Analysis: The International Criminal Court Decides that It Has Jurisdiction Over the Alleged Deportation of the Rohingya

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By: James Hendry

Pre-Trial Chamber 1 of the international Criminal Court has taken a progressive step toward moving the Rohingya situation to investigation by deciding that the Court had jurisdiction over the matter. The Chamber decided the question as a result of a Request from the Prosecutor under article 19(3) of the Rome Statute.[1] The Chamber relied quite heavily on observations from amici curiae.[2] She had asked the Chamber whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people to Bangladesh, which is a State Party to the Rome Statute under article 12(2)(a) when the alleged relevant coercive acts took place on the territory of a non-State Party, Myanmar. She submitted that one of the legal elements of the crime against humanity of deportation – crossing an international boundary – occurred on the territory of a State Party. She recognized that answering this question required determining the scope of the crime against humanity of deportation under article 7(1)(d) as well as the nature of territorial jurisdiction granted the Court under article 12(2)(a).

Overcoming the traditional judicial concerns about ensuring that the Chamber was not giving an advisory opinion without a concrete basis in the facts of a case – concerns raised by the lone dissenting judge – the Chamber took a step toward what might be speedier justice in this matter.

In addition to the Chamber majority decision, this article will review the reasons of the dissenting judge in some detail as they provide an interesting contrast with those of the Chamber. He looks at the process in a much more traditional way.

Jurisdiction to answer the Prosecutor's request

The Prosecutor asked the Chamber to answer the core question of jurisdiction she put to it prior to conducting a preliminary examination because the text of article 19(3) was not qualified by the need for the existence of a "case". She argued that the object and purpose of article 19(3) support a broad interpretation, including determining the Court's jurisdiction prior to her taking a contentious course of action.

The Chamber avoided a "controversial" argument about article 19(3) in favour of one not raised by the Prosecutor. The Chamber interpreted the public position of Myanmar – that the Court had no jurisdiction over it as a non-State Party – as a dispute concerning the judicial functions of the Court under article 119(1) which must be settled by decision of the Court. It noted that academics thought this provision included the Court's jurisdiction. The Chamber held that this article gave it power to decide the Prosecutor's question, leaving article 19(3) to the analysis of the dissenting judge to be discussed later in this article.

The Chamber added that it could alternatively decide the Prosecutor's question based on the well-established principle that enabled an international tribunal to determine the extent of its jurisdiction, "*la compétence de la compétence*," because it was entitled to apply international law by article 21(1(b), having first applied the Rome Statute as required by article 21(1)(a). The Chamber did not want to analyze the application of the principle. It felt it was sufficient to note that the Prosecutor's question was concrete and not abstract because it was based on individual communications received by the Prosecutor under article 15 as well as public allegations about the alleged deportation of the Rohingya people.[3]

The Chamber spent considerable time dealing with the international legal personality of the Court in the context of its view of Myanmar's public position that it was not a party to the Rome Statute that makes the Court a body operating on behalf of and with the consent of States Party.[4] Myanmar relied on article 34 of the Vienna Convention on the Law of Treaties providing that "no treaty can be imposed on a country that has not ratified it." The Chamber then engaged in an interesting discussion of the concept of "objective international personality," a personality that did not arise from the recognition of individual states alone.[5] The Chamber observed that this idea supports the power of the Security Council to act against non-Member States of the UN in cases of threats to peace and security and is an illustration of the point that the UN Charter contains purposes that are not just *inter partes* (that is, between the parties) but *erga omnes* (that is, in relation to everyone). The Chamber considered the

application of this idea to the Court. It observed the commitment of States to an 'international penal tribunal' in the Genocide Convention and observed the significant number of States Party to the Rome Statute and the support of those who did not ratify it for such an international court. The Chamber noted that the objective legal personality of the UN assists the Court when the Rome Statute enables the Security Council to bind non-States Parties who are Members of the UN to cooperate with the Court thereby creating a relationship between the UN and the Court.[6] Additionally, it noted connections between the Rome Statute and non-States Parties: (a) through the *erga omnes*purposes of the Rome Statute and the fact that its terms were adopted from "quasi-universal treaties", that some of its provisions are considered customary international law and that some of them were adopted from established interpretations of the laws of war by international criminal tribunals, (b) that the double jeopardy principle is applicable to offences tried by the Court and then re-tried before some non-State Party's national tribunals with the agreement of the re-trying State even if it is a non-State Party, and (c) the agreement by non-Party States to cooperate with the Court, by executing arrest warrants, approving Security Council referrals to the Court, not using their veto power, and by acting as observers at Assemblies of States Parties. The Chamber concluded that "the vast majority of members of the international community" had acted to give the International Criminal Court objective international personality to act against impunity for the most serious of crimes, engaging with States Party and non-State Parties alike.[7]

Presumably, the Chamber was responding gently to Myanmar's assertion that it had not established a relationship with the Court by not becoming a party to the Rome Statute. The Chamber seems to be moving towards a more expansive basis for asserting the Court's jurisdiction by this extended discussion of objective international personality.

However, having engaged in this fascinating discussion, the Chamber said that this did not imply *erga omnes* power in this case and that it must look at its jurisdiction under the Rome Statute itself.

The Chamber's analysis of the Prosecutor's question

The Chamber decided that to answer the Prosecutor's question, it had to determine whether the scope of article 7(1)(d) ("deportation or forcible transfer of population") was broad enough to constitute "the conduct in question" occurring on the territory of a State Party, Bangladesh, to give the Court jurisdiction under article 12(2)(a). But the Chambers first made it clear that it was not making any findings of fact.[8]

Article 7(1(d)

The Chamber determined that the displacement of a people across a border constituted a specific element of the crime against humanity of the separate crime of deportation described in article 7(1)(d) because deportation required a destination.[9] Its analysis was textual: "deportation and forcible transfer" were separated by an "or". The Elements of Crime[10] related to article 7(1)(d), link conduct – persons being "deported or forcibly transferred" – and destination disjunctively. Further, deportation is characterized by displacement of persons from lawful residence in one State to another; forcible

transfer, on the other hand, occurs within one State. Tribunals applying international criminal law recognized deportation as a crime against humanity before they recognized forcible transfer. International law in general also recognizes the difference between the two crimes based on destination. Accordingly, deportation is a separate crime against humanity from forcible transfer. The Chamber went on to observe that the object and purpose of the Rome Statute supported this conclusion by using deportation and forcible transfer to protect different legal interests: the former protecting the right to live in the State in which the victims were lawfully present; the latter to reside in the area of their lawful residence within a State. The Court had itself made the distinction between crimes of deportation and forcible transfer.[11]

Importantly for the Prosecutor, the Chamber made the specific finding that the displacement across a border constitutes a specific element of the crime of deportation.[12] It cited the first element of the Elements of Crime document pertaining to article 7(1)(d) that requires that the "perpetrator deported…without grounds permitted under international law, one or more persons to another State…by expulsion or other coercive acts". The reason was that destination was essential to the conduct criminalized. The Chamber added that "expulsion or other coercive acts" could include a great variety of heinous conduct.

Article 12(2)(a)

The Chamber decided that the Court had jurisdiction over the "inherently transboundary nature of the crime of deportation in the Statute without limitation" when one element of the crime or part of it occurred on the territory of the State Party under article 12(2)(a).[13] The Chamber agreed with the Prosecutor that article 12(2)(a) is satisfied if one element of a crime occurs on the territory of a State Party.[14] This was consistent with a contextual interpretation of article 12(2)(a) which under article 31(3)(c) of the Vienna Convention on the Law of Treaties includes international law which the Chamber observed permits a State to exercise its criminal jurisdiction pursuant to its interpretation of jurisdiction.[15] It cited the Permanent Court of International Justice which held that the territoriality of criminal law is not an absolute principle of international law and was not necessarily limited by territorial sovereignty.[16] It then embarked on a review of national jurisdictions where States could exercise criminal jurisdiction where only one element or some part of a crime was committed on its territory. It noted Myanmar is party to treaties that require it to take jurisdiction over crimes not committed within its borders, which is true of its domestic criminal law as well as that of Bangladesh.

The Chamber found support for the conclusion that the Court had jurisdiction where one element of the crime occurred on the territory of a State Party based on its conclusion that the object and purpose of the Rome Statute was to be achieved by a compromise by States at the Rome Conference that allowed the Court's to assert jurisdiction in the same circumstances as States Parties within their legal systems and consistent with international law.[17] The Chamber held that a restrictive interpretation that would exclude the Court's jurisdiction where one or more elements of a crime were committed on the territory of a non-State Party would fall short of the object and purpose. There was further definitional support for this conclusion in the very transboundary nature of deportation. The prohibited conduct of

this crime necessarily takes place on the territory of at least two States. As already noted, the Rome Statute does not specify that these States must be parties.

One question that was left open is how much of the deportation can the Prosecutor investigate? The Chamber seems to have answered this. Expulsive or coercive acts resulting in deportation commenced in a non-State Party's territory, leading victims to cross a border with a State Party are covered by article 12(2)(a). The Chamber concluded that in the circumstances identified by the Prosecutor, "the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold."[18]

Interestingly, the Chambers came to its conclusion that the Court has jurisdiction over the alleged deportation of the Rohingya without prejudice to subsequent findings on jurisdiction at a later stage of the proceedings.[19] Is this an advisory opinion or not? It was certainly meant as a spur to hurry the Prosecutor along.

Beyond deportation

The Chamber emphasized that its ruling meant that if any element of another crime besides deportation were committed in a State Party, that crime would come under the jurisdiction of the Court for the same reasons. This would include the crime of persecution under article 7(1)(h), which must be committed in connection with any other crime in the jurisdiction of the Court such as deportation, provided it was proved to have been committed against "any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law".

Noting that the Rohingya in Bangladesh allegedly live in appalling conditions in Bangladesh and that Mayanmar supposedly impedes their return even in the face of repatriation agreements, the Chamber also observed that this could breach article 7(1)(k) prohibiting "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

The Chamber went on to say that arbitrarily preventing a person from entering their own country, an element of which taking place on the territory of Bangladesh, was contrary to article 12(4) of the International Covenant on Civil and Political Rights and other treaties, and was similar to the crime of persecution that prohibits severe and intentional deprivation of fundamental human rights contrary to international law under article 7(2)(g), and preventing relief from the suffering falling under art. 7(1)(k).[20]

Procedural matters

The Chamber made two final comments. It expressed its concern that the Prosecutor made her Request as part of a "pre-preliminary examination" when article 15 did not contemplate such a procedure. It held that, based on the state of the evidential review by the Prosecutor, and this Request

concerning jurisdiction, that she was already engaged in her preliminary investigation pursuant to article 15(6). The Chamber then urged the Prosecutor to decide whether to investigate without delay. It emphasized that the decision need only be made with a "reasonable basis" under articles 15(3) and 53(1) – the lowest evidentiary standard in the Rome Statute – and did not require a complex or conclusive analysis and should be made considering the fallibility of the memory of witnesses and the need to respect the rights of victims to participate in the process of finding the truth and obtaining reparations.

The dissent

The dissenting judge would have refused to address the jurisdictional issue in the Prosecutor's Request because it would be tantamount to providing an advisory opinion based on "imprecise and selective submissions" of the Prosecutor before a preliminary examination had been initiated to determine that there was a reasonable basis to proceed with an investigation.[21] To the Prosecutor's argument that article 19(3) did not refer to a context for the determination of jurisdiction, he replied that the context of article 19 and rule 58(2) on the procedure for determining jurisdiction, which he was bound to consult because of article 31(1) of the Vienna Convention on the Law of Treaties, suggested that it applied only after a case had been defined by the Prosecutor.[22] He went as far as to suggest that the Chamber's broad interpretation might lead to abuse of process by the Prosecutor.[23]

The dissenting judge also thought that the Chamber had wrongly entertained the Request when it based its action on article 119(1), which empowers the Court to settle any disputes concerning its judicial functions. He was concerned that the Chamber rather than the Prosecutor raised this unprecedented argument at this point without the full reasoning expected of judges, simply relying on academic interpretation that it related the Court's jurisdiction.[24] It seems that he was preoccupied with a judge's concern that the lack of argument resulting from the Chamber's own raising this issue did not allow for a full analysis, particularly about why it chose to take this step at the pre-examination stage. He illustrated his concern about the lack of analytical rigour by noting that article 119(1) was not directly related to jurisdiction, which was addressed by specific statutory provisions and that article 119(1) is found among the final, specific provisions in the Rome Statute.[25] More specifically, he could not agree with the Chamber that Myanmar's refusal to cooperate with the Court and its diplomatic statements that the Court did not have jurisdiction over non-State Parties created a "dispute" between Myanmar and the Court concerning a judicial function. The Prosecutor was the interested party at the pre-examination stage of the matter, not the Court.[26] The Prosecutor had not even yet asked the Court to assert its jurisdiction but had only asked for assistance in her deliberations.[27] Further, this was not even a dispute between Myanmar and the Prosecutor. Part of the problem as he saw it was that the Chamber had not properly defined what a dispute was for article 119(1) purposes. In his view, the cases cited by the Chamber showed that a "dispute" is a legal controversy between two parties about their respective rights and did not apply to the relationship between a State and the Prosecutor.[28] He noted that the Chamber did not decide who can present an article 119(1) dispute to the Court, though article 119(2) suggested it would be disputes between two States Party.[29] He cynically concludes this part of his reasons by saying that a "dispute" is "an argument that is invoked to

artificially create a legal basis for a decision."[30]

The dissenting judge also took the position that the principle "*la compétence de la compétence*" could only be applied in the context of a "case" or "dispute" and so could not be an alternative basis for the Chamber's ruling on the Request. In his view, this principle's rationale was to resolve conflicts of law to prevent a unilateral obstruction by litigation or arbitration.[31] There was neither a case nor dispute here at this stage of the proceeding to cause these problems. There were no gaps in the Rome Statute or Rules that had to be filled by invoking this principle to determine that a pre-examination question by the Prosecutor had to answered before deciding whether to proceed with an investigation.[32] To step in here would be to "usurp" the role of the Prosecutor.[33]

The dissenting judge was also concerned that article 19 already enabled the Chamber to decide the question of jurisdiction. To make such a determination this early in the proceedings on other bases, which might have to be re-litigated, was contrary to the rule against superfluity and could potentially produce inconsistent results.

The dissenting judge concluded with re-stating the traditional judicial concerns about advisory opinions. Such opinions tended to be "dogmatic" and "abstract", lacking the concrete base in facts characteristic of "ordinary criminal procedure".[34] He interpreted the Prosecutor's statement that she wanted the ruling to assist her in her decision about concerning a preliminary examination, as excluding the binding nature of the ruling, a point on which he sees the Chamber to be unclear on as well, emphasizing his concern that this this is an advisory opinion only.[35] He finishes with "Expedience cannot come at the cost of full, robust, and in-depth contemplation of the complex issue of jurisdiction."[36]

Conclusion

The Pre-Trial Chamber took a brave step to move justice in the Rohingya situation forward. The Chamber did what it thought necessary to advance the course of justice quickly, coming to a progressive interpretation of the Rome Statute. Its decision will allow the matter to proceed. The dissenting judge articulated the traditional judicial reasons about the dangers of advisory opinions and clearly expressed his preference for careful construction of a concrete case to properly ground a judicial decision. His reasons would have resulted in the affirming of traditional procedure, but set back the clock for the Prosecutor's office, the inevitable price for the Prosecutor's taking a chance on getting an answer to her Request.

After the release of the Chamber's decision, the Prosecutor announced that she will proceed with a full-fledged preliminary examination on deportation and other crimes mentioned by the judges.[37]

On September 20, 2018, the House of Commons of Canada unanimously adopted the following motion:

That the House:

(a) endorse the findings of the UN Fact Finding Mission on Myanmar that crimes against humanity have been committed by the Myanmar military against the Rohingya and other ethnic minorities and that these horrific acts were sanctioned at the highest levels of the Myanmar military chain of command;

(b) recognize that these crimes against the Rohingya constitute genocide;

(c) welcome the recent decision of the International Criminal Court that it has jurisdiction over the forced deportation of members of the Rohingya people from Myanmar to Bangladesh;

(d) call on the UN Security Council to refer the situation in Myanmar to the International Criminal Court;

(e) call for senior officials in the Myanmar military chain of command to be investigated and prosecuted for the crime of genocide.[38]

There has been a major push by many groups such as the Canadian Centre for International Justice[39] and individuals such as Erna Paris[40] for Canada to take a leading role in taking steps to end the impunity of Myanmar leaders.

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References

1. https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf, see James Hendry, “Can the Office of the Prosecutor Investigate the Deportation of the Rohingya?” (2018) 2 PKI Global Just J 13.
2. The Chamber granted leave to members of the Canadian Partnership for International Justice; the International Commission of Jurists; the Women’s Initiatives for Gender Justice; Naripokkho; Ms. Sara Hossain and the European Center for Constitutional and Human Rights; Guernica 37 International Justice Chambers; and the Bangladeshi Non-Governmental Representatives.

3. Note 1 para. 33.
4. Id. para. 35.
5. Id. paras. 37 and 38 citing *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174, 185, where the Court recognized that the vast majority of the members of the international community had the power to bring into existence an entity with objective international personality with the power to bring international claims.
6. Id. para. 43.
7. Id. para. 48.
8. Id. para. 50.
9. Id. para. 60.
10. See https://www.legal-tools.org/doc/3c0e2d/pdf/.
11. Note 1 para. 59.
12. Id. para. 60.
13. Id. paras. 71 and 72.
14. Id. para. 64.
15. Id. para. 65.
16. *The Case of the S.S. Loftus (France v. Turkey)*, Series A no. 70, Judgment, 1927, 20. “Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.” Online at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm at para. 50.
17. Note 1 para. 70.
18. Id. para. 73.
19. Id.
20. Id. para. 77.
21. Id. dissent, paras. 4 and 5.
22. Id. para. 12.
23. Id. para. 13.
24. Id. para. 14.
25. Id. paras. 14 and 21.
26. Id. para. 16.
27. Id. para. 19.
28. Id. para. 17.
29. Id. para. 20.
30. Id. para. 22.

31. Id. para. 26.
32. Id. para. 29.
33. Id. para. 30.
34. Id. paras. 35 and 37.
35. Id. paras. 39 and 40.
36. Id. para. 42.
37. See https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya.
38. Hansard, House of Commons Debates, vol. 148, no. 322, 1st Session, 42nd Parliament, 21650, September 20, 2018 online http://www.ourcommons.ca/Content/House/421/Debates/322/HAN322-E.PDF#pag….
39. See https://www.ccij.ca/news/canada-can-now-bring-justice-rohingya/.
40. Erna Paris, “What Myanmar will tell us about the international rule of law”, Globe and Mail, September 1, 2018, 4.