28th African Human Rights Moot Court Competition

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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 RESPONDENT

List of Abbreviations

ABBREVIATION	EXPLANATION
African Charter	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
CRC	Convention on the Rights of the Child
Court Protocol	Court Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
Court Rules	Rules of the Court
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
OAU Refugee Convention	OAU Convention Governing Specific Aspects of Refugee problems in Africa
1951 Refugee Convention	Convention relating to the Status of Refugees

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
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
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

Decisions of Domestic and International Tribunals

(a) International case law

Civil Liberties Organisation v Nigeria Communication No. 45/90.
Cudjoe v Ghana Communication 221/98 (1999).
Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan Communication No. 386/2010.
Jawara v Gambia (2000) AHRLR 107.
Louis Emgba Mekongo v Cameroon Communication 59/91.
Madui v Algeria (2008) AHRLR 3 (HRC) (2008).
Majuru v Zimbabwe (2008) AHRLR 146 (ACHPR).
Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti Communication No. 383/10.

Plan de Sanchez Massacre v Guatemala App. No. 11,763, Int.-Am. Ct. H.R.

Priscilla Njeri Echaria v Kenya Communication 375/09.

Velasques-Rodriguez v Honduras, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

Vilvarajah and others v United Kingdom (1991) 14 EHRR 248.

Zimbabwe Lawyers for Human Rights and Another v Zimbabwe (2008) AHRLR (ACHPR 2008).

(b) Domestic Courts

Adan v Secretary of State for the Home Department [1993] 2 S.C.R 689, 30 June 1993 (Supreme Court of Canada).

Immigration and Naturalization Service v Cardoza-Fonseca 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987 (US Supreme Court).

Kenya National Commission on Human Rights & another v Attorney General & 3 Others, Petition 227 of 2016, 9 February 2017.

R v Secretary of State for the Home Department, Ex parte Adan and Others, United Kingdom: Court of Appeal [1998] 2 WLR 702 at 8.

Tantoush v Refugee Appeal Board and Others (13182/06) [2007] ZAGPHC 191.

Soft Law Instruments:

(a) Advisory Opinions

Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (1960) ICJ Reports 3 at 178.

(b) General Comments

UNCRC Committee General Comment No. 21: Children in street situations' (27 January 2017).

UNCRC Committee General Comment No. 14: Best interests of the child' (29 May 2013).

UNHRC Committee General Comment No. 8: Right to Liberty and Security of Persons (30 June 1982).

(c) General Guidelines

UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4 at par 164

UNGA *United Nations Guidelines for the alternative care of children* (2010).

UNHCR *Detention Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012).

Books & Journal Articles:

C Inder 'The Origins of 'Burden Sharing' in the Contemporary Refugee Protection Regime' (2017) 29(4) *International Journal of Refugee Law* at 525.

CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The Development of Its Non State Communication Procedures' (1998) 20(2) *Human Rights Quarterly* at 256 and 262.

T Finegan 'Neither Dualism nor Monism: Holism and the Relationship between Municipal and International Human Rights Law' 2011 2(4) *Transnational Legal Theory* at 478.

UU Ewelukwa. 'Litigating the rights of street children in regional or international fora: trends, options, barriers and breakthroughs' (2006) 9(1) *Yale Human Rights and Development Journal* at 85.

W Schabas & H Sax '*A commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty*' (2006) at 76.

W Schabas, H Sax & A Alen '*Article 37 : Prohibition of torture, death penalty, life imprisonment, and deprivation of liberty : A Commentary of the the United Nations Convention on the Rights of the Child'* (2006) 1-245.

Domestic Law of Bentaria:

Constitution of the Republic of Bentaria
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Summary of Arguments

Jurisdiction

1. The Respondent submits that material jurisdiction is unsatisfied in respect of all four claims and that territorial jurisdiction is absent in terms of issue (i).

Admissibility

2. The Respondent contends that claim (i) is based exclusively on mass media reports, that the Applicant failed to exhaust local remedies in claims (i), (ii), and (iv); and that claim (iii) has not been submitted to the African Court within a reasonable time.

Merits

3. The Respondent submits that it is not responsible for the disappearance of Ferana Ditori and that the duty to investigate has been precluded, in keeping with the local laws.
4. The Respondent argues that the people who fled from Peradila were not genuine refugees, that they disregarded the third safe country agreement in place between Peradila and Zabalia; and re-entered the country illegally.
5. The Respondent contends that it acted in accordance with its local laws as well as international human rights instruments by offering shelter and protection to the children on the streets of Bentaria.
6. The Respondent submits that Khali Bozozo did not satisfy the requirements for refugee status, and as such, Bentaria's rejection of his application was in keeping with domestic and international law.

Pleadings

(a) Jurisdiction:

[1] In ***Abubkari v Tanzania*****,**[1] it was stated that there are four aspects which inform this Court's capacity to hear a matter, namely, temporal, personal, material and territorial jurisdiction.[2] Therefore, when an examination of the African Court's jurisdiction is undertaken, these four elements must be analysed. In the present instance, there are substantial contentions to the Court's material and territorial jurisdiction.

'Material Jurisdiction'

[2] The Respondent submits that this Court does not have material jurisdiction in respect of all four issues before this Court. Considering the first issue relating to the forced disappearance of Ferana Ditori, in ***Priscilla Njeri Echaria v Kenya,***[3] it was held that material jurisdiction is established once it has been determined that the case pertains to the violation of a right guaranteed in the African Charter on Human and Peoples' Rights (African Charter). A *prima facie* case has to be established, a requirement which will be fulfilled if the facts in the complaint show that a human rights violation has most likely occurred.[4] The Applicant has failed to bring a *prima facie* case before the Court whereby a human rights violation has been committed by the Respondent or any persons subject to its control in

[1] (007/2013) [2013] AFCHPR 35 at par 34.
[2] *Abubkari v Tanzania* (007/2013) [2013] AFCHPR 35 at par 34.
[3] Communication 375/09 at par 35.
[4]Communication 375/09 at par 35.

that there is no evidence to substantiate the claim that the State has violated any right and therefore there is no cause of action.

[3] Concerning issue (ii) relating to the people who fled from Peradila, the Applicant cannot rely on the **OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)** which they have seriously violated. In violation of **Article 1 (5)(c) OAU Refugee Convention,** the refugees entered Bentaria through illegal means and have been legally detained pending judicial proceedings against their criminal acts.[5] Furthermore, **Article 12(3)** of the **African *Charter*** requires asylum seekers to seek asylum in accordance with the laws of the receiving State. This has not been the case with the refugees represented by the Applicant as they violated Bentarian law by entering Bentaria illegally. Therefore, they do not have the material grounds to institute the present complaint.

[4] Regarding issue (iii), in respect of the children on the streets, the Respondent contends that no violation of the **African Charter,** or any other international human rights instruments took place. Contrarily, there has been an enforcement of the rights guaranteed under human rights instruments in that the State has provided alternative care, shelter, food and protection from exploitation; for the children in accordance with human rights instruments.

[5] Paragraph 7 of the Facts.

With respect to issue (iv), Khali Bozozo's claim lacks material jurisdiction in that he applied for refugee status on a ground which is in violation of Bentaria's domestic law,[6] as well as the African Charter and other relevant instruments. Khali Bozozo was in contravention of both the law of Peradila and Bentari at the time of his application for refugee status,[7] and therefore he has no substantive basis to claim a violation in terms of the African Charter or other human rights instruments.

'Territorial Jurisdiction'

[5] The Respondent submits that this Court lacks territorial jurisdiction with regards to issue (i). In ***Mohammed Abdullah Saleh Al-Asad v The Republic of Djibouti*,**[8] the element of territorial jurisdiction was unsatisfied as the complainant "failed to conclusively establish that he was in the territory of the respondent State". Similarly, in this case the incident in question took place on the High Seas.[9] In any event, the highest Court of Bentaria established a precedent that the State had no jurisdiction over the *North Star* whilst on the high seas.[10] Furthermore, Bentaria is a dualist State and therefore principles of international law do not automatically form part of its national law.[11]

[6] Bentarian Criminal Code, Paragraph 3.
[7] Paragraph 10 of the Facts.
[8] May 2014, ACHPR, 383/10, 55th Ordinary Session par 177.
[9] Paragraph 14.
[10] Paragraph 15.
[11] As above; See also T Finegan 'Neither Dualism nor Monism: Holism and the Relationship between Municipal and International Human Rights Law' 2011 2(4) *Transnational Legal Theory* at 478.

(b) Admissibility:

[6] **Article 56** of the **African Charter** read with **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 honourable Court. Aside from the requirements of **Article 56 (4), (5)** and **(6),** there is no other contention on admissibility in this case.

'Based exclusively on mass media- Art. 56 (4)'

[7] The Respondent submits that the complaint laid on behalf of Ferana Ditori is based exclusively on two newspaper articles with close affiliations to Ferana Ditori, which have not been independently verified.[12] In ***Jawara v The Gambia,***[13] it was held that one should look at whether the complainant made any efforts to verify the truth of the media reports. It is submitted that the Applicants have made no independent attempts to verify the truth of the allegations disseminated by the newspapers. Instead, the Applicant elected to bring this matter before the Court on the basis of these two newspaper articles, which in turn were not based on any facts, but rather on the assumptive beliefs of misinformed individuals.

'Failure to exhaust local remedies- Art. 56 (5)'

[8] In ***Jawara v The Gambia***, it was held that the rationale for the exhaustion of local remedies is to afford the State who stands accused, the opportunity to remedy

[12] Paragraph 15 of the Facts.
[13] (2000) AHRLR 107 (ACHPR) at par 26.

the alleged wrongs whilst offering the local courts the opportunity to decide the matter, unless the process of doing so would be unduly prolonged.[14] For this requirement to be applicable, the remedies in question must be effective, sufficient and available.[15]

In ***Civil Liberties Organisation v Nigeria,***[16] where a claim although filed had not been settled in the domestic courts, the African Commission declined to consider the communication as local remedies had not been exhausted. Similarly, in the case of Ferana Ditori and the people who fled from Peradila, the matters remain unsettled in domestic courts and it is therefore submitted that these claims are inadmissible on this ground.

The fact that Khali Bozozo has exhausted administrative remedies does not preclude him from exhausting judicial remedies, as held in ***Cudjoe v Ghana***.[17]

[9] The Applicant has failed to exhaust all available local remedies, and thus unfairly denied Bentaria the opportunity to remedy the alleged violations, as per the decision in ***Jawara v Gambia***.[18] Bentaria has an "effectively functioning judiciary",[19] thereby clearly demonstrating the effectiveness of the local remedies. Additionally, the remedies are available as individuals and organisations are not

[14] *Jawara v Gambia* (2000) AHRLR 107 (ACHPR), at par 31.
[15] As above.
[16] Communication 45/90. As cited in Cited in CA Odinkalu and C Christensen 'The African Commission on Human and Peoples' Rights: The Development of Its Non State Communication Procedures' (1998) 20(2) *Human Rights Quarterly* at 256.
[17] Communication 221/98 (1999) par 14.
[18] *Jawara v Gambia* (2000) AHRLR 107 (ACHPR), at par 31.
[19] Paragraph 2 of the Facts.

barred from accessing Bentarian Courts. The remedies of these courts are sufficient, in that there are prospects of success for every claim brought before the Bentarian Courts. In the present case, through this application, the Applicant is attempting to make the African Court a "court of first instance rather than a body of last resort".[20]

[10] Equally, in ***Louis Emgba Mekongo v Cameroon***, [21] where the author's case had been pending for twelve years, the African Commission declared the communication admissible due to the fact that under this instance, the exhaustion of local remedies was unduly prolonged.[22] This is in sharp contrast with the six month delay the Applicant experienced before bringing this matter before the African Court. Accordingly, the Respondent submits that the allegation of unduly prolonged local remedies cannot be sustained in the present instance, because as held in ***Zimbabwe Lawyers for Human Rights and Another v Zimbabwe,***[23] the delay was not excessive, or unjustifiably prolonged.

'Reasonable time requirement- Art 56 (6)'

[11] The jurisprudence of the African human rights system has adopted a flexible approach to the reasonable time requirement as contemplated in **Article 56(6)** of the **African Charter**. The reason this rule is in place is to guarantee legal certainty and stability by excluding the possibility of a domestic decision being

[20] As above.
[21] Communication 59/91.
[22] As above. Cited in CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The Development of Its Non State Communication Procedures' (1998) 20(2) *Human Rights Quarterly* at 262.
[23] (2008) AHRLR (ACHPR 2008) at par 60.

challenged after a long period has lapsed.[24] For example in ***Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan***,[25] a 15-month delay in submitting the matter to the Court was held as failing to meet the requirement stipulated under **article 56(6)** considering the reasons given for said delay. Similarly, both the European,[26] and Inter-American human rights systems[27] have accepted a period of six months as reasonable time.

In ***Majuru v Zimbabwe***,[28] the African Commission held that a six month period seems to be the usual standard. However, each case should be determined on its own merits and the complainant must establish compelling reasons for the delay.

[12] The Respondent submits that approximately a year had lapsed before the children's claim was brought before this Court,[29] and that this time frame constitutes an unreasonable delay in light of the principles stated in the above paragraph. The Applicant has advanced no compelling reason for this delay.

[24] *Plan de Sanchez Massacre v. Guatemala*, App. No. 11,763, Int.-Am. Ct. H.R., par. 29.
[25] February 2013, ACHPR, 386/2010, 13th Extra-ordinary Session at par 77.
[26] Article 35(1).
[27] Article 46(1)(b).
[28] (2008) AHRLR 146 (ACHPR) at par 110.
[29] Paragraph 9 of the Facts.

(c) Merits:

(I) THE STATE OF BENTARIA DID NOT VIOLATE THE AFRICAN CHARTER AND OTHER INTERNATIONAL HUMAN RIGHTS NORMS BY 'DISAPPEARING' FERANA DITORI

[13] The Respondent submits that it is not responsible for the disappearance of Ferana Ditori and therefore did not violate any of the provisions of the African Charter**,** and other international human rights norms.

[14] The Respondent firstly submits that the disappearance of Ferana Ditori does not meet the threshold of 'enforced disappearance' under international law, in that there is no direct or substantial causal link between the disappearance of Ferana Ditori and the State of Bentaria and/or its agents. This is because in accordance with **Article 2** of the **International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)** read together with **Article 7 (2)(i)** of the **Rome Statute of the International Criminal Court (ICC)**, a State can only be held liable for enforced disappearance when the act of disappearance is either "…by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State…"[30]

[15] The Respondent further submits with authority in the case of ***Velasques-Rodriguez v Honduras***,[31] where it was held that to attest 'enforced disappearance' the evidence used must be of such a nature that it is capable of establishing the truth of an allegation in a convincing manner. In the present case, the evidence adduced falls short of this threshold in that it is based on a "grainy photo taken in the dark",[32] the authenticity of which has not in any manner

[30] See also *Madui v Algeria* (2008) AHRLR 3 (HRC) (2008) at par 7.2.
[31] *Velasques-Rodriguez v Honduras,* Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988, at par 130.
[32] Paragraph 15 of the Facts.

whatsoever been verified. Furthermore the unclear photograph is published in the media;[33] two mediums of communication which are highly susceptible and closely linked to Ferana Ditori.[34]

[16] The Applicant alleges that Ferana Ditori was photographed with persons wearing Bentarian military regalia. However, military uniforms the world over are very similar in colour and design schemes. Bentaria is no exception to this international military practice. Accordingly, the Respondent cannot be held liable based on an unclear photograph which shows persons wearing military uniforms similar to those worn by the Bentarian Army and many other countries the world over. As such, it has not been established whether the persons wearing what appeared to be Bentarian military regalia are indeed Bentarian security agents. In the premise no State responsibility can be imputed against Bentaria where it is clear that there is no direct or indirect link between the disappearance of Ferana Ditori and its security agents.

[17] The Respondent further submits that it did not have jurisdiction over the *North Star* ship and can thus not be held liable for any conduct that may have arisen on board the ship. In terms of **Article 91** of the **UN Convention on the Law of the Sea**, jurisdiction may arise on account of 'flag State jurisdiction'. In the present case, such jurisdiction did not arise as Bentaria is not a State party to the treaty and thus is not bound by its provisions.

Moreover, under customary international law as captured in **Article 5 (1)** of the **Convention on the High Seas of 1956** as well as in the advisory opinion of the International Court of Justice in ***Advisory Opinion on the Constitution of the***

[33] As above.
[34] Para 15 and 16.

Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation,[35] it is trite that a State can assume jurisdiction over actions on board a ship if such a State exercises effective administrative and technical control over the ship. In other words, it must be settled that there is a causal connection between the State in question and the ship for it to undertake any State Responsibility.

In the present instance such State Responsibility cannot be attributed to Bentaria because it had through consistent practice refused to grant nationality to the *North Star* ship. Further given its geographical positioning, which is stranded between Peradila and Razavia, the Bentarian State is unable to arrest the *North Star* ship and subsequently carry out any form of investigations and prosecute perpetrators.

(II) BENTARIA DID NOT VIOLATE THE AFRICAN CHARTER AND OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS IN ITS TREATMENT OF PEOPLE WHO FLED FROM PERADILA TO BENTARIA

[18] Firstly, the Respondent submits that the people who fled from Peradila in August of 2017, were in fact not refugees and were not in need of any international protection. According to **Article 1 (2)** of the **OAU Refugee Convention** there should be "events seriously disturbing public order" before the Convention's provisions can be triggered.

[35] (1960) ICJ Reports 3 at 178.

In the present instance, all of the reported incidences of violence, occurred before the election on 1 August 2017.[36] The people from Peradila only started approaching the Bentarian border after 1 August 2017, at which point the only reported incidences of violence were "sporadic and isolated attacks on MFC headquarters and offices…., but all other forms of violence [had] ceased."[37]

[19] Secondly, the Respondent submits that in order to qualify as a refugee, one must prove that there is a well-founded fear of persecution, as held in ***Immigration and Naturalization Service v. Cardoza-Fonseca.***[38]

Additionally, the asylum seekers do not qualify for individual refugee status under **Article 1(1) of the OAU Refugee Convention**, or **Article 1(a)(2) 1951 Refugee Convention**. This is because to claim protection under either of these treaties, Peradilans need to demonstrate individual persecution, and that this persecution is linked to their 'race, religion, nationality, membership of a particular social group or political opinion'. There is nothing in the facts to support this.

As confirmed by the United Nations High Commissioner for Refugees (UNHCR),**[39]** the European Court of Human Rights[40] as well as in Kenyan[41] and South African jurisprudence,[42] a generalised situation of violence does not amount to individual persecution. In ***Adan v Secretary of State for the Home***

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[36] Paragraph 6 of the Facts.
[37] As above.
[38] 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987 (US Supreme Court).
[39] UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4 at par 164.
[40] *Vilvarajah and others v United Kingdom* (1991) 14 EHRR 248 at para 110.
[41] *Kenya National Commission on Human Rights & another v Attorney General & 3 others*, Petition 227 of 2016, 9 February 2017.
[42] *Tantoush v Refugee Appeal Board and Others* (13182/06) [2007] ZAGPHC 191.

Department, it was found that a refugee must demonstrate a 'fear of persecution for Convention grounds over and above the risk to life and liberty inherent in [armed conflict]'.[43] Accordingly, an asylum-seeker must go beyond generalised violence and outline a specific ground in the 1951 Refugee Convention as the cause of their 'well-founded fear'.

[20] Furthermore, the Peradilans arrived at the Bentarian border through Zeuta. The Respondent asks this honourable Court to take cognisance of the fact that there is a 'third safe country' agreement in place between Zabalia and Peradila in terms of which persons seeking asylum should "make their claim in the first country they arrive in, either Peradila or Zabalia", unless they are unaccompanied minors or it is in the public interest that they do not do so.[44]

Therefore, those people who entered Bentaria through Zabalia had a duty to claim asylum in Zabalia. These types of agreements are meant to facilitate the process of burden sharing, which is encompassed in **Recital 4** of the **Preamble of the 1951 Refugee Convention**. This recital acknowledges that providing asylum may place sever difficulties on some States, and as such international cooperation is necessary.[45] By not adhering to the third safe country agreement in place between the two countries, Peradilans exacerbated the already astronomical pressure placed on Bentaria in terms of the accommodation of refugees and asylum seekers.

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[43] *R v Secretary of State for the Home Department, Ex parte Adan and Others*, United Kingdom: Court of Appeal [1998] 2 WLR 702 at 8.
[44] Paragraph 7 of the Facts.
[45] C Inder 'The Origins of 'Burden Sharing' in the Contemporary Refugee Protection Regime' (2017) 29(4) *International Journal of Refugee Law* at 525.

[21] In terms of the detention of those persons who returned to Bentaria and were detained in September 2017, it is contended that these people had illegally entered the country. Under **Article 31** of the **1951 Refugee Convention**, the Peradilans in question had to be genuine asylum seekers, that is they had to be coming directly from the country where their freedom or life was threatened, and had to present themselves to the authorities at the first available chance to show good cause for their illegal entry.

The Respondent posits that the Peradilans would not qualify for protection under this Article as firstly, they were not legitimate asylum seekers as shown above. What is more, the Bentarian authorities had to apprehend these Peradilans rather than them presenting themselves to the authorities at the first available chance to provide reasons for their illegal presence in the Respondent state. As such, the people who fled from Peradila fall outside the ambit of **Article 31** of the **1951 Refugee Convention**. In any event their administrative detention cannot be said as arbitrary in terms of **Article 6** of the **African Charter** which provides for the right to liberty, because as was held by the Human Rights Committee in its **General Comment 8 on the Right to Liberty and Security of Persons**,[46] that an administrative detention cannot be said as arbitrary where it has (a) a legal basis, (b) is subject to control by the courts and (c) is necessary and proportionate to protect a legitimate State interest, which was the case in the instant matter.

[46] UNHRC Committee '*General Comment 8: Right to Liberty and Security of Persons'* (30 June 1982) at par 4.

(III) BENTARIA DID NOT VIOLATE THE PROVISIONS OF THE AFRICAN CHARTER AND OTHER RELEVANT INTERNATIONAL HUMAN RIGHTS LAW IN ITS TREATMENT OF THE CHILDREN FOUND ON THE STREETS

[22] The Respondent submits that Bentaria did not violate any of the provisions of the African Charter and other relevant international human rights law in its treatment of the children found on the streets in Bentaria. According to the **UN General Assembly Resolution 64/42 on Guidelines for Alternative Care of Children**, States parties are directed to "treat children with dignity and respect at all times and benefit them from effective protection including abuse, neglect and all forms of exploitation…"[47]

By taking the children into custody and placing them in holding facilities the Bentarian State has lessened the risk of abuse and vulnerability of the children. It is therefore the submission of the Respondent that while living on the streets, the children were at risk of abuse, exploitation and neglect,[48] and that to remedy this, they were placed in 'alternative care'[49] and provided with food, shelter and access to healthcare,[50] in line with the demands of international human rights norms. This decision was taken with the best interests of the child in mind, as mandated **by Article 4 of the African Charter on the Rights and Welfare of**

[47] UN General Assembly 'United Nations Guidelines for the alternative care of children' A/RES/64/142 at par 13.
[48] UU Ewelukwa 'Litigating the rights of street children in regional or international fora: trends, options, barriers and breakthroughs' (2006) 9(1) *Yale Human Rights and Development Journal* at 85.
[49] UN General Assembly 'United Nations Guidelines for the alternative care of children' A/RES/64/142 at par 5.
[50] Paragraph 9 of the Facts.

the Child (ACRWC) read together with **Article 3 (1) of the Convention on the Rights of the Child (CRC).**[51]

[23] The CRC and ACRWC distinguish between 'detention' and 'alternative care'.[52] According to **William Schabas**, detention involves a deprivation of liberty, including the 'forceful detention of a person at a certain, narrowly bounded location', such as prisons or psychiatric institutions.[53] Even if the Court identifies a deprivation of liberty, this deprivation had passed the two-pronged test of lawfulness and non-arbitrariness, and is compatible with **Article 37(b) of the CRC**, and **Article 17 (2) (a) of the ACRWC**.

Furthermore, the detention of the children in holding facilities is lawful because it is made in accordance with the Children's Act of Bentaria.[54] Further, its non-arbitrariness is demonstrated by the urgency of the measures taken. The CRC Committee in its **General Comment 21 on Children in street situations**, has previously observed that children in street situations are at risk of violence, substance abuse and exploitation by adults or their peers.[55] The Committee considers 'temporary residential care', an urgent measure capable of mitigating this risk.[56] The placement of the children by Bentaria in former barracks should be seen as alternative care aimed at safeguarding the children from exploitation

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[51] Article 4.
[52] Article 25(2)(a), ACRWC; Article 20(2), CRC.
[53] W Schabas & H Sax *A commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty* (2006) at 18.
[54] Paragraph 8 of the Facts.
55 UNCRC Committee 'General comment 21: Children in street situations' (27 January 2017) at par 6.
56 UNCRC CRC Committee General Comment 21: Children in street situations' (27 January 2017) at par 17.

on the streets as envisaged in **General Comment 14 on the Best interests of the child.**[57]

Moreover, the Respondent submits that removing the children from the streets and taking them into the care of the government was for the security of the citizens of Bentaria. In the event that securing the welfare of these children is found to be a form of detention, the Respondent submits that it did so for the legitimate purpose of national security as provided for by **clause 4.1.3 of the UNHCR Guidelines on Detention of Asylum Seekers**.[58]

(IV) BENTARIA DID NOT VIOLATE THE AFRICAN CHARTER AND OTHER RELEVANT INTERNATIONAL HUMAN RIGHTS LAW BY ITS TREATMENT OF KHALI BOZOZO

[24] The Respondent submits that Bentaria did not violate the African Charter and other relevant international human rights law by its treatment of Khali Bozozo, in that Khali Bozozo cannot demonstrate a well-founded fear of persecution, and is therefore not entitled to refugee protection in terms of **Article 1 (a)** of the **1951 Refugee Convention** as well as **Article 1** of the **OAU Refugee Convention**. This is because even if it can be said that Khali Bozozo experienced discrimination, that isolated incident alone does not meet the requirement of 'persecution' expressed in the above stated Refugee Conventions.

[25] The Respondent further submits that it enjoys a wide margin of appreciation in terms of **State Sovereignty** as provided for under **Article 4 (a)** and **(g)** of the **AU**

57 UNCRC Committee 'General Comment No. 14: Best interests of the child' (29 May 2013) at par 75.

58 Guideline 4.1.3. 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.

Constitutive Act to exercise its sovereignty and regulate its internal affairs. The Respondent State may therefore deny the refugee status of any applicant. In the present instance the State of Bentaria has denied Khali Bozozo such refugee status as he is in contravention of the domestic laws and continental conventions which mirror the norms and values of the people of Bentaria and Africa in general.[59]

Furthermore, **Article 3 of 1951 Refugee Convention** read together with **Article 3 (1) of the OAU Refugee Convention** requires that a refugee must conform to the laws and regulations of the State in which they seek refuge. As such Khali Bozozo a gay man, is *ab initio* in contravention of the domestic laws of Bentaria which prohibit same-sex relations.[60] The Respondent thus cannot in the interest of maintenance of order and the sacrosanct rule of law permit Khali Bozozo to reside in Bentaria while actively breaking its laws.

Remedial Orders/Prayers:

[26] In light of the above submission, the Respondent asks this Honourable Court to order as follows:

(a) In respect of Jurisdiction and Admissibility; that the Application is inadmissible on all four substantive claims and thus struck the matter from the roll; Alternatively:

[59] Preamble of the Charter.
[60] Paragraph 3 of the Facts.

(b) In respect of the Merits of the case; dismiss the Application on all four substantive claims in that there has not been any violation of the African Charter and/or other international human rights norms; and/or Alternatively;

(c) Any relief the Court may deem appropriate in the circumstances.

Total word count: 5694 words (excluding cover page, list of abbreviations, list of authorities and table of content)