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Date: **11 July 2018**

PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE COURT

Public

Prosecution Response to Observations by Intervening Participants

Source: **Office of the Prosecutor**

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Introduction

1. The Prosecution has sought a ruling on the Court's jurisdiction under article 12(2)(a) of the Rome Statute[1]—specifically, to verify that the Court has territorial jurisdiction when persons are deported from the territory of a State which is not a party to the Statute directly into the territory of a State which is a party to the Statute. This is not an abstract question but a concrete one, which has arisen in the Prosecution's consideration of allegations that hundreds of thousands of the Rohingya people have been deported from Myanmar to Bangladesh.

2. The Prosecution welcomes and appreciates the intervention in these proceedings by five *amici curiae*,[2] with leave of the Pre-Trial Chamber,[3] and two groups of victims seeking participation (collectively, the "Interveners").[4] Consistent with rule 103(2) of the Rules of Procedure and Evidence, and according to the further oral direction of the Pre-Trial Chamber,[5] the Prosecution hereby provides its observations on certain matters arising from those interventions.

Submissions

3. The Interveners unanimously endorse the cardinal points of the Request.[6] They agree that the territorial jurisdiction granted to the Court under article 12(2)(a) of the Statute does not require that all elements of the crime occurred on the territory in question, and that the elements of deportation under article 7(1)(d) necessarily extend beyond the territory of the State from which the victim(s) are deported. The

[1] *See* ICC-RoC46(3)-01/18-1 ("Request").
[2] *See* ICC-RoC46(3)-01/18-20 ("International Commission of Jurists", or "ICJ Brief"); ICC-RoC46(3)-01/18-21 ("Bangladeshi NGOs", or "Bangladeshi NGO Brief"); ICC-RoC46(3)-01/18-22 ("Women's Initiatives for Gender Justice and Others", or "Gender Justice Brief"); ICC-RoC46(3)-01/18-23 ("Canadian Partnership for International Justice", or "CPIJ Brief"), also filed as ICC-RoC46(3)-01/18-25; ICC-RoC46(3)-01/18-24 ("Guernica 37", or "Guernica 37 Brief").
[3] *See* ICC-RoC46(3)-01/18-7; ICC-RoC46(3)-01/18-8; ICC-RoC46(3)-01/18-15; ICC-RoC46(3)-01/18-17; ICC-RoC46(3)-01/18-18. *See also* ICC-RoC46(3)-01/18-12 (rejecting an additional request under rule 103).
[4] *See* ICC-RoC46(3)-01/18-9 ("Shanti Mohila Victims", or the "Shanti Mohila Brief"); ICC-RoC46(3)-01/18-26 ("Tula Toli Victims", or the "Tula Toli Brief").
[5] *See* ICC-RoC46(3)-01/18-T-1-Red, pp. 36:23-37:1.
[6] *See e.g.* Shanti Mohila Brief, paras. 4, 34-35; ICJ Brief, paras. 2, 88-89; Bangladeshi NGO Brief, paras. 21, 25; Gender Justice Brief, para. 49; CPIJ Brief, paras. 4, 18, 32; Guernica 37 Brief, paras. 3.5, 4.1, 4.9, 9.4, 9.8; Tula Toli Brief, paras. 9, 12, 92.

Interveners concur with the factual allegation that hundreds of thousands of the Rohingya people have been deported from Myanmar to Bangladesh.[7]

4. Conversely, no organisation or State has sought to intervene in these proceedings to express any *contrary* understanding of the drafters' intentions in framing the jurisdictional provisions of the Statute. This is wholly consistent with the implication of the Interveners' observations that there is nothing exceptional in the jurisdictional principles described in the Request.

5. The Prosecution is also mindful, as some of the Interveners urge, that the procedure under article 19(3) is not a vehicle for the Court to render purely advisory opinions, or to rule on matters which are abstract or hypothetical.[8] In this context, provided the Court has jurisdiction—which is the sole point at issue in this Request under article 19(3)—the subsequent conduct of any preliminary examination, investigation, or prosecution are exclusively matters for the Prosecutor.[9] For this reason, the Request was framed in terms which, although adequate in the Prosecution's view to confirm that the Court does indeed have jurisdiction in the present concrete circumstances, were otherwise as simple and narrow as possible.

6. Consequently, broader matters of potential criminal liability going beyond those strictly necessary to verify the jurisdiction of the Court need not—and should not—be addressed by the Pre-Trial Chamber at this time.

7. Provided that the Court has jurisdiction under article 12(2)(a), the Prosecution will in any event give appropriate consideration to crimes under article 5 of the Statute which fall within the applicable jurisdictional parameters.[10] For example,

[7] Indeed, five of the Interveners further expand on the factual context in this regard: *see e.g.* Shanti Mohila Brief, paras.11-24; Bangladeshi NGO Brief, paras. 7-20; Gender Justice Brief, paras. 7-11, 41-47; Guernica 37 Brief, paras. 2.1-2.40; Tula Toli Brief, paras. 10, 13-57, 62.
[8] *See below* paras. 12-13 *See also* ICC-RoC46(3)-01/18-T-1-Red, pp. 8:21-9:20.
[9] *See e.g.* Statute, arts. 15, 42(1), 53-54, 58(1) and (6)-(7), 61(3) and (7)-(10).
[10] In this respect, the recent remarks by the Special Rapporteur to the UN Human Rights Council, while accurate, may also be to some degree premature—as explained below (*see below* paras. 35-40), the Request *precedes* any preliminary examination by the Prosecution which would more fully address the variety of potential criminal allegations which may fall within the Court's jurisdiction: *see Oral Update by Ms. Yanghee Lee, Special*

consistent with its position in the Request,[11] the Prosecution agrees that all forms of sexual violence, as well as other forms of conduct, may in principle establish the coercive element for deportation.[12] Should the Prosecution proceed to investigate the deportation of Rohingya from Myanmar to Bangladesh, it will undoubtedly investigate these allegations in that context.[13] Its own internal policy—instituted precisely to recognise the gravity of such conduct[14]—demands no less.[15] Yet, consistent with the limited scope and purpose of a ruling under article 19(3), this does not mean the Pre-Trial Chamber should frame its decision with a view to attempting to "draw the Prosecution's focus and resources" in one direction or another in any subsequent proceedings.[16]

8. Consistent with these remarks, the Prosecution will therefore address the Interveners' observations concerning: the article 19(3) procedure; the elements of the crime of deportation under article 7(1)(d); allegations of other crimes arising from the concrete circumstances identified in the Request; and, the concept of territorial jurisdiction under article 12(2)(a) of the Statute.

9. By contrast, the Prosecution will not further address matters which appear to be wholly unrelated to the scope of the Request, such as the judicial capabilities of Bangladesh,[17] or allegations related to other conduct around the world.[18]

Rapporteur on the Situation of Human Rights in Myanmar, at the 38th Session of the Human Rights Council, 27 June 2018 ("The recent request for a ruling on jurisdiction under Article 19(3) of the Rome Statute over the alleged deportation of the Rohingya people from Myanmar to Bangladesh by the [ICC] Prosecutor is a welcome effort. However the request is limited to one specific crime among the widespread and flagrant violations of human rights and international humanitarian law that have occurred").

[11] *See* Request, paras. 9-10. *See also* ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014 ("OTP SGBC Policy"), para. 34 (noting that crimes against humanity including deportation "may also have a sexual and/or gender element").

[12] Gender Justice Brief, paras. 12-21, 36.

[13] *See* ICC-RoC46(3)-01/18-T-1-Red, pp. 16:3-16:9. *See further below* paras. 35-40.

[14] *See also* Gender Justice Brief, para. 38.

[15] *See e.g.* OTP SGBC Policy, paras. 14, 21, 23-24, 28, 37, 39-40, 45-46, 49, 51, 54, 59.

[16] *Contra* Gender Justice Brief, para. 37. *See also* para. 39.

[17] *See* Guernica 37 Brief, paras. 5.1-5.133. In particular, since the Request is concerned exclusively with the legal question of the scope of this Court's *jurisdiction* under article 12(2)(a), discussion of the possibilities for domestic prosecution is wholly irrelevant. Issues of admissibility under article 17 arise, at the earliest, only when the Prosecution has identified a potential case, to which the Court's jurisdiction is a condition precedent.

A. Requests for a ruling under article 19(3)

10. The Interveners raise two aspects of the procedure under article 19(3), relating to the potential scope of its application and the standing of victims' representatives to participate in proceedings under article 19(3) brought prior to the formal opening of a situation.

A.1. Article 19(3) allows for a ruling at this stage of proceedings

11. The Prosecution agrees with the Canadian Partnership for International Justice (CPIJ) that article 19(3) of the Statute is correctly interpreted, according to the governing principles of the Vienna Convention on the Law of Treaties, to conclude that:

> a request under art. 19(3) can be made to the Court, at the earliest, once the Prosecutor has entered into the statutory determination process leading to a possible preliminary [examination] and formal investigation pursuant to her duties under article 53.[19]

12. This includes circumstances, such as the present, in which the Prosecutor is prompted by information in her possession to consider the exercise of her discretionary powers under article 15—not only under article 15(3) in requesting the Pre-Trial Chamber's authorisation to open an investigation, but also under article 15(1) in taking the precedent step of determining whether to open a preliminary examination in the first place.[20] In this sense, the Prosecution concurs that article

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Consequently, "the question of jurisdiction" cannot be considered "by reference to the principle of complementarity": *contra* para. 5.6. *See also* ICC-RoC46(3)-01/18-30-Conf.

[18] *See* Guernica 37 Brief, paras. 7.1-7.17. *Compare* Tula Toli Brief, para. 73 (cautioning that "acknowledg[ing] that the Court has jurisdiction over the crimes perpetrated against the Rohingya […] is not to imply the existence of jurisdiction in relation to all international crimes which lead to cross-border refugee flows into the territory of a State Party"). The Prosecution takes no position on any factual allegations beyond those addressed in the Request.

[19] CPIJ Brief, para. 11. *See also* paras. 7, 12-16. No other Intervener has specifically addressed this question: *see* Shanti Mohila Brief; ICJ Brief; Bangladeshi NGO Brief; Gender Justice Brief; Guernica 37 Brief; Tula Toli Brief. The Prosecution notes that the CPIJ refers to "the firmly established *compétence de la compétence* principle" as a further indication "that *art[icle] 19 of the Statute must not be construed restrictively*", but not as a free-standing basis for the Pre-Trial Chamber to rule on jurisdictional matters in the present circumstances if the Prosecutor does not have standing under article 19(3). *Compare* CPIJ Brief, para. 13 (emphasis added), *with* ICC-RoC46(3)-01/18-T-1-Red, pp. 24:13-27:5.

[20] CPIJ Brief, para. 14. The CPIJ refers to the power under article 15(1) as the "power to initiate investigations *proprio motu*" and the power under article 15(3) as the "decision to proceed with an investigation". To avoid

19(3) is not intended "to query in the abstract the limits or potential of the Court's jurisdiction",[21] but rather may be triggered when the Prosecutor has a "vested interest" in the sense that she may be called upon to exercise her powers under the Statute.[22]

13. The Prosecution therefore also agrees that the ruling provided by the Pre-Trial Chamber under article 19(3) is "a legally-binding decision on a legal question, not to be equated to an advisory opinion."[23] In particular, such rulings are legally binding in the sense that they determine, within a specific factual context, whether the Prosecution can or cannot exercise jurisdiction—if they decide that the Court lacks jurisdiction, then the Prosecution accepts that, as a matter of law, it cannot proceed further in that respect.[24] To say that the ruling is legally binding upon the Prosecution—as a party to the article 19(3) proceeding—does not mean, however, that it is absolutely the last word for the purpose of subsequent proceedings—if positively resolved, for example, it remains the case that an article 19(3) ruling might subsequently be revisited at later, *inter partes* stages of proceedings, such as when jurisdiction is challenged.[25]

14. The corollary of the legally binding quality of article 19(3) rulings is that they may in principle also be appealed under article 82(1)(a) of the Statute.[26] Indeed, the

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ambiguity (particularly with regard to the meaning of the term "investigation"), the Prosecution prefers its own terminology set out in the main text.

[21] CPIJ Brief, para. 10. *See also* para. 17 (article 19(3) may not be "used frivolously and outside exceptional circumstances").

[22] CPIJ Brief, para. 10. *See also* para. 14.

[23] CPIJ Brief, para. 9. *Cf.* A. Whiting, 'Process as well as substance is important in ICC's Rohingya decision,' *Just Security*, 15 May 2018.

[24] *See* ICC-RoC46(3)-01/18-T-1-Red, pp. 9:6-9:20.

[25] *See* ICC-RoC46(3)-01/18-T-1-Red, pp. 9:21-10:15. *See also* CPIJ Brief, paras. 12-13, 15-16 (distinguishing the concept of a jurisdictional "question" from a jurisdictional "challenge").

[26] *See e.g.* ICC-01/13-51 OA, para. 49 (appeals under article 82(1)(a) require the impugned decision to "consist of or [to be] based on a ruling that a case is admissible or inadmissible", *mutatis mutandis*, and "that the operative part of the decision […] pertain[s] directly to a question on the jurisdiction of the Court or the admissibility of a case"); ICC-01/09-78 OA, paras. 15 (appeals under article 82(1)(a) require the impugned decision, in its operative part, to "pertain directly to a question on the jurisdiction of the Court or the admissibility of a case", exceeding "an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility"), 17 ("[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a)"); ICC-01/04-169 OA, para. 18 ("the decision by

Appeals Chamber has already implied as much in the *Kenya* situation.[27] Further confirming the close relationship between the nature of an article 19(3) ruling and its 'appealability' is the observation by Judges Fernández de Gurmendi and Van den Wyngaert in *Comoros* that "decisions with respect to admissibility and jurisdiction have a separate appellate regime [under article 82(1)(a)] *because* it is important that they are settled as soon as possible in the proceedings."[28]

A.2. Victims' standing to participate in these article 19(3) proceedings

15. The Prosecution takes no position on the submissions by the Shanti Mohila and Tula Toli Victims concerning the particular basis on which they may be permitted to intervene in these proceedings under article 19(3).[29]

16. As the Prosecution previously recalled, the Request was filed when no relevant "situation" existed before the Court, and hence there were no existing proceedings in which relevant victims could already have been registered to participate. As such, at that time, there were no relevant victims to notify under rule 59(1)(b).[30] This notwithstanding, the Prosecution identified the desirability of ensuring that victims' interests are represented, at least through the Office of Public Counsel for Victims if not by other means.[31] In that context, the Prosecution likewise welcomes the intervention by the Shanti Mohila and Tula Toli Victims. The stance taken in the Request was borne out of practicality, and did not reflect a principled opposition to

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the Pre-Trial Chamber was based on a ruling of the admissibility of the case […] To this extent, the impugned decision is a decision 'with respect to […] admissibility,' as required by article 82(1)(a)").

[27] *See* ICC-01/09-78 OA, para. 16 (interpreting article 82(1)(a) by reference to "its relationship with other provisions of the Statute", and specifically "articles 18 and 19" which provide *inter alia* for decisions on jurisdiction or admissibility "on request of the Prosecutor"). *See also* ICC-01/13-51-Anx OA, para. 29 (Judges Fernández de Gurmendi and Van den Wyngaert reasoning that article 82(1)(a) is of broad scope and is not limited "only […] to proceedings in respect of articles 18 and 19").

[28] ICC-01/13-51-Anx OA, para. 36 (emphasis added).

[29] *See* Shanti Mohila Brief, paras. 120-151; Tula Toli Brief, paras. 76-87.

[30] The Prosecution notes that the Shanti Mohila Victims assert that they "have communicated with the Court for the purposes of rule 59(1)": Shanti Mohila Brief, para. 140. However, the Shanti Mohila Victims appear to have applied to the Victims Participation and Reparation Section on 29 May 2018, more than a month *after* the date of the Request: Shanti Mohila Brief, para. 123.

[31] Request, para. 61.

victim representation or participation within the limited procedural framework of article 19(3).[32]

17. Beyond the following observations, therefore, the Prosecution does not consider it necessary or appropriate to express itself on the particular modality by which victims should be represented and/or may be enabled to participate in article 19(3) proceedings when convened at this early stage. The Pre-Trial Chamber can and should ensure that article 68(3) of the Statute is given due effect. However, in this context, the Prosecution does respectfully note the following considerations.

- Proceedings under article 19(3) of the Statute are "judicial proceedings",[33] in which the Prosecution agrees that victims can meaningfully participate.

- Submissions by the legal representatives of victims, or similar submissions, on legal matters relating to the jurisdiction of the Court are not only desirable as a matter of principle, reflecting the Court's commitment to the interests of victims, but may often also be helpful in practice.

- Proceedings under article 19(3) of the Statute appear to have their own participatory regime, as illustrated by rule 92, which excludes proceedings under Part 2 of the Statute from general requirements to notify victims.[34] To the extent that there may be no victims to notify specifically under rule 59(1)(b), the *lex specialis*,[35] or that a particular victim or group of victims has not been eligible for notification under rule 59(1)(b), then it may be

[32] *Cf.* Shanti Mohila Brief, paras. 131-132 ("The Prosecutor does not dispute the right of the victims to make observations, but indicates that this should be through the auspices of the Office of the Public Counsel for Victims […] or through the requesting of leave under rule 103 to file as an *amicus curiae*, rather than under article 19(3). The Prosecutor's (somewhat equivocal) resistance to participatory rights appears to rest entirely upon the timing of the Request"); Tula Toli Brief, paras. 76-78.
[33] *See e.g.* ICC-01/04-556 OA4 OA5 OA6, para. 45 ("participation can take place only within the context of judicial proceedings").
[34] *See* rule 92(1) ("This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2"). *Cf.* Shanti Mohila Brief, para. 134.
[35] *See* Tula Toli Brief, para. 77 ("Rule 59 regulates the procedure" for participation in article 19(3) proceedings). *But see* paras. 83-84 (apparently disapplying the plain terms of rule 59). The Prosecution takes no position whether rule 89 applies: para. 82.

appropriate for the Pre-Trial Chamber to entertain further requests for participation on an *ad hoc* basis, whether under rule 103 or more generally under article 68(3) and rule 93.[36]

- By the nature of requests under article 19(3), however, it may be necessary on occasion to address some matters confidentially, or on an *ex parte* basis. Consequently, in such circumstances, the scope for the participation of victims (as well as other interveners) may be limited in some respects.[37] This is a case-by-case assessment.

B. The crime of deportation under article 7(1)(d)

18. Many of the Interveners submitted observations on the crime of deportation under article 7(1)(d) of the Statute. In general, the Prosecution agrees with their emphasis on the distinct value protected by this crime, which is not the same as the value protected by the crime against humanity of forcible transfer.

19. The Interveners' perspectives on three other matters—the correct definition of the 'cross-border' element of deportation; whether deportation is a continuing crime; and the correct analysis of crimes which may be argued to have alternate elements—are also welcome, but need not be decided at this time. The Interveners do not dispute that at least one element of the alleged deportation occurred on the territory of Bangladesh, on the facts of the Request, which suffices to establish jurisdiction; they merely raise more theoretical questions about *other* circumstances in which the elements of deportation may or may not be said to be met.

B.1. The distinct value protected by the crime of deportation

20. Three of the Interveners expressly concur that the crime of deportation uniquely protects the legal right of individuals to live in the particular State in which

[36] *See also* Shanti Mohila Brief, paras. 141-147.
[37] *Compare* Shanti Mohila Brief, para. 138 (recognising that the participation of victims might in some circumstances be restricted "due to the confidential and *ex parte* nature of the […] proceedings"), *with* paras. 148-149. *See also* Tula Toli Brief, para. 90.

they are lawfully present, with all the cultural, social, linguistic, political, economic and legal interests which may be associated with that right.[38] This perspective is further supported and reinforced by the CPIJ, which points to the caselaw of the Special Panels for East Timor and other materials,[39] and the International Commission of Jurists (ICJ), which analyses relevant international human rights law.[40] Most significantly, as the ICJ points out:

> While in principle, non-nationals must be guaranteed enjoyment of the same rights as nationals, beyond those very small number of political rights identified in Article 25 of the ICCPR, many countries typically do not ensure the equal protection of rights as a matter of domestic law and practice. […] In this regard, there is a tendency to treat non-nationals primarily as subjects of immigration or refugee law over which States typically enjoy wide discretion. As a result, non-nationals are generally restricted in practice in their right to enter any State, take up residence, move freely, exit and re-enter, work within the receiving State, participate in political life, or access State benefits.[41]

21. The circumstances in which many of the Rohingya people presently find themselves in Bangladesh—and notwithstanding even Bangladesh's best efforts to be a 'good host'—underline some of the unique and particular harms that victims of deportation may suffer.

B.2. Defining the 'cross-border' element of deportation

22. While the Interveners agree that deportation must contain a 'cross-border' or 'transnational' element, and that this is what legally distinguishes it from the separate crime of forcible transfer,[42] they characterise this element in different ways.

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[38] *See e.g.* Shanti Mohila Brief, paras. 37, 40, 42, 46; CPIJ Brief, para. 47; ICJ Brief, para. 27. While none of the other Interveners directly addresses this point, nor does any of them dispute it.

[39] CPIJ Brief, para. 47 ("The Special Panels corroborate this point by identifying the status of victims as an important consequence of the distinction: those deported can qualify as refugees, while those forcibly transferred are called 'internally displaced persons' or IDPs. Our world is organized around borders; the distinction between deportation and forced displacement in the Statute merely recognizes this fundamental characteristic of public international law"). *See also* para. 48.

[40] ICJ Brief, paras. 28-30 (human rights engaged by both forcible transfer and deportation), 31-35 (human rights engaged uniquely by deportation), 36-40 (State obligations specific to deportation).

[41] ICJ Brief, paras. 33-34.

[42] *See e.g.* Shanti Mohila Brief, paras. 36-37, 39; ICJ Brief, paras. 4, 9-13, 19; CPIJ Brief, para. 32; Guernica 37 Brief, paras. 4.4, 4.9. Again, while none of the other Interveners directly addresses this point, nor does any of them dispute it. Women's Initiatives for Gender Justice and Others appear to treat forcible transfer and

In particular, two of the Interveners (the ICJ and Guernica 37) argue that it is merely the crossing of an international border which is relevant, whereas two (the Shanti Mohila Victims and the CPIJ) argue that the Prosecution must also prove entry into another State. Thus:

- The ICJ asserts that, for deportation, the victim(s) must be unlawfully and forcibly displaced "across a *de jure* border between two States or, in certain circumstances, a *de facto* border".[43] Relying on customary international law, it thus characterises the required element only as "[t]he crossing of a border"[44] without further specifying the particular destination, provided that it is 'across' a *de jure* or *de facto* international border from the point of origin.

- Guernica 37 considers that neither the Statute nor the Elements of Crimes specifically defines the term "deportation", but endorses the position that it is constituted by "the act of being forced to abandon the national territory of the State or origin".[45] It adds that, "by definition, a border situated between two countries belongs to both states, and the actions and policies that occur on the border are understood to have taken place in the territory of both countries".[46]

23. By contrast:

- The Shanti Mohila Victims argue that "mere ejection from a State (rather than into another state)" is not "sufficient to fulfil the requirements of deportation", asserting that the ordinary meanings of the terms used both

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deportation as one crime with two alternative "destination" elements but ultimately agree that "crossing of an international border indeed constitutes an element of the crime of deportation or forcible transfer, albeit an alternative one": Gender Justice Brief, para. 34, fn. 38. *See further below* paras. 32-34.

[43] ICJ Brief, para. 19.

[44] ICJ Brief, para. 21.

[45] Guernica 37 Brief, paras. 4.7, 4.9.

[46] Guernica 37 Brief, para. 4.11.

in the Elements of Crimes and the jurisprudence of the ICTY "require transfer from one State to another".[47]

- The CPIJ contends that the "mere act of crossing an international border does not complete the crime" of deportation, which "requires *entry* into 'another location' beyond that international border, be it a State, […] the high seas, or an internationally designated neutral zone", and it is the particular destination which distinguishes between deportation and forcible transfer.[48] However, it notes in the alternative that "crossing a border" necessarily "takes place on the territories of both the State from which victims are exiting and the State to which they are entering."[49]

24. Crucially, however, it is undisputed between the Interveners that, whether or not deportation requires the mere crossing of an international border or the entry into another State, this element is established by the allegations in the Request. The members of the Rohingya group who are alleged to be the victims of deportation have not only crossed the international border between Myanmar and Bangladesh, but have also manifestly entered into Bangladesh. Accordingly, for the present purposes, it is simply unnecessary for the Pre-Trial Chamber to resolve the debate between the Interveners at this time.[50]

25. For this reason, therefore, the Prosecution reserves its position on this question. Yet out of an abundance of caution, it also clarifies the reasoning behind its original legal interpretation.

[47] Shanti Mohila Brief, para. 45.
[48] CPIJ Brief, para. 33. *See also* paras. 34-49.
[49] CPIJ Brief, para. 52. *See also* paras. 50-51.
[50] Indeed, this debate is likely only to have any practical consequence in certain narrow situations in which victims are forcibly displaced over an international border but do not immediately enter another State, such as when displaced onto the high seas or any other space not subject to a State's territorial jurisdiction: *see e.g.* Request, para. 16, fn. 32; CPIJ Brief, para. 39. This issue does not arise in the concrete circumstances of the Request.

26. In the Request, the Prosecution characterised the legal element distinguishing deportation from forcible transfer as the mere 'crossing' of an international border[51]—like the ICJ and Guernica 37—because it considered that this best gives effect to the object and purpose of the crime. In particular:

- The crime of deportation is not harmful *per se* because of the particular State in which the victim ends up, but because they are ejected against their will from the State in which they were previously lawfully present.[52]

- It is highly likely that the typical perpetrator of deportation will *not* act out of a desire to force the victim into another particular State—although this may, unusually, potentially be the case on the particular allegations of the Request—but simply to remove them from the State in which the perpetrator is located. Thus, to any extent *arguendo* that requiring proof that the victim 'entered' a particular State also potentially translates to a *mens rea* requirement that the perpetrator *knew or intended the victim to enter a particular State*, this would be a retrograde step that has never previously been required in any prosecution for deportation. It would substantially deprive the crime of its object and purpose, since most perpetrators are concerned with the forcible expulsion of the victims, rather than their destination. There is no good reason to shift the emphasis in this way.

- The Elements of Crimes are not unambiguous in referring to the victim's deportation "to another State". Read in context, and in light of the applicable object and purpose, the better interpretation in the Prosecution's view is simply to require that the victim was deported *outside* the State in which they were previously lawfully present.

[51] Request, para. 16.
[52] *See above* paras. 20-21.

B.3. Whether deportation is a 'continuing' crime

27. Some of the Interveners also address the question whether deportation under article 7(1)(d) can be said to be a "continuing" crime—in other words, whether the conduct for which the perpetrator(s) may be held liable is completed the moment the victim has satisfied the 'cross-border' requirement,[53] or whether *in addition* the conduct subsequently remains "on-going" because it "entails the emergence of an unlawful state of affairs, which is then maintained by the subsequent conduct of the perpetrator."[54] Notably:

- The Shanti Mohila Victims assert that "[d]eportation must be assessed as a continuous crime", because "[w]hilst the crossing of an international border is a discrete and instaneous act of consummation, the aggravated harm that deportation prohibits, namely the removal into another State, persists until the victims are permitted to return."[55] The Tula Toli Victims take the same approach, and simply state that "the crime of deportation will not end until the conditions which forced the victims to Bangladesh no longer persist."[56]

- Women's Initiatives for Gender Justice and Others (WIGJ) agree that deportation "is only consummated if each of the […] elements […] can be established",[57] and further assert that "the crime continues for as long as the underlying acts are being committed".[58] But they conclude only that the "coercive act commences, and the arrival at a different […] state completes the crime of deportation".[59] It is thus ambiguous whether they recognise deportation as a 'continuing' crime in the same sense as the Shanti Mohila Victims (*i.e.*, a crime which can 'continue' *beyond* the point

[53] This is regardless of how this requirement is characterised: s*ee above* paras. 22-26.
[54] Shanti Mohila Brief, para. 67. *See also* paras. 68-70, 73-75.
[55] Shanti Mohila Brief, para. 81. *See also* paras. 82-87.
[56] Tula Toli Brief, para. 58.
[57] Gender Justice Brief, para. 26.
[58] Gender Justice Brief, para. 27.
[59] Gender Justice Brief, para. 35.

> at which it is initially 'completed'), or merely restate the orthodoxy that the temporal duration of deportation extends from the moment of the initial coercion until the 'cross-border' element is satisfied and thus the crime is 'completed'.[60]

28. This question is a novel one—for example, none of the *ad hoc* tribunals has, to date, prosecuted deportation as a continuing crime.[61] Yet the Prosecution again underlines that this question need not be decided at the present time in ruling upon the Request, which is framed adequately for its purpose.[62] Indeed, it is irrelevant for the present purpose whether the crime of deportation is completed the moment at which the cross-border element is satisfied or, *additionally*, continues thereafter until the unlawful state of affairs no longer exists. It is common ground between the Interveners that the alleged deportation of the Rohingya has already been completed, such as to establish criminal liability if the allegations are proved, at such time as the Rohingya crossed from Myanmar into Bangladesh. This suffices to establish jurisdiction under article 12(2)(a) for the crime of deportation.

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[60] The Shanti Mohila Victims also acknowledge this sense of the term 'continuing' crime—but the possibility that time can elapse between the satisfaction of the first element and the satisfaction of the last element has no legal bearing on the separate question whether an individual's liability extends beyond the point at which the crime is 'completed': *cf.* Shanti Mohila Brief, paras. 84-85 ("Responsibility for those coercive acts must be continuing, as a matter of law, to enable it to continue until the point at which it is consummated by the crossing of the international border […] It follows that responsibility for the coercive acts underpinning deportation must have a continuing character to encompass the essential, transnational character of the offence. However, the injurious effects of those coercive acts and their legal significance do not end there: whilst the crossing of the international border consummates deportation, 'it does not exhaust it'", citing *Popović*). Rather, in *Popović*, an ICTY Trial Chamber cited an authority of the US Supreme Court (in discussing whether common law jurisdictions consider the inchoate crime of 'conspiracy' to be a continuing crime), which in turn made clear that it was appropriate to consider a crime to 'continue' past the time of its initial 'completion' when the perpetrators created "a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation": ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Judgment, Vol. I, 10 June 2010, para. 872, fn. 3042 (quoting *United States v. Kissel*, 218 U.S. 601, 607 (1910)). The Prosecution concurs that true 'continuing' crimes (*i.e.*, crimes for which liability may be incurred even after the crime has initially been 'completed') require continuous 'maintenance' of the criminal state of affairs that has been put into place, and cannot simply be inferred from any time which may elapse in 'completing' or consummating the crime. For example, murder does not become a 'continuing' crime (*see below* para. 30, bullet 1) simply because the perpetrator kills with a slow-acting poison (thus, allowing time to elapse between their conduct and the death of the victim).

[61] Indeed, in *Gotovina*, a Trial Chamber of the ICTY considered evidence of a policy to keep "the return of Serbs" to the Krajina "to a minimum" as evidence relevant to determining the existence of a common criminal purpose, but *not* within the context of the charge of deportation: *compare e.g.* ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment, Vol. II, 15 April 2011, paras. 1742-1763 (legal findings on the crimes of forcible transfer and deportation), *with* para. 2057 (conclusion on return of Serbs, in analysis of joint criminal enterprise).

[62] *Cf.* Shanti Mohila Brief, para. 59.

29. Consequently, whether further persons may be liable for any 'continuing' conduct is a question, as with other criminal allegations,[63] which can be addressed by the Prosecution in any subsequent proceedings, and does not form part of the current Request.

30. Out of an abundance of caution, however, and for the sake of completeness, the Prosecution notes that the analysis in the Shanti Mohila Brief on this point may be somewhat misdirected. Even if *arguendo* deportation could be considered a 'continuing' crime in its true sense, the focus of the legal analysis is not simply on the continuing harm to the victims but on the continuing conduct of the *perpetrators*. This follows from at least four related considerations.

- The fact that the protected value underlying a crime may continue to be infringed does not *ipso facto* render the crime a 'continuing' crime.[64] For example, the protected value underlying murder is the right to life. Murder invariably entails the permanent violation of the victim's right to life, since killing is irreversible. This does not mean that the crime of murder 'continues' for as long as the victim is dead. Rather, it is incontrovertible that it is completed at the moment life is extinguished.[65]

- Deportation *stricto sensu* is concerned with the unlawful and forcible ejection of a person from the State in which they were lawfully present, whereas any 'continuing' crime of deportation *arguendo* amounts to preventing the ability of the victim to return to their State of origin. The perpetrators' conduct thus differs in the same way that throwing a person out of a house is different from subsequently locking the door—the initial

[63] *See below* paras. 35-40.
[64] *Cf.* Shanti Mohila Brief, para. 87.
[65] *See also e.g.* ICTR, *Nahimana et al. v. the Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para. 723 ("The Appeals Chamber considers that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time").

act(s) of coercion which led to the deportation will not always suffice to maintain the state of affairs excluding the victim(s) from returning.[66]

- In this regard, deportation may not be directly analogous to the enlistment or conscription of children under the age of 15 years, where criminal liability inheres in their membership within an armed force or group.[67] In this circumstance, the perpetrator may be liable on a 'continuing' basis not simply for the continued effects of the initial act of recruitment, but for their conduct in 'maintaining' the status of the victim as a member of the group.

- Potential harms resulting from denial of any 'right to return' need not be addressed only by construing deportation as a 'continuing' crime. For example, the possibility cannot be excluded that such conduct might, in appropriate circumstances, potentially be prosecuted as an aspect of persecution or other inhumane acts, if the requisite elements were met.[68]

31. For all these reasons, the Prosecution respectfully submits that the Pre-Trial Chamber need not, and should not, base its ruling on the Request on the theory that the alleged deportation constitutes a 'continuing' crime.[69] It suffices, as argued in the Request and unanimously accepted by the Interveners, that a legal element of the

[66] Indeed, deportation does not require the permanent displacement of the victim(s): *see e.g.* ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, paras. 304-307; *see also* C. K. Hall and C. Stahn, 'Article 7,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016), p. 198, mn. 47 ("the emphasis on the conduct ('the perpetrator deported or forcibly transferred') and the framing of the mental element (which does not require intent to forcibly displace persons permanently or 'for a prolonged period of time' [citing Element 6 of Statute, art. 7(1)(i) ('enforced disappearance')]) make it difficult to draw a direct analogy to the continuous nature of enforced disappearance").

[67] *Cf.* Shanti Mohila Brief, para. 86. *See further* ICC-01/04-01/06-2842, paras. 607-618; ICC-01/04-01/06-803-tEN, para. 248.

[68] In particular, for persecution, the Prosecution would need to establish that the victim was severely deprived, contrary to international law, of fundamental rights, and on a discriminatory basis. For other inhumane acts, the Prosecution would need to establish that the conduct of the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, and that the conduct was of a similar character to other acts described in article 7(1) of the Statute. *See e.g.* Elements of Crimes, arts. 7(1)(h), 7(1)(k).

[69] *See also* ICC-RoC46(3)-01/18-T-1-Red, pp. 19:22-20:1.

alleged deportations takes place on the territory of Bangladesh, even if that element then 'completes' the crime.

B.4. Whether deportation has alternative elements

32. One of the Interveners, the WIGJ, appear to take the position that "deportation or forcible transfer" is a single crime with two alternative elements, requiring "the person to be displaced *either* within a state *or* across an international border into another state" (emphasis added). They maintain that there are other examples of crimes containing alternative elements, such as rape, that could materialise through force *or* threat *or* coercion. Yet in any event, and crucially, they also agree that the crossing of an international border *does* constitute an element of the crime, even if it is an alternative one. Consequently, on the facts of the allegations in the Request, they nonetheless concur that the crime of deportation was completed only once the victims crossed the border into Bangladesh.

33. For this reason, whether deportation or forcible transfer constitutes one crime with two alternative elements, as proposed by the WIGJ, or two separate crimes with materially distinct elements (as the other Interveners seem to agree), is immaterial in ruling on the Request. In both scenarios the alleged deportation of members of the Rohingya people was completed only once the 'cross-border' element was satisfied. Again, therefore, it may not be necessary for the Pre-Trial Chamber to decide whether the 'alternative element' theory is correct.

34. Nonetheless, out of an abundance of caution, the Prosecution recalls why it maintains the better view is that deportation and forcible transfer are two separate crimes, based on different legal elements. In particular:

- As described above, the crime of deportation (across an international border) protects distinct additional values to the crime of forcible transfer

(within a State).[70] The significance of this distinction from the perspective of international law, where international borders are a foundational concept, should not be underestimated.

- Unlike the crime of rape under article 7(1)(g), referred to by the WIGJ,[71] article 7(1)(d) expressly provides two distinct criminal "labels" for the prohibited conduct—deportation *or* forcible transfer—which reflect the long evolution and crystallisation under customary international law of two separate crimes. From a standpoint of criminal law theory, such different "labels", when based on materially distinct elements, specifically and necessarily entail the existence of separate crimes. This reflects the principle of 'fair labelling', which is especially appropriate for stigmatic crimes such as all those under article 5.[72]

- The concept of 'alternate elements' within the same crime is generally predicated on the assumption that each of those elements is indeed a true "alternative" (*i.e.* a "remaining course; […] a thing available in place of

[70] *See above* paras. 20-21.
[71] In fact, article 7(1)(g) provides for *six* separate crimes, each with materially distinct elements and different "labels": rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence. *See e.g.* Elements of Crimes, art. 7(1)(g)-1 to 7(1)(g)-6. The Prosecution understands Women's Initiatives for Gender Justice to refer only to the specific crime of rape under article 7(1)(g)-1 as its example. The Prosecution further notes that the Elements of Crimes are inconsistent in elucidating when provisions of the Statute, like article 7(1)(g), actually contain multiple distinct crimes: *see* Request, para. 20, *especially* fn. 39.
[72] Specifically, fair labelling may be important *inter alia* for persons convicted of crimes under the Statute, in that they are not stigmatised with the label of a crime infringing multiple protected values when their conduct was more limited. For example, a person responsible for forcible transfer (infringing one set of protected values) may have an interest in not being labelled as responsible for deportation (infringing additional protected values: *see above* paras. 20-21). Likewise, if a person has committed outrages upon personal dignity, they have an interest in not being convicted for committing cruel treatment, even though the distinction between these crimes could also superficially be framed as 'alternate' elements: *see further below* fn. 77 and accompanying text. The principle of fair labelling may be said to underpin the basic structure of the Statute, explaining for example why specific crimes are enumerated under articles 6-8, and why specific modes are enumerated in articles 25 and 28. *See further generally e.g.* D. Guilfoyle, 'Responsibility for collective atrocities: fair labeling and approaches to commission in international criminal law,' [2011] 64 *Current Legal Problems* 255, pp. 260 (quoting D. Neressian: "The fair labelling principle aims to ensure that the label describing criminal conduct accurately reflects its wrongfulness and its severity […] Labels tell the story of the offender's criminality […] A proper label reflects both the *essence* and the *totality* of the criminal conduct […] It is an amalgam of the interests invaded ([…]), the gravity of the harm ([…]), the mechanisms of injury ([…]), and the offender's mental state […] The princip[al] function of labelling, then, is expression", emphasis supplied); M. Jarvis, 'Overview: the challenge of accountability for conflict-related sexual violence crimes,' in S. Brammertz and M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: OUP, 2016), p. 7 (noting the importance of "fair labelling of criminal conduct", in the context of sexual violence).

another").[73] Yet displacement "to another State" and displacement to another "location" are *not* true alternatives, because displacement to another "location" is *always* entailed to some degree in displacement to "another State".[74] If a person is displaced to another State, they also necessarily satisfy the requirement to be displaced to another location. Deportation (unlawful forcible displacement to another State) thus subsumes forcible transfer (unlawful forcible displacement to another location).

- In this fashion, the relationship between deportation and forcible transfer is *not* analogous to the relationship between the alternate circumstances which might characterise rape,[75] as the WIGJ suggests, but *instead* is analogous to the relationship between the distinct war crimes of cruel treatment and outrages upon personal dignity under article 8(2)(c). In practice, cruel treatment will always subsume outrages upon personal dignity, with the two crimes distinguished only by the severity of the treatment of the victim.[76] Although this distinction could be framed in a way which superficially resembles alternate elements—for example, 'the victim was treated with the severity associated with cruel treatment *or* the severity generally recognised as an outrage upon personal dignity'—these options are likewise not true alternatives. Rather, they constitute distinct crimes, with cruel treatment having an additional element to outrages upon personal dignity, and thus subsuming it, consistent with the additional value that cruel treatment protects.[77]

[73] *See Oxford English Dictionary*, 3rd Ed. (2010), "alternative, *adj.* and *n.*", 3.
[74] This is unlike rape, for example, where it is not necessary for the victim to be incapable of giving genuine consent due to "natural, induced or age-related incapacity" for the perpetrator to have invaded their body by force, and so on.
[75] *See above* fn. 74.
[76] *Compare* Elements of Crimes, art. 8(2)(c)(i)-3, Element 1, *with* art. 8(2)(c)(ii), Elements 1-2.
[77] Specifically, cruel treatment protects the values of human dignity *and* physical and mental integrity, whereas outrages upon personal dignity protects the value of human dignity alone.

C. Allegations of other criminal conduct committed against the Rohingya

35. Many of the Interveners allege that, beyond deportation as a crime against humanity, other crimes contrary to article 5 of the Statute have been or are being committed against the Rohingya people, and may fall within the Court's jurisdiction. These include, in their view:

- genocide, including through the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group, contrary to article 6 of the Statute;[78]
- apartheid, contrary to article 7(1)(j) of the Statute;[79]
- persecution, contrary to article 7(1)(h) of the Statute;[80]
- murder and/or extermination, contrary to articles 7(1)(a) and (b) of the Statute;[81] and
- forced pregnancy, contrary to article 7(1)(g) of the Statute.[82]

36. Importantly, however, as the WIGJ stress in their observations, the Court has no jurisdiction over alleged "crimes committed *in their entirety* […] on Myanmar territory".[83] The Prosecution agrees with this statement, absent a significant change of circumstances such as Myanmar's acceptance of the Court's jurisdiction or a UN Security Council referral.[84]

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[78] *See e.g.* Shanti Mohila Brief, paras.25-33, 104-117; Bangladeshi NGO Brief, paras. 28, 83-105; Tula Toli Brief, paras. 60-61, 63. *See also* ICJ Brief, paras. 22-24.
[79] *See e.g.* Shanti Mohila Brief, paras. 88-98; Tula Toli Brief, paras. 60-61, 63.
[80] *See e.g.* Shanti Mohila Brief, paras. 99-103; ICJ Brief, paras. 25-26; Bangladeshi NGO Brief, paras. 54-82; Tula Toli Brief, paras. 60-61, 63.
[81] *See e.g.* Bangladeshi NGO Brief, paras. 23, 27, 29-44.
[82] *See e.g.* Bangladeshi NGO Brief, paras. 45-53.
[83] Gender Justice Brief, para. 24, fn. 32 (emphasis added).
[84] *See* Statute, arts. 12(3), 13(b). *See further e.g.* ICC-RoC46(3)-01/18-T-1-Red, pp. 6:13-6:15, 9:12-9:13, 16:10-16:12, 17:5-17:11, 21:10-21:12, 23:15-23:20, 27:10-27:12. The Court could in principle also exercise jurisdiction if nationals of an ICC State Party were identified as potential perpetrators of the crimes, under article 12(2)(b), but no information suggests that it is a likely possibility in the circumstances of the Request.

37. Accordingly, if the Pre-Trial Chamber in its ruling confirms that the Court may in principle exercise jurisdiction under article 12(2)(a), the Prosecution will proceed to consider whether to formally announce the opening of a preliminary examination.[85] In that event, it will then consider those alleged crimes which appear to fall within the Court's jurisdiction, *including but not necessarily limited to* deportation as a crime against humanity. In this context, the Prosecution will take good note of the submissions of the Interveners.

38. The Prosecution underlines, however, that it is not necessary for the Pre-Trial Chamber in ruling upon the Request to refer to or consider the possibility of the Court's jurisdiction in respect of *each* of the additional potential crimes identified by the Interveners. This would exceed the scope of the Request, which is limited to verifying that the Prosecutor would not be acting *ultra vires* in the event she takes further action in this situation.

39. For this purpose, assuming the Prosecution is correct in its view in the Request, it suffices to confirm that the Court has jurisdiction over *at least one* crime—deportation—arising from the relevant factual circumstances, and the relevant principle of law.[86] To go further is to put the cart before the horse: it is the Prosecutor who is mandated to examine the information made available and to determine, on that basis, whether to proceed under article 15 of the Statute. Only subsequently may the Pre-Trial Chamber be called upon, under article 15(4), to determine whether it concurs in the analysis of the material which the Prosecution has identified, in any application under article 15(3), as supporting its conclusions.[87]

40. The Prosecution also notes, in this context, the importance of appropriate caution in managing public expectations.[88] The Request was submitted in order to

[85] *See further e.g.* ICC-RoC46(3)-01/18-T-1-Red, pp. 4:16-4:20, 8:11-9:15, 12:13-14:14.
[86] *Contra* Guernica 37 Brief, para. 1.7 (suggesting that the Pre-Trial Chamber would be wrong "to limit its consideration to deportation").
[87] *See further e.g.* ICC-RoC46(3)-01/18-T-1-Red, pp. 8:1-8:5, 8:16-9:20, 10:21-11:2, 15:6-15:19.
[88] *See e.g.* M. Kersten, 'Justice for the Rohingya? An Amicus Brief and the Road(s) to Accountability,' *Justice in Conflict*, 26 June 2018.

confirm the Court's jurisdiction, within a particular set of circumstances. It was not intended to be, and is not suited for, an exhaustive analysis of the possible crimes which may have been perpetrated.

D. Territorial jurisdiction under article 12(2)(a) of the Statute

41. Guernica 37 is correct to state that the question at stake in the Request is not one of "extra-territorial application" of the Court's jurisdiction under the Statute, but rather "interpreting the content and extent of the relevant conduct that must take place in a territory under its jurisdiction".[89] In other words, the concrete circumstances of the Request are not primarily concerned with Myanmar, but rather with what *Bangladesh* can expect from the Court, as an ICC State Party, as well obviously as the interests of the displaced Rohingya people.

42. The Interveners agree that territorial jurisdiction in the meaning of article 12(2)(a) must at least include 'objective' territoriality in which the alleged crime is completed on the territory of an ICC State Party, such as Bangladesh, even if it was not commenced there.[90]

43. The Prosecution recalls that, in interpreting article 12(2)(a) of the Statute, the Pre-Trial Chamber should apply the interpretive approach of the Vienna Convention on the Law of Treaties.[91] Thus, in assessing the object and purpose of the Statute, and particularly with regard to jurisdiction, this entails an assessment of the interests underlying the assertion of jurisdiction, and their impact on the Court's ability to execute its mandate.[92] This again militates in support of interpreting article 12(2)(a) to encompass objective territoriality.

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[89] Guernica 37 Brief, para. 4.16.
[90] *See* Shanti Mohila Brief, paras. 47-51; ICJ Brief, paras. 49, 51-52, 80-83; Bangladeshi NGO Brief, paras. 21, 25; CPIJ Brief, paras. 18, 22, 24-26, 29-31; Guernica 37 Brief, paras. 4.12-4.14, 4.18, 4.21. To the extent this issue is not directly addressed in the submissions of the other Interveners, their acceptance of it is nonetheless clearly implicit.
[91] *See* Request, para. 43; CPIJ Brief, para. 19.
[92] *See further e.g.* ICJ Brief, paras. 57-59; CPIJ Brief, paras. 20-22, 25. *See also* Tula Toli Brief, paras. 64-75.

44. Furthermore, the Prosecution agrees with the CPIJ that, in resolving the jurisdictional question in the Request, the Pre-Trial Chamber could, under article 21(1)(b) of the Statute, also have recourse to customary international law, and that this would support the Request.[93]

45. Likewise, the Prosecution agrees with the ICJ and the Bangladeshi NGOs that, in resolving the jurisdictional question in the Request, the Pre-Trial Chamber could, under article 21(1)(c) of the Statute, also have recourse to general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.[94] As demonstrated in the Request, and by various of the Interveners, it might well be said that there is a general principle of law which recognises a broad basis for territorial jurisdiction, going beyond merely crimes which are committed in their totality within a State.

46. To the extent that the Interveners further elaborate on other aspects of territorial jurisdiction—such as subjective territoriality,[95] the doctrine of ubiquity,[96] or the "reasonable connection" theory[97]—these do not need to be decided in ruling on the Request at the present time.[98] While the Prosecution emphasises that it may well agree with much or all of the Interveners' submissions in these respects on their respective merits, and certainly does not exclude their applicability in principle, it notes that they are not at issue in the context of the concrete allegations of which the Prosecution is presently seised.

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[93] CPIJ Brief, paras. 23-24, 26.
[94] ICJ Brief, para. 84; Bangladeshi NGO Brief, paras. 107, 111. The ICJ further suggests, with reference to a *Lubanga* decision, that it might be necessary to interpret the jurisdictional provisions of the Statute to be consistent with internationally recognized human rights in accordance with article 21(3) of the Statute: ICJ Brief, para. 87. While this may be true, the Prosecution considers such an approach unnecessary in the context of the Request. More generally, it is also the case that the applicable international recognized human rights may be in a degree of tension, and thus less helpful to resolve jurisdictional issues.
[95] *See e.g.* Shanti Mohila Brief, para. 49; ICJ Brief, paras. 49-50.
[96] *See e.g.* ICJ Brief, paras. 53-56; CPIJ Brief, para. 27.
[97] *See e.g.* Guernica 37 Brief, paras. 4.19, 4.22-4.34, 4.38-4.45.
[98] *See e.g.* CPIJ Brief, para. 28 (characterising the Prosecution's approach in the Request as somewhat "restrictive", but observing that "[t]o the extent that restrictive interpretation provides comfort that appropriate restraint is being exercised in construing treaty provisions, this makes the Prosecutor's argument even more convincing").

E. Other theories of jurisdiction beyond territoriality

47. The Prosecution does not understand any of the Interveners to raise jurisdictional arguments which are *not* based on territoriality. However, for the avoidance of doubt, the Prosecution stresses that any such argument would fall outside the scope of the Request[99] and should not in any event be decided at the present time.[100] The Prosecution further observes in this context that article 12(2)(a), in its plain terms, refers to "[t]he State on the territory of which the conduct in question occurred", and article 12(2)(b) refers to the "State of which the person accused of the crime is a national".[101] These concepts—territoriality and active personality (*i.e.*, nationality of the perpetrator(s))—thus appear to demark the boundaries of the Court's jurisdiction.

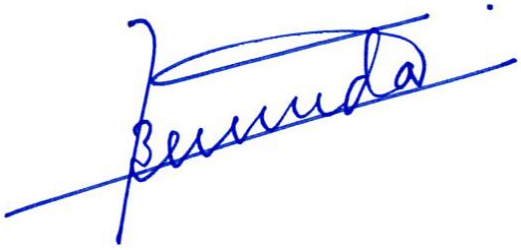
Conclusion

48. For all the reasons above, and those set out in the Request and by the Interveners, the Prosecution requests the Pre-Trial Chamber to rule under article 19(3) on the question whether the Court may exercise jurisdiction under article 12(2)(a) over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, and to confirm the Court's jurisdiction.[102]

49. Consistent with the principle of judicial economy, and the limited scope of the article 19(3) procedure, the Pre-Trial Chamber need not determine each and every legal argument raised by the Interveners, no matter their potential merits, but can and should confine itself to those matters necessary to resolve the Request. Further

[99] *See* Request, paras. 28-29; ICC-RoC46(3)-01/18-T-1-Red, pp. 19:1-20:16.
[100] This was correctly recognised, for example, by the ICJ: *see* ICJ Brief, para. 46 ("For the purposes of the present submissions and the Rome Statute, the ICJ will not address the question as to any extra-territorial or universal jurisdiction that might obtain under general international law").
[101] *See also* Guernica 37 Brief, para. 4.2.
[102] Although the Prosecution is mindful that the Pre-Trial Chamber has given it one further opportunity to make submissions if necessary in response to any observations filed by the Government of Myanmar (*see* ICC-RoC46(3)-01/18-28), this may not arise: *see e.g. The Irrawaddy*, 'Government to ignore ICC request for response on Rohingya case,' Htet Naing Zaw, trans. Thet Ko Ko, 25 June 2018. *See also* ICC-RoC46(3)-01/18-31.

questions raised by the Interveners, although potentially valid in and of themselves, may only become ripe for adjudication in appropriate future cases.



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Fatou Bensouda, Prosecutor

Dated this 11th day of July 2018

At The Hague, The Netherlands