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No.: **ICC-01/19**
Date: **10/10/2019**

PRE-TRIAL CHAMBER III

Before: **Judge Olga Herrera Carbuccia, Presiding Judge**
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE PEOPLE'S REPUBLIC OF BANGLADESH/ REPUBLIC OF THE UNION OF MYANMAR

PUBLIC
with Public Annex A

Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence

Source: **Professor Dr. Tin Aung Aye**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

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Philipp Ambach

Other

Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, the undersigned – Professor Dr. Tin Aung Aye ("the Applicant") seeks leave to present observations in order to assist Pre-Trial Chamber III of the International Criminal Court ("the Court") with the determination of the legal issues arising out of the Prosecutor's "*Request for the authorisation of an investigation pursuant to article 15*"[1] ("the Prosecutor's Request").

The Applicant

1. The Applicant was formerly the head of the Department of Law at Yangon University. Thereafter, he was nominated as a Justice of the Supreme Court of Myanmar and, later, as a member of the Constitutional Tribunal of the Union - a position which he held until 6 September 2012. During his career, the Applicant has authored books and many research papers on legal issues. His works have been published in both the Myanmar and English languages. His last book, "Constitutions and Constitutional Courts of the Nations" was published in December 2015.[2]

2. This application will seek to assist the Court by providing a Myanmar-orientated perspective to a number of issues arising out of the Prosecutor's Request which might otherwise be lacking.

3. The Applicant makes this petition in the full knowledge that the Government of the Republic of the Union of Myanmar has taken the principled decision not to engage with the International Criminal Court.[3] The Applicant is also mindful that, to

[1] ICC-01/19-7.
[2] Curriculum Vitae attached at **Annex A**.
[3] Government of the Republic of the Union of Myanmar Ministry of the Office of the State Counsellor: Press Release dated 9 August 2018: "*The Request by the Prosecutor may be interpreted as an indirect attempt to acquire jurisdiction over Myanmar which is not a State Party to the Rome Statute. Myanmar, as a non-State Party, is under no obligation to enter into litigation with the Prosecutor at the ICC or even to accept notes verbales emanating from their Registry by reference to article 34 of the Vienna Convention on the Law of Treaties ("Vienna Convention").*
The actions of the Prosecutor, constitute an attempt to circumvent the spirit of article 34 of the Vienna Convention". http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/08/09/id-8936

date, the Court has not received detailed submissions from any Myanmar national organization qualified to address the issues at stake.[4] The Applicant notes that the Court has, nonetheless, given standing to amici curiae who profess no discrete expertise other than "*experience intervening as an independent third party in domestic and international jurisdictions … working inter alia to improve the rule of law and respect for human rights in Asia, including in Myanmar and Bangladesh*".[5] The Applicant further notes that the Court granted leave to participate to a private law firm - incorporated in September 2016 - on the basis of its asserted "*expertise in transnational litigation in the fields of human rights and international criminal law*".[6] The Applicant respectfully avers that his standing is of no less caliber.

4. In order, therefore, to ensure a balanced presentation of views, the Applicant submits that it would be in the interests of justice for the Court not just to receive - but to invite[7] submissions which will act as a counterpoint to the Prosecutor's exposition of the legal issues at stake.

5. The need for submissions which challenge the Prosecutor's assumptions and her adopted narrative is imperative in an adversarial system of law and should not be viewed by the learned Pre-Trial Chamber as unnecessarily provocative. This need is even more pronounced given the highly polarized and charged nature of the Myanmar debate. As the respected academic Morten Bergsmo has recently commented:

[4] See ICC-RoC46(3)-01/18-35 where Pre-Trial Chamber I denied the Thayninga Institute for Strategic Studies leave to make submissions on "(*i) the migration of Bengali people to the Rakhine state between 1839 and 2005; (ii) outbreaks of violence in the Rakhine state between 1942 and 2017, including attacks allegedly carried out by "Bengali terrorists"; (iii) actions taken by the Government of Myanmar against terrorism; and (iv) humanitarian activities conducted by the Government of Myanmar*".
[5] ICC-RoC46(3)-01/18-7 at para. 7.
[6] ICC-ROC46(3)-01/18-17 at para. 9.
[7] ICC-02/05-10: where Pre-Trial Chamber I in the Darfur Situation decided to invite "*Louise Arbour, High Commissioner of the Office of the United Nations High Commissioner for Human Rights and Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan, to submit in writing their observations on issues concerning the protection of victims and the preservation of evidence in Darfur*".

> *"This polarisation could become a problem for the ICC. For one, an exceptionally polarised environment can aggravate the challenge of group-think in refugee camps in Bangladesh, cementing the risk of confirmation bias. Potential witnesses may not adequately describe the crowd dimension of violations to life and the person in northern Rakhine communities from 25 August 2017.*
>
> *An excessively polarised climate may also weaken recognition of the importance of turning every stone in making national investigations and prosecutions in Myanmar work".*[8]

Relevant Statutory Provision

6. Rule 103(1) of the Rules of Procedure and Evidence states as follows:

> "*At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate*".

7. Although the rule provides for submissions to assist in the proper determination of "*the case*", practice at the International Criminal Court, both in the present situation and elsewhere, has shown that leave to submit amicus curiae submissions may be granted at any stage of the legal proceedings, including prior to the initiation of an investigation.[9]

[8] Bergsmo, M; "Myanmar, Colonial Aftermath, and Access to International Law", TOAEP Occasional Paper Series at p.3.

[9] *c.f.;* ICC-02/17-43 where Pre-Trial Chamber III granted leave to a collective of human rights organizations seeking to intervene in the proceedings arising out of the Prosecution's appeal against the decision to deny authorization to open an investigation in Afghanistan: "*At this stage, the Chamber does not take a position either on the views expressed in either the Amicus curiae's Request […], or on the merits of the arguments elaborated by the applicants therein. However, in light of the nature and complexity of the issues at*

8. The Applicant is not affiliated with or funded by the Government of Myanmar. Being situated, however, in Myanmar, the Applicant is ideally placed to acquire information which might otherwise be denied the Prosecutor given her present inability to enter the territory of Myanmar and, otherwise, is well versed in "*the national laws of the State[..] that would normally exercise jurisdiction over the crime*" pursuant to article 21(1)(c) of the Rome Statute. As such, the Applicant is aptly suited to act as an "*independent and impartial intervener having no other standing in the proceedings*".[10]

9. Furthermore, and while not presuming to trespass on the province of the learned judges, the Applicant believes that his observations will be of "*indispensable assistance*"[11] to the Court by presenting discrete knowledge acquired as a result of years of experience working in the Myanmar legal establishment.

The Proffered Expertise

10. The Applicant notes that Pre-Trial Chamber I exceeded the scope of the Prosecutor's initial request for a ruling on jurisdiction which was confined to the crime of deportation and, more or less, invited the Prosecutor to seek an investigation into other "cross-border" crimes. Consequently, the Applicant will seek leave to make submissions on the jurisdictional aspects of the two crimes against humanity which were not entertained in the context of the preliminary ruling litigation.

11. Despite the preliminary decision on jurisdiction dated 6 September 2018 ("the Jurisdiction Decision"), Article 19(4) of the Rome Statute clearly envisages the

stake, it considers that receiving additional submissions may assist the Chamber in determining the Prosecutor's Request".

[10] ICC-01/09-35.

[11] ICC-01/04-01/07-3003-tENG at para. 54.

possibility of a future challenge to jurisdiction by a person for whom a warrant of arrest has been issued. His Honour Judge Marc Perrin de Brichambaut anticipated the procedural problems flowing from this in the context of his dissent from the Jurisdictional Decision:

> *To attempt to rule on jurisdiction pre-emptively at this juncture would hazard an inconsistent result with subsequent determinations at a later (and more appropriate) phase of proceedings.*[12]

12. In light of this, the Jurisdiction Decision of Pre-Trial Chamber I should not be seen as binding on the independently constituted Pre-Trial Chamber III. The Applicant will thus set out below observations on the jurisdictional aspects of the crime of deportation which Myanmar could have raised had it formerly engaged with the Court. The Applicant will, further, ask the learned Pre-Trial Chamber to receive these observations which will be of benefit to future suspects should an investigation be initiated. These observations will also be pertinent to the newly raised crime of persecution which cites deportation as the predicate offence at the root of alleged discriminatory conduct.

Article 12(2)(a) of the Rome Statute

13. The plain language of article 12(2)(a) of the Rome Statute states that the Court may exercise jurisdiction when the "conduct" in question "occurred" on the territory of a State Party. As put by the Prosecutor, adopting the findings of Pre-Trial Chamber I, the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute "*if at least one element of a crime …. is committed on the territory of a State Party*".[13] No explanation is given in the Rome Statute as to the required nature of such "conduct" or the scope

[12] ICC-RoC46(3)-01/18-37-Anx at para. 32
[13] Prosecutor's Request at para. 73.

thereof. It is, however, possible to understand how notions of "conduct" may entail crimes which are characterized by the perpetrator's comportment alone – such as theft, and crimes which require a result – such as murder. While such a distinction exists in classical legal theory, the Applicant will argue that it is of no consequence to the present debate. It merely suffices to comment that the assumption that deportation is a result-based crime is not without its problems. Article 7(2)(d) of the Rome Statute defines the conduct required for deportation as follows:

> "*'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*".

14. No written mention, however, is made of the need for a destination or the physical presence of the displaced persons at any particular destination. As will be further analyzed, the essential conduct of the perpetrator of "deportation" may be understood as completed at the moment of nonconsensual and unlawful eviction without the need to prove causation or a result, namely; displacement to another location or to another State.

The Crime of Deportation

15. For the record, the Applicant respectfully disagrees with the contention that population displacement across a national boundary is an essential objective element of the crime of deportation set out in article 7(1)(d) of the Rome Statute. While noting that certain decisions of the International Criminal Tribunal for Yugoslavia and other sources of customary international law have indeed distinguished deportation from forcible transfer by reference to the "cross-border" element, the plain and simple language of article 7(2)(d) of the Rome Statute does not support such a distinction.

16. This was acknowledged by the academic Guido Acquaviva in his analysis of the issue to which the Prosecutor made fleeting reference in footnote 37 of her request for a preliminary ruling:

> "*First, a question has been lingering amongst scholars about the distinction, if any, between the notion of deportation and that of forcible transfer. From the early developments of war crimes law, conventional instruments and judicial rulings have often conflated these two concepts. As the two acts are often mentioned together, doubts abound as to whether they should not be treated as a single crime. Interestingly, the ICC Statute does not appear to make a clear distinction between the two*"[14]

17. It is not denied that the drafters of the Rome Statute were conscious of the historical debate on the matter. Yet, in the circumstances, it is more reasonable to conclude that Article 7(2)(d) was formulated specifically to resolve the issue by fusing what was, at the time, perceived to be a pre-existing and unnecessary distinction, annulling, thereby, the need to prove a cross-border element and placing the emphasis, instead, on "*expulsion*" of persons from "*the area where they are lawfully present*". Article 7(1)(d) of the Rome Statute should not be read, therefore, as containing two crimes but as comprising a single crime of which the defining essential objective element is the spatial displacement of a population regardless of destination. The spatial and, for that matter, the quantitative extent of such displacement would then be considerations for prosecutorial discretion when deciding whether or not to charge an individual for the crime of deportation.[15]

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[14] Acquaviva, Forced Displacement and International Crimes, Legal And Protection Policy Research Series (UNHCR, June 2011), p. 18 http://www.unhcr.org/4e0344b344.pdf

[15] This conceptual shift was, furthermore, reflected in the proposals of the Preparatory Committee of the Rome Statute in February 1997 where the explanation accompanying the crime of "deportation or forcible transfer of population" read as follows: "*the movement of [persons][populations] from the area in which the [persons][populations] are [lawfully present] [present][under national or international law] [for a purpose contrary to international law][without legitimate and compelling reasons][without lawful justification]*".

18. Had the drafters of the Rome Statute intended to maintain the legal distinction between deportation and forcible transfer, as recognized in certain sources of customary law, they would have formulated Article 7(2)(d) accordingly and included a specific reference to national borders. As it is, the pertinent section of the "Elements of Crimes" contains a footnote which makes it clear that the Rome Statute intended to conflate the two concepts:

> "*Deported or forcibly transferred" is interchangeable with "forcibly displace*d".[16]

19. Further support for the contention that deportation and forcible transfer are to be treated as one and the same singular crime under article 7(1)(d) of the Rome Statute is to be found in that section of the Elements of Crimes which refers to the war crime set out in article 8(2)(a)(vii) of the Rome Statute. Article 8(2)(a)(vii) mentions three forms of criminal conduct: (i) deportation, (ii) transfer and (iii) unlawful confinement. Perusal of the Elements of Crimes makes it clear that the first two forms of conduct are to be equated yet distinguished from the third form of conduct. More particularly, the Elements of Crimes splits its commentary on article 8(2)(a)(vii) into two sections and not three; the first section (8(2)(a)(vii)-1) deals with deportation and transfer and the second section (8(2)(a)(vii)-2) deals with unlawful confinement. Had the drafters of the Elements of Crimes believed that deportation and forcible transfer were two discrete

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c.f.; Hall, C.K. Crimes against humanity – para. 1(d), footnote 170, Commentary on the Rome Statute of the International Criminal Court, Triffterer et al., 2nd Edition, page 197.

[16] Fn.13. The Prosecutor has formerly asserted (para. 20 of the request for a preliminary ruling) that the "*disjunctive 'or'*" separating the terms "*deported or forcibly transferred*" should be seen as significant and as pointing to two legally distinct crimes. Support for this contention she claims, is to be found in the Elements of the Crimes which "*likewise mirror the distinction*" between the two terms and are complemented respectively by two destinations: "*to another State or location*". Such textual interpretation is fallacious. To take the "*disjunctive 'or'*" theory to its logical conclusion, it would be necessary, also, to argue that the terms "*expulsion or other coercive acts*" be similarly apportioned to the concepts of deportation and forcible transfer with deportation being committed only by way of expulsion and forcible transfer only by way of other coercive acts. This is plainly not the case and the attempt to construe two legally distinct crimes from the use of the "*disjunctive 'or'*" should be rejected.

crimes, the completion of which depended on additional yet differing essential elements (*i.e.*, the location of the displacement), they would not have placed them together under the same subparagraph 8(2)(a)(vii)-1.[17] It is significant to note that the title of article 8(2)(a)(vii)-1 of the Elements of Crimes is "War crime of unlawful deportation **and** transfer" and **not** "War crime of unlawful deportation **or unlawful** transfer". The use of the connecting word "and" in the present context would seem to negate the Prosecutor's previous carefully crafted argument concerning the interpretative value to be placed on the disjunctive word "or".

20. In light of all the aforementioned, it is not surprising that Pre-Trial Chamber II, in the *Ruto* confirmation proceedings, referred to Article 7(1)(d) as a "unique" crime (in the singular) with two labels and not as "two" crimes with a "unique" label![18] Even the former ICC Prosecutor - Luis Moreno-Ocampo deemed the distinction irrelevant when he filed an amended "document containing the charges" which detailed only instances of forced internal displacement yet used the terms deportation and forcible transfer interchangeably.[19] In any event, it is worthwhile noting that the deportation/forcible transfer dichotomy was only litigated in the *Ruto* case because of a defence challenge to the form of the document containing the charges and not because the Prosecutor attributed any conceptual importance to the distinction. The fact that the incumbent Prosecutor has now performed a *volte-face* and found a need to stress a difference between deportation and forcible transfer is merely evidence of her office's inconsistent approach to the subject. For this reason, *inter alia*, it is not surprising that Myanmar declined to engage in a legal process with a prosecuting authority which, in

[17] See also, article 7(1)(g) of the Rome Statute which 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 and enumerated in six separate sub-paragraphs of the Elements of Crimes; viz, articles 7(1)(g)-1 to 7(1)(g)-6.

[18] ICC-01/09-01/11-373; paragraph 268.

[19] ICC-01/09-01/11-261-AnxA; particularly paragraph 36: "Murder, deportation and persecution are crimes against humanity as defined in Article 7 of the Statute", omitting the term "forcible transfer" in a document which only details internal displacement.

chameleon-like fashion, changed its legal policies to suit the prevailing political climate and the populist demands of civil society organizations.

21. On this point, it is to be remarked that even the Prosecutor herself acknowledges that the crime encapsulated in Article 7(1)(d) does not require proof of the physical presence of a deported population in another State but rather the ejection from the originating State – in this case Myanmar:

> "*As a matter of law, however, it is not necessary to prove entry to another State, but merely that the victim has been ejected from the originating State—as such, a victim may potentially be deported to the high seas. What is crucial is that the international border, de jure or de facto, of the originating State is crossed*".[20]

22. From this contention, it appears that the Prosecutor is of the opinion that all that is required in order to complete of the crime of deportation is to show the crossing of the border of the ejecting state and not the entry into the receiving state. While the distinction might appear oddly semantic, it is, nevertheless, important to mention the difference between international boundaries and borders since ICTY precedent on the crime of deportation appears to confuse the two concepts. The borders of neighboring countries, unlike their geographical boundaries, are not necessarily contiguous.

23. Professor Martin Pratt - the Director of Research at the International Boundaries Research Unit of Durham University has encapsulated the issue succinctly:

> "'*Boundary' is usually used in reference to the line which divides the territory or maritime space of two States, while a 'border' is what has to be crossed in order to enter a state. Sometimes they coincide exactly, but it is more common*

[20] ICC-RoC46(3)-01/18-1; footnote 32.

for the border to include infrastructure such as immigration checkpoints, customs facilities, fencing and patrol roads which extend beyond the boundary; and, in the case of international air- and seaports, the border may be located hundreds of kilometres from the boundary. A boundary is essentially a line of definition, while a border is usually a more complex entity comprising several lines and/or zones, whose primary function is the regulation of movement of people and goods".[21]

24. With this in mind, it is perfectly conceivable that the understanding of neighboring States as to the spatial location of their respective borders may not coincide. As a consequence, borders of neighboring States are not necessarily shared territory and the expulsion of a population by one State across its own self-defined border in such a scenario would not necessarily even lead to the displacement of that population into the jurisdictional territory of its neighbor – as perceived by that neighboring state.

25. As a matter of international policy, furthermore, the crime contained in Article 7(1)(d) of the Rome Statute should not be construed so as to lead to a situation where the Court is obliged to make a ruling on the exact delimitation of a nation's frontiers in order to fix culpability for a crime of deportation. In so doing, the Court would be assuming a role which is entirely the prerogative of sovereign nations – especially

[21] Applied Issues in International Land Boundary Delimitation/Demarcation Practices: A Seminar organized by the OSCE Borders Team in co-operation with the Lithuanian OSCE Chairmanship from 31 May to 1 June 2011 in Vilnius, Lithuania: https://www.osce.org/cpc/85263?download=true. Boundaries are best described as objective geographical abstracts which are not in the sovereign possession of any state affected by them. Borders, on the other hand, are more commonly viewed as subjective notions defining the outer limits of a nation-state's self-determined sphere of sovereign influence whether it be jurisdictional, political, cultural or economic. Borders may encroach beyond or withdraw within an international boundary and be demarcated by physical entities such as immigration posts at airports and checkpoint facilities. To conceptualize the issue otherwise would be to fall in to what the eminent geographer – John Agnew has coined "the territorial trap"; namely, to regard states as fixed units of territorial sovereign space unchanging through time. *c.f.*; Agnew, J.A. (1994), "The territorial trap: the geographical assumptions of international relations theory", Review of International Political Economy 1: 53-80.

where there is an existing dispute as to delimitation and maritime energy issues are at stake (as is the case with the Myanmar and Bangladesh).[22] Switzerland, just by way of example, states the following regarding the delimitation of its national borders:

> "*Because the border is a constituent of Switzerland's sovereign territory, any modification of its course must be affirmed by Parliament and is subject to a facultative referendum*".[23]

26. To summarize, the Applicant will submit that a plain reading of article 7(2)(d) of the Rome Statute would mean that all essential objective elements of the crime of deportation, as with forcible transfer, are completed from the moment of unlawful displacement without the need to prove transfer across a national boundary or to prove the presence of a displaced population in another State's territory. In the present instance, therefore, all essential elements of the alleged crime of deportation (which is totally denied) would have been completed on the territory of Myanmar over which the Court has no jurisdiction since it is not a State Party to the Rome Statute.

The Crime of Persecution

27. If granted leave to present observations, the Applicant will submit that the conduct envisaged by the crime of persecution is set out quite clearly in the text of the ICC Elements of Crimes. Such conduct comprises "depriving" one or more persons of "*fundamental rights*" and "targeting" a group of persons in a discriminatory fashion. According to the Prosecutor, the displaced population was deprived of two rights: "*the right of individuals to live in their communities*"[24] and *"the customary international law right to return"*.[25] Yet, if the Prosecutor's cited evidence is to be accepted, the Applicant will

[22] http://www.nbr.org/publications/asia_policy/Preview/AP10_D_Maritime_preview.pdf.
[23] https://www.swisstopo.admin.ch/en/knowledge-facts/sovereign-border/national-boundary/legal-bases.html.
[24] Prosecutor's Request at para. 171.
[25] Prosecutor's Request at para. 172.

argue that the "deprivation" of the purported fundamental rights mentioned above did not occur on the territory of a State Party. The displaced persons' right to live in their communities would, necessarily, have been deprived from the moment that they were forcibly evicted from their homesteads and before they reached the international boundary with Bangladesh. The same holds true for the deprivation of the so-called right to return. According to the Prosecutor, this right was violated as a result of an ongoing campaign of intimidation and the clearance and re-designation of land formerly habited by the displaced persons:

> "*... the displaced Rohingya people cannot presently return to Myanmar because the conditions for a voluntary, safe, dignified, and sustainable return of Rohingya refugees do not exist. This is allegedly due, at least in part, to the continued campaign of violence, intimidation and harassment against the Rohingya who remain in Myanmar, as well as the restriction of points of entry from Bangladesh (through border fencing and landmines) and extensive operations to clear land formerly occupied by displaced Rohingya, in combination with the construction and development of new buildings and infrastructure – including new "model villages" which, according to the UNFFM, are "predominantly, possibly exclusively, for non-Rohingya communities," and security or military-related infrastructure*".[26]

All elements of this alleged conduct, if true, were perpetrated entirely on Myanmar territory and thus not subject to the jurisdiction of the Court.

28. The evidentiary standard which the Prosecutor needs to meet is whether there exists a reasonable basis to believe that a crime under the Rome Statute has been committed. The Applicant will assert that the facts alleged by the Prosecutor as

[26] Prosecutor's Request at para 142.

supporting discriminatory intent required for the crime of persecution do not satisfy this standard. A parable cited on the Tatmadaw Commander-in-Chief's Facebook page[27] does not mean that it was endorsed by Senior General Min Aung Hlaing any more than racist utterances, however despicable, uttered by lowly police and military personnel[28] may be deemed Tatmadaw policy. The Tatmadaw's campaign in Rakhine State was avowedly prosecuted in order to root out the Arakan Rohingya Salavation Army ("ARSA") which was accused of perpetrating organised acts of terrorism. In the course of this campaign, ARSA sympathisers and those offering it material support might very well have been targeted. Yet targeting of this nature is not indicative of a discriminatory and persecutory intent in so far as the Tatmadaw's campaign (as excessive as the Prosecutor might deem it) was not focussed on an ethnic or religious group *per se* but, rather, on a terrorist organisation and those identifying with its illegal objectives and means.

The Crime of "Other Inhumane Acts"; Violation of the Right to Return

29. The Applicant will also seek leave to submit that the Prosecutor's arguments for the acquisition of jurisdiction over the crime of "other inhumane acts" are even more questionable. As mentioned above, this particular crime against humanity is characterised by the Prosecutor as the "*intentional and severe deprivation of the right of recently displaced Rohingya persons in Bangladesh to return to their State of origin, causing them great suffering or serious injury to body or to mental or physical health*".[29] The Prosecutor alleges that the cross-border element of "*preventing the effective exercise of the right to return*"[30] was the grave harm caused to the displaced persons on Bangladeshi territory or, put otherwise, their "*anguish*" as a result of being uprooted from their homes, their future uncertainty and current socio-economic distress.[31]

[27] Prosecutor's Request at para. 175.
[28] Prosecutor's Request at para. 176.
[29] Prosecutor's Request at para. 124.
[30] Prosecutor's Request at para. 125.
[31] Prosecutor's Request at para. 131. The Applicant notes that Myanmar has entered into negotiations with Bangladesh for the return of verified Myanmar residents through signing of bilateral agreements - in particular the

30. The drafters of the Rome Statute cannot possibly have intended that the "*infliction of great suffering*" should be interpreted in such a flexible fashion. The anguish of a deported person cannot even be compared, for example, to the threshold of harm arising out of other forms of conduct previously recognised as other inhumane acts such as sexual violence and the forced observation of acts of rape and mutilation. Indeed, it will be remembered that the Prosecutor, to her former credit, never sought a prelimary ruling on jurisdiction for this crime, most likely because she felt it inappropriate to prosecute cases of sexual violence and other serious atrocities indirectly (by defining them as "*other inhumane acts*") where she felt unable to prosecute them directly.

31. Finally, the Applicant will submit that the "right to return" cannot be deemed a fundamental right[32] recognised by customary international law such that its subsequent violation would bring it within the category of "*other inhumane acts*". On this issue, the Whewell Professor of International Law at the University of Cambridge - Eyal Benvenisti has opined as follows:

> "*The claim that the right of return is recognized in international in human rights instruments, such as the Universal Declaration of Human Rights or the 1966 Covenant on Civil and Political Rights, is hotly debated. Therefore, it is yet to be generally accepted as part of customary law.*
>
> *Article 12(4) of the 1966 Covenant on Civil and Political Rights stipulates that "No one shall be arbitrarily deprived of the right to enter his own country." This Article raises a series of questions regarding its intent and scope. The first question relates to its scope: As Stig Jagerskiold, one of its first interpreters, writes:*

'Arrangment on Return of Displaced Persons from Rakhine State' concluded on 23 November 2017. These agreements, inter alia, belie the allegations of violating a so-called "right to return".

[32] Prosecutor's Request at para. 128.

"This right is intended to apply to individuals asserting an individual right. There was no intention here to address the claim of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population, such as the relocation of ethnic Germans from eastern Europe during and after the Second World War, the flight of Palestinians from what became Israel, or the movement of Jews from the Arab countries. Whatever the merits of various "irredentist" claims, or those of masses of refugees who wish to return to the place where they originally lived, the Covenant does not deal with those issues and cannot be invoked to support the right to "return." These claims will require international political solutions on a large scale"".[33]

Conclusion

32. In light of all the aforementioned, the Applicant respectfully requests the learned Pre-Trial Chamber to receive his submissions on the crime of deportation and to grant him leave to submit further observations on the crimes against humanity of persecution and "other inhumane acts". Should the learned Pre-Trial Chamber, at some later stage, conduct an oral hearing on the Prosecutor's Request, the Applicant would also request rights of audience through appointed counsel.

Professor Dr. Tin Aung Aye

Done this 10th day of October, 2019.

Yangon, Republic of the Union of Myanmar

[33] Benvenisti, E; "The Right of Return in International Law: An Israeli Perspective".