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No. ICC-RoC46(3)-01/18

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PRE-TRIAL CHAMBER I

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

OBSERVATIONS PURSUANT TO RULE 103(1) OF THE RULES OF PROCEDURE AND EVIDENCE

Public

Amicus Curiae Observations on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"

Source: Members of the Canadian Partnership for International Justice

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to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor

The Office of Public Counsel for the Defence

The Office of Public Counsel for Victims
Ms Paolina Massidda

Legal Representatives of the Applicants

Legal Representatives of the Victims

Mr Wayne Jordash QC

Unrepresented Applicants (Participation/Reparation)

Unrepresented Victims

Amicus Curiae
International Commission of Jurists
Women's Initiatives for Gender Justice
Naripokkho
Ms. Sara Hossain
European Center for Constitutional Rights and Human Rights
Guernica 37 International Justice Chambers
Bangladeshi Non-Governmental Representatives

States' Representatives
Competent Authorities of the People's Republic of Bangladesh

REGISTRY

The Registrar
Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. The Amici Curiae[1] ('the Amici') have been granted leave by Pre-Trial Chamber I ('the Chamber') to submit observations in the present proceeding,[2] which derives from the Prosecutor's request under art. 19(3) for a ruling on whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.[3]

2. The Amici respectfully offer the Chamber observations on the novel legal issues raised by the Prosecutor's Request: (II) the scope of art. 19(3) and the powers of the Prosecutor to seek a ruling on jurisdiction before a formal situation has been assigned to it; (III) the scope of territorial jurisdiction under art. 12(2)(a); and (IV) the scope of the crime of deportation under art. 7(1)(d).

II. Scope of Article 19(3)

3. The Prosecutor seeks a ruling from the Court regarding a question of jurisdiction pursuant to art. 19(3) for the first time. Considering the novelty of the procedure and the possible uncertainty regarding its application in the circumstances giving rise to the Request, the Amici will offer an appraisal of the stage at which such a request can be made by the Prosecutor in the investigative and judicial process envisaged by the Statute. The determination of this question requires an analysis of the nature and scope of a ruling pursuant to art. 19(3).

4. The Amici support the view that the Prosecutor is entitled to seek a ruling on jurisdiction under art. 19(3) in the present circumstances, that is, before a formal situation has been assigned to a Pre-Trial Chamber. Furthermore, the Amici submit that a ruling by the Court pursuant to art. 19(3) should be distinguished from an advisory opinion. Such a ruling is a legally-binding decision on a concrete legal issue arising out of the Prosecutor's duties in the legal framework of the Statute concerning investigations and prosecutions.

5. The power of the Prosecutor to seek a ruling on jurisdiction within the context of a 'situation' or a 'case' is uncontested. A possible uncertainty under art. 19(3) may arise in relation to earlier stages of the Court's processes leading to formal investigations and prosecutions. The Amici are of the view that nothing in the wording of art. 19(3) taken in its

[1] The Amici Curiae are members of the Canadian Partnership for International Justice (in alphabetical order): Jennifer Bond, Robert J. Currie, Amanda Ghahremani, Julia Grignon, Mark Kersten, Fannie Lafontaine, Fançois Larocque, Frédéric Mégret, Valerie Oosterveld, Frederick John Packer, Pascal Paradis, Darryl Robinson, Penelope Simons, Érick Sullivan, Alain-Guy Tachou Sipowo, Mirlja Trilsch, Jo-Anne Wemmers.

[2] "Decision on the 'Request for leave to submit an *Amicus Curiae* brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'", 29 May 2018, ICC-RoC46(3)-01/18-8.

[3] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018 [Prosecutor's Request].

context supports the conclusion that a request under art. 19(3) can only be made once a formal investigation has been launched and a 'situation' has been submitted to a Pre-Trial Chamber. To the contrary, such an interpretation would run contrary to the wording of the relevant provisions, and to the object and purpose of the Statute in light of the duties it places upon the Prosecutor.

6. The Amici respectfully submit that there are two plausible interpretations of the earliest timing at which the Prosecutor can seek a ruling under art. 19(3) of the Statute: a. at any time, outside any factual concrete scenario, on a general question of jurisdiction in order to clarify uncertainties in the Statute; or b. once the Prosecutor has entered into the statutory determination process leading to a possible formal investigation pursuant to its duties under the Statute.

7. The Amici submit that, although the two interpretations above could constitute credible readings of the Statute, the second option is more faithful to the text and context of the relevant provisions. This interpretation is supported by our view of the nature of a ruling pursuant to art. 19(3). This interpretation also places reasonable limitations on requests of this nature, allaying legitimate concerns about their potential undue reach. Considering space constraints, we will focus our submissions on the thrust of our arguments in favour of the second interpretation.

8. The answer as to 'when' the Prosecutor may seek a ruling under art. 19(3) must be preceded by an answer as to 'what' she can ask the Court. This requires the Chamber to clarify the scope of the Court's 'jurisdiction' as the object of the request, as well as the nature of a potential 'ruling' by the Court. The Statute provides sufficient clarification to delineate the concept of 'jurisdiction' pursuant to art. 19[4] and the Amici agree with the Prosecutor that a question can relate to the subject-matter, temporal, territorial, or personal jurisdiction of the Court.[5]

9. As for the nature of a ruling on a question of jurisdiction, the Amici respectfully submit that it should be interpreted as a legally-binding decision on a legal question, not to be equated to an advisory opinion. First, the ordinary meaning of the word 'ruling' refers to an "authoritative decision or pronouncement, especially one made by a judge."[6] The French and Spanish versions, which differ slightly in their formulations, also imply a decision or a

[4] See also Christopher K Hall, Daniel D Ntanda Nsereko & Manuel J Ventura, "Article 19 – Challenges to the jurisdiction of the Court or the admissibility of a case" [Hall & al] in Triffterer & Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Oxford: Hart, 2016), pp 849-98, p 864 [Triffterer & Ambos].
[5] Prosecutor's Request, *supra* note 3, para 52.
[6] The Merriam Webster Dictionary, 2018, *sub verbo* 'ruling': <www.merriam-webster.com/dictionary/ruling>.

settlement.[7] By contrast, advisory opinions are generally consultative and non-binding and reserved for institutions not party to an ongoing or potential adversarial process.[8] Second, this meaning is reinforced by the context of art. 19(3) within the entirety of art. 19, and in relation to other provisions, which indicates that a request by the Prosecutor must not concern an abstract question completely outside the statutorily-mandated process of decision-making vested upon her with respect to investigations and prosecutions, as we will explain below.

10. The purpose of a request from the Prosecutor to the Court on a question of jurisdiction is to "assuage a doubt or resolve an issue that he could not – or would not – settle by himself, without the support of the Court."[9] Rule 58 of the Rules of Procedure stipulates that art. 19(3) requests "shall be in writing and contain the basis for it." This rule implies that the Prosecutor must have a vested interest to raise the jurisdiction question. The mandate of the Prosecutor is not to query in the abstract the limits or potential of the Court's jurisdiction. Her interest in this regard is triggered when she enters the process of determining whether there is a reasonable basis to proceed with an investigation, which can either be initiated by the receipt of information, a referral, or a declaration pursuant to art. 12(3) of the Statute.[10] Art. 53 serves as a guide for this decision-making process. Such requests are not abstract. They take place in a legal process provided for by the Statute and linked to the Prosecutor's statutory duties, and can be the object of a 'ruling' by the Court.

11. The Amici thus suggest 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 investigation and formal investigation pursuant to her duties under art. 53.

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[7] In French, "se prononcer" means "qu'elle statue, juge, tranche, décide" : see Public Works and Government Services Canada, Juridictionnaire, *sub verbo* 'prononcé,ée/prononcer/prononciation'. Similarly, in Spanish, "pronunciarse" includes "las declaraciones, resoluciones, mandamientos, decisiones o condenas de un juez o tribunal": see Diccionario – Enciclopedia Jurídica Online, *sub verbo* 'Pronunciamiento'.

[8] E.g. References to the Supreme Court of Canada may only be made by Canada's executive and legislative branches via the Governor-in-Council or Parliament: See *Supreme Court Act*, RSC 1985, c S-26, ss 53-53. Similarly, only the General Assembly, Security Council, and "other organs of the United Nations and specialized agencies" authorized by the General Assembly may request advisory opinions of the International Court of Justice: See *Statute of the International Court of Justice* (18 April 1946), art 65(1); *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 96 [UN Charter]. Black's Law Dictionary defines advisory opinion as a "Nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose": *Black's law dictionary; definitions of the terms and phrases of American and English jurisprudence, ancient and modern.*, St Paul, West Pub Co, 1951.

[9] Laurent Trigeaud, "Article 19 – Contestation de la compétence de la Cour ou de la recevabilité d'une affaire" [Trigeaud] in Julian Fernandez & Xavier Pacreau (eds), *Statut de Rome de la Cour pénale internationale : Commentaire article par article*, (Paris : A. Pedone, 2012), pp 735-48, at 742 [Fernandez & Pacreau]. Our translation of: "à dissiper un doute ou à résoudre un point qu'il ne pourrait – ou ne voudrait – trancher seul, sans l'appui de la juridiction."

[10] See e.g. The Office of the Prosecutor, Report on Preliminary Examination Activities – 2017, 4 December 2017, para 2.

12. A contextual reading of paragraph 3 in the context of art. 19 as a whole supports this interpretation, which is confirmed when read in the context of other provisions related to the Prosecutor's unique role in triggering the penal process under the Statute. The wording of art. 19(3) refers to a 'question', whereas the other paragraphs are concerned with 'challenges' to jurisdiction or to admissibility, entailing that a case or a situation is already before the Court. Such a restriction cannot be read into paragraph 3. The second sentence in paragraph 3 is independent from the first sentence and aims to encompass both challenges to the jurisdiction of the Court, pursuant to paragraph 2, and questions on jurisdiction, allowing different actors to submit observations depending on the applicable scenario and stage of the proceedings.

13. The *travaux préparatoires* of the Statute corroborate the independence of the first three paragraphs of art. 19. The first sentence of art. 19(3) was included in the draft of the Statute for the first time in December 1997 as part of the work of the Preparatory Committee.[11] The text of this provision was kept intact in the Statute, without any notes or comments. The only alteration is its position within the article. Paragraphs 2 and 3 were first drafted together under one paragraph with two distinct sentences.[12] The final version of art. 19 draws a clearer distinction between the 'challenges' of paragraph 2 – linked to cases or situations – and the 'questions' of paragraph 3, which are not so limited. The Amici further submit that the firmly established *compétence de la compétence* principle embodied in art. 19(1), recognised as a general principle of international law[13] or as a rule of customary international law,[14] indicates that art. 19 of the Statute must not be construed restrictively in a way that limits the possibilities for the Court to ascertain its jurisdiction and "interpret for this purpose the instruments which govern that jurisdiction."[15]

14. A contextual interpretation of art. 19(3) in light of other provisions of the Statute confirms our interpretation as to when the Prosecutor may seek a ruling. These provisions affirm the Prosecutor as the most significant Court actor concerned with the Court's jurisdiction

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[11] UN Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December*, UN Doc No. A/AC.249/1997/L.9/Rev.1 (18 December 1997), pp 26-27, art 36(2).

[12] *Ibid*; UN Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Intersessional Meeting from January 19-30, 1998, in Zutphen, the Netherlands*, UN Doc A/AC.249/1998/L.13 (4 February 1998) p 44, art 12(2). UN Preparatory Committee on the Establishment of an International Criminal Court, *Report - Addendum*, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Doc NU A/CONF.183/2/Add.1 (14 April 1998) pp 43-44, art 17(2).

[13] For e.g., it constitutes one of the "principes généraux du contentieux international": see Trigeaud, in Fernandez & Pacreau, *supra* note 9, p 738, or a "generally accepted principle of the administration of justice": see Hall & al., in Triffterer & Ambos, *supra* note 4, p 852.

[14] See *In the Matter of El Sayed, Decision on the Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing*, Special Tribunal for Lebanon, CH/AC/2010/02, 10 November 2010, para 43.

[15] *Nottebohm (Liechtenstein v Guatemala)*, Preliminary objections, 18 November 1953, ICJ Rep 1953, p 119.

insofar as her powers and duties depend on it: art. 42(1) affirms the OTP as an independent and separate organ of the Court, "responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court," art. 15(1) concerns its power to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court; and art. 15(3) concerns its decision to proceed with an investigation, which must be based on the criteria of art. 53(1), including a requirement that the information available "provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."[16] Read in this context, it is clear that art. 19(3) must allow the Prosecutor to request a ruling on jurisdiction when she receives substantiated information or a referral, triggering the Prosecutor's investigative powers and duties, which themselves depend on a proper assessment of the jurisdiction of the Court.

15. The Amici submit that a contrary interpretation would lead to an absurd result. Indeed, once a situation has been submitted to a Pre-Trial Chamber, the Prosecutor has already decided that there is a reasonable basis to believe that a crime "within the jurisdiction of the Court" has been or is being committed. A 'question' to the Court at this later stage, and *a fortiori* in the context of a case, would essentially become a 'challenge' to her own decision, which could not have been the intent of the drafters.[17]

16. If the Prosecutor cannot seek a ruling on jurisdiction in the different phases leading to preliminary examinations and investigations as we suggest, the Prosecutor would have no other choice but to initiate proceedings to determine the jurisdiction of the Court. This would be contrary to the principle of the good administration of justice, as well as to the goals of efficiency and efficacy in the procedures developed by the Court in recent years, which are at the core of the rules governing challenges to jurisdiction, which must be brought as early as possible in the proceedings.[18] The Prosecutor would face a tough choice: 1) not proceed and save the resources of the Court at the risk of denying victims justice, and acting contrary to the object and purpose of the Statute regarding the fight against impunity; or 2) proceed and risk, if her interpretation of the Statute is incorrect, wasting the Court's resources, creating false hopes for victims, prejudicing the rights of persons in the course of the investigation, and

[16] See also Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3 (9 September 2000), rule 48 [RPE].

[17] Trigeaud, in Fernandez & Pacreau, *supra* note 9, p 742: "It is true that the Prosecutor could hardly contest the jurisdiction or the admissibility of a case for which he or she has requested authorization from the Pre-Trial Chamber to open an investigation" (our translation of "Le Procureur, il est vrai, pourrait difficilement contester la compétence ou la recevabilité d'une affaire [sic] pour laquelle il a lui-même demandé à la Chambre préliminaire l'autorisation d'ouvrir une enquête").

[18] See e.g. Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, art 19(4)-(5) [Rome Statute].

prejudicing the sovereignty of States concerned, in particular non-States Parties where territorial or national jurisdiction is at stake. A ruling on jurisdiction in the decision-making process leading to an investigation would avoid these problems without prejudicing subsequent determinations with regard to jurisdiction, in full respect of the adversarial process and interests and rights of parties at a later stage.[19] The Amici insist on the importance of avoiding the possibility of prejudicing future proceedings as well as giving the perception of prejudice. Legitimate concerns in this regard could be alleviated by committing to transparency in the proceedings in relation to Article 19(3), including if necessary by ensuring the presence of independent counsel at meetings or hearings between the Prosecutor and the Court.

17. Finally, the Amici submit that the restrictions inherent to the nature of a ruling on jurisdiction, which is not an advisory opinion and must not concern an abstract question, should limit the use of art. 19(3) by the Prosecutor and alleviate fears of the proliferation of such requests. The Court may reject any requests from the Prosecutor that are not concrete questions of jurisdiction arising out of the legal process linked to her investigative powers, which prevents art. 19(3) being used frivolously and outside exceptional circumstances.

III. Article 12(2)(a)

18. The Amici support the Prosecutor's assertion that art. 12(2)(a) includes objective territorial jurisdiction. The Amici will offer supplementary support to her conclusion, including additional context on the jurisdictional regime of the Statute and references to the drafting history where relevant. The Amici also submit that the Prosecutor's suggested reading of art. 12(2)(a), while correct, is in fact more restrictive than the jurisdictional regimes under international law, and therefore an uncontroversial interpretation of the provision.

19. As the Prosecutor asserts,[20] and the Appeals Chamber of this Court confirms,[21] the general rules of interpretation under art. 31 of the VCLT are the starting point in the analysis of

[19] *Ibid*, art 19 (Challenges to the jurisdiction of the Court or the admissibility of a case), arts 81-85 (Appeal and revision).

[20] Prosecutor's Request, *supra* note 3, paras 21, 25, 43.

[21] *The Prosecutor v [REDACTED]*, No. [REDACTED], "Judgment on the appeal of the Prosecutor against the decision of [REDACTED]", Date: [REDACTED], para 56*; The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11 OA 7 OA 8, "Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 9 October 2014, para 105; *Situation in the Democratic Republic of the Congo*, ICC-01/04, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, para 33; *The Prosecutor v Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction", ICC-01/04-01/06 A 5, 1 December 2014, para 277.

the Statute.[22] Art. 31(1) of the VCLT prioritises a plain reading of the Statute's provisions in its context and in the light of its object and purpose.[23] The Prosecutor's Request offers a thorough textual and contextual analysis of art. 12(2)(a), including a correct interpretation of the notion of 'conduct' under art. 12(2)(a) as it relates to territorial jurisdiction.

20. The relevant context to consider in the interpretation of 'conduct' is the jurisdictional regime of the Statute. Art. 12(2)(a) is the result of a coalescence of national criminal law principles. Jurisdiction in criminal law is generally based on the interests of States,[24] and creates rights to exercise sovereign power over a certain crime. Interest justifying prescriptive territorial criminal jurisdiction can be invoked by different connections to a State, including by acts, omissions, or consequences occurring on its territory. It is unsound to interpret the word 'conduct' in art. 12(2)(a) outside of the context of jurisdiction, for instance using the varying meanings throughout the text of the Statute in other contexts.

21. In the context of an international criminal tribunal created by treaty, States delegate their jurisdiction to the international institution on agreed grounds of jurisdiction.[25] The scope of the Court's jurisdiction cannot go beyond what States are able to delegate,[26] but conversely, it should at the very least comprise the more restrictive doctrines that form the basis of domestic jurisdiction under international law. Along with subjective territoriality, the principle of objective territoriality is one such restrictive doctrine, and generally a lowest common denominator across national jurisdictions, as will be expanded upon below. This context of the ICC's jurisdictional regime supports the conclusion that 'conduct' can only plausibly be interpreted to at least include all the material elements (acts and omissions, consequences and circumstances) of a crime.

22. The delegated-jurisdiction theory supports the ICC's jurisdiction over nationals of non-party States, which can occur *inter alia* in cases of objective territoriality such as in the circumstances giving rise to the Prosecutor's Request.[27] Complementarity under the Statute

[22] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, registered *ex officio* on 27 January 1980, UN Doc A/CONF. 39/27, art 31 [VCLT].
[23] *Ibid*, art 31(1).
[24] Cedric Ryngaert, "The Concept of Jurisdiction in International Law," p 2, citing FA Mann, "The Doctrine of Jurisdiction in International Law", (1964) 111 RCADI 1:15.
[25] Miles Jackson, "Regional Complementarity, The Rome Statute and Public International Law", (2016) Journal of International Criminal Justice 14, OUP, p 1066; Kevin W Gray & Kafumu Kalyalya, "Overcoming Statism from Within: The International Criminal Court and the Westphalian System", (2016) 17:1 Critical horizons 53, p 58 [Gray & Kalyalya]; Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", (2003) 1:3 J of Intl Crim Justice 621 [Akande].
[26] *Ibid*, p 621; Gray & Kalyalya, *supra* note 25, p 58.
[27] Michael P Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position" (2001) 64 Law and Contemporary Problems 67. See also Michail Vagias, "The territorial jurisdiction of the international criminal court – a jurisdictional rule of reason for the ICC?" (2012) 50:1 Netherlands International

serves an equivalent function as comity in interstate relations when there are competing claims for jurisdiction, and was adopted "to balance a concern for state sovereignty with the creation of an international authority."[28] The ability of non-party States to challenge the admissibility of a case pursuant to art. 19(2)(b) is part of the response to the potential reach of the ICC into State sovereignty.[29]

23. The scope of jurisdiction under art. 12(2)(a) of the Statute should also be informed by principles of customary international law. It is entirely appropriate that in the interpretation of art. 12(2)(a), this Court should have recourse to the customary international law principles, transnational criminal suppression treaties, and domestic statutes and cases of the sort put forth by the Prosecutor (and as supplemented below). The unrestricted wording of art. 31(3)(c), which invites recourse to "any relevant rules of international law applicable in the relations between the parties" as an additional source of interpretation to complement a textual and contextual reading, implies a reference "to all recognized sources of international law" which includes customary international law.[30] Customary international law is also a secondary source of law pursuant to art. 21(1)(b) of the Statute, all the more relevant here considering that the Court derives its jurisdictional powers from the delegated authority of States, as explained above.

24. The manner in which jurisdiction is exercised, then, must flow from distillation of State practice into the customary international law concept of 'objective territoriality'.[31] The jurisdictional mechanisms in the criminal suppression conventions are also relevant State practice contributing to this norm.

25. In terms of substantively interpreting the geographical scope of art. 12(2)(a), we support the Prosecutor's assertion and analysis to the effect that it is simply inevitable that, in formulating a concept of territorial jurisdiction, the States Parties to the Statute must have intended to implant a regime which reflected the manner in which States do this. Any ambiguity

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Law Review 43; William A Schabas, "The International Criminal Court and Non-Party States" (2010) 28 Windsor YB Access Just 1 [Schabas, Non-Party States]; Akande, *supra* note 25, p 621.

[28] Linda E Carter, "The future of the International Criminal Court: complementarity as a strength or a weakness?" (2013) 12:3 Washington University Global Studies Law Review 451, p 453.

[29] Triffterer & Ambros, *supra* note 4, p 869; Claus Kreb, *The Rome Statute and Domestic Legal Orders: Constitutional issues, cooperation and enforcement* (2005) p 32.

[30] Oliver Dörr, "Section 3: Interpretation of Treaties" in Oliver Dörr & Kirsten Schmalenbach, eds. *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin, Heidelberg, 2018) 559, pp 604-05.

[31] Which is itself a sub-principle of the overall principle of 'qualified' or 'extended' territorial jurisdiction, under which States establish jurisdiction on the basis of a broader palette of 'links' or 'connections' to territory, rather than the 'one element must occur on the territory' theory underlying objective territorial jurisdiction: see Robert J Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 2d ed (Toronto: Irwin Law, 2013) 61-67 [Currie & Rikhof]; Steve Coughlan et al, *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (Toronto: Irwin Law, 2014), c 4.

which could be perceived is easily resolved when examining the customary international law around jurisdiction and the State practice which gives rise to it.

26. Both the State practice element and the *opinio juris* element of 'objective territoriality' as a permissive norm of customary international law are established by the Prosecutor's thorough and fairly exhaustive canvassing of the sources on point. States routinely assert jurisdiction over criminal offences on an 'objective territoriality' basis, and they concurrently view these exercises of jurisdiction as being lawful. They also routinely incorporate the functionality of objective territoriality into suppression treaties that establish cooperative mechanisms to facilitate the exercise of jurisdiction, all of which provide either obligations to exercise objective territoriality or "at least a permission to parties to do so."[32]

27. If anything, the Prosecutor's assertion that one element of a crime must occur in the locus State in order to ground territorial jurisdiction utilizes an approach that is more restrictive than current State practice would require. Much contemporary State practice reflects more of what is often termed the principle of 'ubiquity' under which it is only territorial connection to the asserting State that is required, rather than consummation of offences or commission of elements.[33] This is the case, for example, in Canada, where in 1985 the Supreme Court rejected as outdated the notion that commission of an element is required to ground jurisdiction, preferring a broader requirement of "real and substantial connection."[34] Indeed, the Canadian approach has been internationally influential and impacted such major criminal jurisdictional instruments as the UNTOC.[35]

28. This is not to say that we disagree with the argument that commission of an element is required, only that it is a restrictive way in which to interpret art. 12(2)(a) in light of State practice. To 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.

29. The Prosecutor's Request lists numerous examples of domestic statutes and cases reflecting the status of objective territoriality as being based on consistent State practice.[36] To

[32] Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012) at 141.
[33] Prosecutor's Request, *supra* note 3, p 22, especially fn 95.
[34] *R v Libman*, [1985] 2 SCR 178; Currie & Rikhof, *supra* note 31 pp 439-54.
[35] David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford: Oxford University Press, 2007) pp 54-56.
[36] Prosecutor's Request, *supra* note 3, para 40.

this list we would add Australia,[37] Bahrain,[38] Bangladesh,[39] Belgium,[40] Brazil,[41] Colombia,[42] India,[43] Hong Kong,[44] and New Zealand,[45] all of which extend their jurisdiction over offences committed beyond their national territories when the conduct occurs wholly or partially on national territory or when the effects or consequences of extraterritorial conduct manifest domestically. For example, Belgium's courts have recognized qualified territoriality as being consistent with 'general principles.'[46] Another example is India, which asserts a broad extended territorial jurisdiction over acts which "have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians."[47] As a particularly relevant source, given the factual circumstances in these proceedings, Bangladesh's penal code references offences committed "beyond Bangladesh" that are punishable domestically.[48] Bangladesh has also adopted a number of laws that prohibit cross-border offences originating outside Bangladesh and has asserted its jurisdiction when an element of the crime or its consequences manifested on its territory, such as human trafficking.[49]

30. Based on the above and on the Prosecutor's submissions, the Amici are of the view that art. 12(2) of the Statute cannot be interpreted so as excluding objective territoriality. The drafting history can be used to confirm the literal or contextual interpretation of the provision.[50] Art. 12 is the result of a tightly negotiated compromise that protected State sovereignty while taking into account the transnational context of the crimes. This is evidenced by the interaction between the principle of complementarity and the granting of jurisdiction, for example, where nationals of non-States parties commit crimes on the territory of a State party, where nationals

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[37] *Criminal Code Act 1995* (Cth) s 15(1)(a); Danielle Ireland-Piper, *Accountability in Extraterritoriality* (Cheltanham UK: Edward Elgar, 2017) 76.
[38] *Bahrain Penal Code*, *1976* (as amended by Legislative Decree No. 9 of 1982), art 6.
[39] *Bangladesh Penal Code*, ss 3-4.
[40] *Atkinson v Ministère Public Luxembourg* (1995) 100 Int'l Law Rev 610 (Chambre de Conseil, 6 May 1988) [*Atkinson*]; see also *Ryan* (1995) 100 Int'l Law Rev 616 (Ct of Appeals, Brussels, 17 November 1988) [*Ryan*].
[41] *Código Penal*, Decreto Lei No. 2.848 (2 December 1940) art 6.
[42] *Código Penal*, Ley 599 de 2000 Nivel Nacional (24 July 2000), art 14.
[43] *GVK Industries Ltd. v The Income Tax Officer*, [2011] 3 SCR 366, p 367 [*GVK Industries*]; see also *Republic of Italy v Union of India* (2013) 4 SCC 721 [*Italy v India*].
[44] See *HKSAR v Man Kwok Man*, [2000] 1 HKC 778 (Ct of App)
[45] *Crimes Act 1961*, s 7.
[46] *Atkinson*, *supra* note 40 p 611.
[47] *GVK Industries*, *supra* note 43 p 367.
[48] Bangladesh *Penal Code*, ss 3-4: an example is kidnapping, which involves "[conveying] any person beyond the limits of Bangladesh without [their] consent" and "[importing] into Bangladesh from any country outside Bangladesh" ss 360, 366B.
[49] *The Prevention and Suppression of Human Trafficking Act*, *2012*, Act No 3 of 2012 (20 February 2012) s 5(2).
[50] VCLT, *supra* note 22, art 32.

of States parties commit crimes on a territory of a non-State party and, the Amici submit, where crimes are committed in a transnational context at least partly on the territory of a State party.[51]

31. The most recent addition to the jurisdictional provisions in the Statute, art. 15*bis*, illustrates the drafters' understanding that the Court's jurisdiction under art. 12(2)(a) encompasses objective territorial jurisdiction. Art. 15*bis*(5) states: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory." This language would be redundant if the drafters did not envision art. 12(2)(a) to include objective territoriality. The crime of aggression, by definition, involves conduct on the territory of more than one State because it is a crime committed by the authoritative actor of one State "against the sovereignty, territorial integrity or political independence of another State."[52] The crime involves an 'aggressor State' and a 'victim State', where elements of the crimes occur on the territories of at least two States.[53] The specific language in art. 15*bis*(5) providing an exclusion of jurisdiction over a non-States parties' nationals and territories is an explicit derogation from the territorial jurisdiction regime under art. 12(2)(a). The drafting history of art. 15*bis* shows that the inclusion of paragraph 5 was an intentional derogation from the assumed objective territorial jurisdiction under art. 12(2)(a).[54]

IV. Scope and Definition of Article 7(1)(d)

A. Entering 'another State or location' is a material element of deportation under art. 7(1)(d) of the Statute.

32. The Amici support the Prosecutor's assessment that deportation under art. 7(1)(d) is a distinct crime from forcible transfer and will not address this matter in-depth, as the Prosecutor's request has fully expounded the issue through a textual analysis of the disjunctive language of art. 7(1)(d), a contextual understanding confirmed by the drafting history of the provision, and an evaluation of both doctrine and the case law of this Court,[55] the ICTY,[56] and

[51] Philippe Kirsch & Valerie Oosterveld, 'Negotiating an Instrument for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court' (2001) 46 McGill LJ 1141, p 1152.
[52] Art 8bis, para 2.
[53] Roger S Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May - 11 June 2010*, (2010) 2 Goettingen J Int'l L 689.
[54] *Ibid*, p 705.
[55] Prosecutor's Request, *supra* note 3, paras 20, 26, citing *The Prosecutor v Ruto et al*, ICC-01/09-01/11, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," 23 January 2012, paras 244-45, 268 [Ruto].
[56] Prosecutor's Request, *supra* note 3, para 16, citing *Prosecutor v Milomir Stakić*, IT-97-24-A, 22 March 2006, paras 278, 288-302, 317 [Stakić]; *The Prosecutor v Jadranko Prlić et al*, IT-04-74-T, 29 May 2013, para 47 [Prlić]; *The Prosecutor v Momcilo Krajišnik*, IT-00-39-A, 17 March 2009, para 304 [Krajišnik]; *The Prosecutor v Simić et al*, IT-95-9-T, 17 October 2003, paras 122-23 [Simić]; *The Prosecutor v Milorad Krnojelac*, IT-97-25-T, 15

customary international law.[57] We will only touch upon this matter as it relates to the essential elements of the crime against humanity of deportation.

33. However, unlike the Prosecutor, we contend that the crime of deportation under art. 7(1)(d) is only completed once victims have been forced into another State or international location.[58] The mere act of crossing an international border does not complete the crime, it requires *entry* into 'another location' beyond that international border, be it a State, as explicitly mentioned in the Elements of Crimes ('the EoC'), the high seas, or an internationally designated neutral zone. This 'location' then distinguishes whether the conduct is a forcible transfer – a location within domestic boundaries – or a deportation – a location across international borders.

34. The Amici will support this position using the sources of law provided under art. 21 of the Statute and the interpretation tools provided by art. 31 of the Vienna Convention on the Law of Treaties ('VCLT') through (1) a textual analysis of art. 7(1)(d); and (2) a contextual analysis of the language and purpose of art. 7(1)(d) within the framework of the Statute.

1. A textual analysis of art. 7(1)(d) supports interpreting the geographical destination of the crime as an essential element

35. As the starting point in the analysis of the Statute,[59] art. 31(1) of the VCLT prioritises "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[60] Under art. 21(1) of the Statute, there is no source of law hierarchy between the Statute and the EoC, unless there is an irreconcilable contradiction between the two texts.[61] There is no such contradiction here, therefore the Chamber, in line with its decision in *Al Bashir*, must apply the EoC to assist in the interpretation and application of the crime definitions.[62]

36. The Statute defines art. 7(1)(d) as the "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." The EoC further defines the *actus reus* of art.

March 2002, paras 474-76 [Krnojelac]; *The Prosecutor v Popović et a*., IT-05-88-T, 10 June 2010, para 892 [Popović].

[57] Prosecutor's Request, *supra* note 3, paras 25-26.

[58] The OTP concedes at paras 16 and 26, and fns. 32 and 51 of the Prosecutor's Request, *supra* note 3, that it is not necessary to prove entry to another State, but rather that the victim has been ejected from the originating State and has crossed an international border. According to the OTP, the crucial element of the crime of deportation is the international border crossing itself, and not where the victim has crossed into. The OTP analogises to a scenario in which a victim may potentially be deported to the high seas, which involves an international border crossing, but does not constitute entry into 'another State.'

[59] VCLT, *supra* note 22, art 31.

[60] *Ibid*, art 31(1).

[61] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," 4 March 2009, para 128 [Al Bashir].

[62] *Ibid*, majority decision.

7(1)(d) as follows: "[t]he 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" (emphasis added). This definition encompasses four distinct elements that must be present to complete the *actus reus*: (1) displacement to another location; (2) of one or more persons; (3) through force or coercion; (4) in breach of international law.

37. As the Prosecutor acknowledges, there is a "basic presumption that no words in a treaty should be seen as surplus,"[63] therefore the inclusion of the phrase 'to another State or location' in the EoC must be seen as a necessary element of the crimes under art.7(1)(d). The sentence would be both grammatically and substantively complete without this additional specification, but the inclusion of a destination makes it clear that such destination is a fundamental component of the *actus reus* of the crimes.[64]

38. The text of the EoC is clear that the *actus reus* is rooted in the displacement to a location, and not merely from a location. The ordinary meaning of the phraseology 'to another State or location' is predicated on the use of the words 'to', 'another' and 'location'. The preposition 'to' expresses a motion in the direction of a particular destination,[65] the term 'another' is used to refer to a different thing from the one already mentioned,[66] and the noun 'location' is defined as 'a particular place or position.'[67] A coherent interpretation of this phrase recognises that a crucial element of the crime is only fulfilled when the victims enter the new destination.

39. Furthermore, the phrase 'to another State or location' cements the terminus of the commission of the crime and provides the key to distinguishing the two distinct crimes of deportation (international terminus) from forcible transfer (domestic terminus),[68] the former of which not only requires the crossing of a *de jure* or *de facto* border, but also entrance into the cross-border destination. In the English language, the modifier 'another' when placed before coordinate nouns is presumed to apply to both nouns.[69] Hence the phrase 'another State or

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[63] Christopher K. Hall & Carsten Stahn, 'Article 7', in Triffterer & Ambos, *supra* note 4, pp 196-98.
[64] This interpretation is also supported by the jurisprudence of the ICTY: see Stakić, *supra* note 56, paras 278, 288-302; Prlić, *supra* note 56, paras 47, 58; Krajišnik, *supra* note 56, para 304; Simić, *supra* note 56, paras 122-23; Krnojelac, *supra* note 56, paras 474-76; Popović, *supra* note 56, paras 892, 904. See also *The Prosecutor v Tolimir*, IT-05-88/2-T, 12 December 2012, para 801 [*Tolimir*]; *The Prosecutor v Karadžić*, IT-95-5/18-T, 24 March 2016, para 493 (for discussion on mens rea specifically) [*Karadžić*].
[65] *The Oxford English Dictionary*, 2018, *sub verbo* 'to': <https://en.oxforddictionaries.com/definition/to> (accessed 6 June 2018).
[66] *Ibid*, *sub verbo* 'another': <https://en.oxforddictionaries.com/definition/another> (accessed 6 June 2018).
[67] *Ibid*, *sub verbo* 'location': <https://en.oxforddictionaries.com/definition/location> (accessed 6 June 2018).
[68] Ruto, *supra* note 55, para 268.
[69] See 'Style,' in Editors of the American Heritage Dictionaries (eds), *The American Heritage Handbook of English Usage: A Practical and Authoritative Guide to Contemporary English* (Boston: Houghton Mifflin, 1996), p 53; Nadira Aljović & Muamera Begović, "Accounting for Agreement Patterns in Coordinate Noun Phrases with a Shared Modifier" (Conference paper delivered at Masaryk University, December 2014).

location' is equivalent to 'another State or another location,' an interpretation corroborated by the French version of the Statute.[70] The plain reading of this phrase indicates that the relevant destination is to another State or to another location which can be a domestic location or an international location that is not a State, such as the high seas or an internationally designated neutral zone.[71]

40. Pre-Trial Chamber II's decision on the confirmation of charges in *Ruto* endorses both a fundamental reliance on, and literal interpretation of, the EoC.[72] As the Prosecutor's Request comprehensively details, despite the Chamber's reference to deportation and forcible transfer being 'unique crimes', it ultimately found that the final destination of victims is an essential factor in establishing and distinguishing the offences under art. 7(1)(d).[73] While the elements of both crimes are quite similar, the Chamber underscored that "where [the victims] have finally relocated as a result of these acts (i.e. within the State or outside the State)" is fundamental "to draw the distinction between deportation and forcible transfer."[74] As the Prosecutor's Request notes, this is in line with the more robust jurisprudence of the ICTY on this topic.[75] It can be gleaned from this reasoning that the terminus of the crime is a material element of the conduct, since it classifies the criminal responsibility among two alternatives.

41. Interpreting element 1 of the EoC in any other way would lead to a manifestly absurd outcome because it is not practically possible to cross an international border without simultaneously entering into another location. Borders demarcate the end of a State's sovereign jurisdiction, but there is no real geographical space between the end of one State and the commencement of the adjoining State.[76] Therefore, limiting the completion of the crime at the international crossing would negate a crucial and explicitly stated element of deportation under art. 7(1)(d).

2. A contextual analysis of art. 7(1)(d) supports interpreting the geographical destination of the crime as an essential element

42. The wording of art. 7(1)(d) and its accompanying provision in the EoC was a deliberate attempt by the drafters of the Statute to avoid any lacuna in the law and to rectify the

[70] Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 (2000), art 7(1)(d), element 1 [EoC].
[71] Indeed, the Prosecutor agrees that deportation can occur to the high seas: see Prosecutor's Request, *supra* note 3, fns 32, 51. Triffterer and Ambos also discuss this distinction as evidenced in the drafting history: see 'Jurisdiction, Admissibility and Applicable Law,' in Triffterer & Ambos, *supra* note 4, fn 300.
[72] Ruto, *supra* note 55, paras 244-45.
[73] Prosecutor's Request, *supra* note 3, para 26, citing Ruto, *supra* note 55, para 268.
[74] *Ibid* (emphasis added).
[75] Prosecutor's Request, *supra* note 3, para 26, citing Popović, *supra* note 56, paras 890-95; Simić, *supra* note 56, para 123; Hall & Stahn, 'Article 7', in Triffterer & Ambos, *supra* note 4, pp 196-98, mn. 47.
[76] Jean-Pierre Cassarino, "Approaching Borders and Frontiers in North Africa" (2017) Intl Affairs 93:4 p 886.

problematic omissions of the statutes of the ad hoc international tribunals. Art. 7(1)(d) derives its origins from customary international law,[77] and was codified notably in the Charter of the International Military Tribunal at Nürnberg[78] and the ICTY Statute.[79] The drafting history of art. 7(1)(d) demonstrates that the language went through several iterations in part to elaborate the scope and definition of the crimes.[80] Several delegations suggested that art. 7(1)(d) should be guided by the definitions contained in the statutes of the ad hoc tribunals, but they also "recognized the need to reconcile differences in those definitions and to further elaborate the specific content of such offences as […] deportation."[81]

43. The drafters of art. 7(1)(d) intentionally included deportation and forcible transfer as two distinct crimes within the same category. While the inclusion of deportation was widely supported by delegates from the outset, forcible transfer was contested.[82] Indeed, the 1996 Preparatory Committee Report places 'forcible transfer' in tentative square brackets to be discussed.[83] In the end, the forcible transfer was deliberately included to ensure the Court would

[77] See e.g. *Krnojelac v Prosecutor*, IT-97-25-A, 17 September 2003, para 222. See also Stakić, *supra* note 56, paras 300-03 (for discussion on deportation and customary international law). Deportation is listed as a crime against humanity in the Control Council Law No 10 (1949), art II, para 1(c); Charter of the International Military Tribunal for the Far East (1946), art 5(c); ILC, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950), principle VI (c); ILC, Draft Code of Offences against the Peace and Security of Mankind (1954), art 2, para 10 (inhuman acts); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, A/RES/3068(XXVIII), art II (c); Statute of the International Tribunal for the Former Yugoslavia (1993) UN Doc S/25704, art 5(d) [ICTY Statute]; Statute of the International Tribunal for Rwanda (1994) UN Doc S/RES/955, art 3(d); ILC, Draft Code of Crimes against the Peace and Security of Mankind, 1996, art 18(g); UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000, ss 5.1(d), 5.2(c) [UNTAET, Regulation 2000/15]; Statute of the Special Court for Sierra Leone, 16 January 2002, art 2(d); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (2001), art 5.

[78] Charter of the International Military Tribunal (1951) 82 UNTS 279, art VI(c); William A. Schabas, "Part 2 Jurisdiction, Admissibility, and Applicable Law: Art.7 Crimes against humanity," in *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed. (Oxford: Oxford University Press, 2016), p 178 [Schabas].

[79] ICTY Statute, *supra* note 77, art 5(d).

[80] UN, "Report of the Ad Hoc Committee on the Establishment of an International Criminal Court" 1995 UNGAOR, 50th Sess, Supp 22 (A/50/22), p 17 [Ad Hoc Committee Report]; Schabas, *supra* note 78, p 179; Triffterer & Ambos, *supra* note 4, fns 293, 300-01.

[81] Ad Hoc Committee Report, *supra* note 820, p 17.

[82] At the time of drafting, deportation was already recognized as a crime against humanity in the Nürnberg Charter: see Mark Klamberg (ed) *Commentary on the Law of the International Criminal Court*, (Brussels: Torkel Opsahl Academic EPublisher, 2017), p 43, citing Rodney Dixon & Christopher K. Hall, "Chapeau", in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed (Oxford: Hart Publishing, 2008), pp 168-83. See also Triffterer & Ambos, *supra* note 4, fn 293, citing Ad Hoc Committee Report, *supra* note 80; UN, "Report of the Preparatory Committee on the Establishment of an International Criminal Court" 1996, vol I (Proceedings of the Preparatory Committee during March-April and August) 51 Sess, Supp 22 (A/51/22) p 24 [Preparatory Session I]; UN, "Report of the Preparatory Committee on the Establishment of an International Criminal Court" 1996, vol II (Compilation of proposals), 51st Sess, Supp 22A (A/51/22), p 65 [Preparatory Committee Report II].

[83] *Ibid.*

have jurisdiction over forced displacement within national borders in addition to deportation.[84] This reflects the drafters' awareness that they were dealing with separate crimes.

44. The drafters added the phrase 'to another State or location' as part of the EoC in order to distinguish the crime of deportation from the crime of forcible transfer. This language was not included in first drafts of the EoC. A proposal by the United States included as part of the elements of 'deportation' the intention "to transfer a population from its lawful place of residence."[85] A proposal by Canada and Germany later referred to the elements of 'deportation or forcible transfer of population', clarifying: "Deportation refers to the forcible removal of the persons concerned to the territory of another State. Forcible transfer of population refers to the forcible transfer of groups of persons concerned to another location, within the same State."[86] In a subsequent Discussion Paper, the language 'to another State or location' had been included in the elements of art. 7(1)(d).[87] This is likely the result of Canada and Germany's proposal, which distinguished between deportation and forcible transfer based on the material element of the crime's terminus.

45. Both ICC and international case law support this interpretation. As mentioned in paragraph X, Pre-Trial Chamber II of this Court centred its definition of deportation under art. 7(1)(d) on the geographical destination of the crime.[88] The UNTAET Special Panels for Serious Crimes ('Special Panels'), whose regulation defines deportation in an identical manner as the Rome Statute,[89] also distinguished deportation from forcible transfer based on the destination of victims.[90] In *Sarmento*, the judges held that the double formulation of the criminal action refers to the geographical character of the displacement, stating "deportation is the forced removal of people from one country to another, while population transfer applies to compulsory movement of people from one area to another within the same [S]tate."[91]

46. The ICTY also established a clear and essential distinction between the crimes of forcible transfer and deportation, confirming that displacement to another location has both an

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[84] See Darryl Robinson, "The Context of Crimes Against Humanity", in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001), p 86.
[85] Preparatory Commission for the International Criminal Court, *Proposal submitted by the United States of America: Draft elements of crimes, addendum*, 4 February 1999, PCNICC/1999/DP.4/Add.1 (emphasis added).
[86] Preparatory Commission for the International Criminal Court, *Proposal submitted by Canada and Germany on article 7*, 23 November 1999, PCNICC/1999/WGEC/DP.36 (emphasis added).
[87] Preparatory Commission for the International Criminal Court, *Discussion paper proposed by the Coordinator: Article 7 (Crimes against humanity)*, 15 December 1999, PCNICC/1999/WGEC/RT.16.
[88] Ruto, *supra* note 55, para 268.
[89] UNTAET, Regulation 2000/15, *supra* note 77, para 22.
[90] *The Prosecutor v Benjamin Sarmento and Romeiro Tilman*, UNTAET Case No. 18/2001 "Judgment," 16 July 2003, para 136 [Sarmento].
[91] *Ibid*, para 127.

actus reus and a *mens rea* component that ultimately distinguish the two crimes.[92] The *actus reus* of forcible transfer is limited to the displacement of victims within national borders, whereas deportation involves deporting victims across a *de jure* or *de facto* border.[93] Furthermore, the *mens rea* of forcible transfer merely requires the intention to forcibly displace people, whereas the *mens rea* of deportation requires the intention to displace with the animus to do so across a *de jure* or *de facto* border.[94] Since *mens rea* only attaches to material elements of the crime,[95] this suggests that the drafters envisioned the conduct of deportation as spanning from the coercive acts to the forced displacement of victims across a national border.

47. Emphasis on the cross-border nature of the crime of deportation is also consistent with the purpose of the crime.[96] As the Prosecutor's Request and Victims' Submissions rightfully argue, in addition to the shared protection of the right of individuals to live in their communities and homes, "deportation also protects a further set of important rights: the right of individuals to live in the particular State in which they were lawfully present—which means living within a particular culture, society, language, set of values, and legal protections."[97] These additional rights are only breached upon entry into another State or cross-border location. 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.[98] 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.[99]

48. Second, international protections against deportation generally have promoted the right to remain within a State, and not a particular region within a State. Art. 32 of the Fourth Geneva Convention of 1949 regarding 'expulsions', which the ICTY determined to be synonymous

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[92] *The Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras 58, 68 [Milosevic]; Popović, *supra* note 56, para 892; Stakić, *supra* note 56, para 278; see also *Prosecutor v Ante Gotovina et. al.*, IT-06-90-T, 15 April 2011, para 1738 [Gotovina].
[93] Krnojelac, *supra* note 56, paras 474-76; *Prosecutor v Krstić*, IT-93-33-T, 2 August 2001, para 52; Stakić, *supra* note 56, paras 278, 288-302, 317; Gotovina, *supra* note 92, para 1738; *Prosecutor v Stanišić and Simatović*, IT-03-69-T, 30 May 2013, para 992; Prlić, *supra* note 56, para 47; Simić, *supra* note 56, paras 122-23.
[94] Popović, *supra* note 56, para 904; Tolimir, *supra* note 64, para 801; Prlić, *supra* note 56, para 58; Karadžić, *supra* note 64, para 493.
[95] Rome Statute, *supra* note 18, art 30. See also EoC, *supra* note 70, p 1, para 2.
[96] Prosecutor's Request, *supra* note 3, para 17, citing Universal Declaration of Human Rights, GA Res 217A (III), 3rd Sess, Supp No 13, UN Doc A/810 (1948), art 13(2) [UDHR]; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 12 [ICCPR].
[97] *Ibid*; see also Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute," ICC-RoC46(3)-01/18-9, 30 May 2018, para 46 [Submissions on Behalf of the Victims].
[98] *Sarmento*, *supra* note 90, para 127.
[99] *UN Charter*, *supra* note 8, art 2(7). See also J John H. Currie, *Public International Law* (Toronto: Irwin Law, 2008), p 23.

with deportation,[100] had the purpose of allowing nationals in an occupied country to remain within that country.[101] The 1951 Refugee Convention also prohibits certain types of 'expulsions', referring exclusively to international border crossings.[102] Human rights protections against deportation likewise centre on this goal: allowing individuals to remain within States in which they are lawfully present.[103] A teleological and contextual interpretation of art. 7(1)(d) thus emphasizes the removal of victims across a national border as a critical element of the crime of deportation.

49. An interpretation of art. 7(1)(d) that considers the crime's geographical terminus an essential element is also wholly coherent with the purpose of the Statute. Art. 7(1)(d) must be interpreted in the light of the object and purpose of the Statute,[104] which is to "put an end to impunity" and to "enforce[e] international justice."[105] The Court should interpret the crimes under its Statute in a manner that best accomplishes these objectives, so long as it does not contravene the principle of legality or exceed the Court's jurisdiction. In the case of deportation, by acknowledging the essential nature of the geographical terminus of the crime, the Court would be able to better enforce international justice within a legally sound framework that respects the rights of the accused under art. 22 of the Statute and the jurisdictional limitations of the Court.[106]

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[100] *Krnojelac*, *supra* note 56, para 476. See also fn 1437.

[101] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (Fourth Geneva Convention), art 49. See also Milosevic, *supra* note 92, paras 47-52; Patricia M. Wald, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another* (2007) 30 BC Intl & Comp L Rev 15, p 19.

[102] Art. 32 mandates that "contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order", and art. 33 states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." (*Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137). See also Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), p 390.

[103] See UDHR, *supra* note 96, art 13(2); ICCPR, *supra* note 96, art 12; Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* ("Bangkok Principles"), 31 December 1966, art III.1; Organization of African Unity, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, UNTS 14691, art II.3; Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees*, Adopted 22 November 1984, Conclusion 5. See also regional human rights body cases, such as: *Amnesty International v. Zambia*, Comm No 212/98, African Commission on Human and Peoples' Rights, 5 May 1999; *John K. Modise v. Botswana*, Comm No 97/93, African Commission on Human and Peoples' Rights, 6 November 2000; *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, 292/04, African Commission on Human and Peoples' Rights, May 2008.

[104] VCLT, *supra* note 22, art 31.

[105] Rome Statute, *supra* note 18, Preamble.

[106] The Chamber used the ordinary meaning, context and drafting history of the Statute to determine that it contained no restrictions as to who victims of war crimes must be, thus expanding protections to members of armed groups who were subjected to rape or sexual slavery by other members of those groups. The Chamber did not appear to find this in violation of art. 22 (paras 46-51): *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 OA5, "Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'", 15 June 2017.

B. If the Chamber deems deportation under art. 7(1)(d) to be completed upon crossing an international border without requiring entry to 'another State or location', this material element nevertheless occurs on the territory of both adjoining States.

50. Though the Amici contend that an essential element of the crime of deportation under art. 7(1)(d) is entry into 'another State or location,' should the Court agree with the Prosecutor's interpretation that the crime is completed merely upon crossing an international border, this 'crossing' nevertheless occurs on the territory of both contiguous States.

51. Shared national borders do not occupy physical space, but instead represent the meeting point between the territorial sovereignties of contiguous States. They are imaginary lines demarcating the physical territory over which a State can exercise sovereignty.[107] ICTY jurisprudence reflects this notion as both *de jure* or *de facto* national borders[108] divide territorial sovereignties in law or in practice. The concept of the 'shared' border also reflects the meeting of these sovereignties. Political geographers acknowledge that States assert territorial sovereignty by controlling the movement of people and things into and out of their territory.[109] Movement across the border cannot be unilaterally controlled by one State as the action intrinsically requires authorisation by both States: one permitting the exit from a territory and the other permitting the entrance.[110] It is no wonder then why bilateral agreements aimed at regulating 'shared' borders are common, establishing various forms of cooperation to manage

[107] Alison Kesby, "The Shifting and Multiple Border and International Law" (2007) 27:1 Oxford J of Legal Studies 101, p 102 [Kesby]; See also *UN Charter*, *supra* note 8, art 2(4), which articulates that States have sovereign jurisdiction over their own territories; *Case Concerning the Temple of Preah Vihear (Cambodia/Thailand)* [1962] ICJ, p 34; *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ, para 45; John P Grant & J Craig Barke, *Encyclopaedic Dictionary of International Law*, 3rd ed, (Oxford: Oxford University Press, 2009); Victor Prescott & Gillian D Triggs, *International frontiers and boundaries: law, politics and geography* (Leiden: Brill, 2008), p 139; *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, [1986] ICJ Rep p 554, para 17; Ladis KD Kristof, "The nature of frontiers and boundaries" (1959) Annals of the Association of American Geographers 49, p 275; James Anderson and L. O'Dowd, "Borders, Border Regions and Territoriality: Contradictory Meanings, Changing Significance" (1999) 33:7 Regional Studies 593, p 594; Bastian Sendhardt, "Border Types and Bordering Processes: A Theoretical Approach to the EU/Polish-Ukrainian Border as a Multi-dimensional Phenomenon" in Arnaud Lechevalier & Jan Wielgohs (eds), *Borders and Border Regions in Europe: Changes, Challenges and Chances* (Transcript Verlag, 2013), p 34; Matthew H Ellis, "Over the Borderline? Rethinking Territoriality at the Margins of Empire and Nation in the Modern Middle East (Part I)" (2015) 13:8 History Compass 411, p 412.

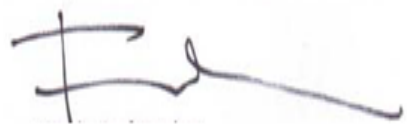
[108] Stakić, *supra* note 56, para 300; *Prosecutor v. Prlić et al*., IT-04-74-A, 29 November 2017, para. 299.

[109] James Anderson, "Borders after 11 September 2001", (2002) 6:2 Space and Polity p 231; James Anderson, "Questions of democracy, territoriality and globalisation" in *Transnational Democracy Political Spaces and Border Crossings*, ed. James Anderson (London: Routledge, 2002), p 27; Reece Jones, "Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border" (2012) 102:3 Annals of the Association of American Geographers 685, p 691.

[110] Kesby, *supra* note 107, pp 115-16.

migratory flows and security measures.[111] These activities aim to protect the territorial sovereignty of both States, which meet at the border.

52. Thus, if national borders are lines that do not occupy physical space but represent the meeting point between the territorial sovereignties of contiguous States, then when one is crossing a national border, they are simultaneously in the territory of both adjoining States. It then follows that a material element of deportation—crossing a border— takes place on the territories of both the State from which victims are exiting and the State to which they are entering.



Fannie Lafontaine
On behalf of the signatories
Director of the Canadian Partnership for International Justice

Dated this 18th day of June 2018
At Quebec City, Canada

[111] See e.g. *Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Reinforcement of Cooperation for the Coordinated Management of their Shared Border*, signed 18 January 2018, entry into force 1 February 2018, arts. 5-6 (art. 9 and the title of the agreement refer to a 'shared' border); Prime Minister of India, *Border Defence Cooperation Agreement between India and China*, 23 October 2013, Press Release; *Agreement between the Swiss Federal Council and the Government of the French Republic on cross-border cooperation in judicial, police, and customs matters*, signed 9 October 2007, entry into force 1 July 2009 (art. 3 and 20 refer to a 'shared' border); *Agreement between the Government of the Kingdom of Belgium and the Government of the French Republic concerning cross-border cooperation in police and customs matters*, signed 5 March 2001 (art. 3 refers to a 'shared' border); *Regulation of the Agreement between the Argentine Republic and the Republic of Bolivia on integrated border controls*, signed 16 February 1998, entry into force 3 February 2003 (this agreement establishes shared border checkpoints, suggesting shared sovereignty at the border); *Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Latvia concerning cooperation on border controls at joint State frontier crossing points*, (similarly, this agreement established shared border checkpoints).