

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

IL-16

*Before*

*Appeals Chamber of the International Criminal Court*

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

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IN THE MATTER BETWEEN:

**THE PROSECUTOR**.....*Prosecution*

v.

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

*Clubbed with*

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

v.

**THE**

**PROSECUTOR**.....*Prosecution*

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**MEMORIAL for [DEFENCE]**

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

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

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**STATEMENT OF JURISDICTION**

The defendant does not submit to the jurisdiction of the ICC.

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## STATEMENT OF FACTS

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### BACKGROUND

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

### CHANGE IN THE POLITICAL SCENARIO

Due to a military coup, there was a shift in power in Burmanyar. Due to this shift, a civil war was started. The Sholingilar community kept a neutral stance during this time. Under this new regime, the Sholingilar community was being harassed and persecuted. To escape this scenario, they started to flee into Bangtangnagar by swimming across or through the land borders.

### SITUATION IN BANGTANGNAGAR

The people of Bangtangnagar employed the Sholingilar community to work at their fields and after 2 years there half million Sholingilar people in Bangtangnagar. There was a drug menace amongst the youth in Bangtangnagar, to deal with this the police Chief of Bangtangnagar started to arrest the individuals. The police also put these individuals in prison under his authority.

### MOVE TO FINLANDIA

The Sholingilar people did not feel safe anymore in Bangtangnagar and decided to shift to Finlandia. The civil societies emphasized with them and mobilized lawyers and activists who could help them. the Finlandia civil society activists, along with the Sholingilar people, raised the issue of the victimization of the Sholingilar people at the International Criminal Court.

**ISSUES RAISED**

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**ISSUE 1**

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

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**ISSUE 2**

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

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**ISSUE 3**

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

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**SUMMARY OF ARGUMENTS**

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**ISSUE 1 - WHETHER THE ICC HAS JURISDICTION OVER THE MATTER AT THE APPEAL, AS BANGTANGNAGAR IS NOT A STATE PARTY TO THE ROME STATUTE AND OTHER GROUNDS?**

It is humbly submitted that the International Criminal Court (ICC) lacks jurisdiction over the case. Firstly, neither of the preconditions for the ICC's jurisdiction is met: the Defendant is a national of Bangtangnagar, a non-State Party to the Rome Statute (RS), and the alleged conduct occurred within Bangtangnagar, which has not accepted the Court's jurisdiction or referred the case to it. It is also emphasized that international legal scholars have expressed reservations about exercising jurisdiction without the support of a State or the United Nations Security Council (UNSC). Secondly, it is argued that the "conduct" in question did not occur on the territory of a State Party, and thus, Article 12(2)(a) RS does not apply. Additionally, it is argued that the Defendant, as the Police Chief of Bangtangnagar, enjoys personal immunity from prosecution, which is necessary to ensure the efficient performance of high-ranking state functions and maintain stability in international relations. They argue that attempting to apply Article 27 RS to establish jurisdiction would contravene international law, as immunity can only be waived by the State involved, and it would infringe upon Bangtangnagar's sovereignty.

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

It is humbly submitted that the Rome Statute (RS) establishes certain restrictions on the International Criminal Court's (ICC) discretion to uphold the admissibility of a case. These limitations include the principle of complementarity, the prohibition of double jeopardy, and the requirement for the offence to be of sufficient gravity. If any of these barriers are present, the case is deemed inadmissible and, therefore, cannot be adjudicated. The defence in the present case submits that it should be declared inadmissible because (1) the principle of complementarity is being violated as the defendant has been investigated and is being prosecuted for substantially the same conduct in the state having jurisdiction, (2) the alleged offence is not of sufficient gravity, and (3) unwillingness or inability of Bangtangnagar to genuinely carry out the investigation or prosecution against the Defendant cannot be ascertained.

### **ISSUE III - Whether the dismissal of the charge of “Deportation as a CAH” is valid?**

It is humbly submitted that the charge of deportation as a Crime Against Humanity is not applicable, as the acts in question were within the context of an investigation into drug abuse. It is contended that the Elements of Crime, as defined in the Rome Statute, were not met, as there was no forced displacement, lawful presence, or intent to deport the Sholingilar community. Additionally, it is argued that the Refugee Convention does not apply due to activities contrary to the United Nations' principles by some Sholingilar community members. It is contended that the responsibility for deportation should not be applied to an individual actor, as their actions were not part of a widespread and systematic attack. The Sholingilar community's situation is attributed to a lack of integration, governmental considerations, and the absence of a UNHCR Mission.

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## ARGUMENTS ADVANCED

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### ISSUE I: THE ICC DOES NOT HAVE JURISDICTION OVER THE MATTER IN APPEAL

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#### 1.1 PRECONDITIONS TO EXERCISE JURISDICTION ARE NOT FULFILLED

1.1.1 THE DEFENDANT IS A RESIDENT OF BANGTANGNAGAR OVER WHICH THE COURT CANNOT EXERCISE JURISDICTION

¶1. The RS prescribes two preconditions for the Court to exercise its jurisdiction: the conduct in question must occur on the territory of a State which has accepted its jurisdiction or must be committed by a national of such a State.<sup>1</sup> The Defendant is a national of Bangtangnagar, and the alleged conduct occurred in Bangtangnagar, which is not a State Party to RS,<sup>2</sup> never accepted its jurisdiction and the situation was never referred to the Court by the UNSC.

¶2. 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>3</sup> Strong reservations were expressed with regard to the references to UNSC and the view was also expressed that the Court should not exercise jurisdiction unless States Parties gave their express consent.<sup>4</sup>

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<sup>1</sup> Rome Statute of the International Criminal Court 1998(Rome Statute), art 12.

<sup>2</sup> Moot Proposition, para 9.

<sup>3</sup> UN, 'Draft Code of Crimes against the Peace and Security of Mankind, in: Report of the International Law Commission on the work of its Forty-Sixth Session' (1994) A/49/10 (Draft Code, UN A/49/10), art 25, s 4.

<sup>4</sup> UN, 'Draft Statute for the International Criminal Court, in: Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1998' (1998) A/CONF 183/2.



¶3. In light of the same, the Defence submits that the Court cannot exercise jurisdiction over a national of Bangtagnagar which is not a State Party to the RS and has refused to cooperate in the Court's proceedings.

#### 1.1.2 COURT CANNOT EXERCISE ITS JURISDICTION SINCE THE "CONDUCT" IN QUESTION DID NOT OCCUR ON THE TERRITORY OF A STATE PARTY

¶4. 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>5</sup> Article 12 of RS explicitly states that the Court may exercise its jurisdiction if the State on the territory of which the conduct occurred is a party to RS or has accepted the Court's jurisdiction.<sup>6</sup>

¶5. 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>7</sup> Using an extensive interpretation of the term "conduct" is against the systematic and teleological interpretation of the RS.

¶6. While the textual interpretation of "conduct" does not explicitly indicate what exactly needs to occur on the territory of a State Party,<sup>8</sup> its meaning can be inferred from other

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<sup>5</sup> JB Maillart, 'The Limits of Subjective Territorial Jurisdiction in the Context of Cybercrime' (*EJIL:Talk!*, 7 August 2014) <<https://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/>> accessed 20 September 2023.

<sup>6</sup> Rome Statute of the International Criminal Court 1998, art 12.

<sup>7</sup> Vienna Convention on Law of Treaties (VCLT), art 31 VCLT; Kenya Authorization, sec19.

<sup>8</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-01/19-27 (14 Nov 2019) Pre-Trial Chamber III (*Myanmar Authorisation*) [46].

provisions. ¶7. Article 30 of the RS distinguishes between “conduct”, “consequence” and “circumstance” as material elements that must be committed with intent and/or knowledge. From Section 7 of 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>9</sup> Art. 20(2) RS shows that a distinction between the terms “conduct” and “crime” was intentional, because it has significant legal repercussions – if a person is convicted or acquitted by the Court, other courts may re-try them for the same “conduct”, as long as it is not for a “crime” under the Court's jurisdiction.<sup>10</sup> Art. 20(1) also indicates a distinction by using the phrase “*conduct which formed the basis of crimes*”. The difference between the two is significant for determining criminal responsibility (Art. 31 RS) – grounds precluding responsibility are those that exist at the time of the person's “conduct”.

¶8. The intentional use of different terms is corroborated by Article 12(2)(a) RS itself because it distinguishes between “conduct” *occurring* on territory and “crime” *being committed* on board a vessel or aircraft.<sup>11</sup>

¶9. The Court (inaccurately) stated in *Myanmar* that preparatory documents offer no explanation as to why the drafters selected to use a different word in relation to vessel/aircraft and that there is no apparent reason for the distinction.<sup>12</sup> However, preparatory documents show that the drafts continuously used the phrase “act or omission” over “conduct” at least

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<sup>9</sup> Vagias, *The Territorial Jurisdiction of the International Criminal Court*, (Cambridge University Press, 2014) 91–92.

<sup>10</sup> *ibid* 94.

<sup>11</sup> *ibid*.

<sup>12</sup> *Myanmar Authorisation* (n 8) [48].

until 10 July 1998.<sup>13</sup> It was only replaced by “conduct” in the final version<sup>14</sup> because the drafters could not agree on the definition of “omission”.<sup>15</sup> This indicates that the Court’s territorial jurisdiction was always intended to be subjective (conduct understood as an *act* and/or possibly an *omission*) and not objective (conduct understood as *crime*, which would also *encompass the result*).

¶10. In light of the above, a teleological interpretation of the terms “conduct” and “crime” as used in the RS leads to a clear distinction between the two. Article 12(2)(a) which talks about extending territorial jurisdiction if conduct occurs on a State Party, would hence not include the alleged conduct of the Defendant which occurred within the confines of Bangtangnagar (non-State Party).

¶11. Furthermore, in pre-emption of the Prosecution’s reliance on the effects doctrine, exponential territorial reach of the Court would grant it the sanction of universal jurisdiction by means of judicial interpretation of Article 12(2)(a) instead of an amendment of the provision. Such a course of action would run manifestly contrary to the intentions of the negotiators in light of universality’s clear rejection in Rome.<sup>16</sup>

## **1.2 ALTERNATIVELY, THE COURT CANNOT INVESTIGATE AND PROSECUTE THE DEFENDANT BECAUSE HE ENJOYS PERSONAL IMMUNITY FROM PROSECUTION**

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<sup>13</sup> Draft Code, UN A/49/10 (n 3), art 21.

<sup>14</sup> Rome Statute, art 12(2)(a).

<sup>15</sup> Vagias (n 9), 92.

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

1.2.1 THE DEFENDANT AS POLICE CHIEF OF BANGTANGNAGAR ENJOYS PERSONAL IMMUNITY IN INTERNATIONAL LAW.

¶13. The purpose of personal immunity is to ensure the efficient performance of the highest sovereign functions. 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>17</sup>

¶14. It is firmly established in international law that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from criminal jurisdiction,<sup>18</sup> which protects them against any act of authority of another State which would hinder them in the performance of their duties.<sup>19</sup> The list of officials benefitting from personal immunity is not restricted to just those three<sup>20</sup> and there is a tendency to expand it.<sup>21</sup>

¶15. A Chief of Police is involved in decisions on most important issues affecting State's governance and crime control and exercising jurisdiction over them would be an interference in that State's internal affairs.<sup>22</sup> Furthermore, the authority granted to the Defendant in his role as Police Chief bequeathed him with the responsibility of commanding the police force

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<sup>17</sup> *Myanmar Authorisation* (n 8) [51]–[52].

<sup>18</sup> Kolb, 'Jurisdictional Immunities of Ministers of Defense' (2014) *Swiss Review of International and European Law* 181.

<sup>19</sup> *Democratic Republic of the Congo v Belgium* (Arrest Warrant of 11 April 2000) 2002 ICJ Rep 3 (*Arrest Warrant*) [54].

<sup>20</sup> *Djibouti v France* (Certain Questions of Mutual Assistance in Criminal Matters) 2008 ICJ Rep 177 [194].

<sup>21</sup> Kolb (n 18) 183.

<sup>22</sup> UN, 'Preliminary report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin' (May 2008) UN Doc. A/CN.4/601, s 121.

and arresting miscreants with bolsters the importance he has, as a functionary of the state of Bangtangnagar.

#### 1.2.2 APPLYING ARTICLE 27 RS TO ESTABLISH JURISDICTION WOULD CONTRAVENE INTERNATIONAL LAW

¶16. No exception exists to the rule granting immunity from criminal jurisdiction to officials, even when they are accused of war crimes or CAH, exists in CIL.<sup>23</sup> Such an exception may develop, but it has to be a policy decision by the States, not an exercise in law-finding of judicial institutions.<sup>24</sup> Personal immunity of incumbent high-ranking officials applies in national jurisdictions even in cases concerning crimes against international law.<sup>25</sup>

¶17. Furthermore, treaties cannot create obligations for third states without their express consent.<sup>26</sup> In *Palestine*, this Court stated that the *Monetary Gold* principle – according to which ICJ cannot adjudicate in matters which would affect legal interests of third parties without their consent<sup>27</sup> – does not apply to the Court because its jurisdiction is not exercised over States, but over natural persons.<sup>28</sup> However, exercising jurisdiction over the Defendant would nonetheless affect the legal interests of Bangtangnagar.

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<sup>23</sup> Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Leiden 2018) 172–175.

<sup>24</sup> Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008) 267.

<sup>25</sup> Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' 21(4) *The European Journal of International Law* 819–820.

<sup>26</sup> VCLT, arts 34-35.

<sup>27</sup> *Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America* (Case of the Monetary Gold removed from Rome in 1943) 1954 ICJ Rep 19 [32].

<sup>28</sup> *Situation in the State of Palestine* (Decision on the 'Prosecution request pursuant to article 19(3) for a ruling

¶18. Personal immunity is a right of the State, not the individual, and only the State may expressly waive it.<sup>29</sup> Exercise of jurisdiction over the incumbent Chief of Police<sup>30</sup> is completely dysfunctional and imposes an obligation on Bangtangnagar to suffer interference with its affairs without its consent.

¶19. States Parties to a treaty-based court are only entitled to waive their own rights, not the rights of others,<sup>31</sup> and they cannot waive the immunity of officials from non-party States. If each State Party to RS is individually barred from exercising jurisdiction over the Defendant, they also cannot exercise it together on the basis of a treaty.<sup>32</sup> Using Article 27 RS in such a way contradicts the most fundamental rule of international law.<sup>33</sup> Additionally, because the Court operates by delegation, immunity of officials of non-party States applies not only in relation to them, but also in relation to the Court itself. Court is prevented by international law from violating those immunities.<sup>34</sup>

¶20. The court had previously ignored the immunity of an incumbent high-ranking official of a non-party State in the case of Al-Bashir, triggering strong opposition.<sup>35</sup> However, the

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on the Court's territorial jurisdiction in Palestine) ICC-01/18-143 (5 Feb 2021) Pre-Trial Chamber I [59].

<sup>29</sup> Akande, 'Head of State Immunity is a Part of State Immunity: A Response to Jens Iverson' (*EJIL:Talk!*, 27 Feb 2012).

<sup>30</sup> Clarifications, pt 24.

<sup>31</sup> Galand (n 23) 162.

<sup>32</sup> Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press 2020) 93.

<sup>33</sup> *ibid.*

<sup>34</sup> Akande, 'International Law Immunities and the International Criminal Court' 98(3) *The American Journal of International Law* (2004) 421.

<sup>35</sup> Galand (n 23) 198.

Court's jurisdiction in *Al-Bashir* was triggered by a UNSC referral of the situation under Chapter VII of UNC. Art. 27 RS was only applicable to a non-party State as a result of that State's obligations under UNC to respect UNSC decisions.<sup>36</sup> In this case, the Court's jurisdiction was not triggered by UNSC acting in the name of the international community as a whole.

¶21. Moreover, international law already balances the protection of sovereign equality and the rule of law by allowing the exercise of foreign criminal jurisdiction over senior officials after the end of their function.<sup>37</sup> Immunity may bar prosecution for a certain period or for certain offences, but it cannot exonerate from (potential) criminal responsibility.<sup>38</sup> Immunities do not represent a bar to criminal prosecution in certain circumstances, such as before courts, where they have jurisdiction.<sup>39</sup> In fact, the principle of irrelevance of official capacity secures the responsibility of the individual, but it does not secure the jurisdiction of the court.<sup>40</sup> Arguing that the interests of preventing impunity outweigh the interests of respecting personal immunity is in defiance of clear state practice.<sup>41</sup> In light of the above, the Court is barred from exercising any jurisdiction over the Defendant as his immunity cannot be waived without Bangtagnagar's consent.

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<sup>36</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09-309 (11 Dec 2017) Pre-Trial Chamber II [34]–[35].

<sup>37</sup> Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 254.

<sup>38</sup> *Arrest Warrant* (n 19) [59]–[60].

<sup>39</sup> *ibid* [61].

<sup>40</sup> Van Alebeek (n 24) 265.

<sup>41</sup> *ibid* 272.

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

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¶22. The RS establishes certain restrictions on the Court’s discretion to uphold admissibility. These limitations are outlined in Article 17 and include the principle of complementarity [Article 17(1)(a) -(b)], the prohibition of double jeopardy [Articles 17(1)(c), 20], and the requirement for the offence to be of sufficient gravity [Article 17(1)(d)]. If any of these barriers, as listed in Article 17, are present, the case is deemed inadmissible and therefore cannot be adjudicated.<sup>42</sup> Furthermore, such determination is based on whether the concerned State is unwilling/unable to genuinely investigate or prosecute the case [Article 17(2)-(3)].

¶23. The Defence submits that the present matter should be declared inadmissible since (1) the principle of complementarity is being violated as the defendant has been investigated and is being prosecuted for substantially the same conduct in State having jurisdiction, (2) the alleged offence is not of sufficient gravity, and (3) unwillingness or inability of Bangtangnagar to genuinely carry out the investigation or prosecution against the Defendant cannot be ascertained.

### 2.1 IN ADMITTING THE MATTER, THE PRINCIPLE OF COMPLEMENTARITY IS BEING VIOLATED

¶24. Article 17 gives effect to the principle of complementarity, according to which the Court ‘shall be complementary to national jurisdictions’. Accordingly, States have the primary

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<sup>42</sup> *Prosecutor v Lubanga* ICC 01/04-01/06-772 OA4 [23].



responsibility to exercise criminal jurisdiction and the Court does not replace, but complements them in that respect.<sup>43</sup>

¶25. The principle of complementarity, which is a fundamental guide for the relationship between States and the Court, is affirmed by its significant position in the RS (Article 1 and Preamble) and the drafting history of the RS.<sup>44</sup> It suggests that the ‘criminal jurisdiction’ of the Court and that of States are ‘complementary’ to each other.<sup>45</sup>

¶26. Considering this the OTP submits that the principle of complementarity will be violated if admissibility of the present matter is upheld since (1) national proceedings in Bangtangnagar are at an advanced stage, (2) the Defendant is being tried for substantially similar conduct, and (3) legal characterisation of the case before the conflicting courts is not relevant.

#### 2.1.1 NATIONAL PROCEEDINGS ARE AT AN ADVANCED STAGE

¶27. Article 17(1)(a) of the RS covers a scenario where, during the admissibility challenge a State having jurisdiction is actively investigating or prosecuting the case against the suspect.

¶28. To determine whether a State having jurisdiction is validly investigating or prosecuting a case, the Court also needs to take into consideration the national criminal justice system of the State in question.<sup>46</sup> A perusal of the same leads us to the Penal Code of Bangtangnagar, which provides the following: “*any person liable, by any law in force in the Union of*

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<sup>43</sup> *Prosecutor v Ruto Kosgey and Sang* ICC-01/09-01/11-307 OA [37].

<sup>44</sup> F Guariglia (n 16).

<sup>45</sup> *Prosecutor v Muthaura Kenyatta and Ali* ICC-01/09-02/11-342 OA [19].

<sup>46</sup> *Prosecutor v Ruto Kosgey and Sang* ICC-01/09-01/11-336 OA [27].

*Bangtangnagar, to be tried for an offence committed beyond the limits of Bangtangnagar shall be dealt with according to the provisions of this Code in the same manner as if such act had been committed within Bangtangnagar.*<sup>47</sup>

¶29. This provision clearly outlines the territorial jurisdiction of Bangtangnagar over crimes committed by persons outside its boundaries. If the law of Bangtangnagar considers an act of a person to be a crime, which is committed beyond its borders, then that person shall be tried as if they had committed that act within its borders. In arguendo, if the AC accepts the contention of the OTP that the conduct of the Defendant extends to the crime of deportation of the Sholingilar, then a jurisdictional conflict arises between the Court and the national courts of Bangtangnagar. Such a conflict suffices the purpose of Article 17 and Article 19<sup>48</sup> of the RS to render the case inadmissible in the interest of complementarity.<sup>49</sup>

¶30. Furthermore, the AC has also ascribed a presumption in Article 17(a)-(c) in favour of national/domestic jurisdictions, provided that there have been investigations or prosecutions at the national level.<sup>50</sup> In the present matter, criminal charges of slavery and police torture have been laid in Bangtangnagar against the Defendant and the trial is set to begin.<sup>51</sup> This provides enough context for the advanced stage at which the domestic investigation already is, and further interference by the Court would clearly be antithetical to the principle of complementarity.

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<sup>47</sup> Moot Proposition, para 1.

<sup>48</sup> Rome Statute, art 19.

<sup>49</sup> *Prosecutor v Simone Gbagbo* ICC-02/11-01/12-75-Red OA [58].

<sup>50</sup> *Prosecutor v Muthaura Kenyatta and Ali* ICC-01/09-02/11-274 OA [43].

<sup>51</sup> Moot Proposition, para 20.

### 2.1.2 BEING TRIED FOR SAME CONDUCT

¶31. It is well established that for such a case to be inadmissible under article 17(1)(a) of the RS, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.<sup>52</sup> The AC has conclusively laid down the principle that if the underlying incidents that the OTP and the State are investigating are identical, the case will be inadmissible before the Court.<sup>53</sup> Hence, what needs to be ascertained is whether there is a degree of overlap between the incidents being investigated by the conflicting authorities. This merits a judicial assessment to determine if the case being investigated by the State adequately mirrors the one being investigated by the Prosecutor.<sup>54</sup>

¶32. It naturally follows that if there is a large degree of overlap in the incidents being investigated, it is sufficient to establish that substantially the same conduct is in question, and hence, admissibility should be declined. The absence of one or two incidents will not necessarily be fatal to an admissibility challenge, especially if they are broadly similar or less serious than others which are included in a large case.<sup>55</sup>

¶33. As stated earlier, criminal charges of police torture and slavery have already been laid against the Defendant in Bangtangnagar. These allegations are pertaining to the alleged conduct of the Defendant against the Sholingilar community and adequately cover all the alleged incidents within their ambit. Hence, there is congruence in the conduct of the

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<sup>52</sup> *Prosecutor v Muthaura Kenyatta and Ali* ICC-01/09-02/11-274 OA [61].

<sup>53</sup> *Prosecutor v Gaddafi and Al-Senussi* ICC-01/11-01/11-547-Red OA4 [71]–[73].

<sup>54</sup> *Prosecutor v Gaddafi and Al-Senussi* ICC-01/11-01/11-565 OA6 [100].

<sup>55</sup> F Guariglia (n 16).

Defendant that is being scrutinised at both the international as well as the domestic level, which defeats the tenet of complementary nature of the Court.

### 2.1.3 LEGAL CHARACTERISATION IS NOT RELEVANT

¶34. In pre-emption of the OTP's stance that the alleged crime should necessarily be prosecuted as having an international ambit and nature, the Defence submits that there is no such requirement in the RS for a crime to be prosecuted as an international crime domestically in order for the admissibility challenge to succeed.<sup>56</sup> In this respect, the PTC has ruled that, under Article 17, "*the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterisation*" and that the consideration that domestic investigations are carried out "*with a view to prosecuting international crimes*" is not determinative.<sup>57</sup>

¶35. Neither the complementarity provisions nor the related *ne bis in idem* principle imposes an explicit obligation on the State to adopt the same legal characterisation of the criminal conduct.<sup>58</sup> The ordinary crimes exception laid out in the ICTY and ICTR statutes has also been excluded by the drafters of the RS as can be seen from their intent in the *travaux préparatoires*.<sup>59</sup>

¶36. As already submitted, what is required is that the crimes prosecuted at the domestic level cover 'substantially the same conduct' as those charged by the Court. Hence, it is the alleged

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<sup>56</sup> *Gaddafi and Al-Senussi* (n 54) [119].

<sup>57</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11-466-Red [85].

<sup>58</sup> *ibid* [86].

<sup>59</sup> F Guariglia (n 16).

conduct, as opposed to its legal characterisation, that matters.<sup>60</sup> The alleged conduct of the Defendant includes instances of police torture and forced labour on state-owned plantations. From these incidents, the Prosecution is trying to draw a correlation to the severe crime against humanity of deportation which is of international nature. In light of this, the charges of police torture and slavery that have been laid against the Defendant adequately mirror the allegations around his conduct in the present proceedings, despite not being an ‘international crime’ which suffices the precondition for the inadmissibility of the present matter.

## 2.2 THE CASE IS NOT OF SUFFICIENT GRAVITY

¶37. Article 17(1)(d) of the RS lays down the gravity criterion for determining an admissibility challenge.<sup>61</sup> The use of the term “shall” in the chapeau of Article 17(1) of the RS leaves no discretion as to the declaration of the inadmissibility of a case once it is satisfied that the case is not of sufficient gravity to justify further action by the Court.<sup>62</sup> Furthermore, the reference to the insufficiency of gravity in Article 17 is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.<sup>63</sup>

¶38. The AC has clarified that gravity should not be confused with the jurisdictional requirements for the various crimes.<sup>64</sup> As a result, the requirement of gravity does not include

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<sup>60</sup> *Prosecutor v Gaddafi and Al-Senussi* ICC-01/11-01/11-565 OA6 [119].

<sup>61</sup> Rome Statute, art 17(1)(d).

<sup>62</sup> *Prosecutor v Thomas Lubanga* ICC-01/04-01/06 [43].

<sup>63</sup> *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) ICC Pre-Trial Chamber II, [56].

<sup>64</sup> *Situation in the DRC* (Judgment on the Ntaganda Arrest Warrant Appeal) ICC-01/04-169 OA (13 July 2006)

a separate requirement that the conduct underlying the case be either “*systematic or large-scale*”.<sup>65</sup> The AC has also criticised the inclusion of other criteria such as the ‘social alarm’ caused by certain conduct, contrasting such ‘subjective’ factors with the ‘objective gravity’ of the crimes charged in any given case.<sup>66</sup>

¶39. Another ground for the determination of gravity, which was criticised by the AC in *Ntaganda* but has found a renewed acceptance in the Court’s assessment is whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed.<sup>67</sup> In light of this established criterion an analysis of the facts brings forth cogent reasons as to how the circumstances responsible for the decision of the Sholingilars to leave Bangtangnagar were the creation of a broader and more socio-political triggers prevalent in the State, and not the sole outcome of the Defendant’s alleged conduct. Even if there was an overreach in the exercise of his authority, the alleged conduct of the Defendant cannot adequately pass the threshold for bearing the most responsibility in the present situation. And hence, the gravity of his conduct is not sufficient to call for a trial before the Court.

### **2.3 UNWILLINGNESS OF BANGTANGNAGAR TO INVESTIGATE OR PROSECUTE THE DEFENDANT CANNOT BE ESTABLISHED**

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[70].

<sup>65</sup> *Lubanga* (n 62) para [51]–[52].

<sup>66</sup> *Situation in the DRC* (n 64) [72].

<sup>67</sup> *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* ICC-01/13-34 Pre-Trial Chamber I [21].

¶40. In pre-emption of the OTP's submission that the facts and circumstances surrounding the matter reflect the unwillingness or inability of Bangtangnagar to prosecute the Defendant, the Defence submits that the stipulations listed in Article 17(2) are not fulfilled.

¶41. Firstly, due procedure has been followed and it cannot be contended that the national trial is a 'sham proceeding' to shield the Defendant from the jurisdiction of the Court.<sup>68</sup> Obvious departures from normal proceedings is a factor that raises doubts about the legitimacy of the exercise.<sup>69</sup> However, initiation of investigation and framing of charges against the Defendant for his alleged conduct is within the jurisdiction of the national court of Bangtangnagar, as can be evidenced from its Penal Code, and hence there is no glaring error or departure from procedure in the lead-up to the national trial.<sup>70</sup>

¶42. Secondly, in relation to unjustified delays,<sup>71</sup> the relevant factors that the Court may consider include the chronology of domestic proceedings and the complexity of the case at hand.<sup>72</sup> PTC has emphasised that the allegations of unjustified delay must be decided "*not against an abstract ideal of justice, but against the specific circumstances surrounding the investigation concerned.*"<sup>73</sup> In light of this it is reasonable to believe that corroborating evidence and creating a case regarding the conduct of the Defendant against a substantial number of people would involve a degree of complexity that justifies the time taken in

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<sup>68</sup> Rome Statute, art 17(2)(a).

<sup>69</sup> Mark Klamberg and others, *Commentary on the Law of the International Criminal Court* (TOAEP 2017).

<sup>70</sup> Moot Proposition, para 1.

<sup>71</sup> Rome Statute, art 17(2)(b).

<sup>72</sup> Mark Klamberg (n 69).

<sup>73</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11-239 [223].

initiation of the criminal proceedings. Being swayed by an imposing ideal of justice is discouraged when due procedure is being followed.

¶43. Lastly, the assertion that the national proceedings are inconsistent with an intent to ensure justice<sup>74</sup> cannot be substantiated. The RS takes into consideration the ambulatory nature of the factual situation before it. The chapeau of Article 17 requires the Court to determine whether the case *is* inadmissible and not whether it *was* inadmissible.<sup>75</sup> In light of this, alleged prior inaction by the authorities of Bangtangnagar cannot be said to have vitiated the veracity of the presently initiated proceedings against the Defendant.

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

¶44. It is humbly submitted that the AC should uphold the dismissal of the charge of deportation by the PTC. The acts committed by the Defendant fall well within the limits of the sovereign power of the state. There are four primary reasons for this; *firstly*, the Elements of Crime, as enshrined in the Rome Statute, are not satisfied [A], *secondly*, there is no *mens rea* to deport the Sholingilar community[B], *thirdly*, the RC has been contravened by the

#### **3.1 THE ELEMENTS OF CRIME, AS ENSHRINED IN THE ROME STATUTE, ARE NOT SATISFIED**

¶45. It is humbly submitted that the acts committed by the Defendant of the state of Bangtangnagar in the present case do not satisfy the Elements of Crime of Deportation as a Crime Against Humanity as laid down by the ICC. Deportation and forcible transfer both

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<sup>74</sup> Rome Statute, art 17(2)(c).

<sup>75</sup> *Prosecutor v Katanga and Ngudjolo* ICC-01/04-01/07-1497 OA8 [56].



entail the forcible displacement of persons from the area in which they are lawfully present without grounds permitted under international law.<sup>76</sup>

¶46. *Article 7(1)(d)* concerns the crime of deportation or forcible transfer, and the elements of crime under the said Article are as follows:

*(1) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location by expulsion or other coercive acts; (2) Such person or persons were lawfully present in the area from which they were so deported or transferred; (3) The perpetrator was aware of the factual circumstances that established the lawfulness of such presence; (4) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; (5) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

¶47. The Trial Chamber in *Krnjelac* held that deportation is illegal only where it is forced. The essential element is that the displacement be involuntary in nature, where the relevant persons had no real choice. Forced displacement is only illegal when it occurs without grounds permitted by international law.<sup>77</sup>

¶48. In the present case, not a single element of the crime has been fulfilled to bring an action against the Defendant. Firstly, there was no deportation or forcible transfer as a result of coercive acts, as the actions taken by the defendant were in pursuance of investigations into the widespread problem of drug abuse that had permeated into the Sholingilar community.

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<sup>76</sup> *Prosecutor v Jovica Stanišić and Franko Simatović* IT-03-69-T.

<sup>77</sup> *Prosecutor v Milorad Krnjelac* (Trial Judgement) IT-97-25-T.

¶49. Secondly, the presence of the Sholingilar community in the sovereign land of Bangtangnagar is not lawful. They entered Bangtangnagar through illegal channels that will not be considered lawful in any circumstance.<sup>78</sup>

¶50. Thirdly, the awareness of the Defendant regarding the factual circumstances that imply lawful presence is immaterial as the presence is in itself unlawful in the first place.

¶51. Fourthly, there was no widespread and systematic attack against the Sholingilar community. The arrests that were made were not on the basis of their identity. They were made to curb the persistent drug menace that was on the rise in Bangtangnagar. The argument that the arrests made by Defendant were coloured by personal bias or hatred was intentional does not hold weight as he was just carrying out his statutory duty.

¶52. Fifthly, the actions of the Defendant were targeted towards the Sholingilar individuals who were involved in drugs and related crimes.<sup>79</sup> Drug abuse can be a major detriment to the growth of a nation, and the curtailment of the same is an essential function of the State's machinery. The actions taken by the Defendant were in pursuance of the same. Hence, the acts would not come under the purview of coercive acts as they were performed within the ambit of the Police's jurisdiction, and they are provided immunity against the same from the state.

### 3.2 THERE IS NO MENS REA TO DEPORT

¶53. It is humbly submitted that there was no mental element on the part of the Defendant to deport the Sholingilar community. The actions performed by the Defendant were in

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<sup>78</sup> Moot Proposition, para 7.

<sup>79</sup> Moot Proposition, para 11.

furtherance of his duty. Bangtangnagar was suffering from a drug abuse menace,<sup>80</sup> and the steps taken by the Defendant were only in pursuance of curbing this issue.

¶54. *Mens Rea* is the fundamental element of any criminal liability. It can be described as the conjunctive requirement of intent and knowledge.<sup>81</sup> Article 30 of the ICC reaffirms the same.<sup>82</sup> Article 30(2)(b) states in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.<sup>83</sup>

¶55. In *Prosecutor v. Kayishema*, the ICTR, in a similar vein, spoke of "*actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan.*"<sup>84</sup>

¶56. Trial Chamber II of the ICC adjudicating upon Katanga opined that "*the form of this criminal intent requires the person to have known that realizing the acts will necessarily bring about the consequence in question, unless an unexpected intervention or unforeseen event impede it. To put it differently, it is nearly impossible for him to foresee that the consequence will not occur*".<sup>85</sup>

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<sup>80</sup> Moot Proposition, para 11.

<sup>81</sup> Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers 2002) 210.

<sup>82</sup> Rome Statute, art 30.

<sup>83</sup> Rome Statute of the International Criminal Court 1998, art 30(2)(b).

<sup>84</sup> *Prosecutor v Kayishema* ICTR-95-1-T.

<sup>85</sup> *Prosecutor v Katanga* ICC T Ch ICC-01/04-01/07-3464 (7 March 2014) [777].

¶57. The decision to leave Bangtangnagar was not a result of the actions performed by the defendant, who was acting in pursuance of his duty as the Police Chief to ensure the safety of the citizens of Bangtangnagar from the menace of drugs. There was no intent of forced displacement, as only a subset of people was part of the investigations conducted by the defendant. As restated by the ICTY, ‘the displacement of persons is only illegal where it is forced, i.e., not voluntary.’<sup>86</sup> Therefore, as per the wording of Article 30(2)(b), which talks about the consequence of a particular action, i.e., deportation in the present case. It cannot be said it has been caused through the actions of the Defendant, as there is no material to prove that he intended to deport the Sholingilar community.

### 3.3 CONTRAVENTION OF THE REFUGEE CONVENTION

¶58. It is humbly submitted that the RC does not apply if the Principles of the UN Charter are not followed by the alien community. Article 1F of the 1951 Convention<sup>87</sup> excludes those refugee applicants where there are “*serious reasons for considering... (d) those who are guilty of acts that are contrary to the purposes and principles of the United Nations.*”

¶59. In the present case, the Sholingilar community has individuals who are involved in drug dealing that is antithetical to the laws and regulations of Bangtangnagar as well as the edicts of the United Nations and the Refugee Convention, 1951.

¶60. It is humbly submitted that while international law jurisprudence has historically supported the rights of asylum seekers, it must be taken into consideration that any group which traverses through state borders does so for a variety of reasons. However, in the

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<sup>86</sup> *Prosecutor v Simic Tadi ‘c’ and Zari ‘c’* IT-95-9-T T Ch II (17 October 2003) [125].

<sup>87</sup> The Refugee Convention 1951, art 1F.

current case, a substantial subset of the Sholingilar community is arguably involved in activities that are in contravention of both domestic laws and acts that are contrary to the purposes and principles advocated by the United Nations.

¶61. The Defendant, based on a very real and tangible understanding of the areas that have a higher propensity of drug abuse, drug dealing and related offences, took investigative measures to counter this menace.<sup>88</sup> The propagation of drugs within the youth of a country in an unhindered manner can wreak havoc on the sociocultural fabric of a country. Furthermore, these principles apply when there is a basic standard of respect accorded for the domestic laws of the State receiving these refugees. In the present case, the acts of the individuals who were promoting the usage of drugs and dealing in the distribution of the same are opposing these tenets and in contravention of the laws applicable in Bangtangnagar.

#### **3.4 QUANTUM OF RESPONSIBILITY FOR DEPORTATION SHOULD NOT BE APPLIED TO AN INDIVIDUAL ACTOR**

¶62. The Defendant submits that the allegation espoused against him has a very high threshold of severity that is associated with its successful application. It is humbly submitted that the Defendant's actions were only restricted to a particular subset of the Sholingilar community, be it the woman who worked in the fields on his orders or the individuals he arrested as part of public safety and crime prevention considerations. The metaphorical net that was cast by the actions of the Defendant was restricted to certain actors and was not part of a 'widespread and systematic attack' against the community at large.

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<sup>88</sup> Moot Proposition, para 10.

¶63. The absence of a widespread and systematic attack, coupled with the lack of intent for the same, provides enough reasoning to establish that his actions simply do not support the allegations of Deportation as contended by the OTP. The requisite understanding of the larger and more comprehensive sociopolitical nexus was something that was absent from the Defendant's actions. The Defendant's intent can be ascribed to security measures being undertaken to prevent the social evil of drug abuse from pervading the society of Bangtangnagar.

¶64. It is argued that the allegations of Deportation should not be applicable to the actions of an individual, especially when, even in international legal jurisprudence, it is clearly established that the severity needs to be of a certain degree and the nature of the attack as well as the intent for the same needs to be widespread, systematic, and malicious and hateful towards a particular class of people<sup>89</sup>. Here, the acts alleged are only emblematic of security decisions taken up by the Defendant.

¶65. The Sholingilar community entered Bangtangnagar through unlawful channels<sup>90</sup>, and the subsequent treatment that was meted out to them can be ascribed to a lack of governmental considerations and the society's valid fears of integrating with a culture completely alien to their own. The plight of the Sholingilars, when they refused to integrate, and consequently the earlier tolerance of the Bangtangnagar people, which turned into resentment, is

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<sup>89</sup> JO Eiermann, 'Investigating Nationals of States Not Party to the Rome Statute for the Crime of Deportation – from Expulsion to Coercion' (*Ssrn.com*, 11 September 2020) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3693064#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693064#)> accessed 25 September 2023.

<sup>90</sup> Moot Proposition, para 10.

emblematic of this particular issue – the lack of integration<sup>91</sup>. Social cohesion is a complicated and long-drawn process, and the fact that two classes of people have issues with integration and coexistence is an unfortunate occurrence. However, the allegations that they did not get the work they deserved or their children not being able to go to the schools they ought to go to are undercurrents of a deeper issue.

¶66. The Defendant, who was considering the implications of this situation only as far as the extent of his duties and responsibilities, should not be held liable for the entire gamut of issues faced by the Sholingilar community. The Defendant is not the Head of the State, which establishes that he is not responsible for the decision-making at a high level. To allow the Prosecution to convict him for the heinous crime of deportation as a crime against humanity would be a misapplication of the law, a misunderstanding of ground realities and an overreach on the part of the honourable AC.

¶67. Furthermore, it is humbly contended that the plight of the Sholingilars, both in their home country of Burmanayar and otherwise, would have been adequately dealt with if there was a UNHCR Mission located in Bangtangnagar. The absence of a UNHCR Mission in the country could have made it more difficult for refugees to access protection and assistance. The policy considerations that would enable the Sholingilars to adequately access redressal mechanisms were missing in the present case.

¶68. Therefore, it is contended that, due to the gamut of varied reasons that have collectively contributed to the present situation, it would be a misapplication of law to ascribe the sole responsibility of the situation to a sole actor, the defendant.

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<sup>91</sup> *ibid.*

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**PRAYER FOR RELIEF**

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

- 1) Adjudge that the ICC does not have jurisdiction over the matter in appeal.
- 2) Adjudge that the matter is inadmissible, as defined in the Articles of the Rome Statute.
- 3) Adjudge that the dismissal of the charge of “deportation as a crime against humanity” is valid.

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

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

Sd/- \_\_\_\_\_

**(The Defence)**