

## Identification of Elements of the Crime Against Humanity of Deportation into the Situation in Bangladesh/Myanmar

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**ABSTRACT:** The Pre-Trial Chamber of the International Criminal Court issues the decision on the authorization of an investigation into the situation in Bangladesh/Myanmar. In this decision, the Pre-Trial Chamber makes considerable findings regarding the elements of the crime against humanity of deportation. The Chamber states that an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place in the territories of at least two States and the drafters of the Statutes and the Rules did not limit the crime of deportation from one State Party to another State Party. Also, if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court has jurisdiction. Thus, acts of deportation initiated in a State not-Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of art. 12(2)(a) of the Statute. Further, the Chamber is of the view that that deportation is an open-conduct crime, meaning that a perpetrator may commit several different conducts which can amount to expulsion or other coercive acts. Therefore, the various types of conduct may, if established to the relevant threshold, qualify as ‘expulsion or other coercive acts’ for the crime of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction, and looting. In fact, in addition to the use of physical or mental force, other pressures, including the threat of the use of force, can be accepted for committing the crime of deportation, even if individuals are forced to voluntarily leave their homes.

**KEYWORDS:** Bangladesh; Deportation; International Criminal Court; Myanmar; Rohingya.

### I. Introduction

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On 14 November 2019, Pre-Trial Chamber III of the International Criminal Court issues the decision on the authorization of an investigation into the situation in Bangladesh/Myanmar.<sup>1</sup> As a result of this decision, the Prosecutor will investigate the crimes allegedly committed against members of the Rohingya people during their expulsion from the Republic of the Union of Myanmar (hereinafter “Myanmar”) to the People’s Republic of Bangladesh (hereinafter “Bangladesh”). Although Myanmar is not a Party to ICC’s Statute, the Prosecutor’s innovative interpretation of the crime against humanity of deportation allowed the Court to react to the crimes committed against members of the Rohingya people. Before requesting the authorization of an investigation, the Prosecutor shall, for the first time, exercises her authority under art. 19(3) of the Statute and raises a question concerning the Court’s jurisdiction. In the judgment of 6 September 2018,<sup>2</sup> the Pre-Trial Chamber I makes considerable findings regarding the elements of the crime of deportation,<sup>3</sup> most of which confirms in the judgment of 14 November 2019. In this article, I will consider these findings.

## **II. The Commission of at Least Part of a Crime or One Legal Element of Such a Crime on the Territory of a State Party Is Sufficient for Exercising the Court’s Jurisdiction**

The Chamber states that the preconditions for the exercise of the Court’s jurisdiction are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.<sup>4</sup> The Chamber lists a number of national jurisdictions, such as Argentina, Australia, China, Colombia, Czech Republic, Egypt, Estonia, Georgia, Germany, New Zealand, Romania, and Switzerland, that have adopted legislation to the effect that the exercise of criminal jurisdiction requires the commission of at least one legal element of the crime on the territory of a State.

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<sup>1</sup> ICC, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Pre-Trial Chamber, Decision Pursuant to art. 15 of the Rome Statute on the Authorisation of an Investigation (Nov. 14, 2019).

<sup>2</sup> ICC, ICC-RoC46(3)-01/18, Pre-Trial Chamber, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under art. 19(3) of the Statute” (Sep. 6, 2019).

<sup>3</sup> Ahmed Regan, *International Criminal Court and Its Tryst with Justice: The Case of Myanmar*, 4(10) INTERNATIONAL JOURNAL OF ARTS HUMANITIES AND SOCIAL SCIENCES STUDIES 23 (2019).

<sup>4</sup> Hale Kip, Melinda Rankin, *Extending the ‘System’ of International Criminal Law? The ICC’s Decision on Jurisdiction over Alleged Deportations of Rohingya People*, 73(1) AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 22 (2018); Caleb H Wheeler, *Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation*, 17(3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE (2019); Marta Bo, *Crimes against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity*, OPINIO JURIS (Dec. 23, 2019); Alessandra De Tommaso, *Deportation of the Rohingya People as a Crime Against Humanity and the Territorial Jurisdiction of the ICC*, INTERNATIONAL LAW BLOG (May 28, 2018).

In the view of the Chamber, public international law also permits the exercise of criminal jurisdiction by a State pursuant to the aforementioned approaches and in this regard, the Permanent Court of International Justice, in the *Lotus* case, has found that the territoriality of criminal law is not an absolute principle of international law.<sup>5</sup> The Chamber then deals with art. 12(2)(a) of the Statute. According to this article, the Court may exercise its jurisdiction if the State on the territory of which the conduct in question occurred, is Party to the Statute. However, if the Court could not exercise its jurisdiction over crimes that were partly committed in the territory of a non-State Party, this would mean that the Court could not hear cases involving war crimes committed in international armed conflicts involving non-States Parties and there is no indication anywhere in the Statute that the drafters intended to impose such a limitation. The Chamber considers that it would be wrong to conclude that States intended to limit the Court's territorial jurisdiction to crimes occurring exclusively in the territory of one or more States Parties and this is confirmed by the fact that the States Parties deemed it necessary to include exclusively such a limitation in art. 15-bis(5) of the Statute in relation to the crime of aggression.

This Chamber's finding affected the Court's jurisdiction *ratione temporis*. While the Prosecutor requests authorization to initiate an investigation into crimes allegedly committed since 9 October 2016, the Chamber authorizes the commencement of the investigation for crimes allegedly committed on or after 1 June 2010, the date of entry into force of the Statute for Bangladesh. The Chamber adds that the Prosecutor may extend the investigation into crimes allegedly committed at least in part on the territory of other States Parties after the date of entry into force of the Statute for those States Parties, insofar as the alleged crimes are sufficiently linked to the situation in Bangladesh/Myanmar. In effect, this finding may have created a new referral mechanism to the Court, by allowing neighboring States which have received refugees who are victims of the crime of deportation to refer the situation in the State of origin to the Court.<sup>6</sup> It also creates the possibility of exercising jurisdiction over certain crimes committed in the ICC's non-Member States, including Syria. In the other words, given the membership of Jordan and Cyprus where many Syrian refugees have been transferred, the Court may prosecute the crime of deportation of the Syrian people and other crimes in connection with this crime.<sup>7</sup>

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<sup>5</sup> PCIJ, *S.S. Lotus (France v. Turkey)*, Series A. no. 70, Judgment (Sep. 7, 1927), para. 20.

<sup>6</sup> Victoria Colvin, Phil Orchard, *The Rohingya Jurisdiction Decision: A Step Forward for Stopping Forced Deportations*, 73(1) AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 16 (2019).

<sup>7</sup> Kevin J. Heller, *Implications of the Rohingya Argument for Libya and Syria (and Jordan)*, OPINIO JURIS (Apr. 4, 2018); Kate Vigneswaran, Sam Zarifi, *A Pathway to Accountability for Syria? The Broader Implications of the ICC's Findings on Jurisdiction over Cross-Border Crimes*, OPINIO JURIS (Sept. 19, 2018).

However, the mental element, which in addition to “intent” includes “knowledge” in the ICC, is not easily provable concerning the perpetrators of the crime of deportation of the Syrian people. While the facts and evidence in the Rohingya case demonstrate the intent of the perpetrators for the commission of the crime of deportation, it is difficult, in the Syria case, to prove the intention of the Syrian officials for the commission of the crime of deportation of the Syrian people. Also, applying the Chamber’s finding on art. 12(2)(a) of the Statute will lead to a strange result. According to the last part of this Article, the Court may exercise its jurisdiction if the crime was committed on board a vessel or aircraft that the State of registration of that vessel or aircraft is a Party to the Statute. Suppose the deportation of people who go from one non-Member State to another non-Member State and use a ship registered in a Member State for transfer. Since crossing the international borders is one of the elements of the crime of deportation which is committed on a ship registered in a Member State, the Court has jurisdiction to prosecute this crime.

### III. Differentiating between Deportation and Forcible Transfer

The Chamber argues that the use of “or” between “deportation” and “forcible transfer” in art. 7(1)(d) of the Statute signifies that this provision includes two distinct crimes. The Elements of Crimes pertaining to art. 7(1)(d) also support this interpretation. The underlying conduct (“deported or forcibly transferred”) and the destination (“another State or location”) also contain references to “or”. In other words, “deported” is linked to the destination of “another State”, while “forcibly transferred” is linked to the destination of “another location” (which specifically entails, *a contrario*, another location within the same State). Thus, an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place in the territories of at least two States.

The Chamber specifies that the crime of deportation is defined, in the Statute and the Elements of Crimes, the forced displacement of the persons from the area in which they are lawfully present to another State and the drafters of these documents did not limit the crime of deportation from one State Party to another State Party. The Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of art. 12(2)(a) of the Statute.

The distinction between deportation and forcible transfer is not considered in the Statute of other international criminal tribunals, including the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far

East, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR). In these documents, the crime of deportation is only criminalized. However, the ICTY's judgment in the Krstic case highlights the distinction between the two crimes.<sup>8</sup> In this case, the Tribunal stated that the crime of deportation is related to crossing the borders of the State and the crime of forcible transfer is related to displacement within a State. However, it seems this judgment, which was issued in 2001, has been influenced by the Rome Statute.

#### IV. The Extension of the Court's Jurisdiction over Other Crimes

At the Prosecutor's request, no question was raised about the Court's jurisdiction over other crimes. Recalling the Pre-Trial Chamber's decision in the Ruto case, the Chamber extends the Court's jurisdiction over crimes other than deportation. It was stated, in the Ruto case, that deportation is an open-conduct crime, meaning that a perpetrator may commit several different conducts which can amount to expulsion or other coercive acts.<sup>9</sup> The Chamber states, in the context of the allegations contained in the prosecutor's request, that various types of conduct may, if established to the relevant threshold, qualify as 'expulsion or other coercive acts' for the purposes of the crime of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction, and looting. In fact, in addition to the use of physical or mental force, other pressures, including the threat of the use of force, can be accepted for committing the crime of deportation, even if individuals are forced to voluntarily leave their homes. In the Krstic case, the ICTY was declared that genuine consent is a criterion for identifying the illegality of the displacement.

The Chamber considers that the "persecution" and "other inhumane acts" are crimes that could fall within the Court's jurisdiction in the Rohingya case. According to art. 7(1)(h) of the Statute, persecution against any identifiable group or collectivity on the discriminatory ground that was committed in connection with any other crime within the jurisdiction of the Court is a crime against humanity. In the view of the Chamber, the Court has jurisdiction over the persecution of Rohingya people in connection with their deportation from Myanmar. Also, according to art. 7(1)(k) of the Statute, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health, amount to a crime against humanity. The Chamber notes that, following their deportation, members of the Rohingya people

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<sup>8</sup> ICTY, Prosecutor v. Krstic, IT-98-33, Trial Chamber, Judgment (Aug. 2, 2001), para. 521.

<sup>9</sup> ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11, Trial Chamber V(a), Judgment (Jan. 29, 2012), para. 244.

allegedly live in appalling conditions in Bangladesh and that the authorities of Myanmar supposedly impede their return to Myanmar. In the view of the Chamber, preventing the return of members of the Rohingya people to his or her own country causes the intentional and severe deprivation of fundamental rights and the great suffering, or serious injury to mental health.<sup>10</sup> It renders the victims' future even more uncertain and compels them to continue living in deplorable conditions. It is important to note that the persecution or "other inhumane acts" for preventing Rohingya people from returning to their country will not have the jurisdictional issues that there are for the crime of deportation, since these crimes are committed in Bangladesh as the ICC's Member State.

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<sup>10</sup> Michael Bradley, *Denial of Right of Return and Demographic Engineering as Potential Crimes Against Humanity*, INTERNATIONAL LAW BLOG (June 11, 2021).