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

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**IN THE  
INTERNATIONAL CRIMINAL COURT  
(THE APPEALS CHAMBER)  
--IN THE MATTERS OF--**

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PROSECUTOR

V.

THE POLICE CHIEF OF BANGTANGNAGAR

&

THE POLICE CHIEF OF BANGTANGNAGAR

V.

PROSECUTOR

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***- SUBMISSIONS ON BEHALF OF THE DEFENCE -***

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**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

Date: 25 September 2023

**THE APPEALS CHAMBER**

**Case before the International Criminal Court (ICC):  
Prosecutor v. The Police Chief of Bangtangnagar**

**The Submission of the Defence Counsel in the Appeal from the Pre-Trial  
Chamber's Decision on Confirmation of Charges against the Police Chief of  
Bangtangnagar**

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&	And
¶/¶¶	Paragraph(s)
AC	Appeals Chamber
app./apps.	Appendix/Appendices
art./arts.	Article(s)
CAH	Crimes against humanity
CIL	Customary international law
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ed.	Edition
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICT	International Criminal Tribunal(s)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
Id.	Ibidem
IHL	International humanitarian law
IL	International Law
OTP	Office of the Prosecutor
p./pp.	Page(s)
PIL	Public International Law
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
TC	Trial Chamber
UNSC	United Nations Security Council
UDHR	Universal Declaration of Human Rights
v.	Versus

VCLT

Vienna Convention on the Law of Treaties

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**STATEMENT OF JURISDICTION**

**THE COUNSEL FOR THE DEFENCE HEREBY HUMBL Y SUBMITS TO THE  
JURISDICTION OF THE APPEALS CHAMBERS OF THE HON'BLE  
INTERNATIONAL CRIMINAL COURT UNDER ARTICLE 82(1)(A) OF THE ROME  
STATUTE AS REFERRED TO UNDER CHAPTER VII OF THE UN CHARTER,  
WHICH READS AS FOLLOWS-**

*Either Party May Appeal Any Of The Following Decisions In Accordance With The Rules  
Of Procedure And Evidence:*

*(A) A Decision With Respect To Jurisdiction Or Admissibility;*

## STATEMENT OF FACTS

1. The Sholingilars are a minority indigenous and religious community that have lived in Burmanyar for centuries. In 2013, a military coup imposed its regime in Burmanyar and began persecuting and harassing the Sholingilars. Despite the fact that the Sholingilars were not permitted from leaving Burmanyar, they entered Bangtangnagar by slipping past the land border and barricades and swimming across the rivers which bordered Bangtangnagar
2. The people began to be employed with unfavourable conditions by the villagers. Some of the Sholingilar youth started indulging in drugs and were arrested on charges of drug dealing and related crimes by the police, following orders from the Police Chief. The Sholingilar people did not want to raise their children in Bangtangnagar despite them being entitled to citizenship there via the jus soli policy and instead fled to a more prosperous country, Finlandia. They were not stopped from leaving. A trial on the charges of slavery and police torture is scheduled to be heard in Bangtangnagar against the Police Chief.
3. In Finlandia, civil society mobilised lawyers to file refugee applications for the Sholingilars and brought their alleged victimisation to the ICC's attention. They sought to initiate two proceedings: one against the Police Chief of Bangtangnagar and another against the Generals of Burmanyar. The Tribunal upheld charges of slavery but dismissed charges of genocide and deportation. Meanwhile, in Bangtangnagar, charges of slavery and police torture have been brought against the Police Chief. The Appeals are to be heard in the ICC.

**ISSUES**

**-I-**

Whether the ICC has jurisdiction over the matter at Appeal?

**-II-**

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

**-III-**

Whether the dismissal of the charge of “deportation as a crime against humanity” is valid?

## SUMMARY OF ARGUMENTS

### **I. THE ICC DOES NOT HAVE JURISDICTION OVER THE POLICE CHIEF'S CONDUCT**

1. The Police Chief is a national of Bangtangnagar, and the conduct occurred in the territory of Bangtangnagar which is not a State Party to the Rome Statute, never accepted its jurisdiction and the situation was never referred to the ICC by the UNSC. The Police Chief is a national of Bangtangnagar, and all of his actions occurred in the territory of Bangtangnagar. The precondition of territoriality under Art. 12(2)(a) of the Statute is, therefore, not met and the ICC cannot exercise jurisdiction over conduct that takes place in Bangtangnagar, since it is not a State Party to the Rome Statute. The effects doctrine cannot be read into Art. 12 of the Rome Statute since an expansive interpretation of Art. 12 to include the effects doctrine results in the ICC exercising legislative powers, thereby expanding its jurisdiction, unrestrained. Additionally, the effects doctrine is not supported by State practice and, therefore, does not form a part of CIL. The Police Chief enjoys immunity from prosecution and the ICC must respect his immunity by not interfering with the sovereignty and internal affairs of Bangtangnagar. As per customary international law, there is no exception to the rule according immunity from criminal jurisdiction to ministers, even when they are accused of crimes against humanity.

### **II. THE MATTER IS NOT ADMISSIBLE AS PER THE ARTICLES OF THE ROME STATUTE**

2. The defence argues that complementarity and Article 18(1) make the prosecution of the Police Chief inadmissible. Firstly, the ICC lacks jurisdiction because a domestic trial scheduled to take place in Bangtangnagar and the state has not demonstrated a desire or inability to bring charges. Secondly, the Defence claims that Article 18(1) in conformity with the complementarity principle was violated and that the prosecution is therefore inadmissible because the OTP did not engage with the national authorities concerned with a view to

discussing and assessing any relevant investigation and prosecution at the national level . Additionally, the Defence challenges the gravity requirements under Article 17(1)(d) fulfillment by pointing to insufficient quantitative and qualitative characteristics, such as insufficient number of victims, isolated incident, crimes' impact, nature, and commission, as well as the defence's involvement in them, are not grave enough to qualify both the criteria. Therefore, the Defence urges the ICC to declare the matter inadmissible.

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

3. The Police Chief's alleged conduct constitutes a Crime Against Humanity (CAH) under Art. 7(1)(d) of the Rome Statute, based on three key elements: firstly, the deportation of the Sholingilars without lawful grounds under IL through coercive means; secondly, the lawful presence of the Sholingilars in the area they were deported from; and thirdly, the Police Chief's awareness of the circumstances establishing the lawfulness of their presence. The *actus reus* for deportation encompasses various actions leading to expulsion or other coercive acts, including fear, duress, psychological oppression, and abuse of power. Furthermore, the prosecution contends that the present case fulfils the contextual elements required for a CAH, including a widespread and systematic attack against a civilian population, with a nexus between individual acts and the attack, and knowledge of the attack. The Police Chief's orders, such as torture, persecution, and arrests, directly contributed to the forced displacement of the Sholingilar community, satisfying the *mens rea* requirement. In conclusion, the prosecution asserts that the Police Chief's actions meet the criteria for a CAH under Art. 7(1)(d) of the Rome Statute, and they argue that he should be held individually criminally responsible under Art. 25(3)(b) for ordering these actions that led to the crime.

## ARGUMENTS ADVANCED

### **1. THE ICC DOES NOT HAVE JURISDICTION OVER THE POLICE CHIEF'S CONDUCT**

1. For the ICC to exercise jurisdiction *ratione loci* over a crime, the preconditions set out in Art.12 of the Rome Statute must be met. Under Art. 12(2), the ICC can exercise territorial jurisdiction over a crime if the ‘conduct in question’ occurred in the territory of a State Party which has accepted its jurisdiction<sup>1</sup> or must be committed by a national of such a State.<sup>2</sup> If the conditions of nationality and territoriality are not met, the ICC may exercise jurisdiction only if it is referred to it by the Security Council<sup>3</sup> or the State consents to its jurisdiction. The Defence is a national of Bangtangnagar, and the conduct occurred in the territory of Bangtangnagar which is not a State Party to the Rome Statute, never accepted its jurisdiction and the situation was never referred to the ICC by the UNSC.<sup>4</sup> The Defence is a national of Bangtangnagar, and all of his actions occurred in the territory of Bangtangnagar. The precondition of territoriality under Art. 12(2)(a) of the Statute is not met [1.1]. The ICC cannot exercise effects jurisdiction [1.2]. The Defence has immunity from prosecution [1.3].

#### **1.1 THE PRECONDITION OF TERRITORIALITY UNDER ART. 12(2)(A) IS NOT MET**

##### **1.1.1 The *travaux préparatoires* support a literal interpretation of the Rome Statute**

2. The Defence humbly submits that universal jurisdiction goes against the principles of PIL [1.1.1.1]. In *arguendo*, the ICC should interpret Art. 12(2)(a) in *dubio pro reo* [1.1.1.2].

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<sup>1</sup> SCHABAS, p. 54.

<sup>2</sup> STATUTE art. 12 ; Ivory Coast Authorization, §187.

<sup>3</sup> STATUTE, art. 13(b).

<sup>4</sup> Harun Warrant, §16..

### **1.1.1.1 The provisions of the Rome Statute must be interpreted *in dubio pro reo***

3. The concept of jurisdiction is neither procedural nor substantive.<sup>5</sup> It describes the power of a judicial body to try a case.<sup>6</sup> The Rome Statute,<sup>7</sup> the ICTY,<sup>8</sup> the ICTR<sup>9</sup> and the general principles of criminal law support interpretations in favour of the accused when there is a definitional ambiguity in substantive law.<sup>10</sup> There is widespread support to interpret jurisdictional issues *in dubio pro reo* as well.<sup>11</sup>

### **1.1.2 The "conduct" in question did not occur on the territory of a State Party**

4. The Defence humbly submits that according to the universally recognized theory of ubiquity, a crime is considered as committed on the territory of a State when either criminal conduct or its result has occurred there.<sup>12</sup> Art. 12 of the Rome Statute explicitly states that the ICC may exercise its jurisdiction if the State on the territory of which the conduct occurred is a party to the Rome Statute or has accepted the ICC's jurisdiction. There is no definitional ambiguity concerning the meaning of the word 'conduct' in the Rome Statute. It is further submitted that

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<sup>5</sup> Bernard.

<sup>6</sup> *Id.*

<sup>7</sup> STATUTE, art. 22.

<sup>8</sup> *Hadžihasanović*, Dissenting Opinion of Judge Shahabuddeen.

<sup>9</sup> *Akayesu*, ¶ 319.

<sup>10</sup> *Hadžihasanović*, Dissenting Opinion of Judge Shahabuddeen.

<sup>11</sup> DONOHUE; *Nahimana*, ¶ 575.

<sup>12</sup> Ryngaert (2015), 78; Maillart (2019), 377; Jurisdiction Observations, §53–54.



the terms of a treaty must be interpreted in good faith in accordance with their ordinary meaning, in their context and in the light of its object and purpose.<sup>13</sup>

**1.1.2.1 'Conduct in question' means act or omission and does not include consequences**

(i) *The Rome Statute establishes a distinction between conduct and consequences*

5. While the textual interpretation of "conduct" does not explicitly indicate what exactly needs to occur on the territory of a State Party,<sup>14</sup> its meaning can be construed from other provisions. Art. 30 of the Rome Statute distinguishes between "conduct", "consequence" and "circumstance" as material elements that must be committed with intent and/or knowledge. From §7 of the General introduction to EOC it can be inferred that "conduct", "consequences" and "circumstances" are possible elements of a crime and, as such, distinct terms.<sup>15</sup> Crimes are defined to proscribe either conduct or consequences or both.<sup>16</sup> Art. 30 of the Statute discusses the subjective elements of a crime and defines *mens rea* for conduct and consequence, thereby distinguishing between the two.<sup>17</sup> The distinction is supplemented by Art. 20 and Art. 31 of the Statute.<sup>18</sup> Art. 20(1) prevents the ICC from exercising jurisdiction over 'conduct' that form the

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<sup>13</sup> Art. 31 VCLT; Kenya Authorization, §19.

<sup>14</sup> Myanmar Authorisation, §46.

<sup>15</sup> VAGIAS, at pp. 91, 92.

<sup>16</sup> PIGAROFF & ROBINSON.

<sup>17</sup> STATUTE, art. 30.

<sup>18</sup> STATUTE, arts. 30, 20(1).

basis of crimes for which the accused has already been acquitted or convicted by the Court.<sup>19</sup> On the other hand, Art. 31 allows general defences in criminal law and exclusion from criminal responsibility if its provisions are fulfilled at the conduct stage.<sup>20</sup> These provisions of the Statute clearly indicate that conduct does not include consequences. Art. 20(2) of the Rome Statute shows that a distinction between the terms "conduct" and "crime" was intentional, because it has significant legal repercussions.

(ii) *The travaux préparatoires and the Elements of Crimes support such an interpretation*

6. The phrase 'conduct in question' replaced the phrase 'act or omission in question' during the Rome Statute's negotiations.<sup>21</sup> The Defence submits that the drafters of the Statute consciously refrained from using the words 'crime in question' in place of 'conduct in question' to exclude consequences from the purview of Art. 12(2)(a) of the Statute.<sup>22</sup> However, preparatory documents show that the drafts continuously used the phrase "act or omission" over "conduct" at least until 10 July 1998.<sup>23</sup> It was only replaced by "conduct" in the final version<sup>24</sup> because the drafters could not agree on the definition of "omission".<sup>25</sup> This indicates that ICC's territorial jurisdiction was always intended to be subjective (conduct understood as an act

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<sup>19</sup> TRIFFTERER; STATUTE, art. 20(1).

<sup>20</sup> VAGIAS, at p. 94; STATUTE, art. 31..

<sup>21</sup> VAGIAS, at p. 91.

<sup>22</sup> *Myanmar Authorisation*, §48.

<sup>23</sup> Draft Code, UN Doc. A/49/10, 41, Art. 21; Bureau Proposal; UN Doc. A/CONF.183/C.1/L.59, 216, Art. 7.

<sup>24</sup> STATUTE, art. 12(2)(a); VAGIAS, at p. 91.

<sup>25</sup> VAGIAS, at p. 92; Lee (1999), 205; Maillart (2014).

and/or possibly an omission) and not also objective (conduct understood as crime, which would also encompass the result). Additionally, ILC members felt that investigation and prosecution of the crimes should not be undertaken in the absence of the support of a State or UNSC.<sup>26</sup> Strong reservations were expressed with regard to the references to UNSC and the view was also expressed that the ICC should not exercise jurisdiction unless States Parties gave their express consent.<sup>27</sup> The Rome Statute recognises the Elements of Crimes as an interpretative instrument.<sup>28</sup> The document makes a clear distinction among conduct, consequences and circumstances,<sup>29</sup> much like Art. 30 of the Rome Statute.<sup>30</sup> Hence, the Defence submits that the word ‘conduct’ means act or omission when the preparatory works and supplementary documents to the Statute are taken into account.

7. The OTP forms an integral part of the ICC, and its practice is fairly reflective of the practice of the Court.<sup>31</sup> In the Registered Vessels Report,<sup>32</sup> the OTP noted that it could exercise jurisdiction over conduct and crimes that occurred on board the vessels of State Parties and not the consequences that followed on the territories of State Parties.<sup>33</sup> Therefore, OTP practice

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<sup>26</sup> Draft Code, UN Doc. A/49/10, 46, Art. 25, §4.

<sup>27</sup> Draft Statute, UN Doc. A/CONF.183/2, fn. 42.

<sup>28</sup> STATUTE, art. 21.

<sup>29</sup> VAGIAS.

<sup>30</sup> STATUTE, art. 30.

<sup>31</sup> STATUTE, art. 34.

<sup>32</sup> Registered Vessels Rep.

<sup>33</sup> DONOHUE.

indicates that conduct and consequences are distinct and cannot be interpreted to have the same meaning.

## **1.2 THE ICC CANNOT EXERCISE EFFECTS JURISDICTION**

8. The PTC, in its decision, ruled that the case fell within the jurisdiction of the Court.<sup>34</sup> The effects doctrine permits exercise of jurisdiction over broad consequences of conduct.<sup>35</sup>

### **1.2.1 Reading the effects doctrine into Art. 12 results in the exercise of legislative powers**

9. The Rome Statute recognises the doctrine of *kompetenz-kompetenz* or the inherent powers of the ICC to determine its jurisdictional outreach.<sup>36</sup> The inherent powers of international judicial bodies to determine their jurisdiction forms a part of CIL as well.<sup>37</sup>

#### **1.2.1.1 The ICC must determine its jurisdiction as per Art. 21(1) of the Statute**

10. Art. 21(1) of the Rome Statute lays down the applicable law before the ICC and limits the scope for interpretation.<sup>38</sup> The *kompetenz-kompetenz* of the ICC is curtailed by Art.21 of the Statute, and the inherent powers under Art. 19(1) do not give the ICC the power to legislate.<sup>39</sup> The Defence submits that the exercise of the effects doctrine in the absence of State Party consent will amount to the ICC transgressing into the legislative domain.

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<sup>34</sup> Moot Proposition, ¶ 17.

<sup>35</sup> VAGIAS, at p. 162.

<sup>36</sup> STATUTE, art. 19.

<sup>37</sup> *Situation in Uganda*, ¶¶ 22-23; *Mbarushimana Jurisdiction; Kony Admissibility*, ¶ 45; HALL ET. AL.

<sup>38</sup> Vagias I.

<sup>39</sup> Jessberger.

### **1.2.1.2 Expanding the limits of jurisdiction goes against the intention of the drafters and the jurisprudence of the ICC**

11. The drafters of the Rome Statute refrained from incorporating the effects doctrine into Art. 12 despite having the opportunity to do so at the drafting stage.<sup>40</sup> The PTC, in the Myanmar case, despite mentioning the effects doctrine,<sup>41</sup> ruled that the objective territoriality principle would apply since one element of the crime took place in Bangladesh.<sup>42</sup> The crime of deportation has severe socio-economic effects in states.<sup>43</sup> The PTC consciously avoided this discussion in its decision, indicating that the effects doctrine cannot be read into the Rome Statute.

### **1.2.1.3 The effects doctrine is not supported by State practice**

12. The effects doctrine has been affirmed by States sparingly and does not form a part of CIL.<sup>44</sup> Apart from the decision of the ICJ in the *Lotus* case, and the practice of certain States in antitrust law, the effects doctrine does not find its application in CIL.<sup>45</sup> The Defence objects to the exercise of the effects doctrine on three grounds. *First*, the doctrine does not have defined limits [i].

(i) *The effects doctrine does not have well-defined limits*

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<sup>40</sup> SCHABAS.

<sup>41</sup> *Myanmar Jurisdiction*, ¶ 56.

<sup>42</sup> *Id.*

<sup>43</sup> Akhavan.

<sup>44</sup> DONOHUE.

<sup>45</sup> *Lotus*.

13. The effects doctrine involves the exercise of jurisdiction beyond the traditional territoriality principles, which form a part of CIL.<sup>46</sup> The laws of different states do not concur on the possible “effects” of a crime.<sup>47</sup> The Defence submits that “reasonably foreseeable effects”<sup>48</sup> cannot be the standard to determine whether the effects doctrine is applicable or not since the parties to the Rome Statute have not agreed to a set standard of effects. Treaties do not impose obligations on States that have not adopted them.<sup>49</sup> Allowing the ICC to determine the standard of effects would violate state sovereignty as obligations under the Rome Statute would bind States that are not a party to the Statute thereby violating the *pacta tertiis* principle.

### **1.3 THE POLICE CHIEF ENJOYS IMMUNITY FROM PROSECUTION**

14. The purpose of immunity is to ensure the efficient performance of the highest sovereign functions.<sup>50</sup> It stems from functional/representative necessity; the principles of sovereign equality and non-interference in internal affairs, as well as the need to ensure stability of international relations and the independent performance of State activities.<sup>51</sup> It is firmly established in international law that certain holders of high-ranking offices in a State enjoy

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<sup>46</sup> SHAW, at p. 499; DONOHUE.

MALCOLM N SHAW, INTERNATIONAL LAW (6<sup>th</sup> ed., 2008).

<sup>47</sup> VAGIAS, at p. 191.

<sup>48</sup> ALCOA.

<sup>49</sup> VCLT, art. 34; DORR & SCHMALENBACH.

<sup>50</sup> Preamble VCDR, §4; Kolb, at p. 185.

<sup>51</sup> UN Doc. A/63/10, §274; Sanger, at p. 198.

immunities from criminal jurisdiction,<sup>52</sup> which protects them against any act of authority of another State which would hinder them in the performance of their duties.<sup>53</sup> The Police Chief was involved in many decisions on important issues affecting State sovereignty and exercising jurisdiction over him would be an interference in Bangtangnagar's internal affairs.<sup>54</sup> The Police Chief has substantial autonomy in his sphere of authority and performs essential functions for his State. The ICC must respect his immunity and not interfere with the sovereignty and internal affairs of Bangtangnagar.

### **1.3.1 The Rome Statute cannot create any obligations for Bangtangnagar**

#### **1.3.1.1 There exists no exception to immunity in international criminal law**

15. As per CIL, there is no exception to the rule according immunity from criminal jurisdiction to ministers, even when they are accused of war crimes or CAH.<sup>55</sup> Such an exception may develop, but it has to be a policy decision by the States, not a state of the law finding of judicial institutions.<sup>56</sup> Personal immunity of incumbent high-ranking officials applies in national jurisdictions even in cases concerning crimes against international law.<sup>57</sup> An exception to this firmly established rule could only be found in the legal basis of the Court.<sup>58</sup>

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<sup>52</sup> Arrest Warrant, §51; Kolb, at p. 181.

<sup>53</sup> Arrest Warrant, §54.

<sup>54</sup> Kolodkin's Report, §121.

<sup>55</sup> Arrest Warrant, §58; Galand, at p. 172–175.

<sup>56</sup> Van Alebeek, at p. 267.

<sup>57</sup> Pinochet, Castro, Hussein, Mugabe, Ghaddafi, Bush, etc. Van Alebeek (2008), 267–268; Akande (2011), 819–820.

<sup>58</sup> Galand, at pp. 160, 198; Stahn, at pp. 253–254; Cormier (2020), 69.

### **1.3.1.2 Applying Art. 27 to establish jurisdiction would contravene international law**

16. Treaties cannot create obligations for third states without their express consent.<sup>59</sup> In *Palestine*, the ICC stated that the *Monetary Gold* principle – according to which matters which affect legal interests of third parties cannot be adjudicated without their consent<sup>60</sup> – does not apply to ICC because its jurisdiction is not exercised over States, but over natural persons.<sup>61</sup> However, exercising jurisdiction over the Defence would nonetheless affect the legal interests of Bangtangnagar. It would render the immunity – which is a right of the State, not the individual, and only the State may (expressly) waive it<sup>62</sup> – of one of its most powerful officials completely dysfunctional and impose an obligation on Bangtangnagar to suffer an interference with its affairs without its consent. State Parties to a treaty-based court are only entitled to waive their own rights, not the rights of others,<sup>63</sup> and they cannot waive the immunity of officials from non-party States. If each State Party is individually barred from exercising jurisdiction over the Defence, they also cannot exercise it together on the basis of a treaty.<sup>64</sup> Using Art. 27 in this manner contradicts the most fundamental rule of international law.<sup>65</sup>
17. **In conclusion, for the aforementioned reasons**, the ICC cannot exercise jurisdiction over the Police Chief under Art. 12 of the Rome Statute.

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<sup>59</sup> Arts. 34–35 VCLT.

<sup>60</sup> *Monetary Gold*, 32.

<sup>61</sup> *Palestine Jurisdiction*, §59.

<sup>62</sup> Fox, at p. 222; Foakes (2011), 4; Akande (2012).

<sup>63</sup> Galand, at p. 162.

<sup>64</sup> Van Alebeek, at p. 277; Cormier (2020), 93.

<sup>65</sup> *Idem.*, 279.



**II. THE MATTER IS NOT ADMISSIBLE AS DEFINED IN THE ARTICLES OF THE ROME  
STATUTE**

**2.1 POLICE CHIEF'S PROSECUTION IS INADMISSIBLE AS PER THE COMPLEMENTARITY  
CRITERIA AND IS IN VIOLATION OF ARTICLE 18(1) OF THE STATUTE**

**2.1.1 It is violative of Article 17(1)(a)**

18. Articles 17 (1)(a) and (b) of the Statute provides that a Court will determine that a case is admissible based on the complementarity criteria which thereafter determines whether the case at hand has been or is being genuinely investigated or prosecuted by a state's national judicial system. A complementarity determination is a two-step assessment, addressing: -

*(1) whether there is a national investigation or prosecution in relation to the same case as the one before the ICC, and*

*(2) where such proceedings exist, whether they are vitiated by unwillingness or inability*

19. In the instant case, while the prosecution may argue that there is no ongoing investigation or prosecution, the ICC's stand has been that there must also be inaction on the same issue for it to be admissible.<sup>66</sup> Failure by a state to take any measure against those involved in the commission of crimes falling within the jurisdiction of the ICC renders the case admissible before the Court (provided that the gravity threshold is satisfied). If any action has been taken, it cannot be admissible as the national jurisdiction, which has the higher priority, is already taking on the matter. It is submitted that the ICC has secondary jurisdiction, with states having primary competence and ability to investigate and prosecute international crimes. Complementarity is thereby evaluated on a case-by-case basis.

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<sup>66</sup> Katanga.

20. Article 17(1) prescribes that a case shall be found inadmissible if it “is being investigated” or “has been investigated” by a state which has jurisdiction. The Appeals Chamber in the case of Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali defined the phrase “the case is being investigated” as “the taking of steps directed at ascertaining whether this individual is responsible for that conduct.”<sup>67</sup>

21. In the instant case, not only an action has been taken, that is the Police Chief has been charged with the crime of torture and slavery, but also a trial in domestic court is pending.<sup>68</sup> The state of Bangtangnagar is neither unwilling or unable to carry out the prosecution. The ICC need not entertain this matter, as it would be violative of Art. 17(1)(a).

### **2.1.2 The Prosecution Proceeded in Violation of Art. 18(1) of the Rome Statute**

22. The Defence humbly submits that Article 18(1) applies to the instant case. It states that when a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.<sup>69</sup>

23. The Defense submits that as per the statute, national jurisdictions have the primary responsibility to investigate and prosecute those responsible for international crimes. Therefore, in conformity with the complementarity principle, the OTP is required to engage with the national authorities concerned with a view to discussing and assessing any relevant investigation and prosecution at the national level.

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<sup>67</sup> *Kenyatta*.

<sup>68</sup> Moot Proposition, ¶ 20.

<sup>69</sup> Statute, Art 18(1).

24. In the instant case, the OTP had not enquired the government of Bangtangnagar whether it was investigating the Police Chief within its jurisdiction concerning his alleged criminal acts, which is not in accordance with Article 18. Hence, the Police Chief's prosecution is inadmissible as it does not meet the complementarity criteria.

#### **2.1.2.1 Gravity requirement under Article 17(1)(d) is not met**

25. The case is inadmissible in accordance with Article 17(1)(d) due to insufficient gravity. A crucial tool for maintaining the Court's efficiency in increasing crime prevention is the gravity threshold. Both quantitative and qualitative factors are important for the Court's determination of the degree of gravity. The gravity threshold must be met by all relevant factors when taken together and not individually. The present instance does not satisfy either the (i) quantitative or the (ii) qualitative criteria.

##### (1) The Quantitative Criterion is not satisfied

26. The number of victims is insufficient to satisfy the quantitative criteria of the gravity assessment. The number of victims, the severity of the damage, and the geographic or temporal distribution are all important considerations when determining the scale. The Defence humbly submits that there is nothing in the factsheet of the case at hand to determine any of these factors mentioned. The number of participating victims provides an indication of the scope of victimhood and the number of victims is one of the relevant considerations in the assessment of the gravity requirement for the purposes of article 17(1)(d) of the Statute.<sup>70</sup>

27. The scope of victimhood is not even determined in the investigation authorized by the PTC. In the *Lubanga* case, Pre-Trial Chamber I ruled that the gravity threshold was reached

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<sup>70</sup> Al-Hassan.

whenever a conduct was either systematic or large-scale.<sup>71</sup> As stated in the Preamble to the Statute, the main purpose of article 17(1)(d) of the Statute is to filter and limit the types of cases that are to be handled by the ICC to only the most heinous crimes those that "threaten the peace, security, and well-being of the world."

28. In the instant case, there is no evidence that there has been systematic or widespread use of young women for slave labour. The alleged crime is only an isolated incident indicating that it cannot be classified as a horrendous crime threatening peace, security and well-being of the world. This also naturally follows from the ICC's status as a subsidiary court with purely complementary jurisdiction. The Defence submits that this is not a matter that ICC has to look into as it is already scheduled for trial in Bangtangnagar.

(2) The Qualitative Criteria are not fulfilled

29. The Defence respectfully submits that enslavement under Article 7 *means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.*<sup>72</sup> This would suggest that the term "enslavement" as used in the ICC Statute only refers to slavery in the traditional sense

30. The right to ownership indicates that the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons.<sup>73</sup> In the instant case, the Police Chief had not

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<sup>71</sup> Lubanga.

<sup>72</sup> Statute, Art. 7

<sup>73</sup> EOC Art 7(1)(c).

exercised any of the powers attaching to the right of ownership over any of the Sholingilar people by purchasing, selling, lending or bartering them. Slavery only refers to circumstances in which the victim is treated as chattel. Moreover, they were not stopped from leaving for Finlandia by anyone in Bangtangnagar<sup>74</sup>. If there was an element of ownership over the Sholingilar people, then it wouldn't be possible for them to move freely into another country. Thereby, it essentially means that the Police Chief is not liable to be prosecuted under the provisions of Enslavement. It is submitted that the crimes' impact, nature, and commission, as well as the defence's involvement in them, are not grave enough to qualify the qualitative criteria. Hence, the Police Chief's prosecution must be ruled inadmissible as the alleged acts were neither quantitatively nor qualitatively of sufficient gravity to meet the threshold of Article 17(1)(d). Thus, the Defence counsel submits that the matter is inadmissible before the International Criminal Court under Section 17 of the statute.

31. **In conclusion, for the aforementioned reasons**, the matter is inadmissible before the ICC.

### **III. THE ALLEGED CONDUCT OF THE POLICE CHIEF DOES NOT SATISFY THE REQUIREMENTS OF DEPORTATION AS A CAH**

#### **3.1 THE ALLEGED CONDUCT DOES NOT SATISFY THE REQUIREMENTS OF DEPORTATION AS A CAH**

32. For a crime to be prosecuted under Art. 7(1)(d), the crime must be inhumane and shock the conscience of humanity and threaten collective security.<sup>75</sup> It must also meet all the elements required for a 'crime' to be qualified as a Crime Against Humanity.

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<sup>74</sup> Moot Proposition, ¶ 13.

<sup>75</sup> Haenen.

### **3.1.1 The contextual elements of a CAH are not made out in the present case**

33. Art. 7(1) of the Rome Statute requires three conditions to be fulfilled for a crime to be a CAH. First, there must be widespread or systematic “attack” against a civilian population. Second, the attack must be carried out in pursuance of a state or organisational policy. And third, the perpetrator must know that the conduct forms part of an ‘attack’.<sup>76</sup> The Defence submits that the Police chief’s conduct did not fulfil these requirements and therefore, does not constitute a CAH.

#### **3.1.1.1 There is no widespread or systematic attack on the Sholingilar community**

34. The Pre-Trial Chamber in the Prosecutor v. Bemba stated regarding ‘widespread’, that it “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”<sup>77</sup> It also concluded that a widespread attack entailed “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>78</sup>

35. “Widespread” refers to the large-scale nature of the attack and the number of victims, whereas “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence.” Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.<sup>79</sup>

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<sup>76</sup> *Kenya Authorisation* ¶78; Statute, Art. 7(1).

<sup>77</sup> *Bemba Confirmation of Charges* ¶ 83.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Kordić; Blaškić.*

36. The defence submits that the threshold of large scale nature of the actions is not satisfied in the instant case. There is nothing to show from the prosecution that the conducts were frequent in nature. There is no organised nature to any of the actions.

37. The Prosecutor will rely on the facts that the torture happened in the prison and a part of the population to slave-labour. However, even if these are found to be true, these do not satisfy the large-scale, frequent, organised nature for a conduct to be satisfied to meet the requirement of widespread or systematic attack. Hence, the defence submits that the element of widespread or systematic attack is not met in the instant case.

### **3.1.1.2 There is no state or organisational policy adopted with an intention to commit**

#### **CAH**

38. The Rome Statute explicitly recognises that a CAH must have a nexus with a state or organisation.<sup>80</sup> The rationale behind CAH was initially the war nexus, and subsequently, the link between state policies and crimes.<sup>81</sup>

39. The elements clarify that “a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack” Although the Elements of Crimes recognise that deliberate inaction by a state can fulfil the policy requirement, such inaction must be “consciously aimed at encouraging” an attack.<sup>82</sup> “The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action”.<sup>83</sup> The concept of ‘policy’ and that of the ‘systematic’ nature of the attack

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<sup>80</sup> Statute, Art. 7(2)(a)

<sup>81</sup> Ambos & Miller.

<sup>82</sup> *Kenya Authorisation* ¶243.

<sup>83</sup> EOC art.7

both refer to a certain level of planning of the attack.<sup>84</sup> There is nothing to show that the active participation of the state is present in forming a policy in furtherance of attack towards the Sholingilar community.

40. Mere inaction does not satisfy the element of policy adopted to attack. Thus, the defence submits that there is no policy that was adopted to promote an attack against the Sholingilar community.

### **3.1.1.3 The police chief did not know his conduct formed part of an attack**

41. Art. 7(1) requires that the acts forming part of the attack must be committed with the knowledge of the existence of such an attack.<sup>85</sup> The drafters intended to include knowledge as an independent element apart from Art. 30 and the specific mens rea requirements prescribed under the defined crimes.<sup>86</sup>

42. The defence submits that the police chief made the orders to arrest since it was his duty and the crimes related to drugs were present in the case. Moreover the state of Bangatagnagar witnessed a sudden influx of undocumented population which would inevitably alarm the authorities in the case of crime rates being increased. The police chief was unaware of his conduct being part of a larger widespread and systematic attack and thus the requisite knowledge for his conduct being a part of attack is absent.

43. The defence submits that the actions of the Police Chief, even if it falls under the ambit of “attack”, cannot be construed to be intentional nor he had the knowledge of his actions to be a part of an attack.

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<sup>84</sup> Laurent Gbagbo ¶ 216.

<sup>85</sup> Rome Statute, art. 7(1)(d)

<sup>86</sup> Ambos & Wirth.



### **3.1.2 The elements of deportation under 7(1)(d) are not satisfied as there is no link between the actions of the police chief and the displacement**

44. The defence submits that actions of the police chief and the resulting consequences does not have a connecting link which the prosecutor must establish for proving the crime of deportation as a CAH.<sup>87</sup> Absent such a link between the conduct and the resulting effect of forcing the victim to leave the area to another State or location, the Chamber may not establish that deportation or forcible transfer of population pursuant to article 7(1)(d) of the Statute has been committed.

45. The absence of the UNHCR mission in the country cannot be said to be the responsibility of the police chief. The community of Sholingilar were already facing manifold difficulties in the state of Bangtangnagar owing to the differential treatment by the villagers, being subjected to employment without wages, and denied access to multiple rights. None of these could be linked to the actions of the police chief and the displacement did not happen due to the actions of the police chief, but the collective struggle the community had to go through from the state and people of Bangtangnagar.

46. The prosecution might rely on the fact that the youth of the community were arrested, and other actions of the Police Chief led the community to leave the territory. However, the defence submits that there is a clear absence of link in this case. No alleged actions of the chief can be pointed out to carry out forceful displacement of the community.

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<sup>87</sup> Klamberg.

### **3.1.3 The residence of the community in Bangtangnagar was not lawful**

47. The UN Refugee Convention provides protection to refugees even in the case of illegal entry to the receiving country, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>88</sup>

48. In the instant case, the community of Sholingilar has arrived at Bangtangnagar through an illegitimate channel. Multiple people reached through different modes, some by swimming, some by land, and through many innovative ways, and none of them were through official channels.<sup>89</sup>

49. The defence submits that even if the people in the community of Sholingilar were to be refugees under the UN Refugee Convention, the fact that they entered illegally, coupled with the fact that they did not present themselves to the authority renders their presence in the state of Bangtangnagar unlawful.

50. Therefore the defence submits that the actions of the Police Chief does not amount to deportation, as the element of lawful residence of the displaced population is a necessary element to prove the crime of deportation as a CAH.

### **3.1.4 Even if the residence was lawful, the Police Chief was unaware of the factual circumstances**

51. The perpetrator should be aware of the factual circumstances that established the lawfulness of such presence.<sup>90</sup> Elements of Crimes clarifies that awareness of the factual circumstances

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<sup>88</sup> Refugee Convention, art. 31

<sup>89</sup> Moot Proposition, ¶ 7.

<sup>90</sup> EOC art.7(1)(d)(3)

establishing the lawfulness of the victims' presence is needed. It is not required that the perpetrator make any legal evaluation of the lawfulness of the victims' presence.<sup>91</sup>

52. In the instant case, it is clear that the people of the Sholingilar community entered illegally from the state of Burmanyar through innovative ways as they were not allowed to cross the border in the first place. The people did not report themselves to the authorities concerned as well. Even with the knowledge of being a signatory of the convention, the police chief had all the reasons to know the residence was not lawful.

53. There is no mention of any domestic law being in existence with respect to the convention. Moreover there is an absence of a UNHCR mission in the state, which all point towards the lack of presence of the awareness of the applicability of the convention.

54. Thus, the police chief cannot be said to be aware of the factual circumstances that may have made the residence of people of the Sholingilar community lawful, hence submits that the elements to prove deportation as a CAH has not been proved beyond reasonable doubt.

#### **3.1.4.1 The Defence cannot be held individually criminally responsible for ordering CAH under Art. 25(3)(b)**

55. Art. 25(3)(b) deals with individual criminal responsibility and is more appropriate in attracting responsibility in the event of active participation in the crime by ordering it, rather than Art. 28(b). In the Article 28 provision, the superior is liable for an omission while in the case of an order to commit a crime (Article 25(3)(b)) the superior is liable for commission for having 'ordered'.<sup>92</sup>

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<sup>91</sup> Robinson, pp.86–88.

<sup>92</sup> Klamberg, p. 268

56. Art. 25(3)(b) of the Rome Statute imposes individual criminal responsibility for the act of ‘ordering, soliciting or inducing’ the commission of a crime.<sup>93</sup> For responsibility to arise under Art. 25(3)(b), four requirements must be met.<sup>94</sup> First, the accused must have a position of authority. Second, the accused must order subordinates to engage in certain conduct. Third, the ordered conduct must influence the commission of the crime. And fourth, the perpetrator must be aware that the order will result in the commission of a crime.<sup>95</sup>

(1) The Police Chief did not have the requisite *mens rea*

57. Under the Rome Statute, ordering’s *mens rea* is governed by the mental element requirement under Art. 30, in the absence of contrary language in Art. 25(3)(b). The defence submits that the *mens rea* element is not satisfied in the present case. The *mens rea* of ordering in relation to the consequences of the order has undergone a strict interpretation at the ICC.<sup>96</sup>

58. Art. 30 requires the accused to order a crime with both intent and knowledge.<sup>97</sup> The mental element requirement under Art. 30 is satisfied when the suspect means to engage in a particular conduct with the will of causing the desired consequence or is at least aware that such consequences will occur in the ordinary course of events.<sup>98</sup>

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<sup>93</sup> Statute, art. 25(3)(b).

<sup>94</sup> Sylvester Mudacumara.

<sup>95</sup> *Ibid.*

<sup>96</sup> HALL ET. AL.

<sup>97</sup> Statute, art. 30

<sup>98</sup> Statute arts. 30(2), 30(3)

59. The ICC has held that the words “will occur in the ordinary course of events” entail a “standard for the foreseeability of events of virtual certainty”<sup>99</sup> unless some unexpected intervention prevents its occurrence.<sup>100</sup> Therefore, the standard of mens rea under Art. 30 is higher than mere foreseeability of the occurrence of the undesired consequences as a likelihood.<sup>101</sup>

60. With regard to the knowledge as of second degree requirement, the Defence submits that the occurrence of a crime was not a “virtual certainty”.<sup>102</sup> The police chief did not know that his actions would have caused forced displacement in all certainty.

61. The defence submits that the objective of the police chief was to displace the community, rather to control the crimes in the border where a sudden influx of manifold illegal migrants happened. The situation that already prevailed out of the scope of the actions of the police chief already made the conditions of the community difficult in the area and the police chief did not want them to be displaced.

62. The defence further submits that the actions of the police chief was acting in the interest of the state and trying to curb the drug related crimes. There was no intention by him to forcefully displace the community.

(2) The actions of the Police Chief did not cause the deportation

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<sup>99</sup> Lubanga ¶ 447.

<sup>100</sup> Bemba Confirmation Charges ¶ ¶ 362-363.

<sup>101</sup> *Ibid.*

<sup>102</sup> Lubanga Appeal ¶ 447.

63. The ICC has held that the conduct of a co-perpetrator under Art. 25 must satisfy a standard higher than “substantial” contribution to the crime.<sup>103</sup> The defence submits that the actions of the Police chief did not form the major influence on the crime of deportation.
64. The people of Bangtangnagar had resented the presence of the Sholingilar community and had treated them with contempt, including employing them as slave-like labourers and denying them basic human rights.
65. Moreover the treatment of the state of Bangtangnagar by not providing access to courts, and not providing opportunities in the form of UNHCR mission and cooperations lead to the deteriorating quality of life for the Sholingilar community.
66. The actions of the police chief were only in furtherance of his duty and arguendo any crimes committed cannot be said to be the influence on the crime of deportation
67. Thus, the defence submits that in the light of objective and subjective elements not being satisfied, the police chief cannot be held individually criminally responsible under Art. 25(3)(b).

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<sup>103</sup> Lubanga Appeal ¶ 997.

**PRAYER**

Wherefore in light of the issues raised, arguments advanced and authorities cited, the Counsel for the Defence respectfully requests this Court to adjudge and declare that:

- 1) The ICC cannot exercise jurisdiction over the Police Chief under Art. 12 of the Rome Statute.
- 2) The matter is not admissible as defined in the Articles of the Rome Statute.
- 3) The dismissal of the charge of “deportation as a crime against humanity” is valid.

Sd/-

*On behalf of the Defence.*

**COUNSEL FOR THE DEFENCE**

