REQUEST TO BE TAKEN BY AMICUS CURIAE

National Chamber of Federal Criminal and Correctional Appeals:

The Robert F. Kennedy Center for Justice and Human Rights (doing business as "Robert F. Kennedy Human Rights" and hereafter "RFKHR"), represented in the case by Angelita Baeyens, Vice President of International Advocacy and Litigation; and Fortify Rights, represented by Matthew Smith, Chief Executive Officer, with the legal sponsorship of Silvia María Malfatti, registered attorney T°28, F°559, C.P.A.C.F. and Fernando Goldar, with electronic address 27-10830027-8, in the case N° 8419/2019, present themselves and respectfully say:

I. AIM

We present with the purpose of submitting to your consideration the factual and legal arguments that may be useful for the analysis of this case.

II. LEGAL STATUS

Angelita Baeyens, as demonstrated in the attached communication, acts in representation of RFKHR, located at 1300 19th Street NW, Suite 750, Washington DC, 20036, United States. Matthew Smith acts in representation of Fortify Rights, located at PO Box 110, Belfast, ME 04915, United States.

III. THE AMICUS CURIAE. THE INTEREST AND REGULATION OF RFKHR AND FORTIFY RIGHTS IN THE CASE

The presentation of amicus curiae opinions in Argentina are only presented before the Supreme Court of Justice of the Nation (hereinafter, "CSJN") according to the Agreement 28/04, 14/06, and the most recent, 7/13, issued by the highest court for such purposes. These agreements were written with an objective to "enrich deliberations on institutionally relevant issues, with well-founded legal, technical or scientific arguments related to the arguments in question" (Art. 4, from the 7/13 Agreement). Nevertheless, this National Chamber of Federal Criminal and Correctional Appeals does not include references to the regulation of the institution in its bylaws. Without mayor requirements, it was in 1995 that this Chamber, accepted the presentation of a case related to the right of the truth with two international organizations,[1] namely, the Center for Justice and International Law (CEJIL) and the Human Rights Watch/Americas, as amicus curiae, marking a milestone in the history of justice in the Argentine Republic. On this occasion, this Chamber considered: a) whether the intervention of "amicus curiae" is included within Art. 44 of the American Convention on Human Rights, b) whether although at the beginning, the role of amicus curiae was aimed to collaborate neutrally with the court, whether in more recent years if that that impartiality had been definitively abandoned, transforming itself into a kind of interested and committed auditor; and c) whether this role should only be reserved for non-governmental organizations that pursue a valid and genuine interest in the subject, as well as demonstrate a specialization in it, with exceptional cases of public interest, as well as one of the magnitude represented by the case in question.

Following the line established by this Chamber, the institution of the amicus curiae, in accordance with the terms from the 7/13 Agreement, establishes that "the Friend of the Court

[1] National Chamber of Federal Criminal and Correctional Appeals. "Events that occurred in the environment of the Higher School of Mechanics of the Navy." C. 761. Reg. N° 5/95. May 18, 1995

must be a natural or legal person with recognized competence over the issue debated in the lawsuit. In the first chapter of your presentation, you will base your interest to participate in the cause and you must state which party or parties you support in the defense of their rights, if you have received from them financing or economic aid of any kind, or advice regarding the fundamentals of the presentation, and if the result of the process will represent you —directly or indirectly— patrimonial benefits" (Art. 2, 7/13 Agreement).

In this sense, we must point out that this presentation seeks to support the position of the complaint of Mr. MAUNG TUN KHIN, of the Burmese Rohingya Organisation UK (BROUK) and six other female survivors of the serious crimes committed by the events denounced in the case in question. In turn, we declare that the RFKHR and Fortify Rights have not received any type of financing, financial aid or advice for the preparation of this amicus, and we also declare that the result of this process will not yield to the RFKHR or Fortify Rights, either directly or moderately, in economic benefits of any kind.

In addition, it is important to add that RFKHR and Fortify Rights have an interest in this case. RFKHR is a non-governmental organization founded in 1968 by the family and associates of former United States Attorney General Robert F. Kennedy to continue his legacy of fighting for a more just and peaceful world. The international advocacy and litigation team that works in the protection of human rights throughout Asia, Africa and the Americas, participates directly in strategic litigation in emblematic cases at the international and regional levels.

RFKHR has worked on human rights issues in both Myanmar and Bangladesh for several years, including training sessions and support for civil society organizations. We believe that the seriousness and magnitude of the human rights violations committed against the Rohingya, as

well as the humanitarian crisis, demands the attention of the international community, as well as our own.

It is also important to note that the RFKHR organized a visit to Myanmar and Bangladesh in July 2018 in order to obtain updated and detailed information on the Rohingya crisis. This delegation was led by the President of the RFKHR, Kerry Kennedy. During this visit, meetings were held with state officials, civil society organizations, community leaders, and refugees. As a result of that visit, in March 2019, the RFKHR presented its report "*Belonging: Findings of the Robert F. Kennedy Human Rights delegation to Myanmar and Bangladesh*."[2] This report gives an account of the findings of the Rohingya crisis. It reflects the conversations that resulted from numerous formal and informal meetings and offers a series of recommendations to the different parties involved in the crisis in regards to what can and should be done to guarantee the human rights of the Rohingya, including their rights to nationality, of movement and access to education.

The RFKHR has also carried out international activism campaigns for the protection of the rights of the Rohingya community. For example, the exchange of letters with the Prime Minister of Bangladesh calling for her to suspend the forced returns to Myanmar[3], as well as her response in which she assures that they are repatriating members of the Rohingya community against their will[4]; and the condemnation and call to end impunity for the violations committed against the Rohingyas through numerous press releases.[5]

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[2] https://rfkhumanrights.org/assets/documents/Myanmar-Report-Final.pdf
[3] https://rfkhumanrights.org/news/urges-bangladesh-not
[4] https://rfkhumanrights.org/news/bangladeshi-prime-minister-responds-to-kerry-kennedy
[5] See, among others: https://rfkhumanrights.org/news/we-urge-immediate-action-to-protect-the-rights-of-rohingyas-on-genocide-anniversary; https://rfkhumanrights.org/news/two-steps-forward-one-step-back-for-justice-for-the-rohingya; https://rfkhumanrights.org/news/international-justice-day-justice-and-accountability-for-the-rohingya

Fortify Rights is an award-winning not-for-profit, nongovernmental human rights organization founded in 2013 and registered in the United States and Switzerland. The organization is operational in Myanmar, Bangladesh, Thailand, and Malaysia, and it works to promote and protect the human rights of all. Since its founding, Fortify Rights has been at the forefront of investigating and exposing human rights violations committed against Rohingya people. Fortify Rights has conducted numerous in-depth investigations into international crimes perpetrated against Rohingya people in Myanmar; these investigations included interviews with several hundred eyewitnesses and survivors of human rights violations in Myanmar, including testimony from members or former members of the Myanmar military and police. In 2018, Fortify Rights published a 160-page report detailing genocide and crimes against humanity against Rohingya during the Myanmar military-led "clearance operations" of 2016 and 2017.[6] Fortify Rights has conducted high-level advocacy with various governments and institutions to ensure justice and accountability for atrocity crimes against Rohingya, and it also provides technical support to Rohingya human rights defenders, which includes, for example, trainings on various subjects for young Rohingya refugees in Bangladesh.[7]

IV. CONSIDERATIONS OF FACTS AND LAW

a. Brief reference to the importance of universal jurisdiction in the fight against impunity for crimes against humanity.

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[6] Fortify Rights, *"They Gave Them Long Swords": Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar*, July 2018, https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf.

[7] See, for example, Fortify Rights, "Refugee 'Instagrammers' Win Prestigious Social-Media Award," November 24, 2020, https://www.fortifyrights.org/for-2020-11-24/.

When Mary Robinson was the United Nations High Commissioner for Human Rights, she stated that "the principle of universal jurisdiction is based on the idea that certain crimes are so damaging to international interests that States are authorized, *and even obliged* to initiate legal action against the perpetrator, regardless of the place where the crime was committed or the nationality of the perpetrator or victim." [8]

The International Criminal Tribunal for the former Yugoslavia has explained that "crimes against humanity are serious acts of violence that harm human beings by attacking what is most essential to them: their life, their freedom, their physical well-being, their health and / or their dignity. They are inhumane acts that, due to their extent and gravity, go beyond the limits of what is tolerable for the international community, who must demand their punishment. But crimes against humanity also transcend the individual, because when the individual is attacked, he attacks himself and denies all of humanity. That is why what essentially characterizes the crime against humanity is the concept of humanity as a victim."[9]

With this premise, the Inter-American Court of Human Rights (hereinafter, "Inter-American Court") established that "the prohibition of crimes against humanity is a peremptory norm of international law (jus cogens). The foregoing means that this prohibition is accepted and recognized by the international community of States as a whole, as a norm that does not admit an agreement to the contrary, and that can only be modified by a subsequent norm of general international law that has the same character. Specifically, the first obligation of States is to prevent these behaviors from occurring. If this does not happen, the duty of the State is to ensure

[8] General Assembly of the United Nations. "Verbal Note on November 27th 2001 directed to the General Secretary of Permanent Missions of Canada and the Netherlands to the United Nations." A/566/677. December 4th, 2001. Annex, p. 8 (emphasis added).

[9] International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Erdemovic, Case No. IT-96-22-T, Conviction of November 29, 1996, para. 28. See also, Tadic, International Criminal Tribunal for the Former Yugoslavia, October 2, 1995, para 62. Ntuyuhaga, International Criminal Tribunal for Rwanda, March 10, 1999 (in relation to the crime of Genocide).

that these behaviors are criminally prosecuted and that their perpetrators are punished, so as not to leave those behaviors unpunished."[10] And it considered "that before the perpetration of crimes against humanity, the community of States is empowered to apply universal jurisdiction so that the absolute prohibition of these crimes, established by international law, becomes effective."[11] In the same sense, the Inter-American Commission on Human Rights in 1998 had recommended the adoption of "legislative and other measures that are necessary to invoke and exercise universal jurisdiction over individuals in matters of genocide, crimes against humanity and crimes against humanity. of war."[12]

We must stress the importance the Supreme Court of Justice of Argentina has given repeatedly in its precedents to decisions of the organs of the Inter American Human Rights Protection System [13]. In the "Simón" precedent, the Supreme Court establishes that "since the modification of the National Constitution in 1994, the Argentine State has taken before international law, and especially, before the Inter-American legal order, a series of duties of constitutional hierarchy, that have been established regarding the scope and content of said duties developing towards clearly limiting the authority of domestic law"[14] and that "the decisions mentioned of the International Court have been interpreted in good faith as jurisprudential guidelines"[15].

The European Court of Human Rights has also confirmed the existence of universal jurisdiction, at least for the crime of genocide.[16] For its part, the Inter-American Court also clarified that the

[10] Court IDH. Case Herzog, et al., v. Brasil. Preliminary Objections, Merits, Reparations and Costs. Sentenced on March 15th, 2018. Series C No. 353, para. 230.
[11] Court IDH. Case Herzog, et al., v. Brasil. Preliminary Objections, Merits, Reparations and Costs. Sentenced on March 15th, 2018. Series C No. 353, para. 302.
[12] IACHR. Annual report 1998. OEA / Ser.L / V / II.102 Doc. 6 rev. April 16, 1999. Chapter VII. See also: IACHR. Resolution 1/03, operative paragraph 2.
[13] Among others, the "Giroldi" and "Bramajo" cases of the Supreme Court of Justice of Argentina
[14] Supreme Court of Justice of Argentina "Simon Case", considering 15.
[15] Supreme Court of Justice of Argentina "Simon Case", considering 24.
[16] Jorgi v. Germany, European Court of Human Rights, July 12th, 2007, para. 67-70.

concept of universal jurisdiction has developed in recent decades and has been recognized by various states to the point out that “it can be stated that currently a) universal jurisdiction is a customary norm that is crystallized, so it does not need to be provided for in an international treaty; b) It may be exercised with respect to international crimes identified in international law as belonging to it, such as genocide, crimes against humanity, and war crimes; and c) it is based exclusively on the nature of the crime, regardless of the place in which it was committed, the nationality of the perpetrator or the victim, and d) its nature is complementary compared to other jurisdictions.”[17]

At the international level, the Argentine Republic has established its position on repeated occasions in relation to the use of this institute. Thus, it has argued that "the most serious crimes of transcendence for the international community as a whole should not go unpunished, and it is the duty of the States to exercise their criminal jurisdiction against those responsible for those crimes." Thy then recalled that although the responsibility and the primary task of carrying out such investigations and prosecutions corresponds to the State in whose territory the crime was committed or to the States that have some connection with said crime; "In some circumstances, when states with primary responsibility are unable or unwilling to exercise jurisdiction, other states that are not directly linked to the crime can fill that gap on the basis of the exercise of universal jurisdiction to prevent impunity."[18]

From the A / 73/123 report of the Secretary General of the United Nations, it appears that Argentina detailed that universal jurisdiction was one of the essential components of the

[17] I / A Court HR. Case of Herzog et al. V. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 15, 2018. Series C No. 353, para.

[18] Intervention of the Permanent Representative for the Argentine Republic Ambassador, Martín García Moritán. October 16th, 2019 https://www.un.org/en/ga/sixth/74/pdfs/statements/universal_jurisdiction/argentina.pdf

international criminal justice system[19], and that this principle had been used in the country "on several occasions, in application of the provisions of Article 118 of its Constitution. The application of this principle was demonstrated by opening investigations of crimes considered *delicti jus gentium* that had been committed outside of Argentina, and in which neither the principle of nationality nor the principle of defense was applicable. However, the exercise of universal jurisdiction was subject to a determination that the crimes had not been tried nor that it was not possible to try them."[20] Likewise, it indicated that in the paradigmatic case, "Simón," the Supreme Court of Justice of Argentina affirmed that "the State is no longer authorized to make decisions whose consequence is the renunciation of criminal prosecution."[21]

Finally, it is worth noting the recommendation of the Independent International Investigation Mission on Myanmar, established by the Human Rights Council, encouraging States to actively investigate and prosecute crimes committed in Myanmar before their respective national courts, under the principle of universal jurisdiction.[22]

b. Rejection due to the application of the principle of complementarity

i. Complementarity and investigation before the International Criminal Court

In its first sentence, later revoked by the Superior, the court of first instance had already established that "before the treatment of the International Criminal Court and its Office of the Prosecutor, the assumptions that would allow entering to analyze issues related to the origin, convenience and viability of the application of the principle of universal jurisdiction." And it concluded that "in relation to the principle of complementarity that governs the actions of the

[19] Cf. Secretary General of the United Nations. A / 73/123. June 3, 2018, para. 39
[20] General Secretary of the United Nations. A/73/123. June 3rd, 2018, para. 6.
[21] General Secretary of the United Nations. A/73/123. June 3rd, 2018, para. 21.
[22] Cf. Independent International Fact-Finding Mission on Myanmar. A / HRC / 39 / CRP.2. September 17, 2018, para. 1657. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf

International Criminal Court, that at the moment all other intervention of criminal prosecution was displaced when the jurisdiction was activated approving the investigation of the International Prosecutor's Office. And, as it was indicated previously, this was done with broad parameters, therefore being premature and speculative to draw conclusions about the definitive object to be investigated and eventually to be judged."

Finally, in the decision under analysis, the lower court, citing a report sent by the Office of the Prosecutor of the International Criminal Court (hereinafter, "ICC"), confirms and reiterates its arguments. In particular, it highlights the sentence in which Pre-Trial Chamber III emphasized that the Office of the Prosecutor was not limited to the specific crimes referred to in the Article 15 (3) Requirement brief (namely, deportation and persecution for reasons of ethnicity and/or religion), but could extend its investigation to other crimes against humanity or other crimes that fall within Article 5, "*as long as they remain within the parameters of the authorized investigation*" (emphasis added).

1. "Inverse" application of the principle of complementarity on behalf of the lower court

On this part of the argument, in the decision-making reasoning, two inconsistencies are observed when analyzing the facts raised: on one hand, it proposes an inverse application of the principle of complementarity, in which the international instance is privileged over the local one. At the same time, the analysis is insufficient and unnecessary since, as we will explain, by virtue of the

principle of complementarity, this analysis corresponds to the ICC and not to the national authority.

This is how Judge Hornos also understood it in the preceding "Salmerón, Rubén Amor Benedicto s / appeal" of Room IV of the Federal Criminal Cassation Chamber in a case of universal jurisdiction related to the crimes of Francoism that: "it is true that the so-called principle of subsidiarity or complementarity of universal jurisdiction that underlies the reasoning of the lower court and the first instance order currently governs the jurisdiction of the International Criminal Court (ICC) […] However, such a principle of complementarity is its own rule and particular to the International Criminal Court, and there is no evidence that it constitutes the codification of a "distinctive and essential" characteristic of the principle of universal jurisdiction itself, and as it arose in international criminal law of customary origin. Certainly, it is not the rule that corresponds to apply in this case."[23]

The fundamental pillar of the Rome Statute and the ICC rests on the principle of complementarity, according to which, the ICC is a court of last resort, which supplements, but does not substitute for, national jurisdictions (Article 1 Rome Statute). Consequently, a case will be inadmissible, on the grounds of complementarity, if it is being investigated, or prosecuted by a State with jurisdiction to do so (Article 17.1.a and 17.1.b), unless the ICC prosecutor's office can demonstrate that the State is actually unwilling or unable to genuinely carry out the procedures. It is up to the ICC and not to the national authorities to determine whether the cases of inadmissibility, in accordance with the provisions of the Rome Statute, are manifested in a specific case.

[23] Room IV of the Federal Criminal Cassation Chamber. Salmerón, Rubén Amor Benedicto on appeal. June 11, 2018. Vote of Judge Hornos, p. 35 (emphasis added)

The fundamental principle of the ICC is to exercise jurisdiction only when states fail to exercise their own. Thus, the principle of complementarity not only prioritizes national jurisdiction but also serves as a catalyst for the development of comprehensive criminal legislation that codifies the crimes established in the Statute, so that States assume jurisdiction, to a greater or lesser extent, about crimes that occur outside its territory. Consequently, the creation of the corresponding legislation, and the effective exercise of jurisdiction over international crimes, whatever their basis, demonstrates a commitment to the fight against impunity on the part of the States.

Likewise, the Statute does not prioritize on the basis of the jurisdiction of the State that claims to investigate or prosecute a case. For the Court, that is legally sufficient, in order to determine that a case is inadmissible according to Article 17, for a State "with jurisdiction" to carry out a genuine criminal procedure, regardless of the basis of that jurisdiction, including universal jurisdiction. In this sense, any State with jurisdiction can open criminal proceedings, and thus exclude the jurisdiction of the International Criminal Court, which by nature is complementary to national jurisdictions.[24]

In relation to the principle of complementarity, the lower court inverts the interpretation and application of the principle to the detriment of justice and the rights of the victims and their next of kin, since it blocks the opening of the investigation at the national level, given the interpretation that there is a coincidence in the object with the investigation before the ICC. Even in the supposed scenario that the case were to be identical (below, it will be shown that this is not the case either), what the Preamble and Articles 1 and 17 of the Rome Statute determine is that

[24] See for example, ICC-OTP Expert Paper, the Principle of Complementarity in Practice, para 63, 2003.

the ICC will only intervene in those cases in which a State with jurisdiction over the matter cannot really intervene, or is not willing to do so.

For example, the ICC Prosecutor's Office in 2003 published its “Informal Expert Paper” on the principle of complementarity in practice and confirmed that jurisdictional bases other than territory, such as active nationality, as well as passive nationality and jurisdiction universal, can also play an important role in the fight against impunity. They emphasized particularly that the recognition of a State that it is not investigating or prosecuting does not affect the primacy of any other State that wishes to investigate or prosecute. Thus, for example, even if a territorial State agrees not to exercise jurisdiction over certain crimes in favor of prosecution by the ICC, other States would still have the right to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, universal jurisdiction) and consequently, admissibility may be challenged by those States or by the accused. Therefore, it would be prudent to consult with the States concerned before making such arrangements.[25]

Furthermore, the prosecution's report clarifies that under the principle of complementarity, a genuine investigation by said third States would prevent the ICC from exercising jurisdiction, provided that, in fact, they can ensure the delivery of the offenders and obtain access to the evidence. The non-exercise of jurisdiction by a territorial State does not alter the primacy of other States over the ICC.[26]

This preference for local jurisdiction, hence also the name of subsidiary jurisdiction, is observed at the same time in the provision of Article 18 (2) of the Rome Statute that provides, even for cases in which the Office of the Prosecutor has initiated an investigation that if the (or a) State

[25] OTP-ICC Informal Expert Paper - The Principle of Complementarity in Practice, paras. 63, 75 (translation and emphasis ours). Available at: https://www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf

[26] Cf. OTP-ICC Informal Expert Paper - The Principle of Complementarity in Practice, paras. 63, 75, paras 75-76.

informs the Court that it is carrying out or has carried out an investigation, "the Prosecutor shall inhibit his jurisdiction in favor of the State in relation to the investigation of the aforementioned persons."

Issues of admissibility should be considered at different stages: before the Office of the Prosecutor opens an investigation and before it chooses a case for prosecution. At the initiation stage of the investigation, the prosecution has not yet identified specific cases and, therefore, the Court's inadmissibility assessment will have a less specific focus. Once the Prosecutor's Office requests an arrest warrant, it has identified a particular case and therefore the analysis can be applied more specifically. The ICC has held that, for a national proceeding to refer to the same case, national investigations must encompass the same individual and substantially the same conduct that is alleged in the proceeding before the court. This is what is known as the same person, same conduct doctrine.

The same person, same conduct test was developed for the first time since the ICC in the Lubanga case, where the pre-trial Chamber established a restrictive interpretation of the “same conduct,” assimilating it to the specific charge presented before the Court (in this case, the recruitment of children).[27] Later, the ICC established a more flexible interpretation, and stated that for a national proceeding to concern the “same case,” the investigation must cover the same individual and substantially the same conduct alleged before the Court.[28] Subsequently, the pre-trial Chamber also adopted a flexible interpretation in the Gaddafi case, indicating that the

[27] Cf. ICC. Thomas Lubanga Dyilo. ICC-01/04-01/06-8-Corr. Pre-Trial Chamber I, 23 February 2006, paras. 31.

[28] Cf. ICC. Muthaura, Appeals Chamber, August 30th, 2011, para. 76. Ruto, Appeals Chamber, August 30th, 2011, para 1. Cfr. ICC. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. No. ICC-01/09-02/11 O A. Appeals Chamber. 30 August 2011, paras. 1 and 39. ICC. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. ICC-01/09-01/11 OA. Appeals Chamber. 30 August 2011, paras 1 and 40.

national procedure must concern the same burden or essence of the crime, but not necessarily the same incident.[29]

The same person refers to the same authors investigated by the Court. The same conduct refers to the fact that those authors have carried out most of the same conduct that is the subject of the investigation in the Court. It is worth noting that in this examination, conduct does not have to be legally classified in the same way in internal/national procedures vs. as in the Criminal Court. What is fundamental, is the comparison of the nature and gravity of the investigations in order to ensure that the national procedures reflect the potential procedure before the Court.

Therefore, even if the judge interpreted a coincidence with the object of both investigations, she was not obliged to renounce the national criminal prosecution. On the contrary, and by virtue of Article 1 and 17 of the Statute[30], she may notify to the ICC, so they can analyze whether it is up to the ICC Prosecutor's Office to abandon the investigation at which time either progress is made, or the process is resolved at the local level.

2. The alleged coincidence in the procedural object

Although it would have been sufficient for the opening of universal jurisdiction for the *a quo* to interpret the principle of complementarity in the form *ut supra* referenced, the RFKHR and Fortify Rights will analyze the alleged coincidence in the procedural objects of the investigation process that currently is before the ICC and the case presented. We reiterate that it is not for the national court to establish admissibility of a case in accordance with the elements of complementarity of the ICC, as stipulated in the Statute. It is up to the ICC to conduct the admissibility examination, including whether or not there are criminal proceedings at the national level.

Article 12 of the Rome Statute establishes that for the ICC to hear a case, there must be jurisdiction based on the element of territoriality or nationality. The fact that Myanmar is not a

[29] Cf. ICC. Gaddafi and Al-Senussi. Pre-Trial Chamber. May 31st, 2013, paras. 73-83..
[30] CSJN. “Simón” case, considering 14.

State party to the Rome Statute makes it impossible for the Court to analyze (and prosecute) crimes committed in Myanmar territory by Myanmar nationals (strict territoriality and active nationality principles).[31] However, the Statute in its Article 12(2)(a), establishes that the Court has jurisdiction if the conduct in question occurred in the territory of a State party (in this case Bangladesh). Pre-Trial Chamber III, in its decision for Article 15, established that even the partial commission of a crime in the territory of a State party is considered sufficient to meet the precondition of territoriality. In this sense, it is clear that, for example, the crime of forced deportation meets the precondition of territoriality, since due to its cross-border nature, at least one element of the crime was committed in the State party of Bangladesh, thus activating territorial jurisdiction of the ICC.

This proposed analysis shows that, at least torture, murders, rapes and other inhuman acts of a similar nature that intentionally cause great suffering or seriously threaten physical integrity or mental or physical health, have, even if only in part, occurred in Bangladesh territory.

In this sense, the territorial jurisdiction of the ICC imposes limitations on the scope of the investigations and cases that can be analyzed before the ICC, and the cross-border element will thus limit the selection of incidents that will make up the basis of the charges before the ICC. Therefore, it can be inferred that there will be crimes over which the ICC will not be able to exercise jurisdiction (particularly those that have not occurred at least in part in Bangladesh, such as crimes of torture, murder and rape committed in Myanmar). If we accept the erroneous, inverse and reduced interpretation of the principle of complementarity of the lower court, then these are the cases in which the principle of complementarity requires deference to national procedures, which are not limited to the territories of States' parties that are linked to the crimes.

[31] See Rome Statue. Article 12(2).

This provides an opportunity for collaboration and could imply a “division of labor” between the ICC and national jurisdictions acting on the basis of universality.

Specifically, in relation to the potential coincidence within the elements of the processes that would prevent “the quo” (same as above) from being able "to analyze issues related to the origin, convenience and viability of the application of the principle of universal jurisdiction", that is to say that beyond the apparent breadth that the Chamber offers to the Prosecutor's Office in its investigation, the defining element is that at least some part of these crimes occurred in Bangladesh territory.[32]

ii. Complementarity and the case before the International Court of Justice

As part of the enumeration of the arguments made by the Prosecutor, the lower court included a reference to the existence of a case that is currently being processed before the International Court of Justice. It originated with a presentation made on November 19, 2019, by the Republic of the Gambia against the Republic of the Union of Myanmar, on the application of the Convention on the Prevention and Punishment of the Crime of Genocide, and in which the International Court of Justice (hereinafter, “ICJ”) would have already accepted your competition prima facie.

In this case, it is evident that there would not be a coincidence of procedural object and therefore, it would be impossible to speak of complementarity since the dispute is at the level of responsibility of the State and does not include individual criminal responsibilities.[33]

In the same situation, both can coexist, that is, the prosecution with the state and individual criminal’s responsibility, since the object of each is diametrically different.

[32] See Rome Statute and the Document about Elements of Criminals.
[33] See Articles 34.1 and 36.1 of the Statute of the International Court of Justice.

iii. Complementarity and the process carried out by the Independent Investigation Commission of the Republic of the Union of Myanmar.

Between its arguments, the lower court considered, during the brief democratic period of the Republic of the Union of Myanmar, that the country formed an Independent Investigation Commission (ICOE, for its acronym in English) which, according to the judge, would recommend that the necessary investigations be continued in order to determine the responsibility of the military personnel, and that "nothing would impede the line established by the Commission, despite current political situations."

At this point, beyond reiterating the jurisprudence of the Inter-American Court in the sense that truth commissions do not substitute the State's obligation to establish the truth through judicial processes,[34] the mere citation of some of the conclusions of the Commission show the impossibility of it being considered a valid accountability mechanism.

The ICOE considered that the allegations of violations in the United Nations and NGO reports derived almost exclusively from interviews that had been conducted with refugees from the Cox Bazar refugee camp in Bangladesh. These specifically cited the case of the Independent International Mission, Research on Myanmar.[35] According to the ICOE, the veracity of the statements of these potential witnesses had yet to be "scrutinized and evaluated."[36]

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[34] Cfr. IDH Court. Zambrano Velez et al. vs. Ecuador, Merits, Reparations, Costs, and Judgment on July 4th 2007. Series C. No. 166, para. 128; Masacres of El Mozote and other neighboring places vs. El Salvador. Merits, Reparations, Costs, and Judgment Sentenced on October 25th, 2012, Series C No. 252, para. 298.

[35] Cfr. The Independent Commission of Enquiry-ICOE, Executive Summary, pg. 9, Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/BM.pdf

[36] Cfr. Independent Commission of Enquiry-ICOE. Executive Summary, pg. 9.

After questioning the veracity of the testimonies, the ICOE concluded that war crimes and serious human rights violations may have occurred as a "disproportionate form of use of force by some members of the Defense Services and the Myanmar Police."[37]

Within this argument there are two questions that must be considered. First, the ICOE was created quickly, in a moment of democratic transition, which is not the current situation in Myanmar. And, secondly, the ICOE findings are contrary to the hypothesis that is raised in the complaint of the case in question. In addition to stating that the serious human rights violations (disregarding completely any crimes against humanity) occurred as a "disproportionate form of use of force," which would eliminate the hypothesis of a crime against humanity due to the absence of a plan, the ICOE did not consider the testimony of numerous victims as full evidence. The victim's word must always be taken as true and, always with the possibility of admitting evidence to the contrary. Victim testimonies are the basis of any initiative to prosecute crimes against humanity, as evidenced by Argentine experience in the prosecution of crimes committed by State Terrorism.

It should also be mentioned that the UN Independent International Investigation Mission on Myanmar has determined that none of the ad hoc commissions and boards established in Myanmar since 2012, including the ICOE, meet the standards of an "impartial, independent, human rights investigation, effective and comprehensive."[38]

iv. Complementarity and the Military Court Investigation

Finally, as an account of the facts considered by the Prosecutor, the lower court noted an investigation was carried out by the Military Court between December 20, 2017 and January 2,

[37] Cfr. Independent Commission of Enquiry-ICOE. Executive Summary, pg. 9.
[38] Human Rights Council, Report of the independent international fact-finding mission on Myanmar, 8 August 2019, paras. 99-102.

2018. As a result of this investigation, several members of the security personnel had been found guilty of the crimes against them and suspended from the armed forces, as well as sentenced to ten years' imprisonment. However, he then recalled that this last sentence was not fulfilled because they were pardoned.

In the first place, it is worth remembering that the Inter-American Court has constant jurisprudence, in which it maintains that the military criminal jurisdiction is not a competent jurisdiction to investigate and, where appropriate, judge and punish the perpetrators of human rights violations.[39] This should be limited to military matters that by their very nature threaten the legal rights of the military order.[40]

For the purposes of complementarity, in accordance with the requirements of Section b) of Paragraph 1 of Article 53 and Sections a) to c) of Paragraph 1 of Article 17, the assessment of complementarity is made on a case-by-case basis and is aimed at determining whether authentic investigations and prosecutions have been carried out or are being carried out with respect to the case or cases identified by the ICC Prosecutor's Office in each respective State. As the Office of the Prosecutor of the International Criminal Court itself has established in the "General policy document on preliminary examinations," when there are or have been national investigations or prosecutions, the Office of the Prosecutor will examine whether the procedure has been or is being carried out in accordance to the order to remove the person in question from his criminal responsibility for crimes within the jurisdiction of the ICC.[41] The sole purpose of the sentence followed by a pardon is to remove the person from a potential subsequent procedure. It is worth

[39] Cf. I / A Court HR. Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 273.
[40] Cf. I / A Court HR. Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 272.
[41] Cf. CPT, Office of the Prosecutor of the International Criminal Court, "General policy document on preliminary examinations", November 2013, paragraph 50.

remembering at this point the constant jurisprudence of the Inter-American Court in relation to the impossibility of amnesties or pardons for crimes against humanity.[42]

Therefore, and beyond what is sustained by the Inter-American Court in relation to the use of military jurisdiction for the prosecution of human rights violations, even if it decides to assess what was done by the Military Court for the purposes of compliance with the requirement of complementarity, the investigation carried out by this Court has no effect. This is because the sentences did not repair the damage caused to the international community as a whole since they did not mean any real form of punishment.[43]

As a conclusion

A detailed analysis of the *pro person* principle shows that, more than the apparent overlay of jurisdictions that the lower court believes that can intervene in the object of this litigation, firstly, it is not up to the national jurisdiction the application of the complementarity principle. This is a norm that is for the ICC. Secondly, if these crimes result in impunity it would severely affect the rights of the victims to the truth, justice and reparation, as the only investigation currently in place (that is, of the ICC) has a very limited scope because of the jurisdictional limitations that have been explained before.

c. Considerations of the lower court in relation to the Plaintiff and victim, Mr. MAUNG TUN KHIN.

The lower court concluded, with regard to the request of Maung Tun Khin, in his capacity as President of the "Burmese Rohingya Organization UK" (BROUK) to become a plaintiff, that the

[42] See, for example, I / A Court HR. Barrios Altos v. Peru. Bottom. Judgment of March 14, 2001. Series C No. 75, paras. 41, 43 and 44.
[43] Cf. International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Erdemovic, Case No. IT-96-22-T, Conviction of November 29, 1996, para. 28.

requirements of Art. 79, 82 and 83, and consistent with the procedural order. To reach such a conclusion, the lower court considered that beyond the object of said organization, there is no evidence of a concrete and direct damage to the organization it represents.

On the other hand, it did not consider that Mr. Maung Tun Khin has the character of an individual victim, since at the time of the events that he denounces, he was in a "different territory from where the same occurred, thereby preventing the assertion that such events occurred and could have affected him in a special, concrete, or direct way."

In a precedent of universal jurisdiction of Room IV of the Federal Criminal Cassation Chamber in a case presented by a victim of Francoism, Judge Borinsky, who made up the majority with Judge Hornos, considered that the complaint should not prove the accusatory hypothesis that it maintains, but rather that it must be "credible" and that in cases like this the rights of the affected individuals should be widely weighed.[44] He added that the current legislative, normative and jurisprudential trends are inclined towards a new role of the victim and the plaintiff as protagonists of the criminal process, and the full attention of their demands and interests, all of which must be combined with the purposes of criminal law which is reflected in the new "victims law" (law 27,372).[45]

Judge Hornos considered that, as is the case with Mr. Maung Tun Khin, the classification of the fact denounced by Salmerón was precisely "what the National Constitution guarantees him to be able to request: that the authorities clarify in safeguarding the protection of their rights -- rights that the Judiciary will have irretrievably defrauded if it cannot offer *more than a refusal based on*

[44] Cf. Room IV of the Federal Criminal Cassation Chamber. Salmerón, Rubén Amor Benedicto on appeal. June 11, 2018. Vote of Judge Borinsky, pp. 25 and 30.
[45] Cf. Room IV of the Federal Criminal Cassation Chamber. Salmerón, Rubén Amor Benedicto on appeal. June 11, 2018. Vote of Judge Borinsky, pp. 32.

purely formal reasons. Especially when, in the embryonic state in which the present cause is still found, the definition of its procedural object is far from being stony and unshakable; rather, it is dynamic and mutable."[46]

Hence, as resolved by the Cassation in the aforementioned, a decision that closes the barriers of the forum is not admissible here without a genuine and prudent investigation of the possible connections between the denounced act and the systematic, generalized attack against the civilian population, which turns out to be precisely the foundation of the subsistence of the criminal action and with respect to the possibility of exercising universal jurisdiction. Indeed, the criminal process itself is the framework in which this discussion should take place.[47]

d. The requirement of the cultural, sociopolitical, or migratory relationship

The lower court highlighted that the exercise of universal jurisdiction, exercised by the courts, is usually linked to the existence of certain cultural, sociopolitical, and migratory links with the State.

This issue was also resolved by Chamber IV of the Criminal Cassation Chamber in the aforementioned precedent by establishing that "although universal jurisdiction must be exercised with the measure and prudence that corresponds to any manifestation of extraterritorial sovereignty, the truth is that, *as long as the principle of attribution of jurisdiction is present, the principle of universal jurisdiction is not subject to any condition. It is not, in other words, a principle of subsidiary, concurrent or limited application to the verification of some point of connection between the fact and the State that intends to judge it.*"[48]

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[46] Room IV of the Federal Criminal Cassation Chamber. Salmerón, Rubén Amor Benedicto on appeal. June 11, 2018. Vote of Judge Hornos, p. 42 (emphasis added).

[47] Cf. Room IV of the Federal Criminal Cassation Chamber. Salmerón, Rubén Amor Benedicto on appeal. June 11, 2018. Vote of Judge Hornos, p. 42.

[48] Room IV of the Federal Criminal Cassation Chamber. Salmerón, Rubén Amor Benedicto on appeal. June 11, 2018. Vote of Judge Hornos, p. 37 (emphasis added).

Therefore, according to what is maintained by the Cassation, the cultural difference that our country has with the place where the events occurred should not be an obstacle to the application of the principle of universal jurisdiction.

We can also find examples of comparative law that show that in practice certain countries have introduced and codified the international crimes provided in the Rome Statute within their domestic legislation, and in so doing, they have adopted absolute universal jurisdiction over them (New Zealand).[49] Germany, for example, has more than a dozen active cases that include universal jurisdiction.[50] Its code on Crimes Against International Law allows the processing of cases that have not been committed in Germany, nor have any connection with the country, even though the discretion of the prosecution is maintained in practice to decide which cases to prosecute.[51] Other states that have adopted universal jurisdiction over international crimes, with certain restrictions through their Constitutional Courts, including: the Netherlands,[52] Belgium,[53] the United Kingdom,[54] France,[55] Trinidad and Tobago,[56] Senegal,[57] and Peru.[58]

V. PRAYER FOR RELIEF

For everything stated above, we request that this Hon. Court:

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[49] International Crimes and International Criminal Court Act 2000, ss. 8-11. See algo examples of countries that have included in their national legislation universal jurisdiction without limitations: Finland: https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-finland; and Sweden: https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-sweden

[50] See, for example the 2020 Redress Report: https://redress.org/wp-content/uploads/2020/03/UJAR_2020_WEB.pdf

[51] German Code of Crimes Against International Law. See alfo, the report from TRIAL and OSJI on universal jurisdiction in Germany. Available at: https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-germany

[52] International Crimes Act, s. 2

[53] August 5th, 2003, Act on Grave Violations of International Humanitarian Law

[54] Court of International Crime, 2001 Act, s. 68(1).

[55] Article 7, para. 2 and Article 706-47, para. 2 CCP. See also: Cour de cassation, Chambre criminelle, 12 July 2016, n ° 16-82664.

[56] Court of International Crime, 2006, Act s. 8.

[57] Art. 2 Loi N. 2007-5, Penal Code art. 431 and constitution art. 9.

[58] Decision 01271-2008-PHC / TC, August 8, 2008, para. 6.

1) Please note that this presentation has been made and the attached documentation has been received;

2) Admit the request to be held as an amicus curiae in this process;

3) The factual and legal arguments formulated here are taken into consideration when deciding on the appeal filed.