

# Prosecutor-initiated Investigation Authorized into Crimes Against Rohingya with Bangladesh Territorial Element

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By: Irit Weiser

On November 14, 2019, Pre-Trial Chamber III authorized the Office of the Prosecutor to proceed with an investigation into alleged crimes committed against the Rohingya people of Myanmar. [here] This decision flows from the September 6, 2018 novel conclusions of Pre-Trial Chamber I that the International Criminal Court (the "Court" or ICC) can assert jurisdiction over the alleged deportation of the Rohingya people from Myanmar - even though that State is not party to the Rome Statute of the International Criminal Court - to Bangladesh which is a State party. In other words, an alleged crime whose elements were largely committed within Myanmar but completed in Bangladesh, are within the territorial jurisdiction of the Court. [here] This decision, outlined by James Hendry in an earlier article

of this Journal, is a significant departure from past ICC cases which focus on conduct occurring solely within the boundaries of one state. [See Analysis: The International Criminal Court Decides that It Has Jurisdiction Over the Alleged Deportation of the Rohingya]

The Chamber's decision has effectively expanded the reach of the Statute, at least in theory. Whether the Court will ever be able to prosecute successfully individuals responsible for alleged crimes in Myanmar is far less certain, given the absence of Myanmar's cooperation and the onerous demands already borne by the Office of the Prosecutor. This is discussed further below.

As a result of Pre-Trial Chamber I's decision, the Prosecutor applied to Pre-Trial Chamber III (the "Chamber") to invoke the power given to her under art. 15 of the Statute to initiate an investigation *proprio motu*. To do so, she needed to convince the Chamber that there was a reasonable basis to proceed with an investigation, and that the case appeared to fall within the jurisdiction of the Court (art. 15(4)).

To assess whether the case appeared to fall within the Court's jurisdiction, the Chamber considered if there was sufficient evidence of the following three elements:

- one of the two requirements contained in article 12(2) of the Statute were present (jurisdiction *ratione loci* or r*atione personae*);
- the conduct fell within the category of crimes set out in article 5 and defined in articles 6 to 8 bis of the Statute (jurisdiction *ratione materiae*); and
- the temporal conditions specified in article 11 of the Statute were present (jurisdiction *ratione temporis*).

Each of these elements is discussed below.

***Jurisdiction ratione loci:*** In order to satisfy the *ratione loci* requirement in article 12(2)(a), the conduct in question must occur on the territory of a State Party. As indicated above, Myanmar is not a State Party to the Rome Statute; this was the origins of the novel question raised by the Prosecutor in her earlier application before Pre-Trial Chamber I as to whether the Court could exercise jurisdiction over crimes that occurred partially on the territory of a State Party and partially on the territory of a non-State party. This Chamber agreed with Pre-Trial Chamber I that the Court may exercise jurisdiction if at least one element of the crime is committed on the territory of a State Party. In support of its conclusion, the Chamber considered the meaning of the term 'conduct' in article 12(2)(a) of the Statute and whether **all** the conduct had to take place in the territory of a State Party.

As regards the meaning of the term "conduct", the Chamber defined it a as a form of behaviour, encompassing more than a mere act. (para. 46) In essence, "conduct" captures the *actus reus* elements underlying the crimes over which the Court has jurisdiction, including the consequences of the behaviour. (para. 50)

To determine whether ***all*** the conduct had to occur in the territory of a State Party, the Chamber turned to customary international law and noted that States have discretion to assert territorial

jurisdiction in transboundary criminal matters provided there is some link to their own territory. (para. 58) As well, after considering the intent of article 12(2)(a) of the Statute, the Chamber concluded the drafters did not intend it be interpreted restrictively (paras. 59-60). The only clear limitation that follows from the wording of article 12(2)(a) is that at least part of the conduct (i.e. the *actus reus* of the crime) must take place in the territory of a State Party. (para. 61)

In regard to the crime of deportation, the perpetrator must deport […] by expulsion or other coercive acts (art. 7(1)(d)). This element may be carried out by physically removing the deportees or by coercive acts that cause them to leave the area they lawfully inhabited. (para. 52) In the circumstances of this case, the Chamber found that the crime was arguably completed when the coercive acts of perpetrators in Myanmar forced the Rohingya population to cross the border into Bangladesh. Thus, a part of the *actus reus* of the crime of deportation occurred in the territory of a State Party, namely Bangladesh.

***Jurisdiction ratione materiae:*** The Chamber considered the Prosecutor's evidence in regard to the contextual elements of crimes against humanity, in particular, article 7(2)(a) which requires 'a course of conduct involving the multiple commission of acts referred to in [article 7(1) of the Statute] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.

The Chamber concluded that there existed "a reasonable basis to believe that since at least 9 October 2016 widespread and/or systematic acts of violence may have been committed against the Rohingya civilian population, including murder, imprisonment, torture, rape, sexual violence, as well as other coercive acts, resulting in their large-scale deportation". The Chamber also determined that the many sources of evidence indicating the heavy involvement of several government forces and other state agents, provided a reasonable basis to believe that there may have been a state policy to attack the Rohingya. (para. 92)

As regards the presence of underlying article 7(1) acts, the Chamber found there was a reasonable basis to believe that various Myanmar authorities may have committed coercive acts that could qualify as the crimes against humanity of deportation (article 7(1)(d)) and persecution on grounds of ethnicity and/or religion (article 7(1)(h)) against the Rohingya population. (para. 110) In all these cases, there was a reasonable basis to believe that one element of the crime could have occurred on the territory of Bangladesh.

Of interest is the Chamber's position that the Court may consider facts falling outside its jurisdiction in a specific case in order to establish the contextual elements of the underlying crimes. Specifically, in the circumstances of this case, the Chamber considered information regarding alleged coercive acts (including murder, forcible transfer of population, imprisonment, torture, rape or persecution) which allegedly occurred entirely on the territory of Myanmar in order to evaluate whether the Prosecutor had a reasonable basis to believe that an attack against the Rohingya civilian population pursuant to a State policy may have occurred. In other words, although the Court does not have jurisdiction over

these alleged crimes per se, it considered them in order to establish whether or not the contextual elements of crimes against humanity (e.g., a state policy) may have been present. (para. 93)

***Jurisdiction ratione temporis:*** The Court has jurisdiction over crimes committed after the entry into force of the Statute or, where a State became party to the Statute at a later date, after the entry into force of the Statute for that State (art. 11). The Statute entered into force for Bangladesh on June 1, 2010. In the circumstances of this case, the Court found that the alleged crimes had been partially committed on Bangladeshi territory since at least October 9, 2016 and thus, the Court could assert jurisdiction *ratione temporis* from that date. (para. 114)

As regards admissibility criteria other than jurisdiction, the Chamber chose not to assess complementarity (i.e., that the Court may exercise jurisdiction only if a state is unable or unwilling genuinely to investigate or prosecute under its national legal system) as it had not received submissions from Myanmar. Moreover, an admissibility challenge in this regard could still be brought at a later stage under article 19 of the Statute if Myanmar decided to participate (paras. 116-117). Additionally, according to the Chamber, the gravity threshold was easily met by the mere scale of the alleged crimes and the number of victims allegedly involved. (para. 118) Similarly, the Chamber concluded that the interests of justice would be served by an investigation, noting in particular the multitude of victims' representations that sought such an investigation. (para. 119)

In an unusual turn, based on the above findings, the Chamber decided to grant the Prosecutor broader authorisation than she had requested. The Prosecutor had sought authorisation to investigate crimes allegedly committed since October 9, 2016, in the context of the 2016 and 2017 waves of violence in Rakhine State, Myanmar, as well as any other crimes sufficiently linked to these events, where at least one element of the crime occurred on the territory of Bangladesh. In addition to granting this request, the Chamber broadened the territorial scope to include alleged crimes committed *at least in part on the territory of other States Parties*, irrespective of the nationality of the perpetrators, provided the crimes are sufficiently linked to the situation described in the Chamber's decision (paras. 124-25).

The Chamber also enlarged the material scope by stating that during the course of evidence gathered during the investigation, the Prosecutor could extend her investigation to other crimes against humanity or other article 5 crimes, as long as they remain within the parameters of the authorised investigation. (para. 126) In regard to this enlargement, the Chamber noted that the reason for subjecting to judicial scrutiny the Prosecutor's ability to trigger an investigation was to prevent 'unwarranted, frivolous, or politically motivated investigations' (art. 15). This objective is achieved once a reasonable basis has been established to believe that 'at least one crime within the jurisdiction of the Court
has been committed' and the potential case(s) are admissible (article 53(1)). (para. 127) Additionally, the Prosecutor's investigatory powers are limited at the preliminary examination stage. According to the Chamber, it would be contrary to the obligation in art. 54(1) to 'extend the investigation to cover all

facts and evidence', '[i]n order to establish the truth' if the Prosecutor were confined only to the incidents she was able to uncover at the preliminary examination stage. (para. 128) This interpretation is also consistent with the approach adopted following a referral by the Security Council or a State Party. (para. 129) Finally, requiring the Prosecutor to request authorisation every time she wishes to add new incidents to the investigation would be contrary to the goals of efficiency of proceedings and effectiveness of investigations. (para. 130)

As regards the temporal scope of the investigation, the Chamber authorized the commencement of the investigation from the date Bangladesh became a State Party – that is, June 1, 2010 – rather than the date of October 9, 2016 requested by the Prosecutor. The Chamber did so because of evidence suggesting that some of the alleged crimes had been committed prior to October 2016. (para. 131) Additionally, the Chamber stated the Prosecutor could extend her investigation to crimes commenced before June 1, 2010 so long as the crimes continued after that date. (para. 132) Lastly, the Chamber found that crimes committed after the issuance of its decision would still fall within the temporal scope of the authorised investigation.

With this decision, the Prosecutor can commence her investigation and if she finds sufficient evidence to establish that specific individuals bear criminal responsibility, she can then request Judges of Pre-Trial Chamber III to issue either summonses to appear or warrants of arrest. The responsibility to enforce warrants of arrest issued by an ICC Chamber remains with States Parties to the Rome Statute who have a legal obligation to cooperate fully with the ICC. Other States may also cooperate with the ICC on a voluntary basis. Myanmar has publicly stated that it rejects the Chamber's decision and specifically, the Court's jurisdiction in regard to alleged crimes committed against the Rohingya. [here]

Realistically, this means that there may never be a trial; rather, the fate of potential accused may be that they can never leave the territory of Myanmar without fearing arrest. The Prosecutor is also empowered to collect broad evidence permitting the creation of an important record and a concrete acknowledgement of the suffering and abuses endured by a vast number of Rohingya.

While there is much reason to applaud the Chamber's expansive interpretation of the Court's jurisdiction, there is also reason for pause. As noted in an earlier Journal article [The ICC's Investigation Problem and Safeguarding Justice for the Rohingya], "[t]he difficulties inherent to the particular investigation of the Situation in Bangladesh/Myanmar will do nothing but further tax the limited investigatory resources of the OTP". In fact, the already overburdened and under-resourced Prosecutor's office could face further demands if there are efforts to initiate actions elsewhere where conflict and alleged crimes in a non-State Party have spread to the territory of a State Party. In this regard, similar arguments have been presented to the ICC on behalf of Syrian refugees who have been forced to flee to neighbouring Jordan, which like Bangladesh, is a signatory to the Rome statute. [here]

It should also be kept in mind that there exist other fora actively examining the Rohingya situation. The U.N. Human Rights Council set up the Independent International Fact-Finding Mission on Myanmar, which was eventually replaced with the Independent Investigative Mechanism for Myanmar in September 2018, In November of this year, The Gambia filed an application instituting proceedings and requesting provisional measures at the International Court of Justice (the "ICJ") in relation to the genocide allegedly committed by Myanmar against the Rohingya. Although the ICJ can only consider State accountability and not individual criminal responsibility, it will be able to address potential crimes that do not have an extraterritorial component, such as genocide.

Given all of the above considerations, it may be wise to limit the instances of the Court's new-found jurisdiction to where there are limited or no effective alternatives for investigation and accountability.

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**About the author**

Irit WeiserIrit Weiser has spent most of her career with the federal Department of Justice. She was Senior General Counsel and Head of Legal Services for Health Canada and the Public Health Agency of Canada. She provided legal, policy and strategic advice to senior levels of government in regard to various health-related matters, including the Canada Health Act, food and drug regulation, quarantine, and tobacco. Prior to heading up Health Legal Services, Irit was General Counsel and Director of the Human Rights Law Section of the Department of Justice. She provided legal and policy advice, and litigation support on the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and international human rights law. Before joining the Department of Justice, Irit worked for the Lawyers Committee for Human Rights in New York. She has also taught International Human Rights at the Faculty of Law of the University of Ottawa. Finally, she has written articles and presented papers on international human rights matters, the Canadian Charter of Rights and Freedoms, and health law. Since retiring, Irit has become involved in a number of pro bono activities, including providing legal assistance to private sponsors through the Refugee Sponsorship Support Program. She is also a member of the Research Ethics Board of the Ottawa Health Science Network, the Council of the Royal College of Physicians and Surgeons of Canada, and Royal College International.

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Image: Rohingya refugees entering Bangladesh after being driven out of Myanmar, 2017, author: Zlatica Hoke, February, 2018, Public Domain from Voice of America.