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THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER BETWEEN

LEAVE US ALONE (LUA)

AND

THE REPUBLIC OF BENTARIA

MEMORIAL FOR THE APPLICANT

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List of Abbreviations

<i>ACERWC</i>	African Committee of Experts on the Rights and Welfare of the Child
<i>ACRWC</i>	African Charter on the Rights and Welfare of the Child
<i>ECHR</i>	European Court on Human Rights
<i>EU Convention</i>	European Convention on Human Rights
<i>CAT</i>	UN Convention against Torture
<i>Charter</i>	African Charter on Human and People's Rights
<i>Court</i>	African Court on Human and People's Rights
<i>Commission</i>	African Commission on Human and People's Rights
<i>CRC</i>	Convention on the Rights of the Child
<i>ICCPR</i>	International Covenant on Civil and Political Rights
<i>ICPPED</i>	International Convention on the Protection of People from Enforced Disappearances
<i>ILC Draft Articles</i>	International Law Commissions Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2011
<i>Maputo Protocol</i>	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
<i>OAU Refugee Convention</i>	Convention Governing the Specific Aspects of Refugee Problems in Africa
<i>1951 Refugee Convention</i>	UN Convention Relating to the Status of Refugees
<i>Protocol</i>	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights Protocol

UN DTA	UN Declaration on Territorial Asylum
UNHCR	United Nations High Commissioner for Refugees
Vienna Convention	Vienna Convention on the Law of Treaties

List of Authorities

International Treaties and Conventions

African Charter on Human and Peoples' Rights
African Charter on the Rights and Welfare of the Child
African Union Constitutive Act
Convention on the Rights of the Child
European Convention on Human Rights
Inter-American Convention on Human Rights
International Convention for the Protection of All Persons from Enforced
Disappearance
International Convention on Civil and Political Rights
International Law Commission Draft Articles on State Responsibility for Internationally
Wrongful Acts 2011
Organisation of Africa Unity Convention Governing Specific Aspects of Refugee
problems in Africa
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of
an African Court on Human and Peoples' Rights
Protocol to the African Charter on Human and Peoples' Rights on the Rights of
Women in Africa
Rome Statute of the International Criminal Court
Rules of the African Court on Human and Peoples' Rights
United Nations Convention Relating to the Status of Refugees
United Nations Convention on the Law of the Sea
Vienna Convention on the Law of Treaties

Case Law

International Case Law

Abubakari v Tanzania (007/2013)[2013] AFCHPR (35)

African Institute for Human Rights and Development v Guinea (2204) AHRLR 57 (ACHPR 2004).

Article 19 and others v Zimbabwe (2010) AHRLR 126 (ACHPR 2010).

Bankovic v Belgium Application no. 52207/99, 12 December 2001.

Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011)

France v Turkey 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) par 57.

Free Legal Assistance Group and Others v Zaire (100/93) [1995] ACHPR 9

Gunme and Others v Cameroon (2009) AHRLR (9)

Madoui v Algeria (2008) AHRLR 3 (HRC 2008)

Media Rights Agenda v Nigeria Communication No. 224/1998, at par 71.

Michelot Yogogombaye v The Republic of Senegal (2009) AHRLR 315 (ACtHPR 2009)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)

Italy v Morocco ('Phosphates of Morocco case') Merits Judgment, 1938 PCIJ, Series A/13 No.74

Jawara v. The Gambia Communication 147/95 et 147/96(2000) RADG 107(ACHPR 2000)

P. M. v Bulgaria Application No. 49669/07 of the European Court of Human Rights, judgment of 24 June 2012

Priscilla Njeri Echaria v Kenya Communication 375/09375/09

Rev. Christopher R Mtilika v United Republic of Tanzania (011/2011).

Tahsin Acar v Turkey Application no. 26307/95.

The Institute for Human Rights and Development in Africa & Finders Group Initiative on Behalf of the TFA (A Minor) v Cameroon Communication No. 001/2018

The Institute for Human Rights and Development in Africa v Angola Communication 292/04

The Institute for Human Rights and Development in Africa v Guinea Communication No. 249/02

Velasques v Honduras Merits Judgment, IACHR Reports 1988

Wackenheim v France, Application No. 854/1999

Zimbabwe Human Rights NGO Forum v Zimbabwe 245/02

Soft law Instruments

Advisory Opinions

United Nations High Commissioner Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol

General Comments

African Commission General Comment No. 3 on the African Charter on Human and Peoples' Rights: the Right to Life (Article 4) (2016).

The Human Rights Committee General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights on Right to Life (2016).

The Human Rights Committee General Comment No. 35- Article 9: On Right to Liberty and Security of person (2014).

Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, 2017.

Resolutions and Guidelines

African Commissions Resolution 375 on the Right to Life (LX 2017)

United Nations High Commissioner for Refugees Handbook on Procedures and Guidelines to Determine Refugee Status.

United Nations High Commissioner for Refugees. 2018. A Guide to International Refugee Protection and Building State Asylum Systems.

United Nations High Commissioner for Refugees. 2012. *Detention Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention.*

United Nations High Commissioner for Refugees. A guide to international refugee protection and building state asylum systems Handbook for Parliamentarians No 27, 2017.

African Commissions Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.

SUMMARY OF ARGUMENTS:

1. The Applicant complains on behalf of Ferana Ditori, asylum seekers from Peradilia street children and Khali Bozozo whose rights enshrined within the African Charter are being violated by the state of Bentaria.
2. The Applicant will submit that the Court has jurisdiction over all four claims.
3. The Applicant will further submit that the State of Bentaria has violated Articles 4,5,6, 12 (3), 17, 18 of the African Charter on Human and Peoples' Rights.

PLEADINGS

(A) JURISDICTION:

[1] The *Abubakari v Tanzania*,¹ it was stated that there are four aspects to inform this Courts capacity to hear a matter, namely; personal, material, temporal and territorial jurisdiction.

‘Personal Jurisdiction’

[2] The Applicant submits that submission by a State party of the declaration under **Article 34(6)** of the **Court Protocol**, is the only condition for the Court to exercise jurisdiction as regards individuals.² The Applicant, has Observer Status with the Commission, as per **Article 5(3)** of the **Court Protocol**. Moreover, the Respondent submitted an **Article 34(6)** Declaration with the African Court on Human and Peoples’ Rights (African Court) on 30 July 2018.³

‘Material Jurisdiction’

[3] The Applicant submits that this Court has the material jurisdiction over all four claims. In the first claim Ferana Ditori is a victim of an enforced disappearance. *Madoui v Algeria*,⁴ read in context with the **African Charter** an enforced disappearance is a violation of the rights guaranteed in Articles 4, 5 and 6 of thereof. In the matter of

¹ *Abubakari v Tanzania* (007/2013)[2013] AFCHPR 35 at par 34.

² *Michelot Yogogombaye v The Republic of Senegal* (2009) AHRLR 315 (ACtHPR 2009)

³ Paragraph 3 of the Facts.

⁴ *Madoui v Algeria* (2008) AHRLR 3 (HRC 2008) at par 7.2.

Tahsin Acar v Turkey,⁵ the **ECHR** held that a State is obligated under **Articles 1 and 2** of the **EU Convention on Human Rights** to protect the right to life by conducting an investigation in cases of suspicious disappearances. The Respondent's refusal to investigate the disappearance of Ferana Ditori is a violation of its own constitution and international law.

[4] The Respondent denied Khali Bozozo asylum based on the discriminatory ground of sexual orientation contrary to the decision in **Zimbabwe Human Rights NGO Forum v Zimbabwe**.⁶ The Respondent further violated the principle of non-refoulement envisaged in **Article 2 (3)** of the **OUA Refugee Convention** by returning him to Peradila.⁷ In the premises in respect of all four claims there has been material violation of rights recognized in the African Charter and other international human rights norms.

'Temporal Jurisdiction'

[5] In **Mtikila v Tanzania**,⁸ it was held that once a State has ratified the Charter it is bound to uphold it and therefore even if it had not ratified the **Protocol** a matter that occurred prior to such ratification will be admissible before the *Court*. The Respondent ratified the **African Charter** in 1986 and is thus bound by it.⁹

⁵ Application no. 26307/95.

⁶ Zimbabwe Human Rights NGO Forum v Zimbabwe 245/02.

⁷ Paragraph 12 of the Facts.

⁸ Rev. Christopher R Mtikila v United Republic of Tanzania (011/2011).

⁹ Paragraph 3 of the Facts.

‘Territorial Jurisdiction’

[6] The Applicant submits that in respect of issues (i) (ii), (iii) and (iv) territorial jurisdiction is satisfied as all violations occurred within the territory of the Respondent State as per the decision in *Priscilla Njeri Echaria v Kenya*.¹⁰

[7] Furthermore, in *Bankovic v Belgium*,¹¹ it was held that under the provisions of **Article 1** of the *EU Convention* the States are obligated to exercise jurisdiction over violations which occurred on board a ship registered in or flying the flag of that State. The provisions of the EU Convention apply *mutatis mutandi* to the Constitution of Bentaria. Therefore the Respondent is obligated to investigate the violations that occurred on the *North Star* ship.¹²

(B) ADMISSIBILITY:

[8] **Article 6 (2)** of the **Court Protocol** read with the **Article 56** of the **African Charter** and **Rule 40** of the **Rules of the African Court on Human and Peoples’ Rights (Court Rules)**, provides for the conditions for admissibility of applications before this Court. Aside from the requirements of **Article 56 (4), (5)** and **(6)**, there is no other contention on admissibility.

¹⁰ Communication 375/09375/09 at par 38.

¹¹ Application no. 52207/99, 12 December 2001.

¹² Paragraph 14 of the Facts.

‘Based exclusively on mass media reports- Art 56 (4)’

[9] In *Jawara v The Gambia*,¹³ the *Court* held that the bone of contention is not whether the information was retrieved from the media but whether it is correct. In addition to media reports the Applicants claim is substantiated by a photograph showing alleged kidnappers wearing Bentarian military uniform and the statement by the State of Razavia.¹⁴

‘Exhaustion of local remedies- Art 56 (5)’

[10] In respect of issue (i) the Applicant submits that the local remedies in Bentaria are unavailable, insufficient and ineffective, contrary to the requirements set in *Jawara v The Gambia*.¹⁵ Premising on the urgency of the violation against Ferana Ditori the failure by Bentarian courts to set a hearing date 6 months after application to the local court renders the remedies unavailable, insufficient and ineffective due to the delay in delivery of justice.¹⁶

[11] In *AIHRD v Guinea*,¹⁷ it was held that even though an Applicant had not exhausted local remedies, the impractical number of potential plaintiffs makes it difficult for domestic courts to provide an effective avenue of recourse. The Respondent arrested more than 1 350 undocumented Peradilan asylum seekers

¹³ *Jawara v. The Gambia* Communication 147/95 et 147/96(2000) RADG 107(ACHPR 2000) at par 26.

¹⁴ Paragraph 15 of the Facts.

¹⁵ *Jawara v. The Gambia* Communication 147/95 et 147/96(2000) RADG 107(ACHPR 2000)

¹⁶ Paragraph 18 of the Facts.

¹⁷ *African Institute for Human Rights and Development v Guinea* (2204) AHRLR 57 (ACHPR 2004).

in one day.¹⁸ Given that all Peradilians have been arbitrarily denied refugee status or safe passage to a third country by the Respondent, the potential number of plaintiffs in the local courts will be well over 1 350 as the actual number of Peradilians is unknown and Peradilians are fleeing Peradila for Bentaria *en masse*.¹⁹

[12] Lastly, with regards to Khali Bozozo, it was held in ***Free Legal Assistance Group v Zaire***,²⁰ that the exhaustion of local remedies is not required where it is impracticable or undesirable to seize local courts with the matter. The prevailing situation in Peradila, has disintegrated into chaos,²¹ and the actions of the Peradilan State have compelled Khali Bozozo into hiding.²² Requiring Khali Bozozo to leave Peradilia in order for him to appear before the Respondent's courts would put him at the undesirable risk of losing his life amidst the chaos and persecution he will face.

'Reasonable time requirement- Art 56 (6)'

[13] The jurisprudence of this *Court* does not stipulate what a reasonable time is. However, in ***EIPR v Egypt***,²³ a period of 10 months after the exhaustion of local

¹⁸ Paragraph 7 of the Facts.

¹⁹ As above.

²⁰ *Free Legal Assistance Group and Others v Zaire* (100/93) [1995] ACHPR 9 at para 35-38.

²¹ Paragraph 6 of the Facts.

²² Paragraph 12 of the Facts.

²³ *Egyptian Initiative for Personal Rights and Interights v Egypt I* (2011) AHRLR 42 (ACHPR 2011) at par 99.

remedies was accepted as a reasonable period to submit the matter before the African Commission. Furthermore, in **Article 19 v Zimbabwe**,²⁴ it was held that a good and compelling reason for the delay is sufficient for the court to consider whatever time period as reasonable.

- [14] The Applicant submits that given the massive nature of the violations in respect of issue (iii), its intersectional nature, the overall vulnerability of the children on the streets and the continuous violations they face, a delay of eleven months should not render the complaint inadmissible.

(C) MERITS

(I) Bentaria Violated The African Charter And Other International Human Rights Norms By 'Disappearing' Ferana Ditori

- [15] The Applicant submits that the abrupt and suspicious disappearance of Ferana Ditori at the hands of alleged Bentarian State agents amounts to enforced disappearance in terms of international law and that the failure on the part of the Bentarian State to disclose and investigate her whereabouts, or, alternatively to act due diligently is a violation of **Articles 1, 2, 4, and 6** of the **African Charter** read together with **Articles 6 and 9 (1)** of the **ICCPR** and **Article 4** of the **Maputo Protocol**.

²⁴ Article 19 and others v Zimbabwe (2010) AHRLR 126 (ACHPR 2010).

[16] **Article 2** of the **ICPPED** defines ‘*enforced disappearance*’ as the “*arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*”.²⁵ Given that Ferana Ditori was last seen in a photo with figures wearing Bentarian army uniform,²⁶ on board the *North Star* ship which is registered in the State of Bentaria,²⁷ and owned by the brother of the Bentarian Minister of Information,²⁸ there is a *prima facie* presumption, of a connection between the Bentarian State and her disappearance. Therefore qualifying this disappearance within the threshold of enforced disappearance.

[17] In ***Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)***,²⁹ it was stated that in instances of enforced disappearance circumstantial evidence and presumptions may be considered as a basis for a claim of enforced disappearance provided it leads to conclusions consistent with the facts.

²⁵ Article 2 of the ICPPED.

²⁶ Paragraph 14 of the Facts.

²⁷ As above.

²⁸ As above.

²⁹ Merits Judgment, ICJ Report 1986, at para 29-30 and 59-60.

[18] In *France v Turkey*,³⁰ the Permanent Court of International Justice held that a flag State assumes jurisdiction over a ship sailing on the High Seas. In the present case, the *North Star* ship was not only registered in the State of Bentaria but was also flying its flag. Furthermore, in terms of **Article 27 of the Vienna Convention on the Law of the Sea**, the Bentarian State cannot invoke its national law to evade international law.

[19] Even if Bentaria cannot be imputed with Ferana Ditori's disappearance, it is required under international law to investigate. In *Tahsin Acar v Turkey*,³¹ the ECHR stated that the protection of the right to life requires State parties to conduct an investigation in cases of suspicious disappearance. Bentaria's failure and refusal to conduct an investigation is a condonation and tolerance of violations of human rights by any perpetrators. In *Velasques v Honduras*,³² it was held that an illegal act by non-state actors can be imputed on the State if it fails to prevent that violation or respond to it".³³ In this case, Bentaria has refused to investigate the violations against Ferana Ditori.

[20] The context of Ferana Ditori's disappearance and the lack of knowledge on her whereabouts creates a presumption that she was killed and consequently an

³⁰1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) par 57.

³¹ Application No. 26307/95 at para 221-226.

³² Merits Judgment, IACHR Reports 1988.

³³ *Ibid*, at par 172.

abrogation of **Article 4 of the African Charter**, further instilling fear in any members of the media who wish to speak out against the government.

[21] **General Comment No. 3 on the African Charter on the Right to Life (2016)** by the African Commission read with **General Comment No. 36 on the Right to Life** by the Human Rights Committee reiterated that "...derogation from the right to life is not permissible in any time even in a time of emergency, including situations of armed conflict".³⁴

[22] Secondly, the enforced disappearance of Ferana Ditori, is an arbitrary deprivation of her right to liberty and security in terms of **Article 6 of the African Charter** read together with **Article 9 (1) of the ICCPR**. Considering the facts, her disappearance curtails her freedom from confinement of her body, with strong possibilities of injury to her body, mind and/or bodily and mental integrity.³⁵

(II) Bentaria Violated The Provisions Of The African Charter And Other Relevant Human Rights Instruments In Its Treatment Of People Who Fled From Peradila To Bentaria

[23] The Applicant submits that the State of Bentaria violated the provisions of the African Charter and other relevant human rights instruments in its treatment of people who fled from Peradila to Bentaria, the right to seek asylum as

³⁴ General Comment No. 3 on the African Charter on the Right to Life (2016), at par 7. See also the African Commissions Resolution 375 on the Right to Life (LX 2017) at par.3. General Comment No. 36: On Right to Life (2016), at par 7.

³⁵ See also *Wackenheim v France*, Application No. 854/1999, at par 63.

contemplated in **Article 12 (3) of the African Charter** more specially the **principle of non-refoulement** as envisaged under **Articles 2 (1), (3) and, (5) of the OAU Refugee Convention** read together with **Articles 31 (1) and 33 (1) of the United Nations Refugee Convention of 1951**.

[24] **Article 12 (3) of the African Charter** and **Article 2 (1) of the OAU Refugee Convention** guarantee refugees the right to seek asylum in other countries. In terms of the **UNHCR Guidelines on International Refugee Protection of 2018**,³⁶ such a right entails amongst others the right to be admitted to territories of States, to access fair and effective process for determining their status and their rapid and unencumbered access to the UNHCR.

[25] The Bentarian State derogated from its obligation in terms of the above instruments in that it failed to admit the thousands of people who fled Peradila individually and *en masse* by refusing to make a determination whether these asylum seekers were in need of international protection. This refusal by Bentaria is an internationally wrongful act as contemplated in **Articles 1 and 2 of the International Law Commission Draft Articles State Responsibility for Internationally Wrongful Acts**. In *Italy v Morocco*,³⁷ it was held that for a State's conduct to qualify as internationally wrongful conduct, it must be settled

³⁶ UNHCR. 2018. A Guide to International Refugee Protection and Building State Asylum Systems.

³⁷ *Italy v Morocco* ('Phosphates of Morocco case') Merits Judgment, 1938 PCIJ, Series A/13 No.74 at p. 28.

that such conduct can be attributed to such a State under international law and constitutes a breach of an international obligation. In the present case the denial of asylum status and subsequent return of the people who fled Peradila by Bentaria constitutes a wrongful act against **Article 12 (3) of the African Charter** and **Article 2 (1) of the OAU Refugee Convention**.

[26] The Applicant submits that the Respondent violated **Article 2 (3) OAU Refugee Convention Article 33 (1)** of the **1951 Refugee Convention** and its domestic laws by rejecting Peradilian asylum seekers at the border.³⁸

[27] **Article II (3)**, of the **Bentarian Refugee Act**, which mirrors **Article 2 (3) OAU Refugee Convention** provides that asylum seekers cannot be rejected at the frontier with the consequence of them returning to the territory they are fleeing.³⁹ The Act captures the **principle of non-refoulement**,⁴⁰ which is reflected in, **Article 3 (1) of the UN DTA** and **Article 3 of the CAT**. Accordingly, the rejection and subsequent return of Peradilians seeking refuge in the State of Bentaria is therefore a violation of international law and an internationally wrongful act.

[28] The Applicant further submits that the Bentarian State has violated the Peradilians' rights to liberty and freedom of movement in terms of **Article 6** of the

³⁸ Par 7 of the Facts.

³⁹ Article ii(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

⁴⁰ Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, at para 24 and 27.

African Charter, Article 9 of the ICCPR and Article 5 of its Constitution by virtue of their arbitrary detention by the Respondent.⁴¹ Pursuant to the decision in *IHRD v Angola*,⁴² the arrest of Peradilans by Bentaria without a warrant of arrest or any document relating to charges and not informing them of the charges against them is a violation of **Article 6**. In *Gunme and Others v Cameroon*,⁴³ the African Commission held that victims that were arrested for months without trial were arbitrarily detained within the meaning of **Article 6** of the **African Charter**.

[29] Additionally, the **UNHCR Guidelines on the Detention of Asylum Seekers of 2012**,⁴⁴ provides that the detention of asylum seekers is considered an extraordinary measure, and can only be used as a means to pursue a legitimate purpose.⁴⁵ Even if entrance to the country under question had been illegal, the detention would be considered arbitrary,⁴⁶ and that the use of police cells is inappropriate.⁴⁷

[30] In this instance, the refugees were not informed of the reasons for their arrest as required by the local laws of Bentaria and have been in captivity for two years

⁴¹ Paragraph 7 of the Facts.

⁴² Communication 292/04 at para 54-55.

⁴³ (2009) AHRLR (9).

⁴⁴ United Nations High Commissioner for Refugees. 2012. *Detention Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention*.

⁴⁵ As above, at p. 16.

⁴⁶ As above at pp. 12-18.

⁴⁷ As above at p. 29.

without having the opportunity of trial.⁴⁸ The reason given by the Respondent is that these Peradilans were arrested to serve as a warning to others.⁴⁹ Seemingly, this is an indication that not only has the Respondent made the unfounded assumption that the refugees in fact did not need refugee status, but above all, the government is hoping to deter other asylum seekers from seeking asylum in Bentaria.

III. Bentaria Violated The Provisions Of The African Charter And Other Relevant International Human Rights Law In Its Treatment Of The Children Found On The Streets

[31] The Applicant further submits that the children's detention in a holding facility, formerly used as military barracks amounted to degrading treatment prohibited by **Article 5 of the African Charter** read together with **Article 16 of the ACRWC**, and **Article 37 (a), (b), and (c) of the CRC** in that it constitutes cruel and inhuman treatment deteriorating the dignity of the affected children.

[32] Further according to the **UNHRC Guidelines on Detention of Asylum Seekers**, children should not be detained, including unaccompanied children.⁵⁰ Detention cannot be justified solely on the grounds of a migration status or on the basis of children being unaccompanied, detention is *never* in the best interest of the

⁴⁸ Paragraph 7 of the Facts.

⁴⁹ As above.

⁵⁰ See Guideline 9.2.

child,⁵¹ considering the long term psychological and developmental problems that have been documented.⁵²

[33] The best interest of the child is the pivotal consideration governments and other organs dealing with children must keep in mind.⁵³ The State must first place the child with a relative and where it is not possible in foster care or residential homes.⁵⁴ In this instance, Bentaria made no efforts to find alternative accommodation for the children, contrary to its responsibility.

[34] In terms of **Article 17 (2) (b)** of the **African Charter** read together with **Article 37 (c)** of the **ACRWC**, State parties are required to separate children from adults in places of detention. The Bentarian State stated in 2017 that the detention of the children was a temporary solution, however the children have not been separated from the adults.⁵⁵ The detention of the children is therefore a violation of set international standards on the treatment of vulnerable children.⁵⁶

[35] The Applicant further submits that the detention of young girls with boys and adults is a violation of their rights under **Article 18 of the African Charter** read together with **Article 27 (1) of the ACRWC, Articles 3 (1) and 11 (3) of the**

⁵¹ United Nations High Commissioner for Refugees. A guide to international refugee protection and building state asylum systems Handbook for Parliamentarians No 27, 2017. p. 108

⁵² International Detention Coalition. Impacts Of Detention On Children.

⁵³ Article 4 of the ACRWC.

⁵⁴ Guideline 9.2.

⁵⁵ Par 9 of the Facts.

⁵⁶ As above.

Maputo Protocol, Article 19 (1) and (2) of the CRC. This is because such detention resulted in the sexual harassment of girls thus subjecting them to sexual vulnerability, and consequently to inhuman and degrading treatment. In ***Media Rights Agenda v Nigeria***,⁵⁷ the term ‘cruel, inhuman and degrading treatment or punishment’ was interpreted so as to extend to the widest possible protection against abuses, whether physical or mental. The sexual harassment of young vulnerable girls in the detention facilities must be viewed in this light.

[36] In ***IHRDA v Cameroon***,⁵⁸ it was held that “in order to prevent violation of human rights, States must identify vulnerable groups prone to abuse and take special measures to prevent violence from occurring”. Furthermore in ***P. M. v Bulgaria***,⁵⁹ the ECHR held that investigations into alleged cases of sexual abuse should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. In contradiction Bentaria has not taken measures to protect the girls from sexual harassment nor measures to investigate and hold perpetrators accountable.⁶⁰

⁵⁷ Communication No. 224/1998, at par 71.

⁵⁸ Communication No. 001/2018 at par 47.

⁵⁹ Application No. 49669/07 of the European Court of Human Rights, judgment of 24 June 2012, at par 64.

⁶⁰ Par 9 of the Facts.

(IV) Bentaria Violated The African Charter And Other Relevant International Human Rights Law By Its Treatment Of Khali Bozozo

[37] The Applicant submits that the Bentarian State has violated its obligations in terms of **Articles 2, and 12 (3) of the African Charter, Article 2 (3) of the OAU Refugee Convention**, by rejecting to grant refugee status to Khali Bozozo.

[38] In accordance with **Article 1 (1) of the OAU Refugee Convention** and **Article 1 (2) of the 1951 Refugee Convention** a person is unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons such as membership of a particular social group is a refugee. Given this definition a person qualifies to be granted refugee status if they are able to establish (a) a well-founded fear of being persecuted and (b) membership of a social group.

[39] In the instant case, Khali Bozozo meets this basic criteria on the following basis. First, his well-founded fear of being persecuted is anchored on the fact that Peradilian security forces raided his house in search of him on charges of his LGBTI activism and his targeting by such security forces for his open identity as a gay man. The said target against Khali Bozozo constitutes both a threat to his life and freedom on account of his sexuality and LGBTI activism.⁶¹

⁶¹ Paragraph 10 of the Facts.

[40] By virtue of identifying as a 'gay man', Khali Bozozo is a member of a particular social group..." According to **Resolution 275 of the African Commission**⁶² read together with the **UNHCR Handbook on Procedures and Guidelines to Determine Refugee Status**, States are directed to interpret "membership in a particular social group to mean "...persons of similar background, habits or social status"⁶³ and that "membership of such a particular social group may be at the root of persecution because...the very existence of the social group as such, is held to be an obstacle to the Government's policies".⁶⁴ Accordingly Khali Bozozo is entitled to be considered as part of this social group regardless of whether his sexual orientation is real or perceived.⁶⁵ Within this framework interpretation, sexual identity as LGBTI has been accepted as meeting the threshold of "social group".⁶⁶

[41] The response that Khali Bozozo's grounds for requesting refugee status do not meet domestic requirements is a violation of **Article 27 of the Vienna Convention**. In terms of this provision, "a State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty..."

⁶² Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.

⁶³ **UNHCR Handbook on Procedures and Guidelines to Determine Refugee Status** at par 77.

⁶⁴ As above, at par 78.

⁶⁵ Resolution 275.

⁶⁶ As above.

[42] The Applicant also submits that the forced repatriation of Khali Bozozo back to the State of Peradilia is in contravention of **Article 2 (5) of the OAU Refugee Convention** on the principle of a safe third country, where any persons who have been rejected refugee status must be allowed temporary residence in the country of rejection, whilst they apply for refuge in a third country. In the case of *IHRDA v Guinea*,⁶⁷ the African Commission held that the return of an individual to a country where they are likely to face inhumane or degrading treatment violates **Article 5 of the African Charter and Article 2 of the ICCPR**. Accordingly, the repatriation of Khali Bozozo without allowing him to apply to another country has resulted in his human dignity being infringed in that he is subjected to living in hiding as he fears constant persecution by Peradilan forces.⁶⁸ The decision by Bentaria has *de facto* silenced Khali Bozozo.

REMEDIAL ORDERS/PRAYERS:

[43] In light of the above submissions, the Applicant asks this Honourable Court to grant relief as follows:

- (a) In respect of Jurisdiction and Admissibility that the application is admissible on all four substantive claims;
- (b) In respect of the Merits of the case:

⁶⁷ Communication No. 249/02, at par 72.

⁶⁸ Para 10 - 12 of the Facts.

- (i) That the Respondent investigates the enforced disappearance of Ferana Ditori and take appropriate measures to apprehend and prosecute the alleged perpetrators and if need be pay reparations;
 - (ii) That the Respondent immediately release all 1 350 persons from Peradila detained for illegally entering Bentaria;
 - (iii) That the Respondent takes all appropriate measures to reconnect the children to their families and establish their origins and in the event that such origins cannot be established provide Bentarian nationality to the children. In addition the Respondent must provide appropriate and suitable accommodation conducive for children.
 - (iv) That the Respondent provides refugee status to Khali Bozozo and pay appropriate reparations for loss, damages and for pain and suffering.
- (c) Alternatively any relief the Court may deem appropriate in the circumstances.

Total word count: 4375 words (excluding cover page, list of abbreviations, list of authorities and table of content)