



**6<sup>th</sup> SURANA & SURANA & RGNUL INTERNATIONAL LAW MOOT COURT  
COMPETITION, 2023**

Original: **ENGLISH**

Date: **7<sup>th</sup> OCTOBER 2023**

Before,

**THE APPEALS CHAMBER INTERNATIONAL CRIMINAL COURT (ICC)**

**SITUATION IN FINLANDIA**

IN THE CASE OF

**THE PROSECUTOR V. POLICE CHIEF OF THE BANGTANGNAGAR**

**PUBLIC DOCUMENT**

**WRITTEN SUBMISSION ON BEHALF OF THE PROSECUTOR**

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**LIST OF ABBREVIATIONS**

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<b>S. NO.</b>	<b>ABBREVIATIONS</b>	<b>FULL FORM</b>
<b>1</b>	<b>Court</b>	International Criminal Court
<b>2</b>	<b>CIL</b>	Customary International Law
<b>3</b>	<b>EOC</b>	Elements of Crime
<b>4</b>	<b>ICTR</b>	International Court Tribunal for Rwanda
<b>5</b>	<b>PTC</b>	Pre Trial-Chamber
<b>6</b>	<b>¶</b>	Paragraph
<b>7</b>	<b>UNHRC</b>	United Nations Human Rights Commission
<b>8</b>	<b>UNSC</b>	United Nations Security Council
<b>9</b>	<b>v.</b>	Versus

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**STATEMENT OF JURISDICTION**

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Article 13(c) of The Rome Statute of the International Criminal Court ( “ *The Statute*”) lays down that the International Criminal Court ( “ *The Court*”) could exercise its jurisdiction on any crime mentioned in Article 5 of the Statute, if “ *The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*”<sup>1</sup>

In compliance with the above-mentioned provision of the Statute, it is humbly submitted that in the instant situation, the Prosecutor has initiated a *proprio motu* investigation into the crimes committed by the Defendant and has fulfilled all the requisites of Article 15 while exercising such power. Thus, the Hon’ble Court has jurisdiction over the instant matter.

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<sup>1</sup> The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002)

2187 U.N.T.S. 90 (“**The Rome Statute**”) art 13(c)

## STATEMENT OF FACTS

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1. **THE SITUATION IN BURMANYAR:** This case arises when Sholingilar Community, a mixed indigenous and religious minority began to flee from the Burmanyar to Bangtangnagar. The reason behind their displacement was application of Military law in their territory of residence which led to a reign of terror, disappearance of people and persecution.
2. **THE INITIAL DAYS AT BANGTANGNAGAR:** Bangtangnagar is a signatory to the 1951 Refugee Convention and Universal Declaration of Human Rights. The Bangtangnagar villagers employed Sholingilar persons as slave-like labour. Around half a million population of Sholingilar now resided in Bangtangnagar and was considered stateless.
3. **THE DEFENDANT:** The Defendant is a powerful Police Chief of Bangtangnagar. On the orders of the Defendant, the youth of Sholingilar community was arrested by police. The Police Chief also subjected women to slave labour and ordered police to torture and mock the male and female youth in the prisons. This led them to move to Finlandia.
4. **INVOLVEMENT OF FINLANDIA CIVIL SOCIETY:** Finlandia is a State Party to the Rome Statute and Universal Declaration of Human Rights and has also signed the Refugee Convention, 1951. The Finlandia Civil Society researched on Sholingilar people and attempted to initiate proceedings to prosecute the Defendant at ICC under Article 15.
5. **PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER:** The PTC, decided that the case fell within the jurisdiction of the court and confirmed the allegations of CAH as well as genocide. The Defendant was defended at the ICC by his government lawyers. The Government of Bangtangnagar publicly made a statement that its functionaries could not be a party to the trial as it was not a signatory to the Rome Statute.
6. **PROCEEDINGS BEFORE THE TRIAL COURT:** Here, the Court accepted the jurisdiction, admissibility and upheld the charges of Slavery as a CAH. The charges of deportation and genocide were struck off and a sentence of imprisonment for 15 years was allotted.

**ISSUES RAISED**

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**I. WHETHER THE COURT HAS JURISDICTION OVER THE MATTER AT THE APPEAL, AS BANGTANGNAGAR IS NOT A STATE PARTY TO THE ROME STATUTE AND OTHER GROUNDS?**

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**II. WHETHER THE MATTER IS ADMISSIBLE, AS DEFINED IN THE ARTICLES OF THE ROME STATUTE?**

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**III. WHETHER THE DISMISSAL OF THE CHARGE OF “DEPORTATION AS A CRIME AGAINST HUMANITY” IS VALID?**

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## SUMMARY OF ARGUMENTS

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### **I. THE COURT HAS JURISDICTION OVER THE MATTER AT APPEAL AND MUST UPHOLD THE PTC'S DECISION REGARDING THE VALID JURISDICTION POSSESSED BY THE COURT.**

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- A) The Statute outlines two necessary conditions which must be fulfilled, before the Court could exercise its jurisdiction. Article 12 lays down the pre-conditions that must be fulfilled by any state before using the three trigger mechanisms laid down in Article 13. The Prosecutor submits that the present case fulfils the pre-condition of Article 12(2)(a), as the conduct of the Defendant had effect on the territory of Finlandia, a state party. Finlandia could exercise its jurisdiction, firstly, as per the effects doctrine, and secondly, because Finlandia possesses objective territoriality over the crime of deportation in the instant case.
- B) The Court has exercised its jurisdiction as per the referral made by the Prosecutor, in accordance with Article 13(c) read with Article 15 of the Statute. It is submitted that, in the instant case, the Prosecutor indeed had a *reasonable basis* to take *proprio motu* investigation on the basis of the information received. The tests for proving this *reasonable basis* have to be read with the tests laid down in Article 53(1), and in the instant case, all three of the elements have been met and thus, the Prosecutor's *proprio motu* initiation of investigation is justified

### **II. THE MATTER IS ADMISSIBLE IN THE COURT IN ACCORDANCE TO THE ROME STATUTE.**

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- A) The Prosecutor submits that the burden of proof with respect to proving the inadmissibility of the case before the Court lies upon the Defendant and thus Prosecutor need not delve into the criterion set out under Article 17 of the Statute.
- B) The Prosecutor sheds light on the principle of the 'Inactivity Test' which states that the Court shall consider whether there are ongoing investigations or prosecutions, or whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. Only if the answers to these questions are in the

affirmative, does the question of unwillingness or inability of a State become relevant. Since there is no ongoing or past investigation against the Defendant, the matter is admissible in the Court.

C) It is humbly submitted that even if it is assumed that the onus to prove admissibility is on the Prosecutor, all the criteria set out under Article 17 are met showcasing the admissibility of the matter before the Court.

### **III. THE TRIAL COURT'S DISMISSAL OF THE CHARGE OF DEPORTATION AS A CRIME AGAINST HUMANITY IS INVALID.**

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A) In order to establish Crime of Deportation as outlined in Article 7(1)(d) of the Rome Statute the necessary elements under the article are to be satisfied. The Deportation or Forcible transfer was a result of acts of violence, detention, torture and enslavement against the Sholingilar community, which were committed by or under the orders of the Defendant.

B) The presence of the community in the Bangtangnagar was lawful as under the international law as because of the application of the rule of non-refoulment as under Article 33 of the Refugee Convention as it is observed as a customary International Law.

C) The intent to conduct the crime has been proved as the actions undertaken by the Defendant led to the ultimate consequence of Forcible displacement in the ordinary course of events. The knowledge and voluntary commission of acts showcases the intention of the Defendant.

D) Moreover, the Defendant was aware that his acts were a part of the widespread and systematic attack as Sholingilar community was half a million in numbers and the attacks were under the orders for specifically the community. Commission of multiple acts of torture, prosecution and violence certify as an attack. Thus, the Prosecution claims that dismissal of "charge of deportation" by Trial Court is invalid and shall be reversed.

## ARGUMENTS ADVANCED

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### **I. THE COURT HAS JURISDICTION OVER THE MATTER AT APPEAL AND MUST UPHOLD AND THE PTC'S DECISION REGARDING THE VALID JURISDICTION POSSESSED BY THE COURT.**

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1. The provisions regarding the exercise of the jurisdiction of this Court have been outlined in Article 13 of the Statute. As per the provision, there exist three mechanisms that trigger the jurisdiction of this Court. The first situation arises if a state party to the statute refers any crime under Article 5 to the Prosecutor.<sup>2</sup> The second trigger mechanism<sup>3</sup> is when the United Nations Security Council refers the matter to the Prosecutor and the third situation arises if the Prosecutor initiates an investigation into a matter *proprio motu* as per the mandates of Article 15.<sup>4</sup>
2. The Statute in Article 12, also lays down certain pre-conditions that have to be read in consonance with Article 13 to establish the jurisdiction of this Court. Article 12(2)(a) of the Statute, which is relevant in the current scenario, outlines the principle of territorial jurisdiction over state parties as well as perpetrators of non-party states, if the '*conduct in question*' had occurred in the territory of a state party.<sup>5</sup>
3. The Prosecutor, in this regard, submits that the PTC and the Trial Court's decision on the validity of the jurisdiction of this Court must be upheld on two grounds: A) A proper interpretation of Article 12(2)(a) would empower the Court to exercise its territorial

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<sup>2</sup> The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 ("The Rome Statute") art 13(a)

<sup>3</sup> The Rome Statute art 13(b)

<sup>4</sup> The Rome Statute art 13(c)

<sup>5</sup> Hans Kelsen, Principles of International Law, (2nd edn, The Lawbook Exchange, Ltd., 2003) ,310

jurisdiction over the Police Chief of Bangtangnagar. **B)** The Court exercised its jurisdiction as per the referral made by the Prosecutor in accordance with Article 13(c) of the Statute.

***A) proper interpretation of Article 12(2)(a) would empower the Court to exercise its territorial jurisdiction over the Police Chief of Bangtangnagar.***

4. For the Court to establish its jurisdiction, it is required that it fulfil the preconditions prescribed under Article 12. Article 12(2)(a) outlines that a Court may exercise its jurisdiction if the perpetrator's *conduct* had an effect on the territory of a state party. In order to prove that the conduct had an effect on the territory of a state party, it must be proven that such effect was '*direct, intended, foreseeable and substantial*'.<sup>6</sup> Thus, the Prosecutor submits that this Court, indeed has the jurisdiction over the Police Chief as: 1). The term '*conduct*' in Article 12(2)(a) must be interpreted to include not only the act but also its effects. 2) The effects doctrine would be applicable in this case. 3) The Court possesses objective territorial jurisdiction as per Article 12(2)(a).

1) *The term 'conduct' in Article 12(2)(a) must be interpreted to include not only the act but also its effects.*

5. On reading Article 12(2)(a), it becomes apparent that the provision also uses the phrase '*conduct in question occurred*'. The Prosecutor argues that the term '*conduct*' must not only be interpreted in its literal sense but should be interpreted in a much wider sense while considering the objects and purpose of the treaty itself.

6. Article 31 of VCLT, which is the foundational pillar for any treaty including the Rome Statute lays down that any provision of a treaty must be interpreted by considering its objects and purpose.<sup>7</sup>

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<sup>6</sup> *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945)

<sup>7</sup> The Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force, January 27, 1980)

7. The object and purpose of the the Statute, as mentioned in its preamble, is to end impunity, and thus the ‘conduct’ in Article 12(2)(a) must be interpreted in such a manner that strengthens the ability of any state party, to exercise its jurisdiction, if any crimes mentioned under the Statute, exists. In this light, the settled position with regard to the correct interpretation of the provision is that ‘conduct’ also includes *the actual conduct* of the parties and *its effects or consequences*.<sup>8</sup>
8. Further, in its decision in *Bangladesh/Myanmar*<sup>9</sup>, the Court while interpreting the term *conduct* in Article 12(1)(a) has held that the term “*a form of behaviour, encompassing more than the notion of an act*”, which has been inferred to conclude that *conduct* as per Article 12(2)(a) not only includes the act itself but also the consequences and the effects of the act too.

2) *The effects doctrine would be applicable in this case.*

9. The culmination of this interpretation of ‘conduct’, is also in consonance with the effects doctrine. The effects doctrine empowers any state party to utilize the trigger mechanisms prescribed under Article 13 if the crime or conduct has taken place outside the territory of the state, but the effects have been on the territory of the state party.<sup>10</sup> The essentials for the

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1155 U.N.T.S. 331 (“VCLT”) art 31

<sup>8</sup> Situation in the State of Palestine (Decision on the “Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”) ICC-01/18 (5 February 2021)

<sup>9</sup> *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 (14 November 2019) (“*Bangladesh/Myanmar*”)

<sup>10</sup> *The Prosecutor v. Lubanga* (Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’) ICC-01/04-01/06 A7 A8 (18 July 2019) (“*Prosecutor v. Lubanga*”)

applicability of the effects doctrine are that such effect must be *direct, intended, foreseeable, and substantial* in nature.<sup>11</sup>

10. The effects doctrine has been upheld and substantiated in many precedents<sup>12</sup> by different international Courts, which gives any state the jurisdiction to prosecute any perpetrator of a crime if the effects have taken place in the territory of the state.
11. It is also well-established that this doctrine is not contrary to the principle of “*pacta tertiis nec nocent nec prosunt*”, which means that a treaty only binds the parties who have agreed to it. This is because the effects of doctrine are only exercised against the *nationals* of non-state parties and not the non-state party as a whole.<sup>13</sup>
12. In *Bangladesh/Myanmar*, the Court while discussing the nature of the crime of deportation, held that if the victims are directly deported into the territory of the second state, then the Court can exercise its jurisdiction, as the effects of the conduct of the other state has happened in the other state provided that either of the two nations are party to the Statute.<sup>14</sup>
13. In light of the above, the Prosecution submits that the actions of the Police Chief in systematically tormenting the people of the Sholingilar community by forcing them to be enslavement<sup>15</sup>, which led to their deportation from Bangtangnagar to Finalandia<sup>16</sup>, gives the court sufficient reason to exercise its jurisdiction in accordance to the effects doctrine.

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<sup>11</sup> Scharf, “The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position”, 64 L & Contemp Probs 67, p.72

<sup>12</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Rep. 168 ; *Prosecutor v Charles Ghankay Taylor* (Judgement) SCSL-03-01-T (18 May 2012).

<sup>13</sup> *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17 (12 April 2019)

<sup>14</sup> *Bangladesh/Myanmar* (n 9)

<sup>15</sup> Moot Proposition ¶ 11

<sup>16</sup> Moot Proposition ¶ 13

- 14.** This could be substantiated on the grounds that the effects of the regiment of the Police against the Sholingilar community were both direct and substantial, as the deported people entered the territory of Finlandia in large numbers, to escape the horrifying situation at Bangtangnagar. The effect of the said conduct was also foreseeable as both Finlandia and Bangtangnagar shared land boundaries and thus, the crime of deportation would have led to the victims crossing the boundaries and entering neighbouring Finlandia.<sup>17</sup>
- 15.** Further, it has also been categorically mentioned how the authorities at Bangtangnagar allowed the movement of the people from Sholingilar to Finlandia, without stopping or restricting them which proves how the deportation was actually intended by the authorities.<sup>18</sup>
- 16.** Thus, this Court exercises its effects jurisdiction as per Article 12(2)(a) as the crime of deportation had a substantial, intended, and foreseeable effect on Finlandia, which is a state party.
- 3) *The Court possesses objective territorial jurisdiction as per Article 12(2)(a).*
- 17.** Article 12(2)(a) of the Statute outlines the concept of objective territorial jurisdiction, which could be exercised by any state party, if the crime is initiated in another state, but is concluded on the territory of the state.<sup>19</sup> This entails that any State could exercise its jurisdiction, even if only one component of the crime has occurred within the state territory.<sup>20</sup> Therefore, even if the crime has commenced in the territory of a non-state party, but has been concluded in the territory of a state party, the state party would be

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<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

<sup>19</sup> *The Prosecutor v. Lubanga* (n 10)

<sup>20</sup> *Bangladesh/Myanmar* (n 9)

deemed to have fulfilled the precondition under Article 12(2)(a), enabling the Court to exercise its jurisdiction.<sup>21</sup>

18. The Court in *Bangladesh/ Myanmar* has laid down that a state can exercise their objective territorial jurisdiction if the *actus rea* of the crime has occurred in the territory of the state party. Further, it was held that deportation happens when the perpetrator deports the victims by expulsion or other coercive acts. The said deportation need not always be through physical force, but can also happen through coercive acts, which forces the victim to leave the place where they were lawfully staying.<sup>22</sup> Moreover, the Court opined that the essentials for the crime of deportation under the Statute conclude when the victims cross the border to another state.
19. On the basis of this customary principle of objective territoriality, it is submitted that the act of the people of the Sholingilar community crossing the border to reach Finlandia constituted the fulfillment of the *actus rea* element of the crime of deportation. This, enables the Court to exercise its objective territorial jurisdiction, as one of the components of the crime has happened within the territorial boundaries of a state party.
20. Thus, Finlandia fulfills the preconditions given under Article 12(2)(a) and the Court indeed has the jurisdiction to adjudicate upon this matter.

***B) The Court exercised its jurisdiction on the referral made by the Prosecutor under Article 13(c) of the Statute.***

21. It is submitted that the Court could exercise its jurisdiction on the referral made by the Prosecutor under Article 13(c) of the Statute which has to be read along with Article 15. The Prosecutor would submit two grounds for the same: 1) The term ‘reasonable basis’ in

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<sup>21</sup> S.S. “*Lotus*” (*France v Turkey*), (1927) PCIJ Series A – No 10

<sup>22</sup> *Bangladesh/Myanmar* (n 9)



Article 15 has to be read in consonance with Article 53(1) of the Statute. 2) All three conditions under Article 53(1) have been met by the Prosecutor.

1) The term 'reasonable basis' in Article 15 has to be read in consonance with Article 53 of the Statute.

22. Article 13(c) of the Statute gives the right to the Prosecutor to refer any matter to the Court which it deems fit, provided the said referral follows the guidelines prescribed within Article 15. The Prosecutor thus can initiate an investigation *proprio motu* on the basis of what they receive provided that the Prosecutor must ascertain the seriousness of the issue and that there exists a *reasonable basis* for the investigations to be commenced.<sup>23</sup>
23. The powers of the Prosecutor under Article 15 are merely substantial in nature and it has been established by this Court in many previous precedents that the tests for what could be considered to be a *reasonable basis* have to be construed with the provisions of Article 53, which lays down the procedural guidelines on the commencement of investigation and prosecution.<sup>24</sup>
24. The Court in many precedents, after interpreting the intent of the drafter and analyzing the *Travaux Prepataires of the Statute* has laid down that both Articles 15 and Articles 53 have the same standard which has to be proved by the Prosecutor, as well as the Trial Chamber<sup>25</sup> and thus, must be interpreted harmoniously.
25. The standards to prove *reasonable basis* as laid down in Article 53 are three-pronged. Firstly, there must be a reasonable basis for the Prosecutor to believe that the Court would

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<sup>23</sup> The Rome Statute art 15(3)

<sup>24</sup> *Situation in the Republic of Côte d'Ivoire* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) ICC-02/11-14 ( 3 October 2011)

<sup>25</sup> *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC-01/09-19, (31 March 2010); (“*Situation in Kenya*”)

have jurisdiction over the crimes committed.<sup>26</sup> Secondly, the said case is or would be admissible as per Article 17.<sup>27</sup> Thirdly, there are substantial reasons for the Prosecutor that an investigation would serve the interests of justice for victims as per the gravity and severity of the situation.<sup>28</sup>

**26.** As per the language and intent of the provision, it is evident that for the fulfilment of the conditions mentioned above, only the lowest evidentiary standard is required<sup>29</sup> which is not even needed to be conclusive.<sup>30</sup>

2) All three conditions under Article 53(1) have been met by the Prosecutor.

**27.** It is submitted that all the three conditions prescribed in Article 53(1) were fulfilled by the Prosecutor and thus the trigger mechanism under Article 13(c) read with Article 15 is perfectly valid, and thus the Court could exercise its jurisdiction over the matter.

**28.** To substantiate the same, the first ground, that is Article 53(1)(a), which entails that the Prosecutor has a reasonable basis to believe that the Court would have jurisdiction over the crimes committed, has been already proved by the Prosecutor in the previous argument above<sup>31</sup> and the same need not be dealt with again.

**29.** The second ground under Article 53(1)(b) lays down the requirement which mandates the prosecutor to ascertain whether the case would be admissible under Article 17 or not. In

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<sup>26</sup> The Rome Statute art 53(1)(a)

<sup>27</sup> The Rome Statute art 53(1)(b)

<sup>28</sup> The Rome Statute art 53(1)(c)

<sup>29</sup> *Situation in the Republic of Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi), ICC-01/17-X-9-US-Exp (25 October 2017). (“*Situation in Burundi*”)

<sup>30</sup> *ibid.*

<sup>31</sup> ¶ 1-¶19

order to prove this ground, the Court has outlined two tests<sup>32</sup>: Complementarity and Gravity.

30. The third ground in Article 53(1)(c) lays down the gravity of the situation, which overlaps with the test of Gravity in Article 17, thus, both these aspects would be proved simultaneously.
31. The test of Complementarity suggests that a matter becomes inadmissible for the Court if the state that has jurisdiction over the alleged crime has initiated an investigation or prosecution against the perpetrator.<sup>33</sup> However, the unwillingness or the genuine incapacity of the state to conduct such prosecution or investigation becomes the exception to the above general rule. Further, the test also lays down that the matter would become inadmissible if the alleged Perpetrator has already been tried for the alleged conduct.<sup>34</sup> Article 20(3) outlines the exception to this general rule and states that the trial for the conduct must not be for the purpose of shielding the alleged perpetrator.
32. On the other hand, the test of Gravity, laid in 17(1)(d) as well as Article 53(1)(c) has to be analyzed in light of both qualitative and quantitative aspects. It is to be noted that to prove both these tests the rationale need not be conclusive and must be examined from the perspective of the likely or the potential cases and situations which could arise, in the investigation of a certain situation.<sup>35</sup>
33. In light of both these tests, the Prosecutor submits that the Prosecutor had sufficient evidence to pass the tests of Complementarity and Gravity. The Bangtangnagar authorities had turned a blind eye to actions of the Police Chief and had indeed been involved in the

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<sup>32</sup> *Situation in Burundi* (n 29)

<sup>33</sup> The Rome Statute art 17(1)(a)

<sup>34</sup> The Rome Statute art 17(1)(c)

<sup>35</sup> *Situation in Kenya* (n 25)

systematic oppression of the Sholingilar community.<sup>36</sup> Thus, the victims' apprehension that justice would not be served, if the trial of the Police Chief were to happen in Bangtangnagar is genuine and hence there was a sufficient reason for the Prosecutor to deem the situation admissible, as it passed the test of Complementarity.

34. Similarly, the said situation also passed the test of Gravity, as *prima facie* there was sufficient proof that there were crimes against humanity of deportation committed against the Sholingilar Community as well as other crimes such as genocide, enslavement and torture. Even quantitatively, there were as many as half a million<sup>37</sup> people of the Sholingilar Community who resided within Bangtangnagar under the unconducive and aggressive regime of the Bangtangnagar authorities. Thus, due to this reason, the Prosecutor was indeed correct in ascertaining the gravity of the concerned situation.

*The above submissions establish that this Court has the jurisdiction to decide over the current matter as the case made by the Prosecutor proves that all the necessary pre-conditions under Article 12 and the requisites for Article 13(c) have been complied with. Thus, the Prosecutor submits that the Court must uphold the PTC's decision regarding the valid jurisdiction possessed by this Court to adjudicate upon the current case.*

## **II. THE MATTER IS ADMISSIBLE IN THE COURT IN ACCORDANCE TO THE ROME STATUTE.**

35. The Prosecutor humbly submits that Article 17<sup>38</sup> of the Statute deals with the issue of admissibility of a case before Court. The issue of admissibility will be dealt by the Prosecutor in three limbs. **A)** The burden of proof pertaining to admissibility lies on the

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<sup>36</sup> Moot Proposition ¶ 12

<sup>37</sup> Moot Proposition ¶ 10

<sup>38</sup> The Rome Statute art 17

Defendant. **B)** The ‘inactivity test’ showcasing the admissibility of the case before Court.

**C)** The criteria set out in Article 17 for the admissibility of a case is fulfilled.

***A) The burden of proof pertaining to admissibility lies on the Defendant.***

**36.** The Prosecutor humbly submits that the burden of proof with respect to proving admissibility does not lie on the prosecution. The general *principle* “*probandi actori incumbit*” becomes relevant here. It is for the party challenging the admissibility of the case to demonstrate that the case is inadmissible before the Court.<sup>39</sup>

**37.** That Article 53 (1)(b)<sup>40</sup> mandates the admissibility of a matter as to be ascertained by the Prosecutor before the initiation of an investigation. In the instant matter, the investigation had been initiated by the Prosecutor thus, signifying that the Prosecutor evaluated the information and considered the case to be admissible before the Court.

**38.** In the numerous precedents, it has been laid down that the “Appeals Chamber will not interfere with the Trial Chamber's exercise of discretion under Article 19(1)<sup>41</sup> of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.”<sup>42</sup>

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<sup>39</sup>*Prosecutor v. Saif al-islam Gaddafi and Abdullah al-senussi* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) COURT-01/11-01/11 (13 May 2013) (*Prosecutor v Saif*)

<sup>40</sup> The Rome Statute art 53 (1)(b)

<sup>41</sup> The Rome Statute art 19

<sup>42</sup> *Prosecutor v. Joseph Kony et al* (Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under Article 19 (1) of the Statute' of 10 March 2009) Court02/04-01/05-408 16 September 2009

- 39.** That in the instant case, the Defendant has not proved that there exists any error of law, an error of fact, or a procedural error let alone proving that such error has materially affected the determination. Hence, the Appeals Chamber shall refrain from interfering with the Trial Chamber's exercise of discretion under Article 19(1)<sup>43</sup> with respect to determining the admissibility of the matter.
- 40.** That the Chambers are entitled to rely on the presumption that the Prosecutor has made an earnest and objective assessment of the domestic situation before launching a criminal investigation into a particular case.<sup>44</sup> Thus the burden to substantiate the inadmissibility challenge rests upon the Defendant and the chamber has no obligation to conduct a preliminary investigation on his behalf.<sup>45</sup>
- 41.** Therefore, the Prosecutor humbly submits that there is no obligation on the Prosecutor to prove the fulfilment of conditions laid down under Article 17<sup>46</sup> for determining the admissibility of a matter before Court.

***B) The 'Inactivity test' showcasing the admissibility of the case before Court.***

- 42.** *Assuming arguendo*, the Prosecutor sheds light on the 'Inactivity test' which is used for determining the admissibility of a matter.
- 43.** Under this test, formulated by the Appeals Chamber, a Chamber considering a complementarity challenge must ask whether there are ongoing investigations or prosecutions, or whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. Only if the answers to these

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<sup>43</sup> The Rome Statute art 19 (1)

<sup>44</sup> *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Judgment on Mr Yekatom's appeal against Trial Chamber V's "Decision on the Yekatom Defence's Admissibility Challenge) Court-01/14-01/18 OA (11 February 2021)

<sup>45</sup> *ibid*

<sup>46</sup> The Rome Statute art 17 (1)

questions are in the affirmative, does the question of unwillingness or inability of a State become relevant. Consequently, in the case of inactivity, the question of unwillingness and inability does not arise.<sup>47</sup> This assessment must be made ‘on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.’<sup>48</sup>

- 44.** In the instant case, neither there is an investigation which is going in the state of Bangtangnagar against the concerned person nor any prosecution as the trial is only “scheduled”<sup>49</sup> and at the time of proceedings concerning the admissibility challenge, there exists no investigation or prosecution.<sup>50</sup>
- 45.** Therefore, the Prosecutor humbly submits that the instant case is admissible as per the inactive test and there is no need to delve into determining the question of unwillingness of the state with respect to investigation or prosecution against the concerned person.

***C) The criteria set out in Article 17 for the admissibility of a case is fulfilled.***

- 46. Assuming arguendo,** the Prosecutor hereby submits that the instant matter is admissible in Court as it fulfils the criteria set out under Article 17 of the Statute.
- 47.** The Prosecutor humbly submits that **(1)** Bangtangnagar is unwilling and unable to carry out the investigation or prosecution against the Defendant. **(2)** There exists no investigation or prosecution against the person concerned, which stems from the unwillingness of the state to genuinely prosecute. **(3)** The person concerned has not been tried for the conduct

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<sup>47</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Decision on the Yekatom Defence’s Admissibility Challenge) COURT-01/14-01/18 (28 April 2020)

<sup>48</sup> *The Prosecutor v. Germain Katanga* (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) COURT-01/04-01/07-1497 (25 September 2009) (*Prosecutor v Katanga*)

<sup>49</sup> Moot Proposition ¶ 20

<sup>50</sup> *ibid*

which is the subject of the complaint, and a trial by the Court is permitted under Article 20, paragraph 3. (4) The case is of sufficient gravity to justify further action by the Court.

1) Bangtangnagar is Unable and unwilling to carry out the investigation or prosecution against the Defendant.

48. The Prosecutor humbly submits that Bangtangnagar will be unable to carry out the investigation or prosecution against the concerned person as he is a Police Chief and is a powerful figure in the state of Bangtangnagar who can influence such investigation in his favour.<sup>51</sup>

49. That when it is proved that a state is not able to carry out an investigation, the question of willingness need not be addressed.<sup>52</sup> *Assuming arguendo*, the Prosecutor humbly submits that Bangtangnagar is unwilling to prosecute the concerned person.

50. That the Defendant subjected young women to slave labour on state-owned plantations. Under the Defendant's orders, the police tortured the male and female youth in prison and mocked them, suggesting they were not fully human<sup>53</sup>. The government of Bangtangnagar turned a blind eye to this drastic exercise of power<sup>54</sup>. This showcases the unwillingness of the state of Bangtangnagar to prosecute the Defendant.

2) There exists no investigation or prosecution against the person concerned, which stems from the unwillingness of the state to genuinely prosecute.

51. That the Defendant was represented by the lawyers of the government of Bangtangnagar at the pre-Trial Chamber. Therefore, there exists a conflict of interest as rather than

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<sup>51</sup> Moot Proposition ¶ 20

<sup>52</sup> *ibid*

<sup>53</sup> Moot Proposition ¶ 11

<sup>54</sup> Moot Proposition ¶ 12



becoming a party to the case and questioning the admissibility and jurisdiction, the state of Bangtangnagar gave de-facto representation to the Defendant which showcases that they have a presumption of innocence for the concerned person. Thus, the state is not impartial in its approach.

**52.** There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice<sup>55</sup>. The state of Bangtangnagar had turned a blind eye to the actions of the Defendant person.<sup>56</sup> The trial of the Defendant by the state of Bangtangnagar was subsequent to the trial decision of the Trial Court. There were no investigations or proceedings against the Defendant before the decision of the Trial Court. This showcases that there exists no genuine intent on the part of the state of Bangtangnagar to bring the Defendant to justice.

3) *The person concerned has not been tried for the conduct which is the subject of the complaint, and a trial by the Court is permitted under Article 20, paragraph 3.*

**53.** That as per Article 20(3)<sup>57</sup> of the Statute, No person who has been tried by another Court for conduct also proscribed under Articles 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law

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<sup>55</sup> *Genie-Lacayo v. Nicaragua* (Judgement on Merits, Reparations and Costs) (Petition No. 10.792, Inter-American Court of Human Rights, 29 January 1997)

<sup>56</sup> Moot Proposition ¶ 12

<sup>57</sup> The Rome Statute art 20 (3)

and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

**54.** Firstly, the facts as they exist at the time of the proceedings concerning the admissibility challenge need to be considered while determining whether there is any trial against the Defendant or not.<sup>58</sup> Therefore, there is no trial against the Defendant and it is only so called ‘scheduled’<sup>59</sup>.

**55. *Assuming arguendo***, the requirement under Article 20(3)<sup>60</sup> is fulfilled as: Firstly, the state of Bangtangnagar has scheduled the trial only after the Court’s decision at the Trial Chamber where the Defendant was held to be liable. Before that, the government turned a blind eye to the objectionable and inhuman acts of the Defendant. Thus, it is for the purpose of shielding the person concerned from criminal responsibility.

**56.** Secondly, the scheduled trial cannot be considered to be independently or impartially in accordance with the norms of due process recognized by international law and is inconsistent with an intent to bring the person concerned to justice because (i) there has been unjustified delay by the state on Bangtangnagar.(ii) The natural justice principle of “*Nemo in propria causa judex, esse debet*” which says that no one shall be a judge in their own case will be violated as rather than becoming a party to the case and questioning the admissibility and jurisdiction, the state of Bangtangnagar represented the Defendant which showcases that they have a presumption of innocence for the concerned person.

**57.** Therefore, the Prosecutor humbly submits that the trial by the Court is permitted under Article 20<sup>61</sup>, paragraph 3.

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<sup>58</sup> *Prosecutor v Katanga* (n 48)

<sup>59</sup> Moot Proposition ¶ 20

<sup>60</sup> The Rome Statute art 20 (3)

<sup>61</sup> *ibid*

4) The case is of sufficient gravity to justify further action by the Court.

**58.** The Prosecutor humbly submits that the instant matter triggers the gravity threshold in two ways. The first is the quantitative method and the second is the qualitative measure.

**59.** The Prosecutor humbly submits that in the matter of the *situation in the People’s Republic of Bangladesh/republic of the Union of Myanmar*, the chamber observed that “With respect to the gravity of the situation at hand, the Chamber is of the view that the mere scale of the alleged crimes and the number of victims allegedly involved – according to the supporting material, an estimated 600,000 to one million Rohingya were forcibly displaced from Myanmar to neighbouring Bangladesh as a result of the alleged coercive acts – clearly reaches the gravity threshold”.<sup>62</sup>

**60.** In the instant matter, over half a million are stakeholders in this situation in the capacity of victims<sup>63</sup>. These people are displaced from their home, denied passports, and without being given status in their new country of residence, the community in Bangtangnagar was for all purposes, like a stateless people<sup>64</sup>. Therefore, the quantitative analysis of the situation showcases that the gravity threshold is triggered.

**61.** Under the qualitative method, the Prosecutor humbly submits that the graveness of the crime which has been dealt in issue no. 3 is sufficient to trigger the gravity threshold.

*Therefore, the Prosecutor humbly submits that the Trial Chamber decision reasonably concluded from the information on the record that the instant matter is admissible in accordance with the Articles of the Statute.*

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<sup>62</sup>*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) COURT-01/19 (14 November 2019)

<sup>63</sup> Moot Proposition ¶ 10

<sup>64</sup> *ibid*

### **III. THE TRIAL COURT'S DISMISSAL OF THE CHARGE OF DEPORTATION AS A CRIME AGAINST HUMANITY IS INVALID**

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**62.** The provisions regarding deportation or forcible transfer have been mentioned in Article 7 of the Rome Statute.<sup>65</sup> It is submitted that the Defendant is to be proved liable under Article 7(1)(d)<sup>66</sup> of the Statute and thus for the same, the Prosecution would establish the crime by proving the fulfilment of the following three elements: **A) Objective Elements, B) Subjective Elements and C) Contextual Elements.**

***A) The requisite objective elements are satisfied.***

**63.** Under the objective elements the following conditions would be satisfied to consider the acts of Perpetrator as crime under Article 7(1)(d): *1) The Acts have deported or forcible transferred one or more persons, 2) The acts caused deportation of persons who were “lawfully present”.*

***1) The Acts have deported or forcible transferred one or more persons.***

**64.** Under Article 7 (1) (d) of the Statute, deportation or forceable transfer is mentioned as an act under “crimes against humanity”. Article 7(2)(d) defines “deportation or forceable transfer” as a forced displacement of person or persons concerned by expulsion or other coercive acts<sup>67</sup>. Further the EOC explains the term “forcibly” as not restricted to physical force, but may include 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.<sup>68</sup>

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<sup>65</sup> The Rome Statute art 7

<sup>66</sup> The Rome Statute art 7(d)

<sup>67</sup> The Rome Statute art 7 (2)

<sup>68</sup> Elements of Crimes UN Doc PCNCOURT/2000/1/Add.2. (“EOC”)

- 65.** Even in the case of voluntary departure, the real consent of the concerned persons is of paramount importance.<sup>69</sup> An apparent consent induced by force or threat should not be considered to be real consent.<sup>70</sup> The absence of genuine choice<sup>71</sup> is a factor in the forcible displacement.
- 66.** As in the case of *Prosecutor v Milamor Stakic*<sup>72</sup>, it was held that fear of violence, duress, detention psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forcible displacement of people.
- 67.** In the instant matter, the persons from Sholingilar community were employed as slave labour. They were not paid salary and their owners did not register their workers' names.<sup>73</sup>. The Defendant also employed women as slave labour on state owned plantations and on his order the police tortured male and female youth in prison. These circumstances have coerced them to move from Bangtangnagar to Finlandia.
- 68.** The nature of the acts committed on orders by the Defendant satisfies those mentioned in Article 7(2)(d)<sup>74</sup>. First, they were under the fear of violence against them. Second, they were detained and tortured in the prisons. Third, they were treated as slave labourers and denied their salaries. The prosecution submits that the acts of Defendant fulfil the essentials needed to establish "deportation and forceable transfer".

2) The act caused deportation of persons who were "lawfully present."

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<sup>69</sup> *Prosecutor v. Milorad Krnojelac* (Judgement) IT-97-25-T (15 March 2002) (**Prosecutor v Krnojelac**)

<sup>70</sup> *Prosecutor v. Tadic* (Judgement) IT-95-9-T (17 October 2003)

<sup>71</sup> *Prosecutor v Krnojelac* (n 93)

<sup>72</sup> *Prosecutor v Stakic* (Judgement) IT-97-24-T (31 July 2003) (**Prosecutor v Stakic**)

<sup>73</sup> Moot Proposition ¶ 11

<sup>74</sup> The Rome Statute art 7(2)(d)

- 69.** Article 7(1)(d)<sup>75</sup> requires that the person or persons who are deported or forcibly transferred must be ‘lawfully present’ in that area. This is further mentioned as a requisite element in the EOC that the lawful presence of person or persons should be established to qualify as “deportation or forcible transfer”.
- 70.** Article 33 of the Refugee Convention of 1951 outlines the ‘Principle of Refoulement’ under which the contracting state should not expel or return a refugee<sup>76</sup> (**‘refouler’**) in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>77</sup>
- 71.** Such a lawful presence is reinforced by Article 31(1) of the Refugee Convention, which prohibits penalties on account of their illegal entry or stay.<sup>78</sup> As per Article 14 of Universal Declaration of Human Rights, everyone has the right to seek and to enjoy in other countries asylum from persecution.<sup>79</sup>
- 72.** As in the present case, the Bangtangnagar was signatory to Universal Declaration of Human Rights and 1951 Refugee Convention<sup>80</sup> whereas Sholingilar people were Stateless.
- 73.** Thus, the prosecution humbly submits that the legality of the presence of Sholingilar people is established on the basis of two reasons: firstly, on the basis of principle of non-refoulement. Secondly, as per the rule mentioned in Article 14 of the UDHR.

***B) The requisite Subjective Elements are satisfied.***

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<sup>75</sup> The Rome Statute art 7(1)(b)

<sup>76</sup> The Refugee Convention art 1

<sup>77</sup> Convention and Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (The Refugee Convention) Art 33

<sup>78</sup> The Refugee Convention art 31

<sup>79</sup> Universal Declaration of Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), Art 14

<sup>80</sup> Moot Proposition ¶ 9

**74.** Under the Subjective Elements the intention of the Perpetrator is to be established as *Mens Rea* forms an important part of commission of a crime as mentioned under Article 31 of the Statute. The following elements are to be fulfilled to satisfy the subjective elements;

1) There was an intention behind the acts committed 2) There was an awareness of lawful presence.

1) *There was intention behind the acts committed.*

**75.** The EOC requires that the perpetrator “knew” that the conduct was “a part of” or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>81</sup> The term ‘knew’ mentioned means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.<sup>82</sup> As mentioned in Article 30 (2) (b), a person intends a consequence if he is aware that it will happen in the ordinary course of events.<sup>83</sup>

**76.** The element of “with knowledge” as presented in Article 7 as an context to the crimes against humanity should not be interpreted to as requiring proof the perpetrator had knowledge of all characteristics of attack.<sup>84</sup> In *Prosecutor v Thomas Lubanga Dyilo*<sup>85</sup>, the Appeals Chamber held that the requisite likelihood of events occurring is virtual certainty, a standard lower than absolute certainty.

**77.** In the present case the Defendant was aware of the fact that the effect his actions will have as he voluntarily engaged in the acts of imprisonment and gave orders regarding detention and employment of Sholingilar women as slave-labourers in the plantations.

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<sup>81</sup> EOC art 7(1)(d)

<sup>82</sup> The Rome Statue art 30(3)

<sup>83</sup> The Rome Statute art 30 (2)(b)

<sup>84</sup> *Prosecutor v Stakic* (n 72)

<sup>85</sup> *Prosecutor v Lubanga* (Judgement) COURT-01/04-01/06-3121-Red (1 December 2014)

**78.** Thus, the intention of Police Chief can be established on the basis of two reasons. First, the Police Chief voluntarily ordered the Sholingilar people to be tortured and women to be employed as slaves labour on youth plantation. Second, he was reasonably aware of the consequence of his acts and in the light of movement of Sholingilar community movement from Burmanyar to Bangtangnagar due to their persecution, thus it was certain that these acts will force these people to transfer.

**79.** Therefore, the Defendant knew that his conduct was a part of and intended the conduct to be part of a widespread or systematic attack against a civilian population.

2) *There was awareness regarding the lawful presence.*

**80.** The EOC mentions it is requisite that the perpetrator was aware of the factual circumstances that established the lawfulness of such presence.<sup>86</sup> This points out the intention of the Preparator in relation to the crime committed.

**81.** In the present case, the Defendant is a powerful Police Chief whose orders are accepted by the Police and he was in a position of power to assign the Sholingilar people to tasks.<sup>87</sup> This implies that he knew the workings of the Police and knew the law of the land. Therefore, the Police chief's conduct can be construed as aware of their lawful presence under the International Law and the Refugee Convention.

**C) *The requisite contextual elements are satisfied.***

**82.** To ensure the satisfaction of the contextual elements the following are to established; 1) The act as part of widespread or systematic attack, 2) The act as an "attack" directed against "civilian population".

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<sup>86</sup> EOC art 7(1)(d)

<sup>87</sup> Moot Proposition ¶12



1) The act as part of widespread or systematic attack

**83.** The introductory part of Article 7 (1) specifies the condition that acts should be widespread or systematic in nature. The EOC also presents widespread and systematic nature of the crime as a requisite.<sup>88</sup> The term ‘widespread’ connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.<sup>89</sup> The scale of victimisation is focal point in analysing the term “widespread”.<sup>90</sup>

**84.** The organised plan or a regular pattern which results in continuous commission of acts may be understood as systematic if there is a non-accidental repetition of similar criminal conduct on a regular basis.<sup>91</sup> The evidence to prove the systematic nature may lie in the structured manner of the acts that took place.<sup>92</sup>

**85.** In the present case, the facts reflect that the acts of torture, slavery and detention were committed against whole of the population which transferred from Bangtangnagar to Finlandia which was around half a million in number.<sup>93</sup> The orders given by Defendant were planned specifically against this community.

**86.** The widespread and systematic nature of attack is established through these reasons. First, the nature of these attack was spread over half million people constituting the widespread

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<sup>88</sup> EOC, Article 7(1)(d)

<sup>89</sup> *The Prosecutor v. Bemba* (Situation in Central African Republic) COURT-01/05-01/08 (15 June 2009) (“*The Prosecutor v Bemba*”)

<sup>90</sup> *Prosecutor v Blaškić* (Judgement) IT-95-14-T (3 March 2000)

<sup>91</sup> *Prosecutor V. Germain Katanga and Mathieu Ngudjolo Chui* (Judgement) COURT-01/04-01/07 (30 September 2008)

<sup>92</sup> *The Prosecutor v Jean-Paul Akayesu* (Appeal Judgement) ICTR-96-4-A (1 June 2001) (“*The Prosecutor v Akayesu*”)

<sup>93</sup> Moot Proposition ¶10

attack. Second, the planned torture, detention and slavery against their specific community fulfills the systematic nature of attack.

2) The act as an “attack” directed against “civilian population.”

87. An explanation for ‘attack’ is outlined in Article (7)(2)(a)<sup>94</sup>. It explains it as a ‘Attack directed against any civilian population’. It is a course of conduct involving the multiple commission of acts referred to in Article 7 (1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack” as per the Article 7(2)(a). Here, the term ‘course of conduct’ points out that the underlying offences in Article 7(1) may indeed be committed in the course of deportation process.<sup>95</sup> In the context of a crime against humanity, ‘attack’ is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention.<sup>96</sup> The expression ‘directed against’ specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.<sup>97</sup>

88. The civilian population refers to any ‘groups distinguishable by nationality, ethnicity or other distinguishing features.’<sup>98</sup> The civilian population must also be the primary target

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<sup>94</sup> The Rome Statute art 7(2)(a)

<sup>95</sup> *Prosecutor v. Bemba* (n 89)

<sup>96</sup> *Prosecutor v Kunarc* (Judgement) IT-96-23-T& IT-96-23/1-T (22 February 2001)

<sup>97</sup> *Prosecutor v Bemba* (n 89)

<sup>98</sup> *Prosecutor v. Ruto, Kosgey, and Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) COURT-01/09-01/11 (23 January 2012)

of the attack, not an incidental victim.<sup>99</sup> Thus, the term ‘population’ implies a collective nature and thus exclude single or isolated acts.<sup>100</sup>

**89.** In the present case, on the orders of the Police Chief the Sholingilar people were subjected to enslavement, torture, persecution and imprisonment which qualifies as offences under Article 7(1) as crimes against humanity and as a part of course of conduct committed in course of the deportation process. The Sholingilar people were targeted on the orders of Police officer making them a primary target of the attack and not an incidental victim.

**90.** Therefore, the Prosecution submits that acts undertaken by the Police Chief account as an attack against the civilian population as; First, there was commission of multiple acts by the Police Chief which satisfies the pre-conditions of “attack”. Second, these attacks were primarily targeted against the Sholingilar population. Third, the Sholingilar people constitutes as a civilian population.

*Thus, based on the fulfilment of the necessary elements required to establish deportation as a CAH, it is submitted that decision of the Trial Chamber in dismissing the charge of Deportation is invalid. Therefore, the Prosecution humbly submits that the Defendant must be held guilty of the crime of Deportation in accordance with provisions of the Statute.*

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<sup>99</sup> *Prosecutor v Akayesu* (n 92)

<sup>100</sup> *Prosecutor v Tadic*, (Judgement) IT-94-1-T (7 May 1997)

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**PRAYER**

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Therefore, in light of the arguments above, the Prosecution respectfully requests the Appeals Chamber to adjudge and declare that:

- I.** This Court can exercise its jurisdiction on this matter, as the necessary pre-conditions laid down under Article 12(2)(a) and the conditions under Article 13(c) read with Article 15 of the Statute are being fulfilled.
- II.** The matter is admissible in this Court in accordance to Article 17 of the Statute.
- III.** That the dismissal of the charge of “deportation as a crime against humanity” is invalid and the Prosecution has met its duty to establish with sufficient evidence that there are substantial grounds to prove that the Defendant is guilty of the said crime.

**ON BEHALF OF THE OFFICE OF THE PROSECUTOR**