

Case Comment: Can the Office of the Prosecutor investigate the deportation of the Rohingya?

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By: James Hendry

The Office of the Prosecutor applied to the Pre-Trial Division of the International Court of Justice for the first time for an early ruling on the jurisdiction of the court. In order to commence an investigation in the Rohingya affair, the Prosecutor needed to know whether the ICC had jurisdiction where these people were forced to move from a non-State Party to a State Party.

The Office of the Prosecutor (OTP) for the first time made an application[1] for a ruling from the Pre-Trial Division (PTC) of the International Criminal Court (ICC) under art. 19(3) of the Rome Statute. The OTP asked whether the Court can exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh. This case thus presents not only a serious test of the effectiveness of the ICC in dealing with major wrongdoing, but also plays the high stakes game of isolating a very important criminal principle – the scope of the criminal conduct that gives the ICC jurisdiction over an investigation by the OTP on its own initiative under art. 13(c) – for decision outside an ongoing proceeding, giving the ICC one crack at deciding a very specific point that it may have to live with for a very long time.

The OTP noted that “consistent and credible” reports showed that more than 670,000 Rohingya people were intentionally deported across the border between Myanmar and Bangladesh. The UN High Commissioner for Human Rights had called this ethnic cleansing and the UN Special Envoy for human rights in Myanmar said that it bore the hallmarks of genocide.[2]The coercive acts occurred in Myanmar which is not party to the Rome Statute. The OTP argued that the ICC nevertheless had territorial jurisdiction under art. 12(2)(a)[3] because an essential legal element of the crime – crossing an international border – took place into Bangladesh, which is a State Party to the Rome Statute. The OTP sought the ruling in case to consider the action it might take itself under arts. 13(c) and 15[4] or in case a State Party decided to refer the situation to the ICC under arts. 13(a) and 14[5].

The OTP determined that this required not only a consideration of art. 12(2)(a) but also the elements of the crime of deportation under art. 7(1(d).[6]

The OTP had reviewed material from UN sources, NGOs, media, experts and communications received by the Office. The information revealed that Myanmar security forces and others, had deported the Rohingya without grounds in international law. The Rohingya had been persecuted for years and had their Myanmar citizenship taken from them. More recently, a “clearance operation” was commenced in August of 2017 by the security forces, including attacks involving killing, rape, torture and enforced disappearance as well as destruction of villages and livestock. The attackers appear to have targeted Rohingya people specifically in a well-organized, coordinated and systematic way, intending to drive them from Myanmar. The Rohingya refugees now live in squalid conditions in Bangladesh in humanitarian crisis.

The Crime of Deportation

The first argument made by the OTP was that the offence of deportation in art. 7(1)(d) is legally complete when individuals are made to directly cross an international border. The OTP argued that States have commonly asserted jurisdiction over conduct that occurs across states borders and that this was reflected in the drafting of art. 12(2)(a). The OTP argued that the crime against humanity of deportation across international *de jure* or even *de facto* borders has long been recognized in international customary law, while the crime of forcible transfer within a territory, also contained in art. 7(1)(d), is more recent development. While both crimes involve forced displacement, deportation protects the additional values of the right to live in one’s own State and not being forced into another, the right to the linguistic and cultural connections in their country of origin, and the detriment of being forced to become refugees in the receiving country. The separation of the crimes of deportation and forcible transfer preserves these distinctions in the values they protect.

The OTP referred to the disjunctive “or” in art. 7(1)(d), to support the argument that forcible transfer and deportation were separate crimes. The OTP then quoted the Elements of Crime,[7] stating that its wording distinguishes between deportation and forcible transfer: “The perpetrator *deported or forcibly transferred*, without grounds permitted under international law, one or more persons to another *State or location*, by expulsion or other coercive acts.”[8] (The view of the author is that this reference does not seem to help the argument greatly because “deported or forcibly transferred” and “State or

location" are both referred to disjunctively which does not make the idea that these are separate crimes very clear). The OTP went on to argue that the Elements also posed a problem by stating that ""deported or forcibly transferred" is interchangeable with "forcibly displaced."" The OTP argued that this did not merge the two crimes because this only meant that the criminal conduct – deportation and forcible transfer – falling within the definition in art. 7(2)(d) was the same conduct punishable under art. 8(2)(viii) as a war crime[9], which refers generally to forced displacement, which could not override the above quotation from the Elements that referred to deportation or forcible transfer, and, another State or location, disjunctively (which I have already suggested is not too clear). In the end, the OTP noted the "haphazard practice" of the Elements on the issue of alternate elements of crimes.[10]

The OTP then argued that the Rome Statute must be interpreted according to its ordinary meaning, context, and object and purpose, applying the approach of the Vienna Convention on the Law of Treaties.[11] As already noted, the text of the Rome Statute refers to the two crimes disjunctively. The context of the Statute uses deportation and forcible transfer as distinct alternatives. The object and purpose of the Statute employs the two offences to protect different values, consistent with their distinct scope at customary international law. The OTP also argues that the ICC has treated the crimes differently, confirming charges of forcible transfer separately from deportation, and further that the International Criminal Tribunal for the former Yugoslavia held that deportation has the extra element of crossing a border, distinguishing it from forcible transfer.[12] This is the critical point for the Prosecution.

Is the ICC's jurisdiction over criminal "conduct" refer to all or a part of the crime charged?

The OTP then reached the second issue concerning how much of the crime must be committed on the territory of a State Party to come within the jurisdiction of the ICC.

The OTP agued that art. 12(2)(a) requires only one element of an offence to take place on the territory of a State Party to give the ICC jurisdiction, basically derived from the generic language of that article referring to "the conduct in question". If one of the elements of the crime is directly crossing a border, then this is part of the "conduct in question" whether or not it is the element that involves coercion.[13] The OTP makes a "common sense" argument by saying that it would not be realistic to expect that all the elements be committed in one state to give the ICC jurisdiction because this would make prosecution of modern crimes difficult or impossible, and would be contrary to the international law of territorial jurisdiction and practice. The OTP drew on case law from the Permanent Court of International Justice, a draft convention and commentary that agreed that States can exercise "subjective territoriality" where the offence commenced on their territory and "objective territoriality" where it was completed there, to show that this is the modern trend in interpretation and practice of jurisdiction.[14] States could be presumed to want to have jurisdiction over whatever part of criminal conduct that takes place in their territory. When referring to treaty law, the OTP acknowledges that most treaties dealing with territorial jurisdiction over crimes are not specific, while couple of important ones are more specific about positive, objective jurisdiction. Further, many States apply objective territoriality in domestic legislation. Interestingly, the argument cites the Canadian practice of

exercising jurisdiction where a “significant portion” of the “activities constituting the offence took place in Canada”.[15] Indeed, the Canadian approach is cited among others as moving away from counting elements of the crime, to looking to the nature, consequences and causes of the crime to test appropriateness of jurisdiction.[16] Once again, common sense and the current situation of deportations over borders requires an objective territorial approach.

The plain meaning of art. 12(2)(a) refers to “conduct on the territory of a State Party” without saying how much conduct was necessary for jurisdiction, let alone employ the vocabulary of “elements” of a crime. “Conduct” in art. 12(2)(a) arguably means “crime” to parallel the territorial jurisdiction conferred by that article over the same type of conduct committed on registered vessels and aircraft and to avoid the semantic distinction between crime and its consequences when the latter are part of the crime. Further, the Preamble to the Rome Statute says that the drafters meant to confer jurisdiction over the most serious international crimes. This would include deportation, which is inherently international. The OTP argued that if all of the elements of a crime had to be proved to give the ICC jurisdiction, this would remove deportation from its remit, unless both were States Party, because, by definition, the criminalized conduct takes place partly in the country ejecting the subjects of the crime across a border into another country.

Using the article 19(3) power

The OTP argued that art. 19(3) was useful to allow it to protect its own and the ICC’s resources from being expended on a matter outside their jurisdiction. It is rightly used at the outset of proceedings. Article 19(3) gives the OTP discretion to seek a ruling from the ICC on a question of jurisdiction or admissibility. In the proceedings, a State that had referred a situation under art. 13 or the victims may submit their observations.

The OTP asked that the matter be assigned to a PTC for resolution of the jurisdictional issue. The OTP noted that Judge Van den Wyngaert, President of the Pre-Trial Division, had earlier held that regulation 46(3) that provides for matters not already assigned to a Pre-Trial Chamber, gives the President of the Pre-Trial Division little discretion to refuse this request.[17]

Conclusion

This case raises a significant question of jurisdiction that could be critical to the power of the ICC to overcome lacuna in the treaty process when a State refuses to join the Statute. It also places a critical jurisdictional issue before the ICC which may affect the effectiveness of the OTP and the ICC in the future. Of course, the plight of the Rohingya is a significant political issue for the world and for the ICC to act on the rule of law. Three cautions are offered by Kevin Jon Heller in *Opinio Juris*[18] that the investigation in issue would be quite circumscribed (to events in Bangladesh), that the Rohingya and NGOs would be frustrated by the scope of the investigation and that there is no real difference between crossing a border and being on the other side. Perhaps a positive answer by the ICC would entice the Security Council to engage the ICC under art. 13(b) as a political matter. The OTP has had to deal with the practicalities of prosecution before as in the *Lubanga* case’s restriction to the child

soldier issue rather than the other horrors committed that would have been harder to prove. A jurisdictional limitation would be easier to explain to a disappointed populace. Last, surely there is a difference between being forced to cross a border and the mere physical appearance on the other side.

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James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

1. At https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf.
2. Para. 2.
3. “In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.”
4. Giving the discretion to the Prosecutor to initiate an investigation of crimes under the Statute, and, should the information reveal a reasonable basis to proceed with an investigation, the Prosecutor shall make an application to the Pre-Trial Chamber for authorization of the investigation, if it agrees with the Prosecutor’s assessment that there is a reasonable basis, and that it appears the ICC has jurisdiction.
5. Article 14 allows a State Party to refer a situation to the Prosecutor in which crimes under the Statute appear to have been committed, requesting the Prosecutor decide whether specific persons should be charged.

6. “Deportation or forcible transfer of population.” Article 7(2)(d) adds: “”Deportation or forcible transfer of population” means 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;”
7. https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.
8. Art. 7(1)(d).
9. Article 7(2)(d) in note 4, art. 8(2)(e)(viii): “Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;”
10. Para. 20.
11. Para. 21.
12. Para. 26.
13. Para. 28.
14. Paras. 32-34.
15. Para. 40.
16. Para. 42.
17. Para. 59 referring to https://www.icc-cpi.int/CourtRecords/CR2014_07668.PDF, para. 3.
18. http://opiniojuris.org/2018/04/09/some-thoughts-on-the-otps-rohyingya-request/?utm_source=CICC+Newsletters&utm_campaign=3cf8a30c65-EMAIL_CAMPAIGN_2017_10_05&utm_medium=email&utm_term=0_68df9c5182-3cf8a30c65-356526825.