

**6th SURANA and SURANA and RGNUL INTERNATIONAL LAW MOOT
COURT COMPETITION, 2023**

IL-16

Before

Appeals Chamber of the International Criminal Court

Filed Under **ARTICLE 13(C)** of
THE ROME STATUTE

IN THE MATTER BETWEEN:

THE PROSECUTOR.....*Prosecution*

v.

THE POLICE CHIEF, BANGTANGNAGAR.....*Defence*

Clubbed with

THE POLICE CHIEF, BANGTANGNAGAR.....*Defence*

v.

THE PROSECUTOR.....*Prosecution*

MEMORIAL for [PROSECUTION]

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INDEX OF ABBREVIATIONS

S.No.	ABBREVIATIONS	EXPANSION
1.	¶	Paragraph
2.	and	And
3.	AC	Appeals Chamber
4.	ANPA	All Nationals Protected Alliance
5.	Anr.	Another
6.	Art.	Article
7.	CAH	Crime Against Humanity
8.	CAT	Committee Against Torture
9.	CIL	Customary International Law
10.	Cl.	Clause
11.	Comm'n	Commission
12.	Crim.	Criminal
13.	ECHR	European Commission of Human Rights
14.	Econ.	Economic
15.	Edn.	Edition
16.	EOC	Elements Of Crime
17.	ICC	International Criminal Court
18.	ICJ	International Court of Justice
19.	Ibid.	Ibidem
20.	IHL	International Humanitarian Law

21.	No.	Number
22.	Ors.	Others
23.	OTC	Office of the Prosecutor
24.	Para.	Paragraph
25.	PTC	Pre-Trial Chamber
26.	r/w	Read with
27.	Rep.	Report
28.	Sess.	Session
29.	TC	Trial Chamber
30.	Trib.	Tribunal
31.	u/a	Under article
32.	u/s	Under section
33.	UDHR	Universal Declaration on Human Rights
34.	UN	United Nations
35.	UNDHR	United Nations Declaration on Human Rights
36.	UNHCR	United Nations High Commission for Human Rights
37.	VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF JURISDICTION

The Prosecution most humbly submits that the Hon'ble International Criminal Court has the jurisdiction to hear the present matters in accordance with **Article 13 of the Rome Statute**.

The present memorial on behalf of the Prosecution sets forth the facts, contentions and arguments in the present case.

STATEMENT OF FACTS

BACKGROUND

The country of Burmnyar is the home of the Sholingilar people which is a mixed indigenous and religious minority. The community relies on small-scale agriculture, fishing, hunting and handicrafts for its survival. The community also practices a system of belief that has facets of different religions and it does not identify with any religion. The community has been gifted with fertile lands and beautiful rivers in their areas.

MILITARY COUP OF 2013 AND ITS EFFECT

After the military coup of 2013, the new regime constricted its people to flee from the country and imposed one religion on the entire country as the official religion. The Sholingilar community was oppressed and persecuted by this new regime. When the community was made bereft of any alternatives, they decided to flee to the neighbouring country of Bangtangnagar which is a party to the Refugee Convention.

EVENTS IN BANGTANGNAGAR

The Sholingilar people were employed to work at fields without any wage or social security. By 2020, around half a million Sholingilar people were living in Bangtangnagar and they were stateless. The police chief of Bangtangnagar arrested many young people on the charge of drug dealing and related crimes. Under his orders, police tortured youth in prison. Due to such oppression, the community decided to leave Bangtangnagar for Finlandia.

MOVE TO FINLANDIA

In Finlandia the concerns of the Sholingilar community were heard for the first time and it is also a party to the Rome Statute. Civil societies along with the activists of Finlandia in an attempt to get justice for the Sholingilar community brought an action at ICC against the perpetrator.

ISSUES RAISED

[ISSUE 1]

Whether the ICC has jurisdiction over the matter at the Appeal, as Bangtangnagar is not a State Party to the Rome Statute, and other grounds?

[ISSUE 2]

Whether the matter is admissible, as defined in the Articles of the Rome Statute?

[ISSUE 3]

Whether the dismissal of the charge of “Deportation as a CAH” is valid?

SUMMARY OF ARGUMENTS

Issue I - Whether the ICC has jurisdiction over the matter at the Appeal, as Bangtangnagar is not a State Party to the Rome Statute, and other grounds?

It is submitted that the International Criminal Court (ICC) has jurisdiction in the case. Article 12 of the Rome Statute (RS) allows the ICC to prosecute crimes that produce substantial and foreseeable effects within a State Party's territory, even if the entire crime did not occur there.

It is humbly contended that the Effects Doctrine applies, provided the effects are direct and substantial. It is emphasized that the RS's main purpose is to end impunity for the most serious international crimes. Furthermore, it is argued that the Defendant, despite their official position as Police Chief, does not enjoy immunity for international crimes, as Article 27 of the RS eliminates immunity for government officials regarding such crimes.

Issue II - Whether the matter is admissible, as defined in the Articles of the Rome Statute?

It is submitted that the case is admissible under the Rome Statute (RS). The principle of complementarity, which balances domestic and ICC proceedings, is not violated because the national proceedings in Bangtangnagar lack concrete investigative progress, and the legal characterization of the charges differs. It is contended that the case meets the gravity criterion as it involves systematic, large-scale atrocities causing international concern. It is submitted that unwillingness to prosecute can be established, citing the delay in domestic proceedings and the inconsistency with bringing the Defendant to justice. It is submitted that the Defendant's power and the nature of the crimes make it unlikely for fair domestic proceedings.

Issue III - Whether the dismissal of the charge of “deportation as a CAH” is valid?

It is submitted that the dismissal of the charge of "Deportation as a Crime Against Humanity (CAH)" is erroneous for three main reasons. Firstly, they assert that the elements of the crime, as defined in the Rome Statute, have been satisfied, citing the defendant's actions in forcibly displacing the Sholingilar community. Secondly, it is submitted that deportation was committed indirectly through a coercive environment, meeting the required intent under Article 30 of the Rome Statute. Lastly, it is contended that the defendant's actions violated the Refugee Convention, specifically by treating the refugees unequally, limiting their employment opportunities, imposing movement restrictions, and failing to provide due consideration to the convention's provisions

ARGUMENTS ADVANCED

ISSUE I: THE ICC HAS JURISDICTION OVER THE MATTER AT THE APPEAL

¶1. A state can exercise jurisdiction if one or part of a constituent element of the crime takes place within its territory.¹ The objective territorial jurisdiction is equally applicable to manslaughter, a crime of negligence or any other crime, irrespective of whether the State territory was the intended location of the consequence.²

¶2. In light of Article 31 of the VCLT,³ a treaty must be interpreted in accordance with its objects and purposes, and the main purpose of the Rome Statute is to end impunity.⁴ The jurisdiction of the Court is limited to the most serious crimes of concern to the international community, specifically genocide, CAH, war crimes and aggression. The purpose of the Statute will be defeated if the jurisdiction of the Court requires all the elements of a crime to take place within the territory of a State Party.⁵

1.1 THE DEFENDANT MUST BE PROSECUTED U/A 12 OF THE STATUTE.

¹ *France v Turkey* PCIJ (ser A) No 10 (1927) [23]. *France v Turkey*, Court of International Justice P.C.I.J., (ser A) No. 10 (1927) para 23.

² *ibid* [para 37]-[83].

³ VCLT 1969, art 31.

⁴ Rome Statute of the International Criminal Court 1998, Preamble.

⁵ *Situation in the People's Republic of Bangladesh* ICC-01/19-27 [69]-[70].

¶3. The OTP submits that conduct and crime u/a 12 are synonymous, and therefore the Effects doctrine is applicable.

1.1.1 CONDUCT AND CRIME U/A 12 ARE SYNONYMOUS.

¶4. Article 12(2)(a) empowers the Court to exercise jurisdiction if it is accepted by the State on whose territory the conduct in question occurred or, by the State of registration of the aircraft or vessel, if the crime was committed on a vessel or aircraft.⁶

¶5. Articles 13 and 14, which are trigger mechanisms for Article 12 in case of State referral, use the words “one or more crimes committed” and no reference is made to conduct in question.⁷ Furthermore, the usage of the term ‘conduct’ across various provisions of the Statute such as Articles 17(1)(c), 22(1), 24, 30(2), 90(1), 101(1) and 108 indicates that the term conduct refers to the *actus reus* of the crime, subject to the jurisdiction *ratione materiae* of the Court.⁸

¶6. This Court at different instances has construed conduct in question as crimes in question while dealing with the connection between crimes charged and the State territory.⁹ The PTC had rightly noted in the *Myanmar* case that, “...*there is no apparent reason why the threshold for territorial jurisdiction would be different based on whether the location of the conduct/crime is on land or vessel/aircraft.*”¹⁰

⁶ Rome Statute of the International Criminal Court 1998 (Rome Statute), art 12.

⁷ Rome Statute, arts 13, 14.

⁸ *Republic of Bangladesh* (n 5) [para 49].

⁹ *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 [36].

¹⁰ *Republic of Bangladesh* (n 5) [para 48]-[49].

¶7. *Travaux préparatoires* confirms that the phrase, ‘crime in question’ was replaced by ‘conduct in question’ solely to include both acts as well as omissions.¹¹ Moreover, the *travaux préparatoires* fails to provide an explanation for treating two similar concepts differently.¹² Therefore, conduct and crime in Article 12(2)(a) of the RS have the same functional meaning.¹³ The distinction between the usage of ‘conduct’ for State territory and ‘crime’ is illusionary as there is no logical justification for treating both differently.

¶8. In the present matter, the conduct of the Defendant of organising “witch hunts” against the Sholingilar community and facilitating their treatment as slaves when they should have been treated with due regard to their status as refugees, forced them to flee in search of a safe haven. Hence, the conduct of the Defendant is constitutive of the broader CAH of deportation and slavery.

1.1.2 THE CRIME PRODUCED SUBSTANTIAL, DIRECT AND FORESEEABLE EFFECTS WITHIN THE TERRITORY OF FINLANDIA, A STATE PARTY

¶9. Article 12(2)(a) of the RS encompasses the Effects Doctrine, which lays down the principle that, when a situation of mass criminality within a non-State Party produces significant and causally related effects within the territory of a State Party, territorial jurisdiction of the Court over the actions of the non-State Party would also follow.¹⁴

¹¹ UN ‘Bureau Discussion Paper, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Part 2, Vol. III’ UN Doc. A/CONF.183/C.1/L.53 (6 July 1998) 208–209. United Nations Office on Drugs and Crime TRAVAUX PRÉPARATOIRES pg.208–209&212.

¹² *Republic of Bangladesh* (n 5) [para 48].

¹³ *ibid.*

¹⁴ *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 [21].

¶10. In this framework, the effects in consideration must be direct, intended, foreseeable and substantial.¹⁵ This has been interpreted to mean the broader social or economic consequences felt within the State Party territory, on which the Court may base its jurisdiction under Article 12(2)(a).¹⁶

¶11. The doctrine of effects jurisdiction is widely followed as noted from various decisions of the ICJ,¹⁷ SCSL,¹⁸ and criminal law jurisdictions of countries like the US,¹⁹ Argentina,²⁰ Canada,²¹ France,²² China²³ and England²⁴. The Assembly of State Parties also extensively endorsed the doctrine's inclusion under Article 12(2)(a) by suggesting that conduct encompasses both conduct in question and its consequence.²⁵

¶12. In the instant case, the true expression of 'objective' legal personality of the ICC manifests itself in its ability to extend its jurisdiction to non-State Parties.²⁶ The acts of the Defendant were an integral part of the chain of events that forced the Sholingilar people to flee, yet again,

¹⁵ *United States v Alcoa* 148 F2d 416 (2nd Cir 1945); *Butte, Anaconda and Pacific Ry Co v United States* 290 US 127 (1933) [102]-[103].

¹⁶ F Guariglia and others, *Jurisdiction and Admissibility: In The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence* (Cambridge University Press 2018).

¹⁷ *France* (n 1).

¹⁸ *Prosecutor v Charles Ghankay Taylor* SCSL-03-01-1389 [698].

¹⁹ *Alcoa* (n 15) [434]-[444].

²⁰ Criminal Code of the Argentine Nation 1984, art 1(1).

²¹ Criminal Code of Canada 1985, s 6(2); *Libman v The Queen* [1985] 2 SCR 178 [212]-[213].

²² *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisemitisme* 145 F Supp 2d 1168 (ND Cal 2001).

²³ Criminal Procedure Law of the People's Republic of China 1996, art 6.

²⁴ *R v Wallace Duncan Smith* 2 Cr App R 1 (1996) [20].

²⁵ 'Report of the Special Working Group on the Crime of Aggression, 7th Session of the Assembly of States Parties' (Second Resumption) ICC-ASP/7/20/Add.1 (2009) [38]-[39].

²⁶ Guariglia (n 16).

in search for a safe haven. Incidents of police persecution, racism, and slave-like labour, which were a direct consequence of the acts and omissions of the defendant, terrorised the already vulnerable Sholingilar community who were then left with no choice but to move to Finlandia.

¶13. A clear and direct link can be established between the conduct of the Defendant and consequence felt in the territory of Finlandia. By 2020, more than half a million people of the Sholingilar community had escaped to Bangtangnagar after facing persecution in Burmanyar. Facing further atrocities in Bangtangnagar, notably at the hands of the Defendant, the people decided to make landfall in Finlandia which is a State Party to the RS. Such exodus of a civil population into the territory of a State Party and the inevitable existing or estimated economic and socio-political ramifications in the State will qualify as the required effect to attract the Court's jurisdiction.²⁷

1.2 THE DEFENDANT DOES NOT ENJOY IMMUNITY FOR INTERNATIONAL CRIMES

¶14. Article 27 of the RS ensures that no immunity is provided to heads of states and government officials. They are not exempt from criminal liability for their acts.²⁸ The statutes of other tribunals like ICTY,²⁹ ICTR,³⁰ SCSL,³¹ IMT³² and IMTFE³³ also eliminate immunity for heads of state. Unlike domestic jurisdictions, international courts deal with international

²⁷ Guariglia (n 16).

²⁸ Rome Statute, art 27.

²⁹ UN, Statute of the International Criminal Tribunal for Former Yugoslavia (1993) UN Doc S/RES/827, art 7(2).

³⁰ UN, Statute of the International Criminal Tribunal for Rwanda (1994) UN Doc S/RES/955, art 6(2).

³¹ Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution (14 August 2000), art 6.

³² UN, Charter of the International Military Tribunal (Nuremburg) (enacted on 8 August 1945), arts 7-8.

³³ UN, Charter of the International Military Tribunal for Far East (enacted on 19 January 1946), art 6.

crimes and do not act on behalf of a particular state but rather on behalf of the international community as a whole.³⁴ Hence, there is no state practice or *opinio juris* to establish head of state immunity in relation to international crimes.³⁵ The international tribunals in the past have prosecuted head of states including President Milosevic of Serbia,³⁶ PM Kambanda of Rwanda,³⁷ President Charles Taylor of Liberia³⁸ and Al-Bashir of Sudan³⁹.

¶15. Therefore, it is submitted, that despite the Defendant's current position as the Police Chief of the State of Bangtangnagar (a high ranking official), he cannot escape liability by claiming immunity for his acts/omissions in official capacity as they amount to severe CAH, which is an international crime.

ISSUE II: THE MATTER IS ADMISSIBLE, AS DEFINED IN THE ARTICLES OF THE ROME STATUTE

2.1 THE PRINCIPLE OF COMPLEMENTARITY IS NOT VIOLATED BY THE COURT'S JURISDICTION

³⁴ *Prosecutor v Al-Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 (May 6, 2019) (*Al-Bashir Appeal*) [115].

³⁵ *Al-Bashir Appeal* (n 34) [116].

³⁶ *Prosecutor v Milošević* (Decision on Preliminary Motions) IT-02-54-PT (8 November 2001) [26]-[30].

³⁷ *Prosecutor v Kambanda* (Judgement) ICTR-97-23S (4 September 1998).

³⁸ *Prosecutor v Taylor* (Judgement) SCSL-03-01-A (26 September 2013).

³⁹ *Al-Bashir Appeal* (n 34).

¶16. The complementarity principle, as enshrined in the RS, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the Court, on one hand, and the goal of the RS to ‘put an end to impunity’, on the other hand.⁴⁰ If States are unwilling or are unable to investigate and, where necessary, prosecute, the Court must be able to step in. “*There may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the ‘duty to exercise its criminal jurisdiction’.*”⁴¹

¶17. Complementarity is a core guiding principle for the relationship between States and the Court, and the same is confirmed by its prominent place in the RS (Article 1 and Preamble). This means that both the Court and the states strive to achieve the goals of the RS, as reflected in its Preamble, especially that of ‘putting an end to impunity for the perpetrators’ of ‘the most serious crimes of concern to the international community as a whole’.⁴² This unified effort to achieve the goals of the RS also implies that there must be, to the extent possible, close cooperation and communication between the Court, especially the OTP, and the State in question.⁴³

¶18. In light of the same, the OTP submits that upholding the admissibility of the present matter will not be antithetical to the principle of complementarity because *firstly*, the national

⁴⁰ Mark Klamburg and others, *Commentary on the Law of the International Criminal Court* (TOAEP 2017).

⁴¹ *Prosecutor v Katanga and Ngudjolo* (Judgment on Katanga’s Appeal on the Admissibility of the Case) ICC-01/04-01/07-1497 OA8 (25 September 2009) [85].

⁴² Rome Statute of the International Criminal Court 1998, Preamble.

⁴³ *Prosecutor v Ruto, Kosgey and Sang* (Dissenting Opinion of Judge Ušacka in the Judgment on the Admissibility Appeal) ICC-01/09-01/11-336 OA (20 September 2011) (*Ruto Admissibility*) [19].

proceedings in Bangtangnagar lack concrete progressive investigative steps and *secondly*, legal characterization of the charged offence is relevant.

2.1.1 THE NATIONAL PROCEEDINGS LACK CONCRETE PROGRESSIVE INVESTIGATIVE STEPS

¶19. In the present matter, there was a total social, economic, political and judicial boycott of the Sholingilar people in their times of need within the borders of Bangtangnagar.⁴⁴ The apathy that was shown to them was not restricted to individual actors or incidents, rather it permeated the social fabric of the entire State with the ruling government at the helm of it.⁴⁵ When faced with active persecution by the Defendant, the State again turned a blind eye, reducing the Sholingilar to sub-humans and a “stateless people”⁴⁶ whose only worth was in their servile labour.

¶20. Article 17(1)(a) of the RS reads as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

¶21. The AC has made it clear that, for a State to claim that the case “*is being investigated*” it is required that the case is under current and active investigation.⁴⁷ Plans by the State to

⁴⁴ Moot Proposition, paras 9-12.

⁴⁵ *ibid.*

⁴⁶ Moot Proposition, para 10.

⁴⁷ *Ruto Admissibility* (n 43) [41].

investigate a case, or assurances that it will prosecute in due course, are not sufficient. They do not create a conflict of jurisdictions between the Court and the State which an admissibility determination is required to resolve.⁴⁸ Rather, the Court requires that a State shows that it has taken, and is taking, “*concrete progressive investigative steps*” such as interviewing witnesses, collecting documentary evidence, or conducting forensic analysis.⁴⁹

¶22. The Defendant must provide more than mere assertions of the status and nature of the investigation in Bangtangnagar; he must provide evidence “*of a sufficient degree of specificity and probative value*” to demonstrate the nature of the case and the investigation.⁵⁰ The civil society activists and lawyers of Finlandia have been actively cooperating with the Sholingilar by helping them tell their story to the world and get justice.⁵¹ The nature of investigation undertaken by them to build up the case against the Defendant is of a much more “probative”⁵² and “active”⁵³ nature.

¶23. In light of this, it is reasonable to believe that the charges laid against the Defendant in the domestic proceedings of Bangtangnagar are nothing but a ‘sham proceeding’ structured by the incumbent government to save face at the international level and throw a wrench in the gears of the Court’s functioning.

⁴⁸ Mark Klamberg (n 40).

⁴⁹ *Prosecutor v Simone Gbagbo* (Judgment on the Admissibility Appeal) ICC-02/11-01/12-75-Red OA (27 May 2015) (*Gbagbo Appeal*) [28]-[29].

⁵⁰ *ibid* [29], [128].

⁵¹ Moot Proposition, paras 13-16.

⁵² *Prosecutor v Muthaura Kenyatta and Ali* (Judgment on Kenya’s Appeal on the Admissibility of the Case) ICC-01/09-02/11-274 OA (30 August 2011) [62].

⁵³ *Prosecutor v Gaddafi and Al-Senussi* (Judgment on Al-Senussi’s Appeal on the Admissibility of the Case) ICC-01/11-01/11-565 OA6 (24 July 2014) (*Al-Senussi Appeal*) [166].

2.1.2 ABSENCE OF SUBSTANTIALLY SIMILAR CONDUCT

¶24. In order for a case to be deemed inadmissible under Article 17(1)(a) of the RS, the domestic investigation must encompass the same individual and essentially the same conduct as alleged in the court proceedings.⁵⁴ This judicial evaluation should take into account the victims' interests and the repercussions on them of any decision declaring a case inadmissible in court despite not all incidents being domestically investigated.⁵⁵ If it has been established that only 'discrete aspects' of the case before the Court are being investigated domestically, it will most likely not be possible for a chamber to conclude that the same case is under investigation.⁵⁶

¶25. The essence of a domestic investigation must be distinctly outlined, regardless of its progression. Under such conditions, it is not plausible to assume that an investigation, potent enough to deem the case inadmissible in court, is in progress.⁵⁷

2.1.3 CHARACTERISATION IS RELEVANT

¶26. The AC has previously held that the Court may consider the legal characterisation of the charges as "*an additional indicator of the actual subject matter of the domestic proceedings*".⁵⁸ The international dimension of the crimes (e.g., the systemic dimension of CAH) can be omitted to minimise the seriousness of the conduct. In such a case, the legal characterisation may well matter, as it does shed light on the true nature of the domestic case, consistent with

⁵⁴ *Ruto Admissibility* (n 43) [40].

⁵⁵ *Al-Senussi Appeal* (n 54) [73]–[74].

⁵⁶ *ibid* [77].

⁵⁷ *Gbagbo Appeal* (n 50) [88].

⁵⁸ *ibid* [71].

the AC's insistence that an admissibility determination requires "*an analysis of all the circumstances of a case, including the context of the crimes*".⁵⁹

¶27. In the present matter, the characterisation of the conduct of the police chief as merely 'police torture' and 'slavery' is not an accurate reflection of the current proceedings before this Court. This is an attempt to dilute the nature of the crimes that have been committed against the Sholingilar. Being regarded as "not fully human" by a state functionary, and furthermore, being subjected to "slave-like labour" and torturous practices to further a systematic narrative that promotes the alienation of a vulnerable community is the requisite context that needs to be taken into consideration in any criminal proceedings against the Defendant. This essential element is missing from the charges that have been laid against him in Bangtangnagar.

2.2 THE CASE IS OF SUFFICIENT GRAVITY

¶28. Article 17(1)(d) of the RS lays down the gravity criterion for determining an admissibility challenge.⁶⁰ The negotiation history of the RS reveals very less in relation to the content of the gravity threshold. The absence of any substantial discussion regarding this question during the negotiations suggests that the drafters did not envision the threshold as a substantial limit on the exercise of the Court's jurisdiction.⁶¹

¶29. The PTC has held that in order to determine whether a case is sufficiently grave to warrant the Court's intervention, two features must be considered: firstly, "*the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale*". Secondly, the

⁵⁹ *Al-Senussi Appeal* (n 54) [99].

⁶⁰ Rome Statute, art 17(1)(d).

⁶¹ MM deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' 32 *Fordham International* (2009) 1416-1425.

assessment of gravity must give due consideration “*to the social alarm such conduct may have caused in the international community*”.⁶² Even though the AC has criticised the above standards of gravity determination, terming them as “subjective”, its reasoning for the same was that the crimes listed in Articles 5–8 of the Statute have been carefully selected. It is apparent from the Preamble and Articles 1 and 5 of the Statute, that, these are considered the most serious crimes of international concern.⁶³ Hence, the AC maintained that these crimes do have an “objective” gravity ascribed to them, as opposed to the higher and more subjective threshold set by the PTC.⁶⁴

¶30. Regulations of the Office of the Prosecutor (OTP), Regulation 29 provides some clues for gravity assessment. Paragraph 2 stipulates that to assess the gravity of the crimes that were allegedly committed in a situation, the Prosecutor “*shall consider various factors including their scale, nature, manner of commission, and impact.*” Furthermore, the Chamber found that certain factors listed in Rule 145(1)(c) of the RPE, which the Chamber shall consider in determining sentences, could serve as useful guidelines for the evaluation of the gravity threshold that is required by Article 17(1)(d) of the Statute. In particular, these factors included “*the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime*”.⁶⁵

¶31. Firstly, as has been stated earlier, the conduct of the Defendant, i.e., committing atrocities against the Sholingilar was clearly a part of a larger narrative, affecting the lives of thousands

⁶² *Thomas Lubanga* (n 14) [46].

⁶³ *Situation in the DRC* (Judgment on the Ntaganda Arrest Warrant Appeal) ICC-01/04-169 OA (13 July 2006) [72].

⁶⁴ *ibid.*

⁶⁵ *Prosecutor v Abu Garda* ICC-02/05-02/09-243-Red (8 February 2010) Pre-Trial Chamber I [31].

of Sholingilar through a catena of incidents detailing their arrest, torture and subjugation to slavery. Secondly, the means employed were an abuse of sovereign authority which exacerbates the degree of care and caution a person in this position should observe. Lastly, the nature of the unlawful behaviour was a systematic persecution targeted against a vulnerable community by abuse of authority, which only adds to the gravity of the offence. The exodus of around half a million people belonging to a community due to the inhumane treatment meted out to them is a cause for grave international concern which has led to the present set of complaints being filed to the OTP by members of civil society, failing which the Sholingilar had no recourse to justice.

¶32. Furthermore, the main reason behind the inclusion of the gravity threshold by the drafters was to maximise the Court's deterrent effect.⁶⁶ In light of this, even if it is accepted that the Defendant was only performing his sovereign duty under orders from the State, the AC has held that it is logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court, regardless of the rank or hierarchy.⁶⁷

2.3 UNWILLINGNESS CAN BE ESTABLISHED

¶33. The OTP submits that the criminal proceedings being undertaken in Bangtangnagar are mired with an unwillingness to bring the Defendant to justice and consequently there is no reason for the Court to declare the case as inadmissible. Article 17(2) of the RS lays out the scenarios where unwillingness of a State can be determined, and in the present matter all three stipulations are fulfilled.

⁶⁶ *Thomas Lubanga* (n 14) [48]

⁶⁷ *Situation in DRC* (n 64) [73].

¶34. Firstly, as has been argued above (2.1.1) the domestic proceedings against the Defendant are only meant to shield⁶⁸ a high ranking official of Bangtangnagar on the pretext of complementarity, by diluting the charges against him.

¶35. Secondly, there has been a substantial delay in the conduct of national investigations and prosecution which is inconsistent with “*an intent to bring the person concerned to justice*”.⁶⁹ An assessment of ‘delay’ is based on factual circumstances with a view to ultimately discern the State’s intent concerns its ongoing domestic proceedings against the specific individual.⁷⁰

¶36. The atrocities against the Sholingilar, including the conduct of the Defendant, have been an ongoing concern since 2020 when they moved into Bangtangnagar.⁷¹ Any semblance of bringing the Defendant to justice has occurred subsequent to the trial before the PTC.⁷² This delay of three years, and taking action after the PTC’s decision against the Defendant is a clear indication of Bangtangnagar’s intention behind the farcical national proceedings.

¶37. Lastly, the domestic proceedings are also being conducted in a manner inconsistent with the intent to bring the Defendant to justice. The admissibility, or lack thereof, of a case based on the state of domestic investigations or prosecutions must be assessed on the facts as they stand at the time of each challenge or review.

⁶⁸ Rome Statute, art 17(2)(a).

⁶⁹ Rome Statute, art 17(2)(b).

⁷⁰ *Prosecutor v Gaddafi and Al-Senussi* ICC- 01/11-01/11-2397 (December 2012) [233].

⁷¹ Moot Proposition, ¶10.

⁷² Moot Proposition, ¶20.

¶38. The Court must determine the admissibility, not that it was inadmissible or that it *could or should* be inadmissible if the State was to act differently in the future.⁷³ The Defendant does not possess a ‘right’ under the Statute to demand that States or Court organs act in a way that would make a case inadmissible. The case’s admissibility should be assessed based on the actual facts, not on how they should be, according to the Defendant’s perspective.⁷⁴ As has been argued above, the facts and circumstances paint a clear picture as to the nature of the proceedings underway in Bangtangnagar.

¶39. The Defendant, being a ‘powerful figure’, has enjoyed the benefit of unbridled exercise of power granted to him by the incumbent government of Bangtangnagar. Without a regime change having taken place,⁷⁵ it is unreasonable to believe that the same government which gave the Defendant a free-hand to persecute the Sholingilar will now ensure a fair trial at the national court.

ISSUE III: THE DISMISSAL OF THE CHARGE OF “*DEPORTATION AS A CAH*” IS ERRONEOUS

¶40. It is humbly submitted before the Hon’ble court that the dismissal of the charge of Deportation as a CAH is erroneous in nature. There are three primary reasons to this substantiation; *firstly*, The EOC as enshrined in the Rome Statute have been satisfied. *Secondly*, deportation has been committed by the defendant indirectly. *Thirdly*, there is a violation of the Refugee Convention.

⁷³ *Katanga* (n 41) [56].

⁷⁴ *ibid* [111].

⁷⁵ Clarifications, pt 18.

3.1 THE ELEMENTS OF CRIME, AS ENSHRINED IN THE ROME STATUTE, HAVE BEEN SATISFIED

¶41. The Pre-Trial Chamber has erred in its decision, as the elements of the crime have been satisfied by the Defendant.

The elements of deportation as provided in *Article 7(1)(d)* of ICC are as follows:⁷⁶

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location by expulsion or other coercive acts.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¶42. Firstly, the Defendant caused the deportation of Sholingilar people, sans any ground permitted under international law through coercive acts such as police brutality, work without salaries, non – registration of workers, absence of legal safeguards due to lack of documentation, overreach of custodial powers and a widespread and systematic pattern of

⁷⁶ Rome Statute, art 7(1)(d).

discrimination.

¶43. Furthermore, deportation and forcible transfer, essential prongs of the first element - both entail the forcible displacement of persons from the area in which they are lawfully present without grounds permitted under international law. In *The Prosecutor v. Radovan Karadžić*⁷⁷ it was held that, to establish deportation and forcible transfer, there must be a forced displacement of persons carried out by expulsion or other forms of coercion. The term "*forced*" may include physical force, as well as the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, abuse of power, or the act of taking advantage of a coercive environment.⁷⁸

¶44. Secondly, the Sholingilar community was lawfully present in Bangtangnagar as Bangtangnagar is a party to the Refugee Convention. It has ratified and acceded to the convention.⁷⁹ Due to the worsening situation in Burmanyar throughout the 2010's⁸⁰ – the Sholingilar community was forced to leave their homeland, and they started entering Bangtangnagar by any means possible - land, air, and water.⁸¹ The widespread persecution they faced in Burmanyar made it impossible for them to stay there.

¶45. International law jurisprudence provides for enough safeguards for victims of such

⁷⁷ *Prosecutor v Radovan Karadzic* IT-95-5/18-T (24 March 2016) Trial Chamber .

⁷⁸ *ibid* [489].

⁷⁹ Clarifications, pt 21.

⁸⁰ Moot Proposition, paras 4-7.

⁸¹ Moot Proposition, para 8.

practices, and Member states of the ICC have a set of responsibilities that they must fulfil⁸². For example, to confirm charges against Bosco Ntaganda⁸³, Pre-Trial Chamber II considered that “*absent any indication to the contrary in the evidence*”, the civilians displaced were lawfully present in the relevant locations. The ICTY Trial Chamber II in *Popović et al*⁸⁴ stated that ‘lawfully present’ should not be equated to the legal concept of lawful residence but recognized in its common meaning. As a party to the RC, the Defendant, as part of the State machinery, was aware of the conditions of ‘lawful presence’ that led the Sholingilar to come to Bangtangnagar.

¶46. Thirdly, it can be logically inferred that the Defendant of a country would be aware of the factual circumstances that would lead to a community’s ‘lawful presence’ in their territory. Bangtangnagar and Burmanyar have an existing economic and political relationship. The State machinery was keen on maintaining status quo, despite the grievances of the Sholingilar community. As a party to the RC, it should have offered more support to the community but failed to do so, to protect their short-term interests.⁸⁵ Hence, it is logical to assume that the Defendant was aware of the lawful presence of the Sholingilar community, and more importantly, had an adequate contextual understanding of the cogent reasons of their presence in Bangtangnagar.

¶47. Fourthly, the attack was part of a widespread or systematic attack on the Sholingilar

⁸² Guarigalia (n 16).

⁸³ *Prosecutor v Ntaganda* ICC-01/04-02/06-309 (9 June 2014) ICC PT Ch II [68].

⁸⁴ *Prosecutor v Popović* (10 June 2010) ICTY T Ch II [900].

⁸⁵ Moot Proposition, para 8.

community, as they were seen with resentment in Bangtangnagar.⁸⁶ There was a systematic attack on their livelihoods and education, their cultural and legal identity, and their presence was met with hostility and hatred. The Defendant and the State created a widespread and multi-faceted environment of abuse. Due to the oppressive actions of the Defendant, the youth started to commit suicide and were thrown into prisons where they were tortured.⁸⁷ They were told in the prisons that they were lesser humans.⁸⁸ The conditions created were hurtful to the extent that newer generations of Sholingilars who were born in Bangtangnagar (and would even qualify as citizens, as the State followed a *jus soli* policy of citizenship) were deeply disappointed, and their parents were reminded of the treatment meted out to them in Burmanyar. The feeling of safety and security dwindled precariously and the idea of moving again to safer havens seemed inevitable to them.⁸⁹

¶48. Lastly, the Defendant was cognizant of the ongoing pattern of systematic abuse continued due to his explicit participation in the exploitation of the Sholingilar community, much of which has been described in the submissions above. The Defendant was an important cog in the mechanisation of this system of exploitation and has a fairly high quantum of responsibility in the perpetration of the same. There was a tacit understanding of the realities of the situation, and the continued abuse at the hands of the police is symbolic of the intent of the Defendant, and the underlying resentment against a class of people that had pervaded the social psyche of the Bangtangnagar people, the government machinery, and the Defendant, is further

⁸⁶ Moot Proposition, para 10.

⁸⁷ Moot Proposition, para 11.

⁸⁸ *ibid.*

⁸⁹ Moot Proposition, para 12.

confirmation of the same intent. In the present case, all the EOC have been satisfied to bring an action against the Defendant.

3.2 DEPORTATION HAS BEEN DONE BY THE DEFENDANT WITH INDIRECT INTENT

¶49. It is submitted that the deportation of the Sholingilar community has been done indirectly, not directly. The crime of deportation would thus not directly be intended by the perpetrators but instead, result from a chain of events caused by them. The EOCs clarify that deportation can be committed by “*other coercive acts*,” according to Article 7(1)(d)(1).⁹⁰ Here, the *actus reus* is manifested through the creation of a coercive environment. Regarding the *mens rea* element, deportation could be charged in cases of both direct intent (where the perpetrator intended to deport the victim) and indirect intent (where the perpetrator was aware that deportation would follow from his or her conduct in the ordinary course of events).

¶50. It is humbly contended that the crime of deportation under the Rome Statute would not necessarily require a direct intent to forcibly displace people across an international border, but an indirect intent would suffice. The fact that the victims have no real choice but to leave a coercive criminal environment to secure their safety, and the alleged perpetrators’ knowledge that their deliberate actions contributed to the coercive environment and resulting refugee flow, could arguably meet the Article 30 *mens rea* conditions under the Rome Statute.

¶51. Therefore, if the relevant minimum standards for the other elements of the crime are met, the Article 19(3) decision in the *Myanmar* case⁹¹ could be applied to other situations where

⁹⁰ Elements of Crime, art 7(1)(d).

⁹¹ *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19-27 (14 Nov 2019) Pre-Trial Chamber III (*Myanmar Authorisation*).

people flee from a coercive environment in a non-state party to a State Party, even if there were no direct intent to deport apparent at the outset. It is submitted that the coercive environment must be “*the main factor for their flight*” and the “*dominant and compelling*” reason.

¶52. In the EOC, the term “*forcibly*” is not restricted to physical force but may include the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.⁹²

¶53. Such acts require a more detailed assessment of the coercive environment itself, how and by whom it was caused, the causal link to those fleeing, whether they had a genuine choice and whether and how it can be proven that the mens rea conditions in Article 30 of the Rome Statute could be met.⁹³

¶54. Deportation as such can, therefore, be considered an open-conduct crime, whereas other offences can form the underlying coercive acts and jointly create the coercive environment from which people want to escape.⁹⁴ “*If a group flees of its own genuine volition, for example, to escape a conflict zone, that would not be forced displacement. On the other hand, if a group flees to escape deliberate violence and persecution, they would not be exercising a genuine choice.*”⁹⁵

¶55. In the present case, the Sholingilar community were never treated with sympathy or respect. From the start, they were treated as slaves or means of free labour. They were denied

⁹² Elements of Crime (n 90).

⁹³ Rome Statute, art 30.

⁹⁴ Ruto Confirmation Decision, (n 41), [244].

⁹⁵ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2010) 249.

passports, denied any chance to acquire citizenship, and they did not integrate. All this dismay, coupled with oppression done by the Defendant, created an environment that was coercive and resentful towards the Sholingilar community. A similar situation can be observed in the ongoing Ukraine situation,⁹⁶ As far as the application of ‘indirect intent’ is concerned, the ICC’s jurisprudence has developed its own particularly high standard for indirect intent requiring that an event can be foreseen by virtual certainty, meaning that it “*will occur in the ordinary course of events*” under Article 30(2)(b).⁹⁷

¶56. Pre-Trial Chamber III of the ICC further clarified that deportation is a crime of result and outlines that the victims must have crossed an international border, as it would otherwise solely constitute a forcible transfer or attempted deportation.⁹⁸

3.3 VIOLATION OF THE REFUGEE CONVENTION

¶57. It is humbly submitted that Bangtangnagar is a party to the Refugee Convention. It has ratified and acceded to the convention.⁹⁹ The oppression and ill-treatment caused to the Sholingilar community is a clear-cut violation of various provisions of the Refugee Convention. This argument lists out provisions that the Defendant violates the provisions of the Convention through his actions.

⁹⁶ *Situation in Ukraine* ICC-01/22.

⁹⁷ *Thomas Lubanga* (n 14) [447].

⁹⁸ *Situation in Bangladesh* (n 5) [52].

⁹⁹ Clarifications, pt 21.

3.3.1 UNEQUAL TREATMENT OF THE REFUGEES

¶58. Article 7(1)¹⁰⁰ states, ‘except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.’ Subsection 5 states that paragraphs 2 and 3 apply both to the rights and benefits referred to in Articles 13, 18, 19, 21, and 22 of the Refugee Convention, as well as the rights and benefits that are not enshrined in the contours of this Convention.

¶59. In the present case, the refugees were not provided the same treatment as that of the Bangtanganagar people. On the contrary, the pattern of behaviour that has been meted out to them by the Defendant, under the sponsorship of the State, as well as by the acts of the State’s machinery, is a clear departure from these rights and benefits that are accorded to alien individuals according to this Convention.

¶60. The members of the Sholingilar community were treated as second-class citizens, with their labour being exploited, suggestions that they were sub-human, and arrests without the application of due process of law. The ‘*other-isation*’ involved multiple dimensions of their racial profile, religious practices, physical attributes, and other markers of identity.

3.3.2 UNEQUAL EMPLOYMENT OPPORTUNITIES

¶61. Article 17(1),¹⁰¹ states that the Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment.

¹⁰⁰ Refugee Convention 1951, art 7(1).

¹⁰¹ Refugee Convention 1951, art 17(1).

Article 18,¹⁰² deals with the Contracting States' responsibility of according to a refugee lawfully in their territory, '*gainful employment*' treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts, and commerce and to establish commercial and industrial companies.

¶62. Article 24 (1)(a),¹⁰³ states as far as laws or regulations govern such matters or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

3.3.3 THERE ARE RESTRICTIONS TO MOVEMENT AND A LACK OF TECHNICAL SAFEGUARDS FOR THE REFUGEES

¶63. Article 26,¹⁰⁴ states each contracting state shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

¶64. Article 28,¹⁰⁵ The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling

¹⁰² Refugee Convention 1951, art 18.

¹⁰³ Refugee Convention 1951, art 24(1)(a).

¹⁰⁴ Refugee Convention 1951, art 26.

¹⁰⁵ Refugee Convention 1951, art 28.

reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents.

¶65. In the present case, it is submitted that there was no such support arranged for the members of the Sholingilar community who made their way to Bangtangnagar. They were not registered as workers, not provided proper documents that would allow them to move freely and were not paid the wages that they had the rightful claims to. Furthermore, there was no scope for any upward social mobility as the nature of the jobs they had access to were limited to working as agricultural labourers in abysmal conditions. The Defendant subjected young women to slave labour on state-owned plantations.

3.3.4 NO DUE CONSIDERATION TO THE CONVENTION BY BANGTANGNAGAR

¶66. The OTP submits that the contravention of the Refugee Convention has been further solidified by the nature of the conflict and the lack of corrective measures taken by the State. Under Article 34, the Contracting State shall, as far as possible, facilitate the assimilation and naturalization of refugees. In Bangtangnagar, there was no governmental intervention in the assimilation of the Sholingilar community. As a signatory that has ratified and acceded to the Convention, Bangtangnagar has flouted *Article 40* as well, which talks about the declaration coming into effect.

¶67. In the present case, Bangtangnagar did not integrate even after the passage of two years and the influx of around half a million Sholingilar people¹⁰⁶ shows their contravention towards the convention and the said provisions.

¹⁰⁶ Moot Proposition, para 10.

PRAYER FOR RELIEF

Wherefore, in light of the facts stated, issues raised, arguments advanced, and authorities cited, it is most humbly and respectfully prayed before this Hon'ble International Criminal Court that it may be pleased to: -

- 1) Adjudge that the ICC has jurisdiction over the matter at the Appeal.
- 2) Adjudge that the matter is inadmissible, as defined in the Articles of the Rome Statute.
- 3) Adjudge that the dismissal of the charge of “deportation as a crime against humanity” is valid.

And pass any other order as it may deem fit in the interest of Equity, Justice and Good Conscience.

For this act of kindness, the prosecution faction shall be duty bound forever.

Sd/- _____

(The Prosecutor)