

**6TH SURANA & SURANA AND RGNUL INTERNATIONAL LAW MOOT
COURT COMPETITION, 2023**

**INTERNATIONAL CRIMINAL
COURT
THE HAGUE, NETHERLANDS**



**THE CASE CONCERNING THE SHOLINGILAR
COMMUNITY OF BURMANYAR**

**THE PROSECUTOR
(PROSECUTION)**

v.

**THE POLICE CHIEF OF BANGTANGNAGAR
(DEFENDANT)**

As submitted under article 81 & 82 of the Rome Statute of the ICC, 2002

WRITTEN SUBMISSION ON BEHALF OF THE DEFENDANT



Original: **English**

THE APPEALS CHAMBER

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

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

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TABLE OF ABBREVIATIONS

1. Art: Article
2. RS: Rome Statute
3. BTN: Bangtangnagar
4. ICC: International Criminal Court
5. Hon'ble: Honourable
6. RC: Refugee convention
7. PTC: Pre-trial chamber
8. Hon'ble: Honourable
9. CSA: Civil Society Activists
10. Govt: Government
11. OTP: Officer of The Prosecutor
12. UNHCR: United Nations High Commissioner for Refugees
13. PT: Point
14. Prop: Proposition
15. Pt: Point

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S. NO.	CASES
1.	Prosecutor of the ICC, Darfur Situation (UNSCR 1593, UN Security Council 2005)
2.	Prosecutor of the ICC, Libya Situation (ICC 2011)
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4.	Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC, 4 March 2009
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6.	Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaissona, ICC, 14 January 2018.
7.	Prosecutor v. Vlastimir Đorđević, ICTY, 27 June 2014.
8.	Prosecutor v. Ruto, Kosgey and Sang, ICC, 23 January 2012.
9.	Prosecutor v. Radovan Karadžić, ICTY, 24 March 2016.

S. NO.	BOOKS
1.	Dr.S.K. Kapoor, Public International Law & Human Rights, Central Law Agency, Allahabad, 16th Ed., 2017

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1.	Rome Statute of the International Criminal Court, 2002
2.	Refugee Convention, 1951
3.	American Service-Members' Protection Act 2002

S. NO.	ONLINE DATABASE
1.	LawFinder
2.	International Criminal Court
3.	International Court Criminal Tribunal for the Former Yugoslavia (ICTY)
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1.	Javier C Hernández, 'I.C.C. Won't Investigate China's Detention of Muslims (Published 2020)' (The New York Times, 15 December 2020) < www.nytimes.com/2020/12/15/world/asia/icc-china-uighur-muslim.html > accessed 24 September 2023.
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5.	'Roy S. Lee (ed.): The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations and Results' (2000) 4(1) Max Planck Yearbook of United Nations Law Online 588, XXXX < http://dx.doi.org/10.1163/187574100x00197 > accessed 22 September 2023
6.	(International criminal Court) < https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf > accessed 23 September 2023

STATEMENT OF JURISDICTION

The Defendant has endorsed their pleadings before this Hon'ble International Criminal Court to not try the instant matter under **Article 81 (1)(b)(ii) & 82 (1)(a)** of the Rome Statute of the International Criminal Court, 2002.

The present petition sets forth the facts, contentions, and arguments.

STATEMENT OF FACTS

1. In the nation of Burmanyar, the Sholingilar community, a diverse minority blending indigenous, Muslim, Hindu, and Buddhist beliefs, lived in isolation, engaging in small-scale agriculture, fishing, and craftsmanship. However, after a 2013 military coup, the regime clamped down on dissent, imposed a single state religion, arrested thousands without due process, and conducted extensive deforestation in Sholingilar regions.
2. Fearing persecution, the Sholingilar refrained from protests and faced harassment due to their syncretic religious practices. In 2015, their territory was declared a restricted border-security area under military law, subjecting them to daily checks and harassment.
3. Desperate to escape, many sought refuge in Bangtangnagar, but they encountered exploitation and discrimination. By 2020, over half a million Sholingilar were in Bangtangnagar, rendered stateless and facing discrimination. Their plight gained attention when they moved to Finlandia, where activists and lawyers provided support, shedding light on the crimes in Burmanyar and Bangtangnagar.
4. Victims' submissions to the ICC led to an investigation, resulting in charges against the Bangtangnagar Police Chief for crimes against humanity. Victims' submissions to the ICC resulted in an investigation, leading to charges of crimes against humanity against the Bangtangnagar Police Chief. Despite the government's non-cooperation, the ICC proceeded with the case, ultimately sentencing the Police Chief to 15 years in prison. Concerns persist that justice may not be served if the case returns to Bangtangnagar's jurisdiction, given the powerful position of the accused.

STATEMENT OF ISSUES

I.

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

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

**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**

The appeal contends that the Trial Court erred in assessing the jurisdiction of the International Criminal Court (ICC) over the situation in Bangtangnagar (BTN). The crimes alleged are not of international character and thus fall outside the ICC's jurisdiction under Article 5 of the Rome Statute (RS). Additionally, BTN's non-membership in the RS further negates ICC jurisdiction.

The appeal further asserts that the crimes committed against the Sholingilar persons in BTN, specifically slavery and police torture, are not of international character and should be handled domestically. Article 82(1)(a) of the RS allows for appeals concerning jurisdiction. It is submitted that the ICC lacks jurisdiction over this case. Further, The principle of complementarity guides ICC jurisdiction, emphasizing the primary responsibility of states to prosecute international crimes.

**Issue 2: Whether the matter is admissible, as defined in the Articles of the Rome
Statute?**

In the present matter, we respectfully contend that, as per Article 19(2)(a), Article 82(1)(a) & (d), the case at hand lacks admissibility before this Court. It does not meet the criteria for admissibility as outlined in the RS, and, accordingly, the Court should abstain from asserting jurisdiction over this matter.

The principle of complementarity, enshrined in the preamble of the RS, distinguishes the Court from other institutions, such as the ICTY and ICTR. It underscores that States have the primary responsibility and the inherent right to prosecute individuals implicated in international crimes. The ICC may intervene only when national legal systems are unwilling or unable to genuinely conduct investigations or prosecutions. Complementarity is grounded in respect for State jurisdiction and considerations of efficiency. States generally have better access to evidence, witnesses, and resources. Moreover, the ICC's capacity to conduct prosecutions is limited.

Issue 3: Whether the dismissal of the charge of “deportation as a crime against humanity” is valid?

The defence submits that the dismissal of the charge of "deportation as a crime against humanity" is valid, citing the Trial Chamber's decision to strike off these charges against the Police Chief. In support of this, the Dorđević Appeals Judgment is referenced, stating that the Prosecution must prove displacement occurred for reasons not permitted under International Humanitarian Law (IHL). The defence disputes that the actions constitute the elements of the crime of Deportation, emphasizing that deportation requires forced displacement, coercive acts, lawful presence, absence of legal grounds, and a connection to a widespread or systematic attack. They argue that all these actions took place within BTN's territory, over which the Court lacks jurisdiction since BTN is not a State Party to the Rome Statute.

ARGUMENTS ADVANCED

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.

1. It is contested before the hon'ble court, under Art. 82 (1)(a) of the RS that the Trial Court erred in finding out whether the court has the required jurisdiction over the situation in BTN or not. The alleged crimes, not being of international character, do not fall within the ambit of the jurisdiction of the ICC under RS¹. In furtherance to this, the court does not have the required jurisdiction by reasons of the State of BTN not being a party to the RS.

1.1 BTN NOT A PARTY TO THE RS

2. Art. 82 of the RS reads out as, "1. *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."²

3. In context of the aforementioned, it is appealed before the hon'ble court that the ICC does not have the required jurisdiction over the matter at hand.
4. The ICC as established by the Rome Statute, is the treaty that created the court. Thereby, the states which are party to the RS have accepted the jurisdiction of the court. In the

¹ RS of the ICC, Art. 5

² Ibid, Art. 82 (1)(a)

present scenario, BTN not being a party to the RS has not consented to the jurisdiction of ICC. In furtherance to this, the ICC's jurisdiction is limited to crimes committed on the territory of a state party or by a national of a state party.

5. Therefore, states that have not ratified or acceded to the Rome Statute are not bound by its provisions. As a result, they are not automatically subject to the jurisdiction of the ICC for crimes committed on their territory or by their nationals. One way for the ICC to exercise jurisdiction over a non-state party is if the United Nations Security Council (UNSC) refers a situation to the ICC under Chapter VII of the United Nations Charter. In such cases, the ICC can investigate and prosecute individuals for crimes within the jurisdiction of the Court, even if the state is not a party to the Rome Statute. This has been done in situations like the Darfur conflict³ and Libya⁴. Again in the present case, no such referral was made.
6. It is argued before the court that the ICC's jurisdiction infringes on the sovereignty of the State of BTN and that they should have the primary responsibility for addressing crimes committed within their borders in accordance with the principle of complementarity. It is asserted before the hon'ble court that the State of BTN should have the primary responsibility for addressing the crimes committed domestically. A similar argument was contested before the ICC by the United States of America, alleging that the ICC's authority could potentially be used to target American officials and military personnel for prosecution, infringing on U.S. sovereignty. The United States claims that it is not a party to the Rome Statute and has consistently argued that it is not bound by the ICC's jurisdiction. The U.S. government has expressed concerns about the potential for

³ Prosecutor of the ICC, Darfur Situation (UNSCR 1593, UN Security Council 2005)

⁴ Prosecutor of the ICC, Libya Situation (ICC 2011)

politically motivated prosecutions of American citizens. As a result, the U.S. has taken measures to protect its citizens from ICC jurisdiction, such as passing the American Service-Members' Protection Act (ASPA), which authorises the use of force to free U.S. citizens held by the ICC.⁵

7. A similar situation arising in relation to the situation of Uyghur Muslims in China, where it was held that China is not a party to the Rome Statute, the treaty that established the ICC. As such, China argued that it had not consented to the ICC's jurisdiction and that the court has no authority to investigate or prosecute individuals for crimes allegedly committed on Chinese territory.⁶
8. As was held in the situation of Uyghur Muslims in China in its report, *“the prosecutor’s office said there was “no basis to proceed at this time” because there did not appear to be enough evidence to show that Chinese officials had committed crimes over which the court had jurisdiction.”* The report further stated that, *“not all conduct which involves the forcible removal of persons from a location necessarily constitutes the crime of forcible transfer or deportation.”*⁷

1.2 CRIMES COMMITTED NOT OF INTERNATIONAL CHARACTER

9. It is humbly submitted before the hon’ble court that the trial erred in analysing the nature of crimes inflicted upon the Sholingilar persons.⁸ It is argued before the court that the

⁵ American Service-Members' Protection Act 2002

⁶ Uyghur Muslims Situation (China)

⁷ Javier C Hernández, ‘I.C.C. Won’t Investigate China’s Detention of Muslims (Published 2020)’ (The New York Times, 15 December 2020) <www.nytimes.com/2020/12/15/world/asia/icc-china-uighur-muslim.html> accessed 24 September 2023.

⁸ RS of the ICC, Art. 81(1)(b)(i)

crimes committed in the territory of BTN by the Police Chief against the Sholingilar persons - criminal charges of slavery and police torture have been laid down in the BTN, and the matter is scheduled for trial there. Thereby, it is contested before the hon'ble court that the crimes committed do not satisfy the elements of crime mentioned in Art. 5 of the RS, and should be dealt with internally, as being of non-international character.

10. The trial upheld the charge of "slavery as a crime against humanity" against the Police Chief and was given a sentence of imprisonment for 15 years.⁹ In the present case there are allegations against the Police Chief of "slavery as a crime against humanity."¹⁰ Art 7 (1)(c) deals with enslavement as a crime against humanity. The Art. reads out as,

1. *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 person or persons, or by imposing on them a similar deprivation of liberty.*
2. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
3. *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.*¹¹

11. The present case before the court lacks sufficient proof to show that the Police Chief :

⁹ Moot Prop, Pt. 19

¹⁰ RS of the ICC, Art. 7(1)(c)

¹¹ Ibid

- a. Exercised any or all of the powers attaching to the right of ownership over one or more persons belonging to the Sholingilar persons, such as by purchasing, selling, lending or bartering such person or persons, or by imposing on them a similar deprivation of liberty.
- b. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- c. 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.

12. The first element of the crime remains unsatisfied and the second element including the usage of the words “ *widespread or systematic attack directed against a civilian population*” cannot be inferred from the given facts of the case. As was held in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*¹², “ *furthermore, the Chamber notes that the Statute provides the following definition of the term "attack directed against any civilian population": [...] a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.*

13. *Although the terms "widespread" and "systematic" are not specifically defined in the Statute, the Chamber has previously held that this language excludes random or isolated acts of violence, and that the term "widespread" refers to the large-scale nature of the attack, as well as to the number of victims, while the term "systematic" pertains to the organised nature of the acts of violence and to the improbability of their random occurrence.*

¹² The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC, 4 March 2009.

14. *The Chamber also considers that there are reasonable grounds to believe that the above-mentioned attack on the said part of the civilian population of Darfur was large in scale, as it affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region. Furthermore, the Chamber finds that there are also reasonable grounds to believe that the above-mentioned attack was systematic as it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern.*¹³

15. Therefore it can be clearly inferred that the acts committed by the Police Chief, within the context of the aforementioned case were random and isolated acts of violence which are currently laid down according to the national laws and within the national jurisdiction of the State of BTN. Thereby, in the absence of large- scale nature of the attack and organised nature of the acts as well as the systematic attacks of a similar pattern continuing for a long period, it can be derived that the crimes against humanity of enslavement levied upon the Police Chief is not of International character and should be dealt internally in a accordance with the domestic laws of the State of BTN.

1.3 FAILURE OF THE CHAMBER TO TAKE INTO CONSIDERATION THE PRINCIPLE OF COMPLEMENTARITY

16. The principle of complementarity governs the exercise of the ICC's jurisdiction. This distinguishes the Court in several significant ways from other known institutions, including the international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and the ICTR). The RS recognizes that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national

¹³ (International Criminal Court, z) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF> accessed 23 September 2023

legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.

17. Under the provisions of Article 17 of the Rome Statute ("RS"), the principle of complementarity is unequivocally enshrined, mandating that the International Criminal Court ("ICC") should only exercise jurisdiction when it is established that national jurisdictions are either unwilling or unable to genuinely prosecute crimes within their territorial confines. In the present case, the State of Bangtangnagar ("BTN") has undertaken the initiation of criminal charges against the accused, specifically the Police Chief, for offences of a similar nature to those brought before the ICC. This demonstrable act of BTN signifies its earnest intention to address the alleged criminal conduct through its domestic legal system. Consequently, it is incumbent upon the ICC to adhere to the principle of complementarity and abstain from intervening in matters where national proceedings are both willing and capable of adjudicating the issues at hand.
18. In accordance with established norms of international law, the primary jurisdiction over offenses committed within the territorial boundaries of a state unequivocally rests with that state. BTN has taken the affirmative step of commencing legal proceedings against the Police Chief with regard to the alleged crimes attributed to him. This proactive engagement underscores BTN's readiness and capacity to exercise its national jurisdiction for the purpose of prosecuting the accused. The principle of complementarity, as meticulously delineated in the RS, mandates that the ICC's intervention is warranted solely in situations where national jurisdictions are either disinclined or unable to

genuinely pursue prosecutions. Given the evident diligence exhibited by BTN in instituting legal action, the ICC is bound by this principle to defer to the national proceedings in this case.

19. Furthermore, subsequent to the adjudication by the ICC, charges pertaining to acts of slavery and police torture have been officially lodged against the Police Chief within the territorial jurisdiction of BTN. These domestic legal proceedings have been meticulously scheduled and are poised to ensue. Such a decisive course of action further underscores BTN's unwavering commitment to ensuring accountability for the alleged criminal offenses within the framework of its domestic legal apparatus. The institution of these domestic proceedings provides substantial corroboration for the assertion that the ICC should, in keeping with the principle of complementarity, relinquish jurisdiction in favor of the national judicial processes that have been diligently activated.

Issue 2: Whether the matter is admissible, as defined in the Articles of the Rome Statute?

20. It is humbly submitted before the honourable court that within the ambit of Art. 19 (2) (a)¹⁴, Art. 82 (1) (a)¹⁵ & (d)¹⁶, the matter at hand is not admissible before the court. It is our contention that the case does not meet the criteria for admissibility as prescribed by the RS, and as such, the Court should decline to exercise jurisdiction over this matter.

¹⁴ RS of the ICC, Art. 19(2)(a)

¹⁵ Ibid, Art. 82(1)(a)

¹⁶ Ibid, Art. 82(1)(d)

***2.1 PRINCIPLE OF COMPLEMENTARITY AND NATIONAL JURISDICTION OF
THE STATE***

21. The Preamble to the RS of the ICC reads out as:

*“The States Parties to this Statute, [...] Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions [...]”*¹⁷

22. The fundamental tenet governing the jurisdiction of this Court is the principle of complementarity. This guiding principle distinguishes the Court in several profound respects from other established institutions, notably the International Criminal Tribunals for the former Yugoslavia and Rwanda (hereinafter referred to as the ICTY¹⁸ and the ICTR¹⁹, respectively). The RS acknowledges and underscores the paramount notion that it is the prerogative and duty of States to primarily assume responsibility for and possess the inherent right to prosecute individuals implicated in international crimes. The ICC is empowered to exercise jurisdiction solely in circumstances where national legal systems falter in fulfilling this responsibility, encompassing situations wherein they ostensibly profess to undertake proceedings but, in substance, lack the willingness or capability to genuinely pursue such endeavours.²⁰

¹⁷ Ibid, the Preamble

¹⁸ International Criminal Tribunal for the Former Yugoslavia

¹⁹ International Criminal Tribunal for Rwanda

²⁰ (International Criminal Court) <www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF> accessed 23 September 2023.

23. The principle of complementarity finds its foundation in two essential pillars²¹: a profound reverence for the primary jurisdiction vested in States and prudent considerations of efficacy and efficiency. This arises from the awareness that, as a general rule, States are better positioned to access pertinent evidence and witnesses, and possess the requisite resources to conduct proceedings effectively. Furthermore, it is worth noting that there exist inherent constraints on the number of prosecutions that a single institution such as the ICC can practically undertake, accentuating the necessity for judicious allocation of its resources.
24. In furtherance the principle of complementarity, Art. 17 (a) of the RS provides, “*the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.*”²² Thus, it can be derived that Art. 17 of the RS clearly provides that the court may take on prosecution only when national justice systems are ‘*unwilling or unable genuinely*’²³ to proceed.
25. In the matter of *The Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaissona*²⁴, the Chamber hereby recalls the consistent application of the Inactivity Test by the Appeals Chamber in its evaluations pertaining to admissibility. In accordance with the principles of this test, a Chamber is duty-bound to inquire into two primary aspects, namely: (i) the existence of ongoing investigations or prosecutions, and (ii) the

²¹ Ibid

²² RS of the ICC, Art. 17(a)

²³ Ibid, Art. 17

²⁴ *The Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaissona*, ICC, 14 January 2018.

occurrence of past investigations wherein the State vested with jurisdiction opted against pursuing the prosecution of the individual in question. It is only when affirmative responses are elicited for these inquiries that the matter of a State's unwillingness or inability to act becomes germane. The assessment of unwillingness or inability, thus, is inherently contingent upon the investigative and prosecutorial endeavours undertaken by the State concerned.

26. Henceforth, it is imperative to emphasize that in instances of inactivity, the issue of unwillingness and inability does not come to the fore. Furthermore, this assessment is mandated to be conducted "on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge."²⁵ Consequently, in cases characterized by inactivity, the inquiry concerning unwillingness and inability is deemed moot and, therefore, is to be determined with due regard to the factual circumstances prevailing at the juncture of the proceedings involving the admissibility challenge.

27. Henceforth, it is incumbent upon this esteemed court to take cognizance of the fact that, in the ongoing case of *The Prosecutor v. The Police Chief of BTN*, charges of a criminal nature, specifically pertaining to acts of slavery and police torture, have been formally levied within the territorial jurisdiction of BTN against the aforementioned accused²⁶. Subsequently, legal proceedings in relation to these charges have been scheduled for adjudication therein. In light of these circumstances, it becomes manifest that both the Inactivity Test, as well as the principle of complementarity, stand duly satisfied.

²⁵ 'Commentary Rome Statute: Part 8: Case Matrix Network' (Home: Case Matrix Network) <www.casematrixnetwork.org/cn/cmknowledgehub/icccommentaryclcc/commentary-rome-statute/commentary-rome-statute-part-8/> accessed 23 September 2023.

²⁶ Moot prop, Pt. 19

28. It is further binding upon this court to observe that the Office of the Prosecutor, acting as the representative of the victims hailing from the Sholingilar community, prior to invoking the jurisdiction of this honourable court, possessed a statutory mandate to advocate for and facilitate the initiation of domestic prosecution by the State and the Sholingilar community itself. It was, therefore, within the purview of the Prosecutor's responsibilities to encourage the said entities to embark upon national prosecution proceedings prior to resorting to direct recourse to the ICC.

29. Article 17(1)(c) of the Statute enunciates the Court's prerogative to determine the inadmissibility of a case when it is established that 'the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3'²⁷. Article 20(3) of the Statute, encompassing the entirety of provisions pertaining to 'ne bis in idem', delineates the fundamental principle that 'no person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct'²⁸. This prohibition remains unassailable unless the proceedings conducted in the other court were undertaken either 'for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court', or alternatively, were not conducted 'independently or impartially', or 'were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'²⁹.

²⁷ RS of the ICC, Art. 17(1)(c)

²⁸ Ibid, Art. 20(3)

²⁹ Ibid, Art. 20(3)(b)

2.2 ADMISSIBILITY AS A PERSONAL RIGHT OF THE ACCUSED

30. An initial perspective on the admissibility phase posits it as a mechanism for safeguarding the individual rights of the accused. This conceptualization of admissibility emanates from the notion that an accused person possesses a fundamental entitlement to be shielded against the perils of double jeopardy and the imposition of multiple concurrent legal proceedings. The conduct of multiple trials, assuming differing forms, would contravene the accused's right to a fair and impartial trial, a right enshrined in various legal instruments, including, but not limited to, the International Covenant on Civil and Political Rights (ICCPR) of 1976³⁰.

31. Hence, the case against the Police Chief of BTN should be declared inadmissible under articles 17(1)(c)³¹ and 20(3)³² of the Statute if the following four elements are met:

- (i) He has already been tried by the national courts;
- (ii) The national trial was with respect 'to the same conduct' as that alleged in this case;
- (iii) The national proceedings were not for the purpose of shielding within the meaning of article 20(3)(a)³³;

³⁰ 'Roy S. Lee (ed.): The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations and Results' (2000) 4(1) Max Planck Yearbook of United Nations Law Online 588, XXXX
<<http://dx.doi.org/10.1163/187574100x00197>> accessed 22 September 2023

³¹ RS of the ICC, Art. 17(1)(c)

³² Ibid, Art. 20(3)

³³ Ibid, Art. 20(3)(a)

- (iv) The national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent that the proceedings were incapable of providing genuine justice within the meaning of article 20(3)(b)³⁴ of the RS, as was held in the case of *The Prosecutor v. Saif Al-Islam Gaddafi*³⁵

32. The preamble of the RS reaffirms the obligation of each State to exercise its criminal jurisdiction over individuals responsible for international crimes³⁶. During the drafting of the RS, there existed a broad consensus that the accused should be accorded the right to challenge the admissibility of the case brought against them.³⁷ Disagreement among the parties convened in Rome primarily revolved around the question of whether individuals who were subjects of investigation but had not yet been formally indicted should possess the ability to invoke the admissibility challenge. The eventual determination, as articulated in Article 19(2)(a) of the RS, stipulates that the accused's entitlement to challenge admissibility arises when the Court intervenes in their liberty, for instance, through the issuance of a warrant of arrest or a summons to appear, thereby underscoring that this right crystallizes at the juncture when the Court exercises its authority over the individual and subjects them to legal processes in a foreign jurisdiction.³⁸

³⁴ Ibid, Art. 20(3)(b)

³⁵ *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC, 27 June 2011.

³⁶ RS of the ICC, the preamble

³⁷ (International criminal Court) <<https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>> accessed 23 September 2023

³⁸ RS of the ICC, Art. 19(2)(a)

33. Therefore, Article 20(1) of the RS prohibits the initiation of a second trial against an individual for the same conduct before the ICC³⁹, while Article 20(2) precludes the possibility of a national retrial of an individual who has already undergone trial before the Court.⁴⁰

Issue 3: Whether the dismissal of the charge of “deportation as a crime against humanity” is valid?

34. It is humbly submitted before this Hon’ble Court, that the dismissal of the charge of “deportation as a crime against humanity” is valid. The said inference can be drawn from the decision of the Trial Chamber which struck off the charges of crime of “Deportation” against the Police Chief.

35. In the Dorđević Appeals Judgement⁴¹, the Appeals Chamber held that: "The Appeals Chamber notes that the Prosecution is required to prove the elements of the crime beyond reasonable doubt, which includes proving that the displacement was carried out on grounds not permitted under IHL. However, it is not a legal requirement to prove that the attack causing the displacement was unlawful or that the KLA was not present in the area. Although involuntary displacements may be justified under IHL, such circumstances are limited."

³⁹ Ibid, Art. 20(1)

⁴⁰ Ibid, Art. 20(2)

⁴¹ The Prosecutor v. Vlastimir Đorđević, ICTY, 27 June 2014.

3.1 DEFENDANT'S ACTIONS DOESN'T CONSTITUTE THE ELEMENTS OF CRIME OF DEPORTATION.

36. **Article-7(1) of the RS** states that, "Crime Against Humanity means any act when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

37. The charge of "Deportation" is given under **Article-7(1)(d)** which states it as, "Deportation or forcible transfer of population." The explanation to **Article-7(1)(d)** is provided in **Article-7(2)(d)** which states that, "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

38. The elements of crime of deportation as given in the draft of Elements of Crimes⁴² by the ICC clearly puts out the factors determining the crime of "Deportation", i.e,

- (a) 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.
- (b) Such person or persons were lawfully present in the area from which they were so deported or transferred.
- (c) The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

⁴² The Elements of Crimes are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11).

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

(e) 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.

39. The Counsel contends that the actions carried out by the defendant during the tenure of his position as the Chief of the Police of the State of BTN were in the official capacity of the office held by him. The waves after waves of influx of people crossing illegally into the border of BTN from sea and land routes from the State of Burmanyar created a major problem for the State administration since locals residing in the border villages started hiring the Sholingilar persons as slave-like labour in their fields. The owners of the fields did not register the workers' names which caused a detrimental effect to the local labour market of the area as they hired the Sholingilar people for free and did not have to pay them for their work. This led to the resentment of Sholingilar people by the local populace because of the great amount of influx of the Sholingilar's from the State of Burmanyar, the local populace began to worry about their jobs. The non-registration of the labour also made it difficult for the State administration to take relevant actions for people who have illegally crossed the border to issue them valid Identity Papers as prescribed under the RC,1951.⁴³

40. That because of the resentment of the local populace against the Sholingilar people, they were exploited and denied payments by private owners and businesses. After being persecuted for decades in their parent state of Burmanyar, the Sholingilar people were already physically, mentally and monetarily exhausted. The further denial of the basic amenities pushed the Sholingilar youth on the edge of a drug addiction. The Sholingilar youth started to get involved in drug dealing and related crimes. Due to the rampant growth

⁴³ RC 1951, Art. 27

in drug dealing and related crimes in the areas where Sholingilar people were residing the defendant ordered the police to arrest the persons involved in the commission of such crimes. It is pertinent to note that crime related to drug dealing is a serious crime considered nationally as well as internationally. Article 2 of the RC, 1951 states that, “every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”⁴⁴

41. That the subjection of young women to state owned plantations was to provide favourable treatment and better employment opportunities to the Sholingilar youth. The action taken by the defendant is also in consonance with the RC, 1951.⁴⁵

42. The Counsel also contends that the acts done by the defendant was taken in accordance with Article-9 of the RC, 1951 which states that, “Nothing in this convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.”⁴⁶

43. Furthermore, it is stated that the above said contentions emphasises that the actions taken by the Police Chief/Defendant doesn't constitute the elements of crime of Deportation which are:

⁴⁴ Ibid, Art. 2

⁴⁵ Ibid, Art. 17

⁴⁶ Ibid, Art. 9

- (a) Forced Displacement: Deportation involves the forced displacement of individuals or a population. This is a key element.
- (b) Coercive Acts: The displacement must occur through expulsion or other coercive acts. It is essential to show that the acts leading to displacement were indeed coercive.
- (c) Unlawful Presence: The individuals must be lawfully present in the area from which they are being forcibly displaced. This element establishes that deportation involves the removal of individuals who are legally entitled to be in a particular place.
- (d) Absence of Grounds Permitted Under International Law: Deportation can only be considered a crime against humanity if it occurs without lawful grounds permitted under international law. This element is crucial to determining whether the deportation was illegal.

44. As all the actions were taken by the police chief in the official capacity of his office and in grave and exceptional circumstances of the huge influx of the Sholingilar people into the State of BTN under the ambit of maintenance of Public Order. According to the Ruto, Kosgey and Sang Pre-Trial Chamber⁴⁷: "In order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim. 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(2) (d) of the Statute has been committed."

⁴⁷ Prosecutor v. Ruto, Kosgey and Sang, ICC, 23 January 2012.

45. As noted by ICTY Trial Chamber in *The Prosecutor v. Radovan Karadžić*⁴⁸: "International law recognises certain grounds permitting forced removals, such as the evacuation of: (i) a civilian population for its security or for imperative military reasons; and (ii) prisoners of war out of combat zones and into internment facilities, subject to the conditions set out therein. If an act of forced removal is carried out on such bases, that act cannot constitute the actus reus of deportation or forcible transfer. Evacuation is an exceptional measure which is permitted to protect the civilian population. However, it is unlawful to use evacuation measures based on imperative military reasons as a pretext to remove the civilian population and seize control over a desired territory. Although forced removal for humanitarian reasons is justifiable in certain situations, it is not justified where the humanitarian crisis that caused the displacement is itself the result of the perpetrator's own unlawful activity."

3.2 NON-JURISDICTION OF THE COURT

46. The assumption that deportation is a result-based crime is not without its problems. Article 7(2)(d) of the RS defines the conduct required for deportation as follows: "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".

47. No written mention, however, is made of the need for a destination or the physical presence of the displaced persons at any particular destination. The essential conduct of the perpetrator of "deportation" may be understood as completed at the moment of non-

⁴⁸ *The Prosecutor v. Radovan Karadžić*, ICTY, 24 March 2016.

consensual and unlawful eviction without the need to prove causation or a result, namely; displacement to another location or to another State.

48. The Counsel disagrees with the contention that population displacement across a national boundary is an essential objective element of the crime of deportation set out in Article 7(1)(d) of the RS. While noting that certain decisions of the International Criminal Tribunal for Yugoslavia and other sources of customary international law have indeed distinguished deportation from forcible transfer by reference to the "cross-border" element, the plain and simple language of Article 7(2)(d) of the RS does not support such a distinction.
49. The crime encapsulated in Article 7(1)(d) does not require proof of the physical presence of a deported population in another State but rather the ejection from the originating State – in this case BTN: “As a matter of law, however, it is not necessary to prove entry to another State, but merely that the victim has been ejected from the originating State— as such, a victim may potentially be deported to the high seas. What is crucial is that the international border, de jure or de facto, of the originating State is crossed”. From this contention, it appears that all that is required in order to complete the crime of deportation is to show the crossing of the border of the ejecting state and not the entry into the receiving state.
50. To summarise, the Counsel contends that a plain reading of Article 7(2)(d) of the RS would mean that all essential objective elements of the crime of deportation, as with forcible transfer, are completed from the moment of unlawful displacement without the need to prove transfer across a national boundary or to prove the presence of a displaced population in another State’s territory. In the present instance, therefore, all essential elements of the alleged crime of deportation (which is totally denied) would have been

completed on the territory of BTN over which the Court has no jurisdiction since it is not a State Party to the Rome Statute.

PRAYER

Wherefore, it is most humbly pleaded and implored before the Hon'ble International Criminal Court, in light of the facts and circumstances of the case, issues raised, arguments advanced and authorities cited, that this Hon'ble Court may be pleased to adjudge, rule upon, and determine the following:

1. The ICC does not have jurisdiction over the matter at Appeal, as BTN is not a state party to the RS as the alleged crimes are not of International Character and therefore not within the scope of jurisdiction of the ICC.
2. The matter is not admissible on the grounds of the Principle of Complementarity and other grounds, as defined in the Articles of the RS.
3. The dismissal of the charge of "deportation as a crime against humanity" is valid as the charge of the crime of Deportation against the Police Chief does not sustain.

AND/OR

Pass any other order it may deem fit in the interest of Justice, Equity & Good

Conscience.

All of which is most respectfully prayed & humbly submitted.

Counsel for Defendant