining case, the facts reveal that on 15 January 2021, 'an association of potentially displaced persons sued in the High Court for compensation for loss of livelihood and an order for rehabilitation and relocation'.³⁵ The High Court awarded US\$ 3.5 million compensation to the association. 'The High Court's decision was upheld by the Court of Appeal in April 2022 and the Supreme Court in July 2022, following an appeal by the government'.³⁶ Despite this, the government has not complied with the judgment. Given that Sentsifia law does not allow any further right of appeal beyond the Supreme Court,³⁷ GoHRA submits that local remedies were exhausted in the circumstances. *Second*, in the case of the CSMR, Aisha challenged the decision of the Department of Social Welfare and Development not to register the CSMR before the Aseda High Court.³⁸ The High Court dismissed Aisha's action, upholding the reasons of the Department.³⁹ On appeal, the Court of Appeal and

³⁴ *Josiah v Tanzania* [2019] 3 AfCLR 83 [38].

³⁵ Facts, [14].

³⁶ *ibid*.

³⁷ Facts, [6].

³⁸ Facts, [26].

³⁹ *ibid*.

the Supreme Court affirmed the High Court's decision.⁴⁰ Consequently, local remedies were exhausted.

(2) The Requirement to Exhaust Local Remedies should be waived in the cases concerning Nsana's Corruption, the Street Children and GoHRA's Senior Members, and the FSHS Policy

[10]. Concerning Nsana's case, GoHRA argues that there were no remedies to exhaust. An Applicant is required to exhaust only ordinary judicial remedies in the Respondent State.⁴¹ Under Sentsifia law, the OSP is the body tasked to investigate and prosecute corruption allegations.⁴² These *investigative* and *prosecutorial* processes prescribed for corruption allegations do not qualify as ordinary judicial remedies considering that the decision to investigate and prosecute such allegations is a discretion vested in the OSP that an ordinary person has no control over.⁴³ In effect, under Sentsifia law, private persons like GoHRA do not have a cause of action in matters of corruption. Consequently, local remedies are inexistent and the requirement to exhaust them should be waived.

[11]. In the case of the street children and GoHRA's senior members, GoHRA argues that local remedies are ineffective. An Applicant is only required to exhaust local remedies where they are effective.⁴⁴ Local remedies are effective if they offer a prospect of

⁴⁰ Facts, [26].

⁴¹ *Ogiek Case* (n 12) [97].

⁴² See OSP Act (Annex I), s 5(a)(b).

⁴³ *ibid.*

⁴⁴ *Jawara v Gambia* [2000] AHRLR 107 [32].

success.⁴⁵ On 5 July 2021, after the High Court dismissed GoHRA's suit for want of standing,⁴⁶ it appealed to the Court of Appeal.⁴⁷ Yet, unlike other human rights matters (e.g., the illegal mining and CSMR cases), where the appeals were heard within three months from the date of submission,⁴⁸ 23 months (July 2021–May 2023) has elapsed and 'no date has been set for the hearing'.⁴⁹ The failure to set a hearing date is discriminatory and symptomatic of undue prolongation, and implies an averse posture of the Court not to hear GoHRA's appeal. Hence, local remedies are ineffective and the requirement to exhaust them should be waived.

[12]. Finally, regarding the FSHS case, GoHRA submits that local remedies are unavailable. An Applicant is obligated to exhaust local remedies where they are available.⁵⁰ Local remedies are available if they exist,⁵¹ and can be pursued without impediments.⁵² Under Sentsifia law, the decision of a public body can be challenged either in a constitutional action,⁵³ or in a human rights enforcement action where the

⁴⁵ *Jawara* (n 44) [32].

⁴⁶ Facts, [23].

⁴⁷ *ibid.*

⁴⁸ In the Illegal mining case, the appeal spanned from February to April 2021; and in the CSMR case, the appeal lasted from March to June 2022. See Facts, [14], [23].

⁴⁹ Facts, [23].

⁵⁰ *Jawara* [32].

⁵¹ *Purohit and Others v Gambia* [2003] AHRLR 96.

⁵² *Werema* (n 33) [40].

⁵³ Facts, [6].

decision violates the Bill of Rights.⁵⁴ However, neither of these avenues are available to GoHRA to challenge the government's decision to limit the FSHS policy to only 150 schools.⁵⁵ *First*, under Sentsifia law, only citizens can sue in the Supreme Court to question the constitutionality of a public body's decision.⁵⁶ Thus, juridical persons like GoHRA registered under Sentsifia laws,⁵⁷ are incapacitated to institute constitutional actions. *Second*, in human rights actions, Sentsifia law requires an Applicant to demonstrate a direct personal interest.⁵⁸ Indeed, this informed the dismissal of GoHRA's suit on behalf of the street children and its 20 senior members by the Aseda High Court.⁵⁹ Therefore, although the limited implementation of the FSHS policy is discriminatory and breaches the Bill of Rights,⁶⁰ GoHRA cannot sue for lack of standing.

[13]. In any event, the Bill of Rights recognises only the right to basic education,⁶¹ which covers only primary and junior secondary education.⁶² Accordingly, since the FSHS policy covers senior secondary education,⁶³ it is not justiciable under Sentsifia's constitution. As

⁵⁴ Facts, [6].

⁵⁵ Facts, [21].

⁵⁶ Facts, [6].

⁵⁷ Facts, [8].

⁵⁸ Constitution of Sentsifia (Annex I), art 33(1).

⁵⁹ Facts, [23].

⁶⁰ Facts, [4].

⁶¹ Facts, [4], [23].

⁶² UNESCO, *International Standard Classification of Education* (UIS 2011) 30, [123].

⁶³ Facts, [5].

such, pursuing local remedies would be an exercise in futility. For these reasons, local remedies are unavailable and the requirement to exhaust them should be waived.

II. SUBMISSION WITHIN REASONABLE TIME

[14]. An Applicant is required to submit the application within reasonable time from the date of exhausting local remedies.⁶⁴ Reasonable time is assessed on a case-by-case basis,⁶⁵ and the Court does not apply a fixed time limit.⁶⁶ Admittedly, the CSMR case was submitted 11 months (June 2022–May 2023) after the Supreme Court dismissed Aisha’s appeal.⁶⁷ However, since the issue of sexual orientation is a controversial novel subject within the African human rights system,⁶⁸ GoHRA obviously needed time to satisfy itself on whether the Department’s refusal to register the CSMR is compatible with Sentsifia’s human rights obligations. In *APDF and IHRDA v Mali*,⁶⁹ the Court ruled that four years and six months was reasonable time because the Applicants needed time to study the compatibility of the Person and Family Code with Mali’s human rights obligations. On the strength of this and the Court’s core mandate to protect human rights,⁷⁰ GoHRA urges the Court to find that 11 months is reasonable time and that the CSMR case is admissible.

[15]. Accordingly, GoHRA submits that the application is admissible.

⁶⁴ African Charter, art 56(6).

⁶⁵ *Gombert v Cote D’Ivoire* [2018] 2 AfCLR 270 [36].

⁶⁶ *Cheusi v Tanzania* [2020] 4 AfCLR 219 [65].

⁶⁷ Facts, [26].

⁶⁸ S Maguire, ‘The Human Rights of Sexual Minorities in Africa’ (2004) 35 *CWILJ* 1.

⁶⁹ [2018] 2 AfCLR 380 [54].

⁷⁰ *Johnson v Ghana* [2017] 2 AfCLR 155 [22].

(II) SUBMISSIONS ON THE MERITS OF THE CASE

A. THE ACCOUNTABILITY OF MR PUTIN YEUNGO FOR ILLEGAL MINING AND THE ACCOUNTABILITY OF MR NSANA ADONGO FOR CORRUPTION

[16]. GoHRA submits that Sentsifia violated the African Charter and other human rights norms by failing to hold Putin Yeungo accountable for illegal mining [I] and Nsana Adongo accountable for corruption [II].

I. THE FAILURE TO HOLD PUTIN YEUNGO ACCOUNTABLE FOR ILLEGAL MINING

[17]. The African Charter obligates State Parties to protect the rights enshrined under the Charter.⁷¹ This protective duty entails a due diligence obligation to *inter alia*, prosecute human rights violators,⁷² and afford the victims of human rights violations adequate remedies.⁷³ GoHRA submits that by failing to hold Putin Yeungo accountable, Sentsifia has breached its due diligence obligation to prosecute Putin Yeungo for illegal mining [1] and to recompense the victims of illegal mining [2]. Consequently, Sentsifia has violated the victims' rights to satisfactory environment and life [3] and to reparations [4].

(1) Sentsifia Breached its Duty to Prosecute Putin Yeungo for Illegal Mining

[18]. Under the African Charter, the state in whose territory a violation occurs bears the ultimate responsibility to prosecute.⁷⁴ As such, unless warranted by necessity, the duty to prosecute when it arises cannot be delegated.⁷⁵ In environmental conservation context,

⁷¹ African Charter, art 1; *Thomas v Tanzania* [2015] 1 AfCLR 465 [135].

⁷² *ZHR NGO Forum v Zimbabwe* [2006] AHRLR 128 [146].

⁷³ *ibid* [159]; UN Guiding Principles on Business and Human Rights (2011), Principle 25.

⁷⁴ *ZHR NGO Forum* (n 72) [70], [160].

⁷⁵ ILC, *The Obligation to Extradite or Prosecute* (2014) *YILC*, Vol II (Part Two), [9].

a state's duty to protect the environment⁷⁶ involves the prosecution of persons who degrade the environment.⁷⁷ Accordingly, given that Sentsifia has laws on illegal mining⁷⁸ and the courts to try Putin Yeungo,⁷⁹ his extradition to Camelot for prosecution⁸⁰ was needless and thus, constituted an unjustified entrustment of Sentsifia's duty to prosecute.

[19]. In any event, assuming *arguendo* that the extradition of Putin Yeungo to Camelot was necessary for the maintenance of the "Sentsifia–Camelot" alliance,⁸¹ Sentsifia has still failed to fulfill its duty to prosecute because Camelot failed to duly prosecute Putin Yeungo for illegal mining. Admittedly, Camelot tried, convicted and sentenced Putin Yeungo to 15 years imprisonment.⁸² However, Camelot has since granted him pardon.⁸³ GoHRA argues that the fact that Putin Yeungo was left off the hook despite the conviction and sentence makes a mockery of the trial. In fact, the pardon granted to Putin Yeungo is tantamount to impunity – a thing that the AU principles⁸⁴ and the African Charter⁸⁵

⁷⁶ See Revised ACCNN, art 2; *SERAC v Nigeria* [2001] AHRLR 60 [52].

⁷⁷ *SERAP v Nigeria*, Application No ECW/CCJ/APP/08/09 (14 December 2012), [97] (CCJE).

⁷⁸ Minerals and Mining Act 2002 (Act 589) (Annex I).

⁷⁹ Facts, [6].

⁸⁰ Facts, [13].

⁸¹ Facts, [3].

⁸² Facts, [13].

⁸³ *ibid.*

⁸⁴ AU Constitutive Act, art 4(o).

⁸⁵ *Thomas v Uganda*, Communication No 431/12 (22 February 2018) [288].

ardently frowns upon. In principle, the object of prosecution, conviction and sentence of a human rights violator is to punish him and to deter others from violating rights.⁸⁶ Therefore, clemencies that nullify punishment for human rights violations fall afoul of the duty to prosecute and thus, impermissible under the African Charter.⁸⁷ To that extent, Camelot failed to duly prosecute Putin Yeungo for illegal mining by granting him pardon.

[20]. Consequently, Sentsifia breached its duty to prosecute Putin for illegal mining.

(2) Sentsifia Breached its Duty to Compensate the Victims of the Illegal Mining

[21]. Under their lease agreement, Putin Yeungo's companies, Adryx Ltd and Angold PLC undertook 'to ensure an environmentally-friendly ecosystem while they are engaged in mining'.⁸⁸ These two companies retain US\$ 5 trillion annual net profit.⁸⁹ Against this background, when they engaged in the illegal mining that decimated the 'local habitats', forest, inland waters, rivers and farms' of persons,⁹⁰ a claim for compensation for the victims, jointly and severally against Putin Yeungo and his companies was apposite. Even so, Sentsifia failed to enforce any action against them contrary to its obligation to provide adequate compensation for the victims for the harm caused by the two companies.⁹¹ This failure breaches Sentsifia's obligation to compensate the victims. Though Sentsifia's

⁸⁶ ICJ, *The Right to Remedy and Reparation for Gross Human Rights Violations: Practitioners Guide No 2, Revised Edition* (2018) 215, 219.

⁸⁷ See *ZHR NGO Forum* [192].

⁸⁸ Facts, [10].

⁸⁹ *ibid.*

⁹⁰ Facts, [12], [14].

⁹¹ *ZHR NGO Forum* [146], [159]; UN Guiding Principles (n 73), Principle 25.

Court awarded US\$ 3.5 million damages to the victims,⁹² and Camelot has also pledged to compensate the victims,⁹³ they do not *per se* remedy Sentsifia's breach as neither the damages nor Camelot's pledge have been paid.⁹⁴

(3) Sentsifia has Violated the Victims' Rights to Satisfactory Environment and Life

[22]. Article 24 of the African Charter guarantees the right to satisfactory environment and obligates states to conserve the environment⁹⁵ and to prevent land degradation.⁹⁶ Likewise, Article 4 of the African Charter and Article 6(1) of the ICCPR guarantee the right of persons to life and imposes a duty on states to protect the natural environment.⁹⁷ By failing to hold Putin Yeungu accountable for illegal mining despite the environmental deterioration,⁹⁸ Sentsifia has violated the rights to satisfactory environment and life.

(4) Sentsifia has Violated the Victims' Right to Reparations

[23]. Victims of human rights violations have the right to reparations.⁹⁹ States are thus bound to provide prompt and effective remedies to victims of human rights violations.¹⁰⁰ Sentsifia's unjustified failure to compensate the victims of illegal mining is a violation of their right to reparations.

⁹² Facts, [14].

⁹³ Facts, [13].

⁹⁴ Facts, [13], [14].

⁹⁵ Revised ACCNN, art 2(1).

⁹⁶ Revised ACCNN, art 6(1).

⁹⁷ ACmHPR, General Comment No 3: *The Right to Life* (Article 4) 2015, [3].

⁹⁸ Facts, [12].

⁹⁹ ICCPR, art 2(3)(a).

¹⁰⁰ *SERAC* (n 76) [46].

II. THE FAILURE TO HOLD NSANA ADONGO ACCOUNTABLE FOR CORRUPTION

[24]. GoHRA submits that by failing to hold Nsana accountable, Sentsifia has breached its duty to combat corruption [1] and therefore violated the right to development [2].

(1) Sentsifia has Breached its Duty to Combat Corruption

[25]. States have the duty to combat corruption.¹⁰¹ Corruption includes illicit enrichment (i.e., an unexplainable increase in the wealth of a public official).¹⁰² The duty to combat corruption entails an obligation to effectively investigate and prosecute corruption allegations.¹⁰³ Sentsifia has breached this duty because it has failed to conduct effective investigations into the corruption allegations levelled against Nsana. An investigation is effective if it is carried out with reasonable expedition, transparent and conducted by an impartial body.¹⁰⁴ Admittedly, Sentsifia's CHRAJ investigated Nsana and found him inculpable of corruption.¹⁰⁵ However, this investigation was a sham. Indeed, the fact that the High Court ordered the OSP to reinvestigate Nsana following the Attorney-General's application,¹⁰⁶ proves that CHRAJ's investigation was ineffective. Aside this, the OSP's investigation is also ineffective because it has unduly prolonged. The OSP's investigation has lingered for almost two years (July 2021–May 2023);¹⁰⁷ it has not published any

¹⁰¹ African Charter on Public Values and Principles, art 12(1); ACPCC, art 2(1).

¹⁰² ACPCC, arts 1, 4(1)(g).

¹⁰³ IACHR, Corruption and Human Rights in the Americas (6 December 2019) 99, [263].

¹⁰⁴ *ZHR NGO Forum* [91].

¹⁰⁵ Facts, [15], [17].

¹⁰⁶ Facts, [17].

¹⁰⁷ Facts, [17], [27].

progress report nor assigned any reasons for the delay. Accordingly, the investigation is unduly prolonged and thus, ineffective. Consequently, Sentsifia has breached its duty to combat corruption.

(2) Sentsifia Violated the Right to Development

[26]. Article 22(2) of the African Charter guarantees the right to development. In this regard, states are duty-bound to combat corruption and all public irregularities.¹⁰⁸ The laws of Sentsifia insist that 35% of the royalties received by the FPB be invested in rural infrastructure, industry and development.¹⁰⁹ As such, by failing to hold Nsana accountable for corruption, Sentsifia has violated the right to development of the rural communities.

[27]. Accordingly, Sentsifia violated the African Charter, the African Charter on Public Values and Principles, ACPCC, ICCPR and the Revised ACCNN by failing to hold Putin Yeungo accountable for illegal mining and Nsana Adongo for corruption.

¹⁰⁸ ACPCC, art 2(1).

¹⁰⁹ Facts, [10], [11].

B. THE TREATMENT OF THE CHILDREN AND GoHRA's 20 SENIOR MEMBERS

[28]. GoHRA submits that Sentsifia violated the African Charter and other human rights treaties in its treatment of the Children [I] and GoHRA's senior members [II].

I. THE TREATMENT OF THE CHILDREN AT THE VILLA

[29]. States have the duty to advance the best interest of children¹¹⁰ and to protect their rights.¹¹¹ The detention of the children at The Villa undermined their best interest [1] and the forcible vaccination of the children violates their right to health [2].

(1) The Detention of the Children at The Villa Undermined their Best Interest

[30]. The best interest principle requires that states take measures that safeguard children's rights and contribute effectively to the psychological well-being and holistic development of children.¹¹² In this case, Sentsifia detained the children at The Villa, together with GoHRA's 20 arrested senior members.¹¹³ The Villa, one of the prisons that interned transgressors during the Covid-19 pandemic,¹¹⁴ is surrounded by high walls and heavily guarded.¹¹⁵ Medically, detaining children together with adults in an environment such as The Villa exposes them to emotional distress, trauma and fear and disturbs their mental health and character orientation.¹¹⁶ Accordingly, by detaining the children at The

¹¹⁰ ACRWC, art 4; UNCRC, art 3.

¹¹¹ African Charter, art 18(3).

¹¹² *CHR and RADDHO v Senegal* [2015] Application No 001/2012 [34] (ACERWC).

¹¹³ Facts, [19].

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ UNHRC, Report of the Special Rapporteur (*Juan E Mendez*) on Torture 2015, [16].

Villa, for six months (14 April–14 October 2020),¹¹⁷ Sentsifia breached the best interest principle.

[31]. Further, Sentsifia has the duty to place unaccompanied children in foster homes or other suitable institutions for their care.¹¹⁸ Therefore, granted that Sentsifia rounded up the children to insulate them of the Covid–19 disease, it should have housed them in a foster home or other suitable institution. By detaining them at The Villa instead, Sentsifia violated the children’s right to an alternative family care¹¹⁹ and hindered their best interest. In any event, the return of the children to the street¹²⁰ violates Sentsifia’s duty to trace and reunite the children with parents or relatives.¹²¹ Hence, Sentsifia undermined the best interest of the children.

(2) The Forcible Vaccination of the Children Violates their Right to Health

[32]. The right to health of every child is guaranteed.¹²² This right comprises children’s autonomy over their own body and the right to be free from unwarranted interference, including non–consensual medical treatment.¹²³ Despite their protestations, Sentsifia vaccinated all the children without testing.¹²⁴ For the lack of consent, the vaccination of the children was forcible. Sentsifia therefore, violated their right to health.

¹¹⁷ Facts, [19], [22].

¹¹⁸ ACRWC, art 25(2)(a).

¹¹⁹ *ibid.*

¹²⁰ Facts, [22].

¹²¹ ACRWC, art 25(2)(b).

¹²² African Charter, art 16.

¹²³ ACmHPR, *Nairobi Guidelines* (November 2010), [64]–[65].

¹²⁴ Facts, [22].

II. THE TREATMENT OF GoHRA's 20 SENIOR MEMBERS AT THE VILLA

[33]. GoHRA submits that the detention of its 20 senior members was arbitrary [1] and the forcible vaccination violates the rights of its 20 senior members [2].

(1) The Detention of GoHRA's 20 Senior Members at The Villa was Arbitrary

[34]. 'Every individual has the right to liberty and to the security of his person'.¹²⁵ In this regard, the arbitrary arrest and detention of persons is prohibited.¹²⁶ An arrest and detention is arbitrary if it is not justified by law¹²⁷ or followed with due process.¹²⁸ The arrest and detention of GoHRA's senior members at The Villa is arbitrary because (i) the Presidential Directive, based on which they were arrested was an unjustified derogation measure; and (ii) in any event, Sentsifia did not observe due process.

i. The Presidential Directive was an unjustified derogation measure

[35]. To prevent the violation of rights,¹²⁹ derogation measures that temporarily limit or detract from the rights provided by the African Charter in emergency situations are impermissible.¹³⁰ The Presidential Directive, which banned gatherings, public transports, and civil activism to contain the Covid-19 disease¹³¹ is an impermissible derogation measure because it indefinitely restricted the freedoms of movement, and expression of

¹²⁵ African Charter, art 6.

¹²⁶ *ibid.*

¹²⁷ *Onyachi and Njoka v Tanzania* [2017] 2 AfCLR 65 [132].

¹²⁸ *Mallya v Tanzania* [2019] 3 AfCLR 482 [64], [65].

¹²⁹ *Constitutional Rights Project and Another v Nigeria* [2000] AHRLR 191 [41].

¹³⁰ *Commission Nationale v Chad* [2000] AHRLR 66 [21].

¹³¹ Facts, [19].

persons for six months in the major cities of Sentsifia.¹³² Because derogations are impermissible under the African Charter, the Presidential Directive was unlawful.

[36]. GoHRA acknowledges that the outbreak of the Covid-19 in Sentsifia warranted the implementation of some containment measures. Even so, the defence of necessity does not avail Sentsifia. Necessity precludes the wrongfulness of a state's conduct if that conduct was the only means to safeguard an essential interest against a grave and imminent peril and the state did not cause or contribute to the peril.¹³³ *First*, the Directive was not the only means to contain the spread of the Covid-19 disease in Sentsifia. Rather than the Directive, the government could have implemented the WHO safety precautions which comprises social distancing, handwashing, nose masking, and hand sanitising, that are proven to be effective.¹³⁴ *Second*, Sentsifia contributed to the outbreak of the Covid-19 disease by failing to close its air routes and by celebrating the "Year of Return" festival which saw influx of over 13,000 Sentsifians in the diaspora.¹³⁵ The defence of necessity therefore, cannot avail Sentsifia.

[37]. Consequently, the Presidential Directive was an unjustified derogation measure.

ii. In any event, Sentsifia did not observe due process

[38]. Where arrested and detained for a transgression, a person must be processed and tried within reasonable time before an impartial tribunal.¹³⁶ Sentsifia arrested GoHRA's

¹³² Facts, [19], [22].

¹³³ Articles on State Responsibility, art 25(1)(2).

¹³⁴ Paul Glasziou et al, 'Public Health Measures for Covid-19' (2021) *BMJ* 375

¹³⁵ Facts, [18].

¹³⁶ African Charter, art 7(1)(d).

senior members for flouting the Presidential Directive.¹³⁷ Without any charge or trial, they were detained at The Villa for seven months and two days (14 April–16 November 2020).¹³⁸ The failure to indict them for any offence made their detention at The Villa, an arbitrary imprisonment.

[39]. Therefore, the detention of GoHRA's 20 senior members at The Villa was arbitrary.

(2) The Forcible Vaccination Violates the Right of GoHRA's 20 Senior Members

[40]. Every person has the freedom of thought and conscience including religious freedom¹³⁹ and the right to determine one's course of life.¹⁴⁰ In fact, every adult has the right to decide whether to submit to a medical process or not.¹⁴¹ This is notwithstanding the strong public interest to preserve life and health of all citizens.¹⁴² Sentsifia conditioned the release of GoHRA's staff members on the vaccination.¹⁴³ Accordingly, the vaccination of GoHRA's staff members was coercive and thus, violated their freedom of thought and conscience.

[41]. Accordingly, Sentsifia violated the African Charter, ACRWC, ICCPR and UNCRC in its treatment of the Children and GoHRA's 20 senior members at The Villa.

¹³⁷ Facts, [19].

¹³⁸ Facts, [19], [22].

¹³⁹ African Charter, art 8; ICCPR, art 18(1).

¹⁴⁰ See *Jehovah's Witnesses of Moscow v Russia* [2010] Application No 302/02 (ECtHR).

¹⁴¹ *In re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782 (per Lord Donaldson).

¹⁴² *ibid.*

¹⁴³ Facts, [22].

C. THE LIMITATION OF THE FSHS POLICY TO 150 LESS ENDOWED SCHOOLS

[42]. GoHRA submits that the limitation of the FSHS policy is discriminatory [1] and violates the right to education [2].

(1) The Limitation of the FSHS Policy is Discriminatory

[43]. Discrimination against persons is prohibited.¹⁴⁴ Thus, every person is entitled to equal treatment without distinction as to social origin.¹⁴⁵ A limitation policy based on social origin which impairs the equality of treatment in education is discriminatory.¹⁴⁶ Therefore, the limitation of the FSHS policy to only the 150 less endowed schools to the exclusion of schools in the major cities and semi-urbanised towns,¹⁴⁷ is discriminatory.

[44]. GoHRA admits that the right to education, an Economic, Social and Cultural Right, must be progressively realised having regard to a state's available resources.¹⁴⁸ Undeniably, the outbreak of the Covid-19 put Sentsifia in economic difficulties.¹⁴⁹ Nonetheless, Sentsifia is not justified in limiting the FSHS policy because it had viable alternatives to generate funds for the full implementation of the policy. *First*, Sentsifia could have capitalized on its precious Hugono tree which is primarily used for producing immune boosters and drugs for respiratory related diseases.¹⁵⁰ As the Covid-19 is a

¹⁴⁴ African Charter, art 2; ICCPR, art 2.

¹⁴⁵ *ibid*; *Ogiek Case* [137].

¹⁴⁶ UNESCO CADE, arts 1, 3(a).

¹⁴⁷ Facts, [21].

¹⁴⁸ *Gunme and Others v Cameroon* [2009] AHRLR 9 [206]; *Ajavon* (n 25) [136].

¹⁴⁹ Facts, [18], [20].

¹⁵⁰ Facts, [2].

respiratory disease,¹⁵¹ capitalizing on the Hugono trees during the peak of the Covid–19¹⁵² would have attracted foreign investment and generated revenue for Sentsifia since it is ‘a foreign investment hub’.¹⁵³ *Second*, Sentsifia could have narrowed the scope of the FSHS policy. For instance, it could have sponsored only feeding or tuition. This would have significantly reduced costs and generated returns for disbursement to the other schools. Given these alternatives, the limitation of the FSHS policy is not necessary and is thus, unjustified.

[45]. Consequently, the limitation of the FSHS policy is discrimination in education.

(2) **The Limitation of the FSHS Policy Violates the Right to Education**

[46]. ‘Every individual has the right to education’.¹⁵⁴ This right obligates states to ensure equal treatment in access to education.¹⁵⁵ On this basis, given that the limitation of the FSHS policy is discriminatory, Sentsifia has violated the right to education of the pupils of the other 12,850 schools not covered by the policy.

[47]. Accordingly, Sentsifia violated the African Charter, ICCPR, ICESCR, and UNESCO CADE in limiting the FSHS policy to the 150 less endowed schools.

¹⁵¹ <https://www.who.int/health-topics/coronavirus#tab=tab_1>accessed 11 June 2023.

¹⁵² Facts, [18]–[20].

¹⁵³ Facts, [10].

¹⁵⁴ African Charter, art 17(1); ICESCR, art 13(1).

¹⁵⁵ *Nairobi Guidelines* (n 123) [71].

D. THE REFUSAL TO REGISTER THE CSMR UNDER NGO REGISTRATION ACT

[48]. GoHRA submits that the non-registration of the CSMR is discriminatory [1] and violative of the freedom of association [2].

(1) The Non-registration of the CSMR is Discriminatory

[49]. All persons are entitled to equal protection of the law.¹⁵⁶ As such, discrimination against persons on grounds of sex,¹⁵⁷ including sexual orientation¹⁵⁸ is prohibited. Sentsifia discriminated against the CSMR because despite registering 350 NGOs in 2022,¹⁵⁹ Sentsifia refused Aisha's application to register the CSMR on grounds that its objectives are discordant with the Sentsifian Constitution.¹⁶⁰

[50]. Indeed, the Sentsifian Constitution¹⁶¹ reinforces Sentsifia's duty under the African Charter to promote and protect moral and traditional values.¹⁶² Even so, public morals is not a justifiable ground to limit the rights of LGBTIQ+ persons to equal protection of the law and non-discrimination.¹⁶³ In *Eric Gitari v NGO Board et al*,¹⁶⁴ the Kenyan High Court held that the refusal to register the NGLHRC on moral grounds was unjustified, noting

¹⁵⁶ African Charter, art 3(2).

¹⁵⁷ African Charter, art 2.

¹⁵⁸ *ZHR NGO Forum* [169]; *Toonen v Australia*, [1994] Communication No 488/1992 [8.4].

¹⁵⁹ Facts, [4].

¹⁶⁰ Facts, [26].

¹⁶¹ Constitution of Sentsifia (Annex I), art 75(1).

¹⁶² African Charter, art 17(3).

¹⁶³ *Zhdanov and Others v Russia*, 16 July 2019 [152], [155] (ECtHR).

¹⁶⁴ [2013] Petition No 440 – Affirmed by the Kenyan Supreme Court on appeal.

that moral or religious beliefs, no matter how strongly held, cannot be a basis for limiting rights. Similarly, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁶⁵ Justice Ackermann opined that the enforcement of the private moral views of a section of the community, which are based largely on nothing more than prejudice, cannot qualify as a legitimate purpose. In this regard, a state is obligated to harmonise its internal morals and traditional values with its human rights obligations under the African Charter.¹⁶⁶ Therefore, the refusal to register the CSMR because of Sentsifia's bid to uphold its cultural values,¹⁶⁷ is without reasonable and legitimate purpose. In the *Ogiek Case*, the Court underscored that discrimination is only justifiable if it is reasonable and pursues a legitimate purpose.¹⁶⁸ Accordingly, the refusal to register the CSMR is unjustified.

[51]. Consequently, Sentsifia discriminated against the CSMR in refusing to register it.

(2) Sentsifia has Violated the Freedom of Association

[52]. The freedom of association of all persons¹⁶⁹ including the right to form LGBTIQ+ advocacy groups¹⁷⁰ is recognised. By discriminating against the CSMR, Sentsifia has violated the freedom of association of CSMR members.

[53]. Accordingly, Sentsifia violated the African Charter and ICCPR in refusing to register the CSMR under the NGO Registration Act.

¹⁶⁵ [1998] ZACC 15 [37] (South Africa Constitutional Court).

¹⁶⁶ See *APDF* (n 69) [116]–[125] (emphasis added).

¹⁶⁷ Facts, [2], [4], [26].

¹⁶⁸ *Ogiek Case* [139].

¹⁶⁹ African Charter, art 10(1); ICCPR, art 22(1).

¹⁷⁰ *Gay Alliance of Students v Matthews* [1976] 544 F 2d 162.

(III) SUBMISSIONS ON REPARATIONS

[54]. Under international law, ‘any breach of an engagement involves an obligation to make reparation’.¹⁷¹ Thus, by Article 27(1) of the Court’s Protocol, where a violation of human or peoples’ rights is established, the Court shall grant reparations, including the payment of compensation, restitution or guarantees of non–repetition.¹⁷²

[55]. Compensation lies to address pecuniary losses like loss of profit, livelihoods and employment opportunities,¹⁷³ and moral injuries like loss of dignity, psychological harm and inconvenience,¹⁷⁴ occasioned by the violation. Regarding restitution, it seeks to restore the victims to their pre–violation status.¹⁷⁵ Finally, guarantees of non–repetition may lie to compel the responsible state to investigate and prosecute the perpetrators of the violations or to nullify an impugned legislation.¹⁷⁶

[56]. Accordingly, since Sentsifia has breached the African Charter and other human rights instruments, GoHRA requests the Court to order Sentsifia to (a) hold Putin Yeungo accountable for illegal mining under Sentsifia law; (b) compensate the victims of the illegal

¹⁷¹ *Chorz’ow Factory* [1928] PCIJ Series A, No. 17, p. 29; James Crawford, *The ILC’s Articles on State Responsibility* (Cambridge 2002) 147.

¹⁷² See *Mtikila v Tanzania (reparations)* [2014] 1 AfCLR 72 [27].

¹⁷³ *Gomes Lund v Brazil*, 24 November 2010 [287] (IACtHR).

¹⁷⁴ *Mtikila* (n 172) [33]–[36].

¹⁷⁵ *Assanidze v Georgia* [2004] Application No 715/03 [198] (ECtHR).

¹⁷⁶ *Norbert Zongo v Burkina Faso (reparations)* [2015] 1 AfCLR 258 [101]–[111].

mining for loss of livelihood and inconvenience and restore them to gainful livelihood; (c) expedite investigations and prosecute Nsana for corruption; (d) compensate the children and GoHRA's 20 senior members for the psychological harm and distress, resulting from the detention at The Villa and forcible vaccination; (e) extend the FSHS policy to the remaining 12850 schools; and (f) to repeal the Unnatural Offences Act and Article 75(1) of the Sentsifian Constitution.

CONCLUSIONS AND PRAYERS

[57]. In light of the foregoing submissions, GoHRA respectfully prays this Honourable Court to find, adjudge and declare that:

- I.** The Court has jurisdiction and the matter is admissible.
- II.** Sentsifia violated the African Charter and other international human rights norms by failing to hold Mr Putin Yeungo accountable for illegal mining and Mr Nsana Adongo accountable for corruption.
- III.** Sentsifia violated the African Charter and other relevant human rights treaties in its treatment of the children and GoHRA's 20 senior staff members at The Villa.
- IV.** Sentsifia violated the African Charter and other relevant international human rights law by its decision to run the FSHS policy only in the 150 less endowed schools.
- V.** Sentsifia violated the African Charter and other relevant international human rights law for refusing to register the Center for Sexual Minority Rights under the NGO Registration Act.

Respectfully submitted,
COUNSEL FOR GoHRA, THE APPLICANT.