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6th SURANA & SURANA & RGNUL INTERNATIONAL LAW MOOT COURT COMPETITION, 2023

Original: **ENGLISH** Date: **7th OCTOBER 2023**

Before,

THE APPEALS CHAMBER INTERNATIONAL CRIMINAL COURT (ICC)

SITUATION IN FINLANDIA

IN THE CASE OF

THE PROSECUTOR v. POLICE CHIEF OF THE BANGTANGNAGAR

PUBLIC DOCUMENT

WRITTEN SUBMISSIONS ON BEHALF OF THE DEFENDANT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS III

INDEX OF AUTHORITIES IV

I. TREATIES AND CONVENTIONS .... **IV**

II. CASES .... **IV**

A) International Criminal Court .... **iv**

B) International Criminal Tribunal for the former Yugoslavia .... **vi**

C) Domestic Cases .... **vii**

1) United States of America vii

III. BOOKS .... **VII**

IV. JOURNALS AND ARTICLES .... **VIII**

V. DOCUMENTS .... **VIII**

A) ICC Documents .... **viii**

STATEMENT OF JURISDICTION IX

STATEMENT OF FACTS X

ISSUES RAISED XI

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 .... **XI**

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

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

SUMMARY OF ARGUMENTS XII

I. The Court Does Not Have The Jurisdiction Over The Matter At Appeal As Per Article 12 of the Statute .... **XII**

II. The Matter is Inadmissible In The Court In Accordance to the Statute. .... **XII**

III. The Trial Court's Dismissal Of the Charge of Deportation As A Crime Against Humanity Is Valid .... **XIII**

ARGUMENTS ADVANCED 1

I. THE COURT DOES NOT HAVE THE JURISDICTION OVER THE MATTER AT APPEAL AS PER ARTICLE 12 OF THE STATUTE **1**

A) *The term 'conduct' cannot be interpreted to include its consequences too.* **2**

1)The terms conduct and consequences have been distinguished by the Statute and the Elements of Crime. *2*

2)The travaux prepatoires intended a restricted interpretation of the term conduct *3*

B) The effects doctrine would not be applicable in the present scenario. ***5***

C) The objective territoriality principle laid in Bangladesh/Myanmar is flawed and would not be applicable. ***6***

II. THE MATTER IS INADMISSIBLE IN THE COURT IN ACCORDANCE TO THE ROME STATUTE **8**

A) Ipso facto admissibility. ***9***

B) The principle of complementarity. ***9***

C) Inadmissibility under Article 17 of the Statute. ***10***

D) The principle of ne bis id idem ***13***

E) Same person/Same conduct test. ***14***

III. **THE TRIAL COURT'S DISMISSAL OF THE CHARGE OF DEPORATATION AS A CRIME AGAINST HUMANITY IS VALID** **15**

A) 'The Voluntary Nature of Transfer' ***16***

B) 'The Absence of Mental Element' ***18***

1) There was no awareness regarding lawful presence *19*

2) Absence of knowledge of the fact that the conduct was part of a widespread or systematic attack against a civilian population. *20*

PRAYER XIV

LIST OF ABBREVIATIONS

S. NO.	ABBREVIATIONS	FULL FORM
5	¶	Paragraph
11	**CAH**	Crimes Against Humanity
2	**CIL**	Customary International Law
1	**Court**	International Criminal Court
3	**EOC**	Elements of Crime
4	**PTC**	Pre Trial-Chamber
9	**r/w**	Read With
6	**UNHRC**	United Nations Human Rights Commission
7	**UNSC**	United Nations Security Council
8	**v.**	Versus
10	**VCLT**	Vienna Convention on the Law of Treaties

INDEX OF AUTHORITIES

I. TREATIES AND CONVENTIONS

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 **("The Rome Statute")**	*IX,1,2,3,7,8,9,10,11,12,13.15,18,*
United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted on 19 December 1988, entered into force on 11 November 1990)	*16*
The Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force, January 27, 1980) 1155 U.N.T.S. 331 ("**VCLT**")	*2,3,4*

II. CASES

A) International Criminal Court

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
Prosecutor v. Thomas Lubanga Dyilo (Situation in the Democratic Republic of the Congo) ICC –1/04-01/06 (09 March 2006)	*13*

Situation in the Philippines (Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation") ICC-01/21 OA (15 September 2021)	*17*
The Prosecutor v. Callixte Mbarushimana (Decision on the confirmation of charges) ICC-01/04-01/10-514 (30 May 2012)	*6*
The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012)	*13*
The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 (31 May 2013)	*11,14,*
*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-*Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) ICC-01/11-01/11 (11 October 2013)	*14*
*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-*Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 OA 4 (21 May 2014)	*14*

The Prosecutor v. Thomas Lubanga Dyilo (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006) ICC-01/04-01/06 (OA4) (14 December 2006)	*13*
The Situation in The People's Republic of Bangladesh/Republic of The Union of Myanmar (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) ("***Bangladesh/Myanmar***")	*5,7*

B) International Criminal Tribunal for the former Yugoslavia

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
Prosecutor v. Karjinsik (Judgement) IT-00-39-T (27 September 2006)	*18*
Prosecutor v. Kunarc (Judgement) IT-96-23-T& IT-96-23/1-T (22 February 2001)	*20*
Prosecutor v. Miroslav Tadić (Judgement) IT-95-9-T (7 October 2003)	*15*

C) International Court of Justice Cases

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
Nicargua v United States of America (Judgement) ICJ Rep 392 (27 June 1986)	16

D) Domestic Cases

1) United States of America

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
US v. Aluminium Co. of America, 148 F.2d 416 (1945)	5
US v. Nippon Paper Industries Co. Ltd. 109 F.3d 1 (1997)	5

III. BOOKS

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
Michael Vagias, The Territorial Jurisdiction of the International Criminal Court (CUP, 2014), 91–92	3,4
Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by (Beck-Hart-Nomos, 2nd Edn, 2008), 872	3

IV. JOURNALS AND ARTICLES

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' [2007] International and Comparative Law Quarterly 59/	*4*
Caleb H. Wheeler, Human Rights Enforcement at the Borders – ICC Jurisdiction over the Rohingya Situation, 17 JICJ 609 (2019)	*7*
Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 33 B. YIL. 203 (1957)	*7*
M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' in Max Planck Yearbook(ed) (*United Nations Law*, 2003) 591	*9*

V. DOCUMENTS

A) ICC Documents

BIBLIOGRAPHICAL INFORMATION	PAGE NO.
Elements of Crimes UN Doc PCNCOURT/2000/1/Add.2. ("**EOC**")	*3,19*

STATEMENT OF JURISDICTION

Article 82(1)(a)[1] of The Rome Statute (‘***The Statute***’) of the International Criminal Court lays down that:

“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”

In compliance with the above-mentioned provision of the Statute, it is humbly submitted that in the instant situation, the Defendants have approached the Hon’ble Appeal Chambers to contest the decision of the Pre-Trial Chambers (‘***The Pre-Trial Chambers***’) in upholding its jurisdiction over the present case as per Article 13(c) read with Article 15 of the Statute. Thus, the Hon’ble Appeal Chambers has the jurisdiction to adjudge the current matter.

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[1] The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 **(“The Rome Statute”)** art 82(1)

STATEMENT OF FACTS

1. **The Situation in Burmanyar**: This case arises when Sholingilar Community, a mixed indigenous and religious minority began to flee from the Burmanyar to Bangtangnagar. The reason behind their displacement was application of Military law in their territory of residence which led to a reign of terror, disappearance of people and persecution.
2. **The Initial Days at Bangtangnagar**: Bangtangnagar is a signatory to the 1951 Refugee Convention and Universal Declaration of Human Rights. The Bangtangnagar villagers employed Sholingilar persons as slave-like labour. Aound half a million population of Sholingilar now resided in Bangtangnagar and was considered stateless.
3. **The Defendant**: The Defendant is a powerful Police Chief of Bangtangnagar. On the orders of the Defendant, the youth of Sholingilar community was arrested by police on the charges on drug dealing and related crimes because of the consumption of drugs by the community. Then the people of the community decide to move to Finalandia.
4. **Involvement of Finlandia Civil Society:** Finlandia is a State Party to the Rome Statute and Universal Declaration of Human Rights and has also signed the Refugee Convention,1951. The Finlandia Civil Society researched on Sholingilar people and attempted to initiate proceedings to prosecute the Defendant at ICC under Article 15.
5. **Proceedings before the Pre-Trial Chamber**: The PTC, decided that the case fell within the jurisdiction of the Court and confirmed the allegations of CAH as well as genocide. The Defendant was defended at the ICC by his government lawyers. The Government of Bangtangnagar publicly made a statement that its functionaries could not be a party to the trial as it was not a signatory to the Rome Statute.
6. **Proceedings before the Trial Court**: Here, the Court accepted the jurisdiction, admissibility and upheld the charges of Slavery as a CAH. The charges of deportation and genocide were struck off and a sentence of imprisonment for 15 years was awarded.

ISSUES RAISED

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?

I. THE COURT DOES NOT HAVE THE JURISDICTION OVER THE MATTER AT APPEAL AS PER ARTICLE 12 OF THE STATUTE

A) The Defence humbly submits that the Court does not have jurisdiction over the matter at appeal, as the required pre-conditions enshrined in Article 12(2)(a) have not been fulfilled. It is submitted that the *'conduct in question'* had not occurred in the territory of Finlandia and that the term '*conduct'* cannot be interpreted to also include its *consequences*, as the Statute, as well as the *travaux prepatoires* clearly distinguishes between these two aspects of crime.

B) The effects doctrine would also not apply in the present matter because the correct interpretation of Article 12(2)(a) does not support the effects-based jurisdiction. Further, the said doctrine can also not be applied in this present matter as it does not qualify as a customary principle of international law.

C) The decision of the PTC in *Bangladesh/Myanmar* would not be applicable here due to its various flaws and thus there would be no objective territoriality of the Court over Bantangnagar.

II. THE MATTER IS INADMISSIBLE IN THE COURT IN ACCORDANCE TO THE STATUTE.

A) The Defence humbly submits that the matter is not ipso facto admissible before the Court since there is no state inactivity as the trial is scheduled against the Defendant. The principle of complementarity as enshrined in the statute implies the priority jurisdiction of national authorities.

B) The Defence further contends sheds light on the requirements of Article 17 which lays down when a case is inadmissible under the Court and the same has been proved by the

Defence. Further, the principle of *ne bis id idem* as well as the same person/ same conduct test showcases the inadmissibility of the matter before the Court.

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

A) In order to establish that the dismissal of the charge of Deportation as a crime against humanity is valid, it has to be proved that conduct of the defendant does not fulfil the criteria mentioned under Article 7(1)(d) so as to establish deportation as a crime against humanity.

B) It is proved that transfer of the alleging party is Voluntary in Nature and the conduct of the Defendant does not amount to a 'coercive act' under the statute and is permitted under the international law. Therefore, does not amount to the crime of deportation.

C) The absence of mental element needed to fulfil the criteria to establish deportation as the there was absence of the awareness regarding the lawful presence and there was a lack of knowledge that the act formed a part of widespread and systematic attack on the part of defendant.

I. THE COURT DOES NOT HAVE THE JURISDICTION OVER THE MATTER AT APPEAL AS PER ARTICLE 12 OF THE STATUTE

1. The Statute lays down that for any matter to come within the jurisdiction of the Court, there must be fulfillment of two essentials, enshrined under Article 12 and Article 13 of the Statute. Article 13 lays down the mechanisms that trigger the jurisdiction of the Court.[2] However, as a precursor to exercising the said trigger mechanisms, it is mandated that the pre-conditions outlined under Article 12 are met.[3]

2. On interpreting Article 12(2)(a), it becomes apparent that in case a *proprio motu* investigation has been undertaken by the Prosecutor in accordance with Article 13(c) of the Statute, then the Court could exercise its jurisdiction if the state on whose territory the '*conduct in question'* occurred is a party to the Statute. [4]

3. In light of the *proprio motu* investigation commenced by the Prosecutor as per Article 13(c), the Defence submits that this Court cannot exercise its jurisdiction in this matter as the '*conduct in question'*, enshrined in Article 12(2)(a), did not occur in Finlandia, but was only restricted to Bangtangnagar. The three grounds to prove the same are: ***A)*** The term '*conduct*' cannot be interpreted to include its '*consequences'* too. ***B)*** The effects doctrine would not be applicable in the present scenario. ***C)*** The objective territoriality principle laid in *Bangladesh/Myanmar* is flawed and would not be applicable here.

[2] The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 **("The Rome Statute")** art 13

[3] The Rome Statute art 12

[4] The Rome Statute art 12(2)(a)

A) The term 'conduct' cannot be interpreted to include its consequences too.

4. The Defence humbly submits that the PTC and Trial Chambers have erred by upholding that the alleged conduct had occurred in Finlandia. It has been clearly established by the facts that the alleged conduct had clearly taken place in Bangtangnagar, a non-party, and that the term *conduct* cannot be interpreted to inculcate its consequences as well. Thus, any interpretation of the term *conduct* which includes its consequences/ effects is contended on the following grounds: *1*) The terms '*conduct*' and '*consequences*' have been distinguished by the Statute and the Elements of Crime. *2)* The *travaux prepatoires* intended a restricted interpretation of the term *conduct*.

1) The terms conduct and consequences have been distinguished by the Statute and the Elements of Crime.

5. The Statute and the Elements of Crime ('**EOC**'), when read together, have categorically laid down that the terms '*conduct'* and '*consequences'* have different connotations. It is a well-accepted principle enshrined in Article 31(1) of the Vienna Convention of the Law of the Treaties,1969 ('**VCLT**') that any treaty must be interpreted in accordance with the ordinary meaning ascribed to them within the framework of the goals and objects of the treaty as a whole.[5] The Statute r/w the EOC outlines various instances, where there has been a clear distinction drawn between conduct and consequences.

[5] The Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force, January 27, 1980) 1155 U.N.T.S. 331 ("**VCLT**") art 31(1)

6. Firstly, Article 30 of the Statute lays down the essentials required to construe the mental elements of a crime, of which *intent* could be ascertained in relation to their firstly their conduct[6] and secondly, the consequence[7]. Thus, the drafters have established that the conduct and the consequence are two distinct elements to form the intent, to constitute the mental element.

7. Secondly, being in consonance with the abovementioned Section 30 the EOC in ¶ 7 of the General Introductions draws a line between the '*conduct', 'consequence',* and *the 'circumstances.*[8] That is, the provisions lay down the conduct, the consequence, and the circumstances to be the distinct prerequisites to establish the mental element.[9]

8. Thirdly, the difference between consequence and conduct has also been outlined in Article 31, which pertains to grounds in which criminal liability is excluded. [10] The said provision outlines the appropriate time to ascertain if criminal liability could be absolved or not, at the time when the conduct of the crime occurs and not at the time of criminal consequence.[11]

9. Thus, it could be established the terms *'conduct'* and '*consequence'* have been considered by the Statute as two separate distinct elements of crimes and any interpretation of Article 12(2)(a) which attempts to interpret *'conduct'* to inculcate its consequences is flawed and against the intent of the Statute itself.

2) <u>The travaux prepatoires intended a restricted interpretation of the term conduct</u>

[6] The Rome Statute art 30(2)(a)

[7] The Rome Statute art 30(2)(b)

[8] Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2. ("**EOC**") General Introduction ¶7

[9] Michael Vagias, The Territorial Jurisdiction of the International Criminal Court (CUP, 2014), 91–92

[10] The Rome Statute art 30

[11] Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Beck-Hart-Nomos, 2nd Edn, 2008), 872

10. It is submitted that the *travaux prepatoires* or the preparatory documents of the Rome Statute enshrine the thought process of the drafters, and establish their actual intent regarding the different facets of the Statute. Article 31[12] of the VCLT outlines that any treaty must be interpreted and read in consonance with their overall intent and purpose and thus in the present scenario it is submitted that the drafters intended to interpret *'conduct'* in a restrictive manner.

11. On perusing the preparatory documents of the Statute, it becomes apparent that Article 12(2)(a) of the Statute was outlined in Article 21 of the draft Statute. The said provision used the phrase '*act or omission'* instead of the term '*conduct'.* It was only replaced by *'conduct'* in the final draft, as the drafters were not able to reach a consensus on the meaning of the term *'omission'.*[13] This meant that drafters had always intended to interpret the term *'conduct'* in its ordinary sense, denoting either an act or an omission. Thus, any interpretation that seeks to unnecessarily expand the scope of the term '*conduct*' squarely lies in contravention to the actual intent of the drafters of the Statute.

12. It is also submitted that the underlying intent of the Statute was to respect the sovereignty of the parties and thus, when the drafters were against the notion of giving the Court universal jurisdiction over crimes.[14]This intent also adheres to Article 34 of the VCLT which enshrines that any state which is a non-signatory must not be bound by any treaty obligations.[15] The drafters too intended to create a consent-based system, where only the parties who had consented to a treaty would be bound by it.

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[12] VCLT art 31

[13] Michael Vagias, The Territorial Jurisdiction of the International Criminal Court (CUP, 2014), 94

[14] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' [2007] International and Comparative Law Quarterly 59/

[15] VCLT art 34

13. An interpretation of any provision of the Statute, that contravenes the foundation stones of the Statute, is fallacious. Thus, the term *'conduct'* must not be given a wider interpretation, as that contravenes the intent of the drafters of the Statute as enshrined in the Statute.

B) The effects doctrine would not be applicable in the present scenario.

14. In light of the above, it submitted that '*conduct'* Article 12(2)(a) cannot be interpreted to include its '*consequences',* and thus, as a corollary, even the effects doctrine is not applicable in the present fact scenario.

15. The Defence submits that Article 12(2)(a) of the Rome Statute does not recognise the effects of any conduct to a sufficient ground for exercising jurisdiction. The only two conditions that the said provision enshrines is that the conduct in question must have occurred in the territory of a state party or the perpetrator must belong to a nation that is a party to the Statute,

16. Further, the effects doctrine, cannot be read onto the provision, as it is not considered to be a customary principle of law. It must be noted that the effects doctrine has been enshrined mostly in domestic legislation, with its scope mostly being limited to matters of anti-trust[16] scenarios Moreover, the state practice in many nations has disregarded the effects doctrine and has specific legislation that prevents such extra-territorial provisions. Thus, the effect also lacks an *opinio juris,* a necessary element for any principle to be deemed to be a customary principle of law.

17. The Prosecutors may claim, as a rebuttal, the validity of the effects doctrine by citing the PTC's contentious decision in *Bangladesh/Myanmar*[17] having a similar fact situation. It

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[16]*US v. Aluminium Co. of America,* 148 F.2d 416 (1945);
US v. Nippon Paper Industries Co. Ltd. 109 F.3d 1 (1997)

[17] *Situation in The People's Republic of Bangladesh/Republic of The Union of Myanmar* (Decision Pursuant to

is humbly submitted that on scrutinizing the said decision of the PTC, it becomes clear that the PTC had in no way expanded the scope of Article 12(2)(a) to inculcate the effects doctrine within it. The PTC had completely based its verdict on the grounds that one of the elements of crimes had occurred on the territory of a state party, that is Bangladesh and in no way had validated the effects doctrine.

18. In any case, even if the Court decides to take the effects doctrine into consideration, it is submitted that the doctrine would still be inapplicable in the current scenario. It has been held by the Court in *Mbarushimana*[18] that in order to establish the effects doctrine, it must be proved that the said effect was *"direct, intended, forseeable and substantial'.*

19. The term effect here refers to the people of Sholingilar community entering the territory of Finlandia. In the present scenario, in no way it can be ascertained that the Police Chief had an intention to deport the community specifically to Finlandia. It has also been established that the community was not stopped from crossing the boundaries of Bangtangnagar.[19] Hence, it cannot be established that the Police Chief could have reasonable foreseen that the community would specifically enter the territories of Finlandia.

20. Thus, the Defence submits that the effects doctrine cannot be applied in the present scenario.

C) The objective territoriality principle laid in Bangladesh/Myanmar is flawed and would not be applicable.

Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) ("***Bangladesh/Myanmar***")

[18] *The Prosecutor v. Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10-514 (30 May 2012)

[19] Moot Proposition ¶ 13

21. The Dе́fense submits that the PTC decision in Bangladesh/Myanmar, where the objective territoriality of the Court was upheld is flawed, and thus cannot be applied in the present scenario.

22. At the onset, it must be noted that there exist various lacunae in the decision as it runs ultra vires to the provisions of the Statute. The PTC had upheld the principle of objective territoriality, where even if one element of a crime has occurred in the territory of a state party, that gives the Court power to exercise its jurisdiction under Article 12(2)(a).

23. However, it must be taken into account that the PTC had based this decision merely upon the submissions of the Prosecutor which claimed that the objective territoriality has been accepted in various domestic legislations and international principles. [20]

24. It is submitted that Article 21 of the Statute lays down that the Court in the first instance must apply the provisions of the Statute, the EOC, and the Rules of Procedures and Evidence.[21] National legislations and customary principles of law must be applied after exhausting the provisions of the Statute, EOC, and the Rules and Procedures and Evidences.

25. The PTC also erred in accepting the submissions of the Prosecutor, as the Statute itself does not allow interpreting the validity of the principle of objective territoriality merely on the basis of the phraseology used in Article 12(2)(1). The PTC is also flawed in considering the national legislations as the basis for its decisions, as the principle of

objective territoriality is explicitly mentioned in these legislations, which is not the case with the Statute, where there have been no mentions regarding the same. [22]

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[20] *Bangladesh/Myanmar*

[21] The Rome Statute art 21

[22] Caleb H. Wheeler, Human Rights Enforcement at the Borders – ICC Jurisdiction over the Rohingya Situation, 17 JICJ 609 (2019)

26. Further, the said decision also contravenes the rule of Contemporaneity, which lays down that the terms of the treaty must be interpreted in accordance with the meaning to which they were ascribed at the time of entering into treaty obligations.[23] Thus, any interpretation of the Statute that goes against what was agreed upon by the parties at the time of entering into the agreement is fallacious.

27. In any case, the PTC's decision is not binding upon the Court,[24] and thus in light of the above-mentioned submissions, it is established that the principle of objective territoriality laid in *Bangladesh/Myanmar* is flawed and is not applicable in the present scenario.

The Defence thus humbly submits that the Court does not possess the jurisdiction over this matter as the necessary pre-conditions as per Article 12(2)(a) has not been fulfilled and that the effects doctrine as well as the decision of Bangladesh/Myanmar would not be applicable in the current matter.

II. THE MATTER IS INADMISSIBLE IN THE COURT IN ACCORDANCE TO THE ROME STATUTE

28. That the Defendant under ***article 82 (1) (a)*** of the Statute challenges the admissibility of the instant case in the Court. The defendant humbly submits that Article 17 of the Statute

deals with the issue of admissibility of a case before Court. The issue of admissibility would be dealt in five prongs: **A)** Ipso facto admissibility. **B)** The principle of

[23] Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 33 B. YIL. 203 (1957)

[24] The Rome Statute art 21(2)

Complementarity. **(C)** Inadmissibility under Article 17 of the Statute. **D)** The principle of *ne bis id idem.* **(E)** Same person/Same conduct test.

A) Ipso facto admissibility.

29. The Defence humbly submits that there is no ipso facto admissibility of the case on the grounds of the state's inactivity. The criminal charges of slavery and police torture were laid in Bangtangnagar against the Police Chief, and the matter is scheduled for trial in the state of Bangtangnagar.[25]

B) The principle of complementarity.

30. That the Preamble of the Statute states that "*nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State*." Article 1[26] of the Statute states that the Court's jurisdiction "shall be complementary to national criminal jurisdictions."

31. That Complementarity as enshrined in the Statute is a principle that represents that instead of the Court, the state party would have priority in proceeding with cases within their jurisdiction.[27]

32. The Defence humbly submits that following the principle of Complementarity, the jurisdiction lies with the state of Bangtangnagar as the trial is scheduled against the Police

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[25] Moot Proposition ¶ 20

[26] The Rome Statute art 1

[27] M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' in Max Planck Yearbook(ed) (*United Nations Law*, 2003) 591

Chief on the charges of police torture and slavery[28]. This showcases that there has been an investigation on this matter and thus the national jurisdiction of the state should be prioritised.

C) Inadmissibility under Article 17 of the Statute.

33. That the Defence would establish the inadmissibility of the case under Article 17 (1) (A)[29] in a two-step process. Firstly, there exists an ongoing investigation by the state of Bangtangnagar which has jurisdiction over the instant matter and secondly the state is willing and able to genuinely carry out the investigation.

34. As for the first step, it is submitted that the trial takes place subsequent to or parallel to an investigation, and in the instant matter a trial is already scheduled which showcases that an investigation has already been initiated therefore the case is inadmissible in the court.

35. In order to determine 'unwillingness' in a particular case, as per Article 17 (2)[30] of the Statute, one or more of the following, as mentioned below, shall materialise:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of 'shielding' the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5[31];

(b) There has been an 'unjustified delay' in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

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[28] Moot Proposition ¶ 20

[29] The Rome Statute art 17 (1) (A)

[30] The Rome Statute art 17 (1) (2)

[31] The Rome Statute art 5

(c) The proceedings were not or are not being conducted 'independently or impartially'**,** and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

36. The Defence humbly submits that none of the aforementioned conditions are fulfilling as:

(a) the State of Bangtangnagar has laid criminal charges of slavery and police torture and if the intention were to shield the person, such grave crime would not have been laid on him. Secondly, before even starting the trial, it cannot be argued that this would be a sham trial to safeguard the Police Chief.

(b) There was no unjustified delay as the Court took Suo motu cognizance of the matter and started a trial against the Police Chief. As soon as the Trial concluded at the Court, the Trial was scheduled against the police chief in the state of Bangtangnagar. In the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi***,** it was contended that "time was needed by Libya to ensure that justice was achieved in the case rush to judgment by the ICC, without granting Libya the necessary time, would be contrary to the necessity to co-operate with a post-conflict government facing serious security problems".[32]

(c) The proceedings are yet to start therefore the question of impartiality and independence cannot be entertained at this juncture.

37. As for the second step, in order to determine 'inability', in any particular case, the Court shall identify three scenarios:

[32] The prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 (31 May 2013)

1. a state is unable to obtain the Defendant;
2. a state is unable to obtain the necessary evidence and testimony for putting the persons allegedly responsible on trial;
3. the state is otherwise unable to carry out its proceedings[33]

38. In the case of *Gaddafi v. Al Senusi*[34]**,** The Chamber considered the ability of a State genuinely to carry out an investigation or prosecution in the context of the relevant national system and procedures. In other words, the Chamber assessed whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya.

39. That the Penal code of Bangtangnagar provides that "*any person liable, by any law in force in the Union of 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*." Thus, the state authorities will be able to carry out prosecution without any hindrance.

40. In the instant matter, the Defendant is still a Police Chief in the State of Bangtangnagar, which showcases the ability of the state to obtain the Defendant.[35]

41. The Defence humbly submits that in the instant matter, none of the conditions with respect to proving 'inability' is fulfilled, thus it can be concluded that the state of Bangtangnagar is able to genuinely carry out the investigation.

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[33] The Rome Statute art 17(3)

[34] The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 (31 May 2013)

[35] ibid

Therefore, based on this two-fold test laid down under article 17 of the Rome Statute, the Defence humbly submits that the instant case is not inadmissible in the Court.

D) The principle of ne bis id idem.

42. That admitting the case will be a violation of the principle of *ne bis id idem* as enshrined under Article 20 of the Statute[36].

43. Article 20 (3)[37] states 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 unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise, were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

44. That this matter would attract the test laid down in Article 20[38], as the charges against the Police Chief were of slavery and police torture in the state of Bangtangnagar and the same charge of slavery have been upheld by the Trial Chambers.

45. Firstly, the state of Bangtangnagar has laid criminal charges of slavery and police torture and if the intention was to shield the person, such grave crime would not have been laid on him. Secondly, before even starting the trial it can't be argued that this will be a sham

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[36] The Rome Statute art 20

[37] The Rome Statute art 20 (3)

[38] The Rome Statute art 20

trial to safeguard the police chief. Therefore, admitting the matter which is already scheduled for trial in the state of Bangtangnagar.

46. The Defence humbly submits that for a case to be inadmissible 'national proceedings must encompass both the person and the conduct which is the subject of the case before the court'.[39] In the instant case, the Trial is scheduled against the police chief as well and his conduct has also been encompassed resulting in charges of slavery and police torture against him.

E) Same person/Same conduct test.

47. The Defence humbly submits that the instant matter passes the 'same person/same conduct test' according to which if the same case in terms of suspect and conduct is prosecuted by the national authorities and the proceedings are genuine in nature, then the case will not be admissible in the Court[40].

48. That the ICC in the appeals chamber has held that it can be 'substantially the same conduct' as alleged in the proceedings before the Court.[41]

49. The PTC has held that the relevant factual aspects of Mr. Al – Senussi's conduct, as alleged in the proceedings before the Court, to evaluate his criminal responsibility, had been investigated by the Libyan authorities, confirming that 'the same conduct' alleged against

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[39] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006) ICC-01/04-01/06 (OA4) (14 December 2006)

[40] *Prosecutor v. Thomas Lubanga Dyilo* (Situation in the Democratic Republic of the Congo) ICC – 01/04-01/06 (09 March 2006)

[41] *The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 23 January 2012

Mr. Al – Senussi in the proceedings before the Court was subject to Libya's domestic proceedings.[42]

50. That in the instant matter, the same person, who is the 'Police Chief' of Bangtangnagar is prosecuted at the Court as well and the trial is scheduled against him in the state of Bangtangnagar. Similarly, the conduct for which he is prosecuted at the Court is 'slavery as a crime against humanity'. In the national trial, the charges laid against him were of police torture and slavery. Thus, the conduct in both the trials are overlapping.[43]

51. The Defence further contends that the scope of investigation done by the state of Bangtangnagar is wider than the one done by Court as it is limited to slavery as a crime against humanity whereas the charges laid against the Police Chief in Bangtangnagar are slavery as well as police torture.[44]

Therefore, the Defence humbly submits that the Trial Chamber's decision pertaining to the admissibility of the matter before the Court shall be reversed.

III. THE TRIAL COURT'S DISMISSAL OF THE CHARGE OF DEPORATATION AS A CRIME AGAINST HUMANITY IS VALID

52. The charge of deportation or forcible transfer has to be dealt with according to the provisions of the Article 7(1)(d) of the Statute. The Defence humbly submits that given

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[42] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-*Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) ICC-01/11-01/11 (11 October 2013)

[43] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-*Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 OA 4 (21 May 2014)

[44] The prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 (31 May 2013)

CAH alleged against the Defendant in the Pre Trial and Trial Chamber was struck off in the Trial Chamber Judgement.

53. The Defence agrees with the decision of Trial Chamber that there has been no commission of deportation as a crime against humanity by the Defendant. The allegations of charge of Deportation against the Defendant are invalid. The Defence will submit its arguments in favour of the dismissal of the charge of deportation.

54. The absence of single element for the crime of deportation as per Article 7(1)(d) would amount to dismissal of the charge against deportation. The Defence humbly submits that the issue would be proved under two heads; ***A)*** The Voluntary Nature of Transfer and ***B)*** The Absence of Mental Capacity .

A) 'The Voluntary Nature of Transfer'

55. As per the EOC mentioned in Article 7(1)(d)[45], there must be deportation or forcible transfer, not within the grounds mentioned under international law, of one or more persons to another State or location, by expulsion or other coercive acts. The displacement of persons is only illegal where it is forced, i.e., not voluntary.[46]

56. In the present instance where the Sholingilar people were transferred from the state of Bangtangnagar to the state of Finlandia was of their voluntary will and not forced by the Defendant. [47] There exists no active force of nature transferring them from one place to another as under the situation present in the provisions of Article 7(1)(d).

57. In addition to this, the Defence would submit the absence of any acts leading to expulsion or coercion. The term "forcibly" is not restricted to physical force, but may include threat

[45] The Rome Statute, art 7(1)(d)

[46] *Prosecutor V. Miroslav Tadić*, (Judgement) IT-95-9-T, 1(7 October 2003)

[47] Moot Proposition¶ 13

of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment. The Defence would prove that the act undertaken by the Defendant does not amount to a 'coercive act' as required under Article 7 of the Statute.

58. As per Article 3 of UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 states that parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.[48]

59. The principle of prosecution of persons involved in drug related crimes under domestic law can be confirmed by the virtue of International Customary Law on the grounds of general acceptance by the conduct of states.

60. In the case of *Nicaragua v USA*[49], it was held that to deduce the existence of customary rules, the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

61. The same can be justified in relation to the acceptance of the treaty which is based on this principle, i.e., the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 to which 191 nations of the world are a party.

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[48] *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (adopted on 19 December 1988, entered into force on 11 November 1990)

[49] *Nicargua v United States of America* (Judgement) ICJ Rep 392 (27 June 1986)

In the case of the Situation in the Philippines, the ICC chamber recognized the right and duty of all countries to combat drug trafficking. In this sense, legitimate operations against illicit drugs, respecting internationally protected human rights, could not as such qualify as an attack against the civilian population.[50]

62. As in the present instance, the act of imprisonment as well as force used by the Defendant were in the colour of his duty as a Police Chief to combat drug dealings and related crimes and did not encompass any human rights violation. Therefore, it can be proved that there was no deportation or forcible transfer on the basis of the following reasons; firstly, the people of the Sholingilar community voluntarily moved from Bangtangnagar to Finlandia. Secondly, the conduct of the police officer did not amount to 'coercion' under International Law.

63. Hence, negation of the element of deportation or forcible transfer proves that the defendant is not guilty of deportation as a crime against humanity.

B) 'The Absence of Mental Element'

64. ***Assuming arguendo***, the Defence hereby submits that there has been no commission of the crime of deportation against Sholingilar people as the acts of Defendant does not fulfil the criteria of Mental Element as per the Statute.

65. The provisions of Article 31(1)[51] of the Statute mention that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the

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[50] *Situation in the Philippines* (Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation") ICC-01/21 OA (15 September 2021)

[51] The Rome Statute, art 31(1)

jurisdiction of the Court only if the material elements are committed with intent and knowledge.

66. Article 31(3)[52] further provides the explanation of the term 'knowledge', i.e., awareness that a circumstance exists or a consequence will occur in the ordinary course of events. As held in the case of *Prosecutor v Krajinsik*[53]it was held that the perpetrator of deportation or forcible transfer must intend to forcibly displace the persons.

67. To prove the absence of the mental element, the Defence will submit its arguments under two heads; *1)* There was no awareness regarding lawful presence and *2)* Absence of knowledge of the fact that the conduct was a part of a widespread or systematic attack against a civilian population.

1) There was no awareness regarding lawful presence

68. The EOC in its Article 7(1)(d)[54] mentions that the perpetrator must be aware of the factual circumstances that established the lawfulness of the presence of people deported.

69. This provision reflects the intention of the preparator to remove the people who are lawfully present. As per Article 32 of the Statute[55], a mistake of law may, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime.

70. In the instant matter, the Defence would submit its argument on the grounds that there was the absence of factual circumstances to construct the lawful presence. This mistake of not knowing the lawful presence because of the factual circumstances would fall under the ambit of the mistake of law.

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[52] The Rome Statue, art 31(3)

[53] *Prosecutor v Karjinsik* (Judgement) IT-00-39-T (27 September 2006)

[54] The Rome Statute, art 7(1)(d)

[55] The Rome Statute, art 32

71. The Defence humbly submits that the Defendant was not aware of the circumstances establishing the lawful presence. The reasons for the same involve; firstly, that though the State of Bangtangnagar was a signatory to the Refugee Convention of 1951, there was complete absence of any UNHRC commission in the state of Bangtangnagar.[56] Secondly, the rule followed in Bangtangnagar was of *Jus Soli* citizenship which means that the status of citizen only on the basis of birth.[57]

72. Therefore, it can be concluded that there was no awareness regarding the lawful presence of the individuals for the following reasons; firstly, there was no fact establishing that the Defendant was aware of the circumstances which made their presence lawful. Secondly, there existed a mistake of law as per Article 32 which defies the mental element.

73. Hence, it can be concluded that the defendant was not aware of the lawful presence of the Sholingilar people which is an important element[58] in establishing the mental element.

2) *Absence of knowledge of the fact that the conduct was part of a widespread or systematic attack against a civilian population.*

74. The EOC for the crime of deportation under Article 7 (1)(d)[59] requires that the perpetrator must 'know' that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

75. In the present case, first there has been no conduct undertaken by the Defendant which amount to attack as they were undertaken in the capacity of the Police Chief and did not

[56] Moot Proposition ¶ 9

[57] Ibid (n8)

[58] EOC, art 7(1)(d) 3

[59] EOC, art 7 (1)(d)

amount to human rights violation. ***Assuming arguendo***, even if the conduct amounted to the attack there was an absence of intention to constitute as part of widespread and systematic attack.

76. In the case of *Prosecutor v Kunarac*[60], the Court observed that there must exist knowledge on the part of the Defendant that there is an attack on the civilian population and his act is part of the attack.

77. In the present case, the general sentiments of the population do amount to an attack against the civilian population.[61] The reasons proving the absence of knowledge on the part of the Defendant are; firstly, the acts undertaken by the Defendant were in the capacity of his duty. Secondly, the conduct of the Defendant was in the context of drug-related crimes committed by the Sholinglar community and not in reference to any attack.

78. Therefore, on the grounds encompassing the absence of awareness of the lawful presence of Sholingilar people and lack of knowledge that the act formed a part of widespread and systematic attack on the part of the defendant, the Defence concludes that there existed no Mental Element on the part of the Defendant. As the Mental Element is a basic ingredient to form any crime against humanity, the Defence submits that the absence of *mens rea* proves that the defendant is not guilty of deportation as a crime against humanity.

Therefore, the Defence submits that the Defendant is not guilty of crime of Deportation as a crime against humanity under Article 7(1)(d). This proved on two bases; Firstly, that the transfer of the community was voluntary in nature. Secondly that there does not exist the requisite mental element to fulfil the criteria of crime of deportation. Hence, the dismissal by the Trial Chamber of Deportation as a Crime against Humanity is valid.

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[60] *Prosecutor v Kunarc* (Judgement) IT-96-23-T& IT-96-23/1-T (22 February 2001)

[61] Moot Proposition ¶ 10

PRAYER

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

I. This Court does not possess the jurisdiction to hear this matter at appeal as the said pre-conditions under Article 12 (2) (a) have not been fulfilled.

II. This matter is inadmissible in this Court in accordance to Article 17 of the Statute.

III. That the Trial Court's dismissal of the charge of Deportation as a Crime against Humanity is valid.

ON BEHALF OF THE DEFENDANTS