

**Human Rights Enforcement at the Borders: International  
Criminal Court Jurisdiction Over The Rohingya Situation**

**By Dr Caleb H Wheeler**

**c.h.wheeler@mdx.ac.uk**

**Lecturer in Law, Middlesex University**

**The Burroughs**

**London, NW4 4BT**

**United Kingdom**

## **Abstract**

In September 2018, Pre-Trial Chamber I of the International Criminal Court reached a decision that could profoundly impact accountability for transnational human rights violations. In its decision, the Pre-Trial Chamber found that it has jurisdiction over the crime against humanity of deportation as it relates to the government of Myanmar's treatment of the Rohingya ethnic group. This decision is remarkable for the fact that Myanmar is not a state party to the Rome Statute and therefore not directly subject to the International Criminal Court's Statute. The Court circumvented this problem by ruling that a portion of the crime was committed in Bangladesh permitting the exercise jurisdiction in this matter. This article endeavours to accomplish two goals. First, it analyses the Pre-Trial Chamber's ruling to determine whether it complies with the Rome Statute and international law. Second, it will discuss the ramifications of the decision and consider whether it can act as a partial solution for addressing transnational human rights violations being committed in the territory of non-states parties. The article concludes that the decision itself is open to question, creating a danger that it will be susceptible to challenge. The International Criminal Court needs to ensure that these sorts of controversial decisions have a firm legal foundation to better deliver justice to the victims of atrocity crimes and to protect the Court from criticism that it is failing victims.

Keywords: International Criminal Law; International Human Rights Law; International Criminal Court; Transnational Crimes; Rohingya; Jurisdiction

## Article

### **1. Introduction**

In September 2018, Pre-Trial Chamber I of the International Criminal Court reached a decision that could profoundly impact accountability for transnational human rights violations. In its decision, the Pre-Trial Chamber found that it has jurisdiction over the crime against humanity of deportation as it relates to the government of Myanmar's treatment of the Rohingya ethnic group. The decision is remarkable for the fact that it permits the Court to exercise jurisdiction over members of the Burmese government for actions they performed entirely within the territory of Myanmar. Myanmar is not a state party to the Rome Statute and therefore not directly subject to the Court's Statute. The Pre-Trial Chamber circumvented this problem by ruling that deportation is a crime that necessarily involves the displacement of people across national borders, meaning that some element of the crime takes place in more than one country. In this case, the Rohingya were displaced to Bangladesh, which is a state party to the Rome Statute. By virtue of that fact, the Pre-Trial Chamber ruled that a portion of the crime was committed in Bangladesh permitting the International Criminal Court to exercise jurisdiction in this matter. On the surface, this appears to be a positive development. It signifies the existence of a new approach for ending impunity for human rights violations by introducing the possibility of holding individuals liable that would otherwise have escaped accountability for their actions. Unfortunately, concerns about some of the legal underpinnings of the decision suggest that the decision may have been incorrectly decided. This raises the danger that the decision will be subject to challenge leading to the Rohingya once again being deprived of an opportunity for justice.<sup>1</sup>

### **2. Background**

The Rohingya living in Myanmar's Rakhine state have been the target of widespread state-sponsored violence since at least 1978.<sup>2</sup> This campaign of violence

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<sup>1</sup> For more on this decision and other issues surrounding the Rohingya crisis see P. Akhavan, 'The Radically Routine *Rohingya* Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute', 17(2) *Journal of International Criminal Justice* (2019); B. Van Schaack, 'Determining the Commission of Genocide in Myanmar', 17(2) *JICJ* (2019).

<sup>2</sup> Public Interest Law and Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State: Factual Findings & Legal Analysis* (Public Interest Law & Policy Group, 2018), at 5.

is the result of a pervasive belief amongst the government, state-controlled media and much of the population of Myanmar that the Rohingya are illegal ‘Bengali’ immigrants who threaten national security.<sup>3</sup> The Burma Citizenship Law of 1982 exacerbates this idea by effectively excluding the Rohingya from recognition as citizens of Myanmar. The law specifically identifies eight ethnic groups whose members are eligible for citizenship.<sup>4</sup> Those ethnic groups can be further divided into 135 national races, the members of which can be considered citizens of Myanmar.<sup>5</sup> The Rohingya are not one of these 135 groups, meaning that they are largely barred from citizenship and the rights associated with that status.<sup>6</sup>

In 2012, there was an uptick in military-perpetrated violence against the Rohingya.<sup>7</sup> This renewed period of unrest started as reprisal attacks following the gang rape and murder of a Rakhine woman by a group of three Rohingya men.<sup>8</sup> These reprisal attacks incited the Rohingya residents of Maungdaw town to riot and mob violence by both Rohingyas and Rakhines in Sittwe.<sup>9</sup> The government responded by declaring a state of emergency in Rakhine state, which granted authority to the military to intervene in the situation.<sup>10</sup> This resulted in human rights abuses being committed against the Rohingya, including the unlawful use of force, torture, the destruction of property, arbitrary detention and internal displacement.<sup>11</sup>

The human rights abuses committed in 2012 represented a turning point for the Rohingya in Rakhine state.<sup>12</sup> They ushered in a period of growing distrust and deteriorating relations between the Rohingya and other ethnic groups. Violence between the Rohingya and the government escalated again in 2016 in response to

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<sup>3</sup> Ibid.

<sup>4</sup> Burmese Citizenship Law of 1982 (16 October 1982) Ch. II(3).

<sup>5</sup> Human Rights Council, ‘Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64 (12 September 2018), at ¶ 12.

<sup>6</sup> PILPG *supra* note 2, at 5.

<sup>7</sup> Ibid at 5-6.

<sup>8</sup> Human Rights Watch, “‘The Government Could Have Stopped This’: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State’ (31 July 2012) <<https://www.hrw.org/report/2012/07/31/government-could-have-stopped/sectarian-violence-and-ensuing-abuses-burmas-arakan#>> accessed 12 March 2019.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, Doc. No. GE.18-15350(E) (18 September 2018), at ¶ 26.

<sup>12</sup> Ibid at ¶ 27.

attacks carried out by Rohingya militant groups and resulted in the widespread internal displacement of the Rohingya.<sup>13</sup> Then, on 25 August 2017, the Arakan Rohingya Salvation Army ('ARSA'), a Rohingya militant group, launched a series of attacks against government forces.<sup>14</sup> In response, the government of Myanmar launched a large-scale military assault against the Rohingya that caused the displacement of more than 700,000 Rohingyas across the border into Bangladesh.<sup>15</sup>

Following the forced migration, Rohingyas interviewed in Bangladesh reported that the Myanmar military committed excessive acts of violence against the Rohingya during this period, including indiscriminate killings, sexual violence, torture, the mutilation of corpses and extrajudicial executions.<sup>16</sup> The military also destroyed a substantial amount of real property. Acts of arson were common, and satellite imagery apparently demonstrates that more than 360 villages that had been primarily inhabited by the Rohingyas were completely or substantially destroyed.<sup>17</sup> These acts of violence did not end with the displacement of the Rohingyas from their places of residence. During their flight to Bangladesh, some Rohingyas were maimed or killed by landmines placed along paths near the border of Myanmar and Bangladesh.<sup>18</sup> The military continued to murder people at border crossings to ensure they would not remain in Myanmar.<sup>19</sup>

The ostensible purpose of the military campaign was to eliminate the threat of violence posed by the ARSA.<sup>20</sup> However, this justification appears largely to be a pretext for a broader operation. Members of the government made several statements suggesting the operations had a purpose that extended beyond just purging the Rohingya community of militants. Government officials referred to the military's actions as 'clearance operations' and the military Commander-In-Chief, Senior General Min Aung Hlaing stated that the 'problem' of the Rohingya 'was a long-

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<sup>13</sup> Medecins Sans Frontieres, "'No One Was Left': Death and Violence Against the Rohingya in Rakhine State, Myanmar (Medecins Sans Frontieres, 2018), at 11.

<sup>14</sup> Ibid.

<sup>15</sup> Human Rights Council, Report of the Detailed Findings, *supra* note 11, at ¶ 27.

<sup>16</sup> Medecins Sans Frontieres, *supra* note 13, at 8, 10.

<sup>17</sup> Human Rights Watch, *Bangladesh Is Not My Country: The Plight of Rohingya Refugees From Myanmar* (Human Rights Watch, 2018), at 24.

<sup>18</sup> Ibid.

<sup>19</sup> Human Rights Council, 'Report of the Independent International Fact-Finding Mission', *supra* note 5, at ¶ 41.

<sup>20</sup> Ibid at ¶ 33.

standing one’ which the government was ‘taking great care’ to solve.<sup>21</sup> The soldiers directly involved in carrying out the operations also made comments suggesting that the operation was directed against the entire Rohingya population. Some Rohingya reported being ordered to ‘leave the country; this is not your country’ and ‘you can’t live in my country, go away from my country.’<sup>22</sup> Others recounted being told ‘[y]ou do not belong here – go to Bangladesh.’<sup>23</sup> Still others indicated that they were encouraged not to return to Myanmar or they would be killed.<sup>24</sup> While the comments of individual soldiers cannot be understood to represent the overall purpose of the government, they are certainly indicative of the general attitude with which the military operation was being carried out.

The evidence suggests that the acts of violence carried out by the military were directed at the entire Rohingya community and not just militants within that community.<sup>25</sup> This conclusion is based on the huge impact the operations had on the entire Rohingya community as compared to the relatively small number of Rohingya militants thought to exist at the time. The Myanmar government estimated that only 1,000 Rohingya militants took part in the 25 August 2017 attacks that led to the commencement of the military operations.<sup>26</sup> By comparison, a conservative estimate indicates that more than 9,400 people were killed during the month following the beginning of the military operation.<sup>27</sup> 700,000 people fled to Bangladesh.<sup>28</sup> Hundreds of villages were attacked by the military, many of which were entirely obliterated either through arson or by being bulldozed.<sup>29</sup> The destruction of crops and infrastructure, the poisoning of sources of drinking water and the theft of livestock all suggest that measures were being taken against the entire community and were aimed

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<sup>21</sup> *Ibid* at ¶ 35.

<sup>22</sup> PILPG, *supra* note 2, at 64.

<sup>23</sup> Office of the High Commissioner for Human Rights, ‘Mission Report of the OHCHR Rapid Response Mission to Cox’s Bazar, Bangladesh’ (13-27 September 2017) 5.

<sup>24</sup> PILPG, *supra* note 2, at 85.

<sup>25</sup> Human Rights Council, ‘Report of the Independent International Fact-Finding Mission’, *supra* note 5, at ¶ 33.

<sup>26</sup> Fortify Rights, “‘They Gave Them Long Swords’: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar’ (Fortify Rights, 2018) 112.

<sup>27</sup> Medecins Sans Frontieres, *supra* note 13, at 23.

<sup>28</sup> Human Rights Council, ‘Report of the Detailed Findings’, *supra* note 11, at ¶ 27.

<sup>29</sup> Human Rights Watch, *Bangladesh Is Not My Country*, *supra* note 17, at 24.

at ‘ensuring the Rohingyas’ permanent removal’ from Myanmar.<sup>30</sup> This signifies that the extent of the operations far exceeded the purported goal of eradicating the terrorist threat posed by Rohingya militants.

There is also reason to believe that the Burmese government did not just intend to displace the Rohingya from Myanmar. The incredible brutality of the violence directed at the Rohingya has led some observers to conclude that at least some of the perpetrators were acting with the goal of exterminating the Rohingya.<sup>31</sup> One investigator concluded, ‘the Burmese had basically achieved their desire to force the Rohingya into Bangladesh, yet that wasn’t sufficient – instead they preferred the Rohingya dead.’<sup>32</sup> This raises the prospect that the outcome sought by some of the perpetrators went beyond deportation and may have more closely resembled genocide.

### **3. The Issues Before the Court**

This is the backdrop against which the Prosecutor’s Office submitted its Request for a Ruling on Jurisdiction under Article 19(3) of the Statute in April 2018.<sup>33</sup> The Request addressed two issues, one procedural and one substantive. The procedural matter relates to whether Article 19(3) permits the prosecutor to request a jurisdictional ruling during this stage of proceedings while the substantive question is directed towards whether the International Criminal Court could exercise jurisdiction over the forcible deportation of the Rohingya across the border separating Myanmar and Bangladesh. The Prosecutor sought an affirmative answer to both questions.

#### **A. The Procedural Issue**

The Office of the Prosecutor based its argument about the procedural question on three separate grounds.<sup>34</sup> First, it suggests that a plain reading of Article 19(3) supports the idea that the article is broad in scope and permits the Prosecutor’s Office to request a ruling on ‘the full range of jurisdictional issues arising under the Statute’.<sup>35</sup> It is also submitted that the article itself contains no language limiting its

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<sup>30</sup> PILPG, *supra* note 2, at 51, 64.

<sup>31</sup> *Ibid* at 51.

<sup>32</sup> *Ibid*.

<sup>33</sup> Application Under Regulation 46(3) (Prosecution’s Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute) No. ICC-RoC46(3)-01/18-1, Pres PT Ch (9 April 2018).

<sup>34</sup> *Ibid* at ¶ 26.

<sup>35</sup> *Ibid* at ¶ 52.

application to any particular phase of proceedings.<sup>36</sup> Next, the Prosecutor's Office argues that when Article 19(3) is placed in the appropriate context its application should not be confined only to the case stage of proceedings. This argument is supported by the claims that judicial practice, legal commentators and the general principle of law, *compétence de la compétence* support the proposition that a determination about the Court's jurisdiction may be reached at any point in proceedings.<sup>37</sup> Finally, the Prosecutor's Office found support for its position in the object and purpose of Article 19(3). It submits that Article 19(3), when used properly, can promote judicial economy and the appropriate use of prosecutorial resources, by 'allowing judicial consideration of certain fundamental questions' before the Prosecutor pursues potentially contentious actions.<sup>38</sup>

Pre-Trial Chamber I issued its opinion on the Prosecutor's Request on 6 September 2018. Before fully addressing the Prosecutor's arguments, the Pre-Trial Chamber remarked on the controversial nature of the Prosecutor's submissions regarding Article 19(3). Rather than try to resolve that controversy, the Pre-Trial Chamber chose to avoid it. Instead of considering whether Article 19(3) is applicable under these circumstances, the Pre-Trial Chamber applied Articles 119(1) and 21(1)(b) when reaching its decision.

It is probable that Pre-Trial Chamber I chose the alternative avenues of Article 119(1) and Article 21(1)(b) as the statutory bases for its decision as it knew that Article 19(3) could not be applied at this stage of the proceedings. When read on its own, it is reasonable to understand Article 19(3) to mean that the Office of the Prosecutor may seek a ruling about jurisdiction and admissibility at any time. That is because subparagraph (3) does not contain an explicit qualifier limiting its application to a particular stage of proceedings.<sup>39</sup> However, when subparagraph (3) is placed in context with the rest of Article 19 it becomes clear that determinations about jurisdiction or admissibility can only be made once a matter has become a case.

Subparagraph (1) of Article 19 permits the Court to 'satisfy itself that it has jurisdiction in any case brought before it.'<sup>40</sup> A similar limitation is found in

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<sup>36</sup> Ibid at ¶ 53.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid at ¶ 54.

<sup>39</sup> Art. 19(3) ICCSt.

<sup>40</sup> Art. 19(1) ICCSt.

subparagraph (2) in relation to challenges to admissibility. Subparagraph (2) grants the ability to challenge ‘the admissibility of a case’ to three different interested groups.<sup>41</sup> Both of these sections explicitly limit inquiries into jurisdiction and admissibility to matters that have become cases. This is significant because a case does not exist at the International Criminal Court until a warrant of arrest or a summons to appear is issued, i.e. until the accused is formally identified.<sup>42</sup> This definition comports with the findings of Pre-Trial Chamber I in a decision relating to victim participation in the Situation in the Democratic Republic of Congo. There, Pre-Trial Chamber I found that a case involves ‘specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’.<sup>43</sup> Based on this definition, the Court, interested states including those with jurisdiction over the matter and the accused are only permitted to challenge the jurisdiction of the International Criminal Court or the admissibility of a case after an accused is formally identified.

In contrast, if Article 19(3) is read in the manner suggested, then the Office of the Prosecutor is not subject to a similar limitation. This would mean that the Office of the Prosecutor has a right to question the Court’s jurisdiction that is even more expansive than that which is possessed by the Court itself. It is an unsupportable conclusion that the drafters of the Statute intended to give the Office of the Prosecutor more power in this regard than the Court or any other interested parties. Judge Marc Perrin de Brichambaut concurred with this conclusion in his partially dissenting opinion from the Decision of the Court with respect to the Prosecutor’s Request in this matter. He found that Article 19(3), when placed in its proper context, is not applicable until a matter has reached the case stage of proceedings.<sup>44</sup>

This reading of Article 19(3) has its detractors. In their jointly written chapter in Otto Triffterer and Kai Ambos’ commentary on the Rome Statute, Christopher Hall, Daniel Nsereko and Manuel Ventura reach the opposite conclusion. In their

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<sup>41</sup> Art. 19(2) ICCSt.

<sup>42</sup> W.A. Schabas, *An Introduction to the International Criminal Court* (5<sup>th</sup> ed, Cambridge University Press, 2017), at 277.

<sup>43</sup> Situation in the Democratic Republic of Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) No. ICC-01/04, PT Ch I (17 January 2006) ¶ 65.

<sup>44</sup> Request Under Regulation 46(3) of the Regulations of the Court (Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut) No. ICC-RoC46(3)-01/18, PT Ch (6 September 2018) ¶ 12.

view, the fact that Article 19(3), unlike Article 19(1) and 19(2), does not contain an explicit restriction limiting its application to the case phase of proceedings is significant.<sup>45</sup> They do not elaborate on this point and focus entirely on the plain language of the Statute without making any attempt to understand the article in context. The Prosecutor's Office relied on this interpretation in its Request without mentioning any of the opposing commentary.

Instead of attempting to unpick this thorny issue, the Pre-Trial Chamber ignored it and relied on Article 119(1) as a partial basis for its decision. Article 119(1) states that '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.'<sup>46</sup> Although the phrase 'judicial functions' is rather vague, it has been defined broadly to include questions of jurisdiction.<sup>47</sup> The Pre-Trial Chamber interpreted this to mean that it is 'empowered to rule on the question of jurisdiction set out in the Request.'<sup>48</sup> The Pre-Trial Chamber's approach to Article 119(1) is not universally accepted. William Schabas points out that neither the Rome Statute or the Rules of Procedure and Evidence contain a mechanism for the International Criminal Court to adjudicate disputes about its judicial functions.<sup>49</sup> He posits that the purpose of the article is not to authorise the Court to make decisions about its own judicial functions, but instead is meant to bar other bodies from questioning the decisions of the Court.<sup>50</sup>

It is important to point out that Article 19(1) sets out a practice whereby the Court can reach a determination about its jurisdiction. Article 19(1) explicitly states that 'The Court shall satisfy itself that it has jurisdiction in any case brought before it.'<sup>51</sup> This provision clearly gives the Court the authority to rule on questions of

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<sup>45</sup> C.K. Hall, D.D. Ntanda Nsereko and M.J. Ventura, 'Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case, in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Hart, 2016), at 875.

<sup>46</sup> Art. 119(1) ICCSt.

<sup>47</sup> R.S. Clark, 'Article 119', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Hart, 2016), at 1729.

<sup>48</sup> Request Under Regulation 46(3) of the Regulations of the Court (Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute) No. ICC-RoC46(3)-01/18, PT Ch (6 September 2018) ¶ 28.

<sup>49</sup> W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2016), at 1485.

<sup>50</sup> Ibid.

<sup>51</sup> Art. 19(1) ICCSt.

jurisdiction but limits the exercise of that authority to the case stage of proceedings. This demonstrates that while the Court does have the authority to rule on questions of jurisdiction like the one raised by the Prosecutor's Office, it cannot exercise that authority at this stage of proceedings. To read Article 119(1) in such a way as to permit the Court to enter a decision about jurisdiction at anytime would effectively render Article 19(1) meaningless. It is a well-established legal principle that all of the words used by the drafters when writing a Treaty or Statute should be given effect.<sup>52</sup> Trial Chamber V(A) of the International Criminal Court recognised this principle in a decision in the *Prosecutor v Ruto et al.* The Trial Chamber found that the Statute should not be read in a manner that results in another part of the Statute being made redundant.<sup>53</sup> Instead, the Statute must be read as a whole because there may be provisions in the Statute that impose limitations on the provision under consideration that are not apparent when viewing the relevant part in isolation.<sup>54</sup> In reaching this conclusion, the Trial Chamber relied heavily on the jurisprudence of the International Court of Justice and its predecessor, the Permanent Court of International Justice.<sup>55</sup> The Pre-Trial Chamber ignored this earlier jurisprudence by reading Article 119(1) in such a way as to render Article 19(1) meaningless. The Pre-Trial Chamber's decision makes no reference to the limitation on making determinations about jurisdiction found in Article 19(1). This omission casts serious doubt on the applicability of Article 119(1) when deciding on the request made by the Prosecutor's Office.

Pre-Trial Chamber I also found that Article 21(1)(b) of the Statute gave it the authority to determine whether the Court has jurisdiction over the deportation of the Rohingya. Article 21(1) establishes the various sources of law the Court may rely on when reaching a decision. The sources contained in subparagraph (a) are the Statute, Rules of Procedure and Evidence and Elements of Crimes; subparagraph (b) includes applicable treaties and the principles and rules of international law; and subparagraph

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<sup>52</sup> *Prosecutor v Ruto et al.* (Decision on Mr Ruto's Request for Excusal From Continuous Presence During Trial) No. ICC-01/09-01/11, TC V(5) (22 June 2013) ¶ 39.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* at ¶ 31.

<sup>55</sup> *Ibid* at ¶¶ 31, 39; *citing* Competence of the ILO to Regulate Agricultural Labour, PCIJ Series B, Nos 2 and 3 (1922) 23; Corfu Channel case (Judgment of 9 April 1949) (1949) ICJ Reports 4, 24; Interpretation of Peace Treaties (Second Phase) Advisory Opinion (1950) ICJ Reports 221, 229.

(c) encompasses general principles of law.<sup>56</sup> These sources are placed in a three-tiered hierarchy, with the Article 21(1)(a) sources at the top and the Article 21(1)(c) sources at the bottom.<sup>57</sup> In *Prosecutor v Bashir*, Pre-Trial Chamber I confirmed the place of the Statute, Rules of Procedure and Evidence and Elements of Crimes at the apex of the hierarchy and went on to find that the sources described in Articles 21(1)(b) and (c) should only be applied when: 1) there is a lacuna in the Article 21(1)(a) sources; and 2) that lacuna cannot be filled by the application of the criteria found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21(3) of the Rome Statute.<sup>58</sup>

The first criterion established in the *Bashir* case, that there must be a lacuna in the Statute before recourse can be made to the Article 21(1)(b) and (c) sources, would seem to preclude the Pre-Trial Chamber from basing its decision on one of those sources. Clearly, if the Pre-Trial Chamber believes that Article 119(1) applies to this matter it cannot also think that there is a gap in the Statute permitting recourse to Article 21(1)(b). Additionally, Article 19(1) explicitly identifies the stage of proceedings at which the International Criminal Court may make a determination about jurisdiction. However, despite the absence of a lacuna in the Statute, the Pre-Trial Chamber saw fit to demonstrate that it possessed the necessary competence to decide the jurisdictional issue pursuant to an Article 21(1)(b) source. In this case it relied on the established principle of law of *la compétence de la compétence*, which is the long-established idea that a body possessing jurisdictional authority has the ability to delineate the extent of its own authority.<sup>59</sup> The International Court of Justice defined the principle when ruling on the preliminary objections in the *Nottebahl Case (Liechtenstein v Guatemala)*, as standing for the proposition that ‘in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments

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<sup>56</sup> Art. 21 ICCSt.

<sup>57</sup> Schabas, *Commentary*, *supra* note 49, at 515.

<sup>58</sup> *Prosecutor v Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir) No. ICC-02/05-01/09, PT Ch I (4 March 2009) ¶ 126.

<sup>59</sup> Permanent Court of International Justice, Interpretation of the Greco-Turkish Agreement on December 1st, 1926 (Final Protocol, Article IV), Advisory Opinion of 28 August 1928, Series B, No. 16, p. 20; see also *The Walfish Bay Boundary Case* (Germany, Great Britain), Award of 23 May 1911, Reports of International Arbitral Awards, vol. XI, p. 263, ¶ LXVII.

which govern that jurisdiction'.<sup>60</sup> Pre-Trial Chamber I then explained that this concept had been extended to international and regional criminal law and human rights courts and tribunals, and specifically to the International Criminal Court.<sup>61</sup> The Pre-Trial Chamber concluded that the principle of *la compétence de la compétence* endows it with the ability to Rule on the Prosecutor's Request.<sup>62</sup>

An analysis of the relevant sections of the Statute tends to indicate that, contrary to its decision, the Pre-Trial Chamber did not have the competence to decide the issue of jurisdiction before it. Three different possible bases are suggested under which the Court may be able to exercise its authority in this matter. A close examination of all three indicates that none of them authorise the Pre-Trial Chamber to make a decision in this area. Article 19(3) is only applicable during the case stage of proceedings, a stage that this matter has not yet reached. Additionally, reading Article 19(3) in the manner proposed by the Prosecutor would mean that the Prosecutor has more power than the Court itself to raise inquiries regarding jurisdiction. Article 119(1) also cannot be relied upon. If it is read in such a way to permit the Court to reach a decision about jurisdiction at any time, as suggested by the Pre-Trial Chamber, it would render Article 19(1) meaningless. Such an interpretation does not comport with international law, which mandates that effect needs to be given to all aspects of the treaty or statute under consideration. Resort can also not be made to Article 21(1)(b). This article is only operative if there is a lacuna in the Statute, which there clearly is not in this situation. As a result, there is no statutory basis upon which the Pre-Trial Chamber can justify making a decision about whether the Court has jurisdiction over the crime against humanity of deportation as it relates to the forcible transfer of the Rohingya from Myanmar to Bangladesh.

### ***B. The Substantive Issue***

The Prosecutor's substantive request is framed as a question about whether the International Criminal Court could exercise jurisdiction over the alleged forcible deportation of the Rohingya from Myanmar to Bangladesh.<sup>63</sup> Deportation is a crime against humanity pursuant to Article 7(1)(d) of the Rome Statute that outlaws the

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<sup>60</sup> *Nottebohm case (Liechtenstein v. Guatemala)* (Preliminary Objections), Judgment of 18 November 1953, [1953] ICJ Rep. 111, p. 119.

<sup>61</sup> Decision on Prosecutor's Request, *supra* note 48, at ¶¶ 31-3.

<sup>62</sup> *Ibid* at ¶ 33.

<sup>63</sup> Prosecutor's Request, *supra* note 33, at ¶ 1.

‘[d]eportation or forcible transfer of population’ ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>64</sup> The Statute goes on to define deportation and forcible transfer more specifically as the ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law’.<sup>65</sup> The Prosecutor’s Office suggests in its request that although ‘the coercive acts relevant to the deportation’ occurred in the territory of Myanmar, a non-state party, an essential legal element of the crime, crossing an international border, happened in Bangladesh, which is a state party.<sup>66</sup> The purpose of the request was to clarify whether the Court would have jurisdiction over these crimes before the Office of the Prosecutor embarked on a preliminary examination of the situation.<sup>67</sup>

As a preliminary point, it is generally agreed that Article 7(1)(d) describes two separate but related crimes: deportation and forcible transfer.<sup>68</sup> Both crimes involve similar conduct; what distinguishes the two is the final destination of the victims of the crime. Deportation occurs when people are displaced across an international border while forcible transfer results when they are displaced but remain in the territory of one state.<sup>69</sup> Therefore, an implicit element of the crime of deportation is that the people involved are displaced across an international border. This is consistent with the International Criminal Court’s Elements of Crimes, which indicates that deportation occurs when ‘one or more persons’ is displaced into ‘another State...by expulsion or other coercive acts.’<sup>70</sup> While the Pre-Trial Chamber went to great lengths to demonstrate its conclusion on this point, there is nothing

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<sup>64</sup> Art. 7(1)(d) ICCSt.

<sup>65</sup> Art. 7(2)(d) ICCSt.

<sup>66</sup> Prosecution’s Request, *supra* note 33, at ¶ 2.

<sup>67</sup> *Ibid* at ¶ 3.

<sup>68</sup> Decision on Prosecution’s Request, *supra* note 48, at ¶ 55; see also K. Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press, 2014), at 86; C.K. Hall and C. Stahn, ‘Article 7: Crimes Against Humanity’, in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Hart, 2016), at 263; R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *A Introduction to International Criminal Law and Procedure* (3rd edn., Cambridge University Press, 2014), at 248; G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., Oxford University Press, 2014), at 358.

<sup>69</sup> *Ibid*.

<sup>70</sup> Art. 7(1)(d) Elements of Crimes.

particularly controversial about it.

The Pre-Trial Chamber's approach to Article 12(2) proved to be more provocative. Article 12(2) delineates the preconditions that must exist before the Court can exercise its jurisdiction following the referral of a situation to the Court by a state party or where the prosecutor has initiated an investigation *proprio motu*.<sup>71</sup> Jurisdiction can be exercised in these situations when either: the place in which the alleged conduct in question occurred is located in a state that is a party to the Rome Statute; or a person accused of a crime is a national of a state party.<sup>72</sup> The Office of the Prosecutor's Request to the Pre-Trial Chamber is concerned with the first of these two situations. The Pre-Trial Chamber found that for jurisdiction to exist under Article 12(2)(a) at least one legal element of the crime alleged must take place within the territory of a state that is a party to the Rome Statute.<sup>73</sup> The Pre-Trial Chamber further reasons that because the crime of deportation involves the affected people crossing an international border, the conduct involved must necessarily take place in two different states.<sup>74</sup> In the Pre-Trial Chamber's view that means that because the Rohingya were forced into Bangladesh some of the conduct making up the crime against humanity of deportation took place in the territory of a state party providing the Court with jurisdiction over the crime.<sup>75</sup>

The trouble the Pre-Trial Chamber's decision is that it may not properly interpret Article 12(2)(a) of the Rome Statute. The Pre-Trial Chamber understood the term 'conduct' expansively so as to mean that any element of an alleged crime is conduct within the meaning of the article. This led it to the conclusion that the International Criminal Court has jurisdiction in this matter. However, the Statute does not say that jurisdiction exists so long as some element of the crime takes place in the territory of a state party. Instead, it requires that 'the conduct in question' must occur in the territory of a state party.<sup>76</sup> The confusion surrounding this issue is a product of the fact that the Court has not previously defined the term 'conduct', either generally or in terms of Article 12(2)(a). This raises the following questions: Does 'conduct' refer to the criminal conduct of the accused? Or can any action taken by anyone that

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<sup>71</sup> Art. 12(2) ICCSt., see also Art. 13(a) ICCSt., Art. 13(c) ICCSt. and Art. 15 ICCSt.

<sup>72</sup> Art. 12(2) ICCSt.

<sup>73</sup> Decision on Prosecution's Request, *supra* note 48, at ¶ 64.

<sup>74</sup> *Ibid* at ¶ 71.

<sup>75</sup> *Ibid* at ¶ 73.

<sup>76</sup> Art. 12(2)(a) ICCSt.

makes up some element of the crime be considered ‘conduct’ under this section of the Statute?

The Office of the Prosecutor foresaw this problem in its request and advocated in favour of understanding conduct broadly so that its meaning is not limited only to the criminal acts committed by the alleged perpetrator.<sup>77</sup> The Office of the Prosecutor argument rests on its application of the rules of interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties.<sup>78</sup> First, it claimed that the plain-meaning of the term ‘conduct’ is not instructive because it fails to establish “*how much* conduct is required or *what constitutes* conduct.”<sup>79</sup> This is an interesting supposition by virtue of the fact that the Office of the Prosecutor’s request does not actually provide a definition of ‘conduct’. In the end, this may be of relatively little import. When used as a noun, ‘conduct’ can be defined generally as ‘the manner in which a person behaves’, ‘personal behavior’ or ‘a person’s deeds.’<sup>80</sup> These definitions are quite broad and not particularly responsive to the questions posed by the Prosecutor’s Office’s request. They do suggest that conduct can be understood broadly to refer to the acts or omissions of any person but do not address how extensive activities must be to be considered conduct.

However, an inquiry into understanding the plain meaning of a term should not stop with dictionary definitions. The test for determining the plain meaning of a term is not necessarily ‘what the ordinary person would understand it to mean’, but should also take account of how ‘a person reasonably informed in that subject’ might understand the term.<sup>81</sup> A variety of scholars have attempted to explain ‘conduct’ in the context of the Rome Statute. Antonio Cassese defined ‘conduct’ as ‘certain behaviour’ that is criminalized under international rules.<sup>82</sup> Gerhard Werle indicates

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<sup>77</sup> Prosecution’s Request, *supra* note 33, at ¶¶ 43-47.

<sup>78</sup> *Ibid* at ¶ 43; see also Vienna Convention on the Law of Treaties Art 31(1).

<sup>79</sup> *Ibid* at ¶ 44 (original emphasis).

<sup>80</sup> *The Concise Oxford English Dictionary* (11th edn., Oxford University Press, 2008); B. A. Garner, *Black’s Law Dictionary* (10th edn., Thomson Reuters, 2014).

<sup>81</sup> R. Gardiner, *Treaty Interpretation* (2nd. edn., Oxford University Press, 2015), at 194.

<sup>82</sup> A. Cassese, *Cassese’s International Criminal Law* (Oxford University Press, 2013), at 38.

that conduct is ‘an act or omission’ set out in the definition of the crime.<sup>83</sup> Douglas Guilfoyle describes conduct as an act or omission ‘prohibited by a rule of international law.’<sup>84</sup> These definitions are responsive to both of the questions the Office of the Prosecutor suggested were not adequately answered when considering the plain meaning of the term ‘conduct’. They demonstrate that conduct consists of those activities that are described as criminal under international law. Further, the amount of conduct required is that which is enough to constitute criminal acts. Therefore, the Office of the Prosecutor may have been incorrect when it asserted that the meaning of conduct could not be understood by its plain meaning.

Additionally, the Rome Statute and the Elements of Crimes can reasonably be read to mean that it is the acts attributable to the alleged perpetrator that constitute conduct within the meaning of the Statute. Article 7 of the Statute states ‘[f]or the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:...(d) deportation or forcible transfer of population.’<sup>85</sup> This formulation specifically defines crimes against humanity as acts being directed against civilians, that is to say, which by their very nature must be committed by the alleged criminal perpetrators. The victims are only involved to the extent that they are the objects of those acts. No requirement exists mandating that victims behave in any particular way for the crime to be completed. This suggests that the actions about which the Statute is concerned are the acts of the alleged perpetrators of crimes against humanity. The text of the Elements of Crimes also supports this conclusion. The introduction to the section on crimes against humanity states that the conduct involved is that which ‘is impermissible under generally applicable international law’, i.e. illegal acts performed by the people perpetrating crimes.<sup>86</sup> There is no reference to how victims must behave for a crime against humanity to exist. The statement, ‘[a] particular conduct may constitute one or more crimes’ further reinforces this point.<sup>87</sup> This implies that the conduct about which

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<sup>83</sup> G. Werle, ‘General Principles of International Law’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), at 56.

<sup>84</sup> D. Guilfoyle, *International Criminal Law* (Oxford University Press, 2015), at 187.

<sup>85</sup> Art. 7 ICCSt.

<sup>86</sup> Art. 7 Elements of Crimes.

<sup>87</sup> General Introduction, Elements of Crimes.

the Elements of Crimes are concerned is criminal conduct committed by the alleged perpetrator, not how people act after a crime has been committed against them.

The Office of the Prosecutor next argued that ‘conduct’ should be understood more broadly when placed in the context of the Rome Statute.<sup>88</sup> It supports its opinion on two bases. The first suggests that ‘conduct’ is synonymous with ‘crime’, and that because a crime necessarily includes each individual element so to does conduct.<sup>89</sup> The second ground alleges that there is no clear distinction between conduct and consequence and that they should be considered one and the same. The Office of the Prosecutor supports its first argument by advocating that the term ‘conduct’ is used in the first clause of Article 12(2)(a), while ‘crime’ is used in the second clause, although both words appear to be describing the same thing. On that basis it is argued that it would be illogical for ‘conduct’ and ‘crime’ to not be synonymous as that would mean that the jurisdictional test would change depending on where the crime occurred.<sup>90</sup>

While there is some foundation for the Office of the Prosecutor’s claim when considered in the limited context of Article 12(2), it may be undermined when ‘conduct’ is placed in the larger context of the Statute as a whole. There are numerous references in the Statute that support the conclusion that ‘conduct’ refers specifically to the acts of the alleged perpetrator. The use of the term ‘conduct’ in Article 22 is particularly interesting because it not only refers to conduct, but also uses the identical term ‘conduct in question’ found in Article 12(2)(a). It states, ‘[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.’<sup>91</sup> This formulation appears to equate the terms ‘conduct’ and ‘crime’, but in such a way that it is reasonable to understand ‘crime’ to refer to the criminally culpable acts of the alleged perpetrator and not all of the elements that make up a crime.

There are other references to ‘conduct’ in the Statute that support the conclusion that ‘conduct’ refers to the actions of the alleged perpetrator. Article 17 declares inadmissible cases in which the accused ‘has already been tried for conduct

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<sup>88</sup> Prosecution’s Request, *supra* note 33, at ¶ 46.

<sup>89</sup> Prosecution’s Request, *supra* note 33, at ¶ 46.

<sup>90</sup> *Ibid.*

<sup>91</sup> Art. 22(1) ICCSt.

which is the subject of the complaint.<sup>92</sup> Similarly, Article 20, the provision on *ne bis in idem*, refers to ‘conduct which formed the basis of crimes’ and ‘conduct also proscribed under article 6, 7, 8 or 8 bis’.<sup>93</sup> These references to ‘conduct’ can also be read narrowly to refer only to the criminal conduct of the alleged culprit. Further instances in which conduct is equated to the criminal acts of the accused but not necessarily the crime itself can also be found in Articles 24, 30, 31, 32, 78, 90, 93 and 101. An examination of these references leads to the conclusion that conduct may be used in more than one way in the Statute but that it can be understood to refer only to the acts or omissions of the person thought to have committed criminal acts. As a result, the meaning of ‘conduct’ is not entirely clear when placed in the larger context of the Rome Statute.

Next, the Office of the Prosecutor asserted that the Statute’s drafters struggled with distinguishing between conduct and consequence and “sometimes views on where to draw the line [...] differed.”<sup>94</sup> This argument is somewhat specious as it relies on the notion that because the drafters of the Rome Statute disagreed about the distinction between ‘conduct’ and ‘consequence’ it means that there is no real difference between the terms. In fact, the opinions of the drafters differed about a great number of topics and very few of the terms in the Statute would have any meaning at all if unanimity amongst the drafters is a necessary criterion. The Office of the Prosecutor also supported its argument by suggesting that contemporary commentators were unable to clearly define the term ‘consequence’ or explain how it differed from ‘conduct’ in their review of the discussions of the subject during the Rome Conference.<sup>95</sup> While this may be, it is clear from the Elements of Crimes that the terms ‘conduct’ and ‘consequences’ are not synonymous. The General Introduction to the Elements of Crimes indicates that crimes falling under the jurisdiction of the International Criminal Court can be made up of as many as four different types of elements: conduct, consequence, circumstance and for some crimes,

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<sup>92</sup> Art. 17(1)(c) ICCSt.

<sup>93</sup> Art. 20 ICCSt.

<sup>94</sup> Ibid; citing M. Kelt and H. Van Hebel, ‘What Are Elements of Crimes?’, in R.S. Lee (ed.), *The International Criminal Court” Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational Publishers, 1999), at 15, 26-7, 39-40.

<sup>95</sup> Prosecution’s Request, *supra* note 33, at fn. 109.

a mental element.<sup>96</sup> These elements are listed in order when describing each crime, with the conduct element always coming first.<sup>97</sup> Organising the elements in this way suggests that everything contained in the first element describes the conduct that must occur for the crime to be committed.

Further, scholars have also delineated the difference between these two terms. Gerhard Werle defines ‘consequence’ so as to include all of the effects of the conduct.<sup>98</sup> Antonio Cassese describes ‘consequences’ as ‘the effects caused by one’s conduct.’<sup>99</sup> Kai Ambos asserts that Article 30 of the Rome Statute makes clear that ‘conduct’ is distinct from ‘consequence’.<sup>100</sup> He concludes that this distinction ‘makes it difficult’ to allow the exercise of jurisdiction based only on the consequences of a crime being felt on the territory of a state party.<sup>101</sup>

The difference between ‘conduct’ and ‘consequence’ is also borne out by the specific definition of deportation found in the Elements of Crimes. Deportation or forcible transfer occurs when the perpetrator expels or engages in other coercive acts that result in a person or people relocating to another state or location.<sup>102</sup> Under this definition, the conduct attributable to the perpetrator are the acts of expulsion and/or other forms of coercion while the consequence of that behaviour is that the victims are forced to relocate. There is a clear relationship between the conduct and its consequence, but that does not mean that the consequence is part of the conduct. The Office of the Prosecutor fails to explore this distinction in its request and the Pre-Trial Chamber did not address when, if ever, the consequences of conduct can be considered part of the conduct itself.

The Prosecutor’s Office has, in other contexts, examined how close the relationship between conduct and its consequences must be for those consequences to serve as the basis for jurisdiction under Article 12(2)(a). In its Article 5 Report on the *Situation in the Republic of Korea*, the Prosecutor’s Office evaluated whether aggressive military acts performed by North Korea and directed towards the territory

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<sup>96</sup> General Introduction, Elements of Crimes.

<sup>97</sup> Ibid.

<sup>98</sup> Werle, *supra* note 83, at 56.

<sup>99</sup> A. Cassese, *Cassese’s International Criminal Law* (Oxford University Press, 2013), 38.

<sup>100</sup> K. Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Oxford University Press, 2016), 247, fn. 276.

<sup>101</sup> Ibid at 247.

<sup>102</sup> Art. 7(1)(d), Elements of Crimes.

of South Korea could give rise to the exercise of jurisdiction by the International Criminal Court.<sup>103</sup> The jurisdictional situation under consideration in the Korean context was similar to the Myanmar and Rohingya matter to the extent that the state in which the criminal conduct took place, North Korea, is not a state party to the Rome Statute, while the place in which the effects of those actions were felt, South Korea, is a state party.<sup>104</sup> The Prosecutor's Office concluded that in that matter the Court did have jurisdiction pursuant to Article 12(2)(a) because the conduct of firing military ordinance could not be separated from the consequence of hitting the area at which it was targeted.<sup>105</sup> In the view of the Prosecutor, differentiating between the two under these circumstances would create an artificial distinction when the conduct and the consequences 'are one and the same'.<sup>106</sup>

In a subsequent report, the Prosecutor's Office further elaborated on its understanding of the requisite closeness between conduct and consequences to support an exercise of jurisdiction by the Court. It demonstrated that there needed to be a very close relationship between the conduct and the consequences to form an adequate basis for jurisdiction. In the Article 53(1) report submitted by the Office of the Prosecutor in the *Situation on Registered Vessels of Comoros, Greece and Cambodia*, it indicated that there needed to be a very close connection between conduct and consequences for the latter to provide a sound basis for a finding of jurisdiction.<sup>107</sup> There, the Office of the Prosecutor was considering the extent of its jurisdiction to open an investigation into an incident that occurred on a flotilla of ships on 31 May 2010.<sup>108</sup> The Office of the Prosecutor asserted that the Court only had jurisdiction over events that took place on the vessels registered to state parties of the Rome Statute.<sup>109</sup> The Office of the Prosecutor reached this conclusion on the basis that '[n]othing in the Statute, commentary, or relevant jurisprudence supports the proposition that the Court's jurisdiction would also extend to any events that, while

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<sup>103</sup> *Situation in the Republic of Korea* (Article 5 Report) Office of the Prosecutor (June 2014) ¶ 30.

<sup>104</sup> *Ibid* at ¶¶ 38-9.

<sup>105</sup> *Ibid* at ¶ 39.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Situation on Registered Vessels of Comoros, Greece and Cambodia* (Article 53(1) Report) Prosecutor's Office (6 November 2014).

<sup>108</sup> *Ibid* at ¶ 3.

<sup>109</sup> *Ibid* at ¶ 16.

related to the events on board the vessels in the flotilla, occurred after individuals were taken off the vessels.’<sup>110</sup>

These two reports support the proposition that for the International Criminal Court to exercise its jurisdiction on the basis of the consequences occurring in the territory of a state party, there must be more than a mere relationship between the perpetrator’s conduct and its consequences. Instead, there must be a sufficiently close relationship between the events so as to suggest that they are essentially indivisible. Whether a close enough relationship exists between the actions that took place in Myanmar and the Rohingyas’ entry into Bangladesh is open to debate. It could be argued, as the Pre-Trial Chamber found, that the crossing of an international border is a necessary part of deportation and that the very act of crossing a border under such circumstances is inextricably linked to the conduct that precipitated the crossing. Alternatively, one might assert that although the actions that took place in Myanmar did result in the Rohingya crossing the border with Bangladesh, it was not the necessary outcome of those actions. These actions could have equally caused an internal displacement, as it had in the past, further persecution of the Rohingya within the borders of Myanmar, the displacement of the Rohingya to India, also not a party to the Rome Statute, or some other unforeseen outcome. That more than one possible outcome existed may indicate that the consequence, which is the only part of the alleged crime to occur in the territory of a state party, may not have been sufficiently connected to the conduct to support a finding that the International Criminal Court has jurisdiction in this matter.

Finally, the Prosecutor’s Office asserted that the object and purpose of the Statute requires that only one element of a crime need occur in the territory of a state party for the International Criminal Court to have jurisdiction. It argues that such a finding would be in line with national and international law and to read the Statute otherwise would undermine the Court’s complementarity regime.<sup>111</sup> In support of that position, the request by the Office of the Prosecutor identifies a variety of states that allow jurisdiction to be exercised so long as one element of a crime takes place on its territory.<sup>112</sup> The Pre-Trial Chamber picked up on this argument and implicitly agreed

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<sup>110</sup> Ibid at 13, fn 21.

<sup>111</sup> Prosecution’s Request, *supra* note 33, at ¶ 49.

<sup>112</sup> Ibid at ¶ 40.

with the approach advanced by the Prosecutor's Office.<sup>113</sup> In particular, the Pre-Trial Chamber found that the drafters of the Statute intended to allow the International Criminal Court to exercise jurisdiction to the same extent as its states parties.<sup>114</sup>

The wording of the Rome Statute calls this conclusion into question. All of the national laws discussed by the Office of the Prosecutor specifically allow jurisdiction to be exercised in situations that are broader than what is described in Article 12(2)(a). Argentina, China, Germany, Iran and Italy all explicitly state that they will have jurisdiction over a crime if either the act or omission constituting the crime, or its consequence or effect, occurs on its territory.<sup>115</sup> This is in direct contrast to the Rome Statute, which only allows jurisdiction if 'the conduct in question' took place in the territory of a state party. The International Criminal Court's approach is clearly more limited as it only mentions conduct and not consequences. Further, that those national laws see the need to refer to consequences in this regard has the tendency to show they are not thought to be synonymous with conduct.

Several other countries take a somewhat different approach that is still more expansive than what is contained in the Rome Statute. Canada and England and Wales each allow the exercise of jurisdiction when 'a significant portion' or a 'substantial measure' of the crime takes place in their territory.<sup>116</sup> France, Japan, the Republic of Korea, South Africa and the United States all have jurisdiction when some, but not all of the elements occur in their territory.<sup>117</sup> These states are also taking a different approach from that set out in the Rome Statute by expressly stating that jurisdiction exists so long as some part of the crime takes place in the relevant territory. While it is apparent that a number of states allow jurisdiction to be exercised so long as some part of the crime takes place within its territory that does not mean the same holds true for the International Criminal Court. The statutory language used in these national statutes is fundamentally different from the wording contained in the Rome Statute. As a result, it does not follow that the approach taken in national jurisdictions should necessarily also apply to the International Criminal Court.

The Office of the Prosecutor also argues that international law supports a

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<sup>113</sup> Decision on Prosecution's Request, *supra* note 48, at ¶ 70.

<sup>114</sup> *Ibid.*

<sup>115</sup> Prosecution's Request, *supra* note 33, at ¶ 40.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

finding that jurisdiction exists because one element of the crime occurred in the territory of a state party.<sup>118</sup> The territoriality principle stands for the proposition that a State has jurisdiction over any crimes that occur or have been committed on its territory, regardless of the nationality of the perpetrator.<sup>119</sup> When a crime occurs in more than one state the objective territoriality of the crime is considered. Objective territoriality permits a state to make a jurisdictional claim over a crime that is completed in its territory, or when ‘one of the constituent elements of the offence, and more especially its effects, have taken place there’.<sup>120</sup> Objective territoriality is particularly relevant in the context of crimes of effect, where the conduct takes place entirely in the territory of one state but where the effect of the crime takes place in a different state.<sup>121</sup>

The Pre-Trial Chamber’s decision that the International Criminal Court has jurisdiction over the deportation of the Rohingya is in line with some earlier commentators who have suggested that the Statute allows for the exercise of objective territoriality by the Court.<sup>122</sup> However, that position does not take proper account of the fact that the territoriality principle is an approach designed to establish when states, not international criminal justice institutions, have jurisdiction over a crime. There is no reason to believe, despite the insistence of the Office of the Prosecutor to the contrary, that objective territoriality should also act to confer jurisdiction to the International Criminal Court. Jurisdiction based on the territoriality principle is a reflection of state sovereignty; it permits the state to regulate and enforce activities within its own borders without fear of interference by external forces.<sup>123</sup> It is a state’s exercise of the freedom to establish its own laws and regulations within its own

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<sup>118</sup> Prosecution’s Request, *supra* note 33, at ¶ 49.

<sup>119</sup> Ambos, *Treatise III*, *supra* note 100, at 211.

<sup>120</sup> *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 23; see also Ambos, *Treatise III*, *supra* note 100, at 212.

<sup>121</sup> Ambos, *Treatise III*, *supra* note 100, at 212.

<sup>122</sup> M. Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2014), at 162; see also R. Rastan, ‘The Jurisdictional Scope of Situations Before the International Criminal Court’, 23(1) *Criminal Law Forum* 1-34, 19 (2012).

<sup>123</sup> A. Mills, ‘Rethinking Jurisdiction in International Law’, 84(1) *The British Yearbook of International Law* (2014) 187-239, 196-7; see also W.A. Schabas and G. Pecorella, ‘Article 12: Preconditions to the Exercise of Jurisdiction’, in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Hart, 2016), at 681.

territory and a demonstration that it has the equal right to do so.<sup>124</sup> The International Criminal Court is the product of a political agreement amongst the state parties.<sup>125</sup> As such, it lacks sovereignty and, in turn, the territorial jurisdiction that goes with it.<sup>126</sup> While the Court may have the authority to decide the extent of its own jurisdiction, that determination is limited by territoriality as set out in the Statute.<sup>127</sup> States are generally protective of their sovereignty and wish to reserve for themselves the ultimate authority to control activities occurring within their own territory.<sup>128</sup> In fact, evidence exists to suggest that state parties intended to limit the jurisdiction of the International Criminal Court.<sup>129</sup>

Further, the language of Article 12(2)(a) itself provides a basis for finding that the drafters meant for it to be narrowly interpreted. Article 12(2)(a) explicitly requires that the conduct, not the consequences or effects of that conduct, take place on the territory of a state party. The Statute's silence with regard to extending the jurisdiction of the Court to those states upon whose territory the effects of crime occurs may be intentional and the omission of the concept from the Statute supports a narrow construction of Article 12.<sup>130</sup> The drafters of the International Criminal Court's Statute would have been aware that some countries take an approach to jurisdiction where by it can be asserted if the effects of a crime take place in its territory. They would also have been familiar with the objective territoriality approach that follows a similar formula. They could have adopted a statute that addressed jurisdiction in the same way if they had so wished. The fact that they did not is

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<sup>124</sup> C. Ryngaert, *Jurisdiction in International Law* (1st edn., Oxford University Press, 2008), at 28-9.

<sup>125</sup> D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), at 579.

<sup>126</sup> M. Vagias, 'The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC?', 59(1) *Netherlands International Law Review* 43-64, 46 (2012).

<sup>127</sup> *Ibid*; see also Vagias, *The Territorial Jurisdiction of the International Criminal Court*, *supra*. note 122, at 161; D. Guilfoyle, 'The ICC Pre-Trial Chamber Decision on Jurisdiction Over the Situation in Myanmar', 73(1) *Australian Journal of International Affairs* 2-8, 4 (2019).

<sup>128</sup> D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), at 578.

<sup>129</sup> Guilfoyle, 'The ICC Pre-Trial Chamber Decision', *supra* note 127, at 5.

<sup>130</sup> Schabas, *An Introduction*, *supra* note 42, at 68.

significant and should not be disregarded.

It must also be noted that the Special Working Group on the Crime of Aggression discussed inserting language in the Statute that would have defined ‘conduct’ as it is used in Article 12(2)(a) to encompass both conduct and its consequence.<sup>131</sup> However, despite apparent ‘general support’ for the proposition, the proposed change was not implemented.<sup>132</sup> The draft amendments to the Rome Statute relating to the crime of aggression do not mention any modification to the Article 12(2)(a) definition of ‘conduct’, nor was any such amendment ever adopted.<sup>133</sup> It is not known why this amendment to the Statute did not come to fruition but three relevant points can be extrapolated from the fact it was discussed. First, the members of the working group were aware of the jurisdictional theory of objective territoriality; second, they were also aware that the Statute, as written, did not comport with objective territoriality; and third, despite their awareness of both they chose to do nothing.

When the rules of interpretation established in the Vienna Convention on the Law of Treaties are applied to Article 12(2)(a) of the Rome Statute, it supports the conclusion that the term ‘conduct’ relates to the actions of the alleged perpetrators of crimes against humanity, not their victims. In this case, all of the actions performed by the perpetrators credited with forcing the Rohingya to flee to Bangladesh were carried out in Myanmar. The only activity that took place in the territory of a state party was the entry of the victims into Bangladesh as a result of the actions taken in Myanmar. It is apparent that this, on its own, is not enough to support the existence of jurisdiction. As a result, it is unlikely that the Pre-Trial Chamber’s decision to find that the International Criminal Court has jurisdiction in this situation complies with the terms of Article 12(2)(a) of the Rome Statute.

#### **4. Effects of this Ruling**

It has been suggested that the Pre-Trial Chamber’s ruling ‘will have far

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<sup>131</sup> Vagias, *The Territorial Jurisdiction of the International Criminal Court*, *supra* note 122, at 81.

<sup>132</sup> *Ibid*; citing ICC Assembly of the States Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2, 7<sup>th</sup> Session of the Assembly of States Parties (Second Resumption), 9-13 February 2008, ¶ 39.

<sup>133</sup> ICC Assembly of the States Parties, *Discussion Paper on the Crime of Aggression Proposed by the Chairman* (revision January 2009), ICC-ASP/7/SWGCA/INF.1, 7<sup>th</sup> Session of the Assembly of States Parties (Second Resumption), 9-13 February 2008, at 2-3.

reaching consequences’ on the prosecution of current and future occurrences of human rights violations.<sup>134</sup> The ruling is seen as creating a ‘route to accountability’ for at least some perpetrators of human rights abuses that until now have been otherwise immune from prosecution.<sup>135</sup> In fact, the effects of the Pre-Trial Chamber’s ruling are already being felt. In March 2019, the Guernica Centre for International Justice submitted a communication to the Prosecutor’s Office requesting that it begin a preliminary investigation into the deportation by the Syrian government of some Syrian nationals into Jordan.<sup>136</sup> The Guernica Centre argues that sufficient parallels exist between the situations in Myanmar and Syria to warrant the opening of a preliminary investigation into crimes committed in the latter state on the basis of the Court’s decision with regard to the former.<sup>137</sup> This is largely a continuation of an argument first advanced in the Amicus Curiae Brief submitted by the Guernica Centre in support of the Prosecutor’s Request for a ruling about jurisdiction over the Rohingya situation. In its brief, the Guernica Centre submits that it is ‘universally accepted’ that millions of Syrian citizens have been displaced as a result of the conflict in Syria, ‘a significant portion’ of whom left Syria entirely.<sup>138</sup> The majority of these people are thought to have been the subject of ‘targeted attacks’ by the Syrian government and its allies, with the use of barrel bombs and chemical weapons, as well as the intentional destruction of hospitals and other forms of infrastructure, being amongst the tactics used to drive the affected people out of Syria.<sup>139</sup> For these reasons, the two situations are seen as being alike.<sup>140</sup>

The Guernica Centre is not alone in their efforts to encourage the Prosecutor to open a Preliminary Investigation in Syria. A collection of British lawyers working

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<sup>134</sup> Request Under Regulation 46(3) of the Regulations of the Court (Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)) No. ICC-RoC46(3)-01/18, PT Ch (18 June 2018), at ¶ 7.1.

<sup>135</sup> T. Cadman and C. Buckley, ‘Filling the Vacuum: Syria and the International Criminal Court’ (Justice In Conflict, 19 March 2019) <<https://justiceinconflict.org/2019/03/19/filling-the-vacuum-syria-and-the-international-criminal-court/>> accessed 22 March 2019.

<sup>136</sup> *Ibid.*

<sup>137</sup> Guernica Centre for International Justice, ‘Press Statement: GCIJ Files Article 15 Communication with ICC Prosecutor on Syria’ (4 March 2019) <<https://www.guernicagroup.org/news/press-statement-gcij-files-article-15-communication-with-icc-prosecutor-on-syria>> accessed 22 March 2019.

<sup>138</sup> Amicus Curiae Observations by Guernica 37, *supra* note 134, at ¶ 7.8.

<sup>139</sup> *Ibid* at ¶¶ 7.10, 7.14.

<sup>140</sup> *Ibid* at ¶ 7.11.

on behalf of a group of Syrian refugees living in Jordan have also submitted a communication to the Prosecutor requesting that an investigation be opened against senior Syrian officials including president Bashir al Assad.<sup>141</sup> The decisions to submit the communication is based on the belief that ‘a jurisdictional gateway...has opened up finally for the ICC prosecutor to investigate the perpetrators who are most responsible.’<sup>142</sup>

The Pre-Trial Chamber’s decision about the Rohingya is being viewed as an opportunity to increase accountability for human rights abuses that would otherwise go unpunished. While it is appropriate to explore all paths available to increase human rights protections, it is necessary that these new approaches be founded on a firm legal footing. Unfortunately, that may not be the case with the Pre-Trial Chamber’s decision that the International Criminal Court has jurisdiction over some human rights violations allegedly committed by the government of Myanmar against the Rohingya. Therefore, a modicum of caution is advised before victims of similar situations wholeheartedly embrace the possibility that decision means that they too will have an opportunity to experience justice being done.

## **5. Conclusion**

There are significant reasons to question whether the Pre-Trial Chamber properly decided the Prosecutor’s Request Under Regulation 46(3) of the Regulations of the Court. From a procedural standpoint, it is highly doubtful that the Pre-Trial Chamber possesses the competence to make a decision about jurisdiction at this stage of proceedings. The statutory provision serving as the basis for the Prosecution’s original request is only applicable during the case stage of proceedings. As a result, that provision cannot be used to permit the Pre-Trial Chamber to decide this matter at this point in proceedings. The Pre-Trial Chamber avoided this problem by identifying two other parts of the Statute that it believed gave it the authority to issue its decision. However, reliance on Article 119(1) is misplaced as its application would deprive Article 19(1) of any meaning. Article 21(1)(b) is also not applicable in this situation as it can only be used when there is a lacuna in the Statute. This means that the Pre-

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<sup>141</sup> O. Bowcott, ‘Syrian Refugees Launch Legal Bid To Try Assad For Crimes Against Humanity’, *The Guardian* (London, 7 March 2019) <<https://www.theguardian.com/law/2019/mar/07/syrian-refugees-launch-legal-bid-to-try-assad-for-crimes-against-humanity>> accessed 22 March 2019.

<sup>142</sup> *Ibid.*

Trial Chamber did not have a procedural foundation on which to make its decision.

The Pre-Trial Chamber's conclusion that some part of the conduct making up the crime against humanity of deportation occurred in the territory of a state party is also dubious. The term 'conduct' as used in the Rome Statute and the Elements of Crimes can be read in such a way to mean that the actions of the people alleged to have committed crimes must occur in the territory of a state party. The conduct the Pre-Trial Chamber relied on to form its conclusion that the International Criminal Court has jurisdiction in this matter cannot be attributed to the perpetrators. While it may represent an element of the crime, it is not conduct in the sense meant by the Statute. However, the Pre-Trial Chamber appears to have conflated the term 'conduct' with 'crime' leading it to conclude that the Court has jurisdiction over the crime of deportation as it relates to the Rohingya as a result of the victims crossing the border into Bangladesh. This approach may not accord with the plain language of Article 12(2)(a) of the Rome Statute.

Ultimately, the Pre-Trial Chamber's decision appears to rest on an imperfect legal foundation. Legitimate concerns exist about the substance of the decision and whether the Pre-Trial Chamber was empowered at this point in the proceedings to make the decision at all. While the Pre-Trial Chamber should be applauded for suggesting a creative approach for delivering at least some partial form of accountability for the crimes committed against the Rohingya, it needs to be wary of offering false hope to victims. Legal decisions built on faulty premises are prone to reversal, which in turn can dash the heightened expectations of the victims of atrocity crimes. It is necessary for the International Criminal Court to ensure it is always proceeding on firm legal ground to make it less vulnerable to criticism and to better deliver the justice the victims of international crimes so desperately crave.