PARTIALLY DISSENTING OPINION OF JUDGE MARC PERRIN DE BRICHAMBAUT

Table of Contents

I. Introduction

1. At the outset, I find that the request presented by the Prosecutor[1] (the "Prosecutor's Request" or the "Request") for a ruling on jurisdiction under article 19(3) of the Rome Statute (the "Statute") comes at a highly unusual juncture before even a preliminary examination of a situation has been initiated by the Prosecutor, let alone authorization to commence an investigation has been requested from this Pre-Trial Chamber pursuant to article 15(3) of the Statute.

2. I cannot agree with the Majority's finding that the interpretation of article 19(3) of the Statute "is quite controversial based on the different readings of the Court's statutory documents and the literature interpreting this provision".[2] I deem it necessary to fully address the issue of its applicability at such a premature stage of proceedings. Indeed, as the legal basis on which the Prosecutor's Request is grounded, this issue must be addressed by the Chamber and cannot be avoided or dismissed in a lapidary fashion.

3. I am moreover not persuaded by the analysis advanced by the Majority that finds alternative legal bases for the Chamber to entertain the Prosecutor's Request based on article 119(1) of the Statute, which is not mentioned in the Request, or based on the principle of international law commonly referred to as *la compétence de la compétence/Kompetenz-Kompetenz* (the "principle of *la compétence de la compétence*").[3] Therefore, I am not in a position to participate in any kind of ruling by the Chamber at this juncture.

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[1] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Application Under Regulation 46(3), 9 April 2018, ICC-RoC46(3)-01/18-1.
[2] Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18 (the "PTC I Decision"), para. 27 (footnote omitted).
[3] PTC I Decision, paras 28-33.

4. I further note that to answer the Prosecutor's jurisdictional question at this stage would be an exercise in speculation tantamount to delivering a *de facto* advisory opinion. To make a ruling on jurisdiction based on imprecise and selective submissions by the Prosecutor[4] when there is not even a preliminary examination that has defined the parameters of a situation, let alone has been concluded, is explicitly proscribed by well-established jurisprudence as will be discussed below.

5. I contend that the arguments proffered by the Prosecutor do not support the Court's ability to intervene effectively at this embryonic stage. However, were the Office of the Prosecutor to seek authorization to commence an investigation, after having satisfied itself of a reasonable basis to proceed, and, as part thereof, request a decision on jurisdiction, the Prosecutor would be well within its statutory rights.

6. This opinion first addresses the question of the applicability of article 19(3) of the Statute at this stage of the proceedings. I next explain why it is erroneous to invoke article 119(1) of the Statute as an alternative legal basis to address the Prosecutor's Request in the present instance. Subsequently, I scrutinize the proper recourse to the principle of *la compétence de la compétence*, underlining its inapplicability at this stage. Subsequently, I recall the express injunctions and underlying rationale for the Court to demur from delivering advisory opinions. Finally, I conclude that, at this juncture, the Court cannot rule on jurisdiction over the alleged deportation of the Rohingya people from the Republic of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh").

[4] Among the vagaries of the Prosecutor's Request is its failure to engage substantively on whether deportation is a "continuous" crime.

II. Article 19(3) of the Statute is inapplicable to the present instance

7. First and foremost, I reiterate the need to address the interpretation of article 19(3) of the Statute presented by the Prosecutor and the question as to whether it is a sound legal basis to entertain her Request at this stage of the proceedings.

8. Article 19(3) of the Statute states that "[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility". Although the questions of jurisdiction and admissibility are of crucial importance in the International Criminal Court's proceedings (the "ICC"), the level of controversy present at this early stage of the proceedings, with no case present and prior to an indication that the Office of the Prosecutor intends to proceed with an investigation, prevents recourse to article 19(3) of the Statute to render a ruling on jurisdiction. In that respect, I consider that article 19(3) of the Statute is inapplicable in the present instance.

9. In her Request, the Prosecutor provides an interpretation of article 19(3) of the Statute that is indifferent to its context, constituted of article 19 as a whole, to other regulatory texts of the Court and to the established jurisprudence of the latter altogether. This approach cannot be accepted since it is a deep-seated principle that, according to article 31 of the Vienna Convention on the Law of the Treaties, treaty provisions must be interpreted in accordance with their ordinary meaning in their context and in the light of the object and purpose of the treaty.[5] In order to determine

[5] Article 31(1) of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155, p. 331. The Appeals Chamber has confirmed that the principles of treaty interpretation set out in article 31 of the Vienna Convention on the Law of Treaties also apply to the interpretation of the Statute (*see* Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para. 277). *See also* Permanent Court of International Justice (the "PCIJ"), *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, "Advisory

whether article 19(3) can constitute the legal basis for the Chamber to address the Request, it is thus necessary to proceed to its contextual interpretation.

10. Firstly, a contextual interpretation of article 19(3) of the Statute with reference to the entirety of article 19 and against its scope of application suggests that this article applies only once a case has been defined by a warrant of arrest or a summons to appear pursuant to article 58 of the Statute. Indeed, taken as a whole, the article's title, *"Challenges to the jurisdiction of the Court or the admissibility of a* case*"* [emphasis added] infers that a "case" must be present for the article to apply. Hence, the article's heading itself makes clear that it only governs questions of jurisdiction and admissibility at the case stage. An interpretation of the other paragraphs of article 19 of the Statute equally supports this view. In fact, the first paragraph, in providing that the Court "shall satisfy itself it has jurisdiction in any *case* brought before it" and that it "may, on its own motion, determine the admissibility of a *case*" [emphasis added], clearly suggests that article 19(1) can be applied only at the case stage. Furthermore, the wording of the second paragraph of article 19 stresses this same point when providing that, for the identified parties to be able to challenge the jurisdiction of the Court or the admissibility of the case, the existence of the latter must be ascertained.

11. Secondly, the wording of other regulatory legal texts governing the activity of the Court, and thus the application of article 19(3) of the Statute as well, equally make clear that the latter cannot be invoked unless a case is present. In this regard, reference is made to rule 58(2) of the Rules of Procedure and Evidence establishing the procedure to be followed by Chambers when dealing with questions on jurisdiction or admissibility, which reads as follows:

Opinion of 12 August 1922", Series B, No. 2, p. 23: "it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".

> When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a *case* in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall […] [emphasis added].

12. Accordingly, based on a contextual interpretation, I conclude that article 19(3) of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor.

13. Interpreting article 19(3) of the Statute in a manner that allows it to be applied at the "pre-preliminary examination" stage may open the door for the Prosecutor to put to the Pre-Trial Chamber hypothetical or abstract questions of jurisdiction that do not arise from a concrete case or even a situation. It might also allow the Prosecutor to circumvent the procedures otherwise applicable, delay her decision-making, or even shift the burden of assembling a case onto the Pre-Trial Chamber. Such prosecutorial attempts would not only be inappropriate, but also inconsistent with the four-phase procedure for preliminary examinations that the Office of the Prosecutor has itself determined and described as a "statutory-based approach".[6] The purpose of this incremental and cumulative process is to marshal the evidence necessary for the Court to decide whether there is a reasonable basis to proceed with an investigation. In the present instance, the Prosecutor has deviated from that

[6] *See* the *OTP Policy Paper on Preliminary Examinations*, https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf, (November 2013) ("[T]he Office has established a filtering process comprising four phases. While each phase focu[s]es on a distinct statutory factor for analytical purposes, the Office applies a holistic approach throughout the preliminary examination process […] Phase I consists of an initial assessment of all information on alleged crimes received under article 15 […] Phase 2 […] entails a thorough factual and legal assessment of the crimes allegedly committed in the situation with a view to identifying the potential cases falling within the jurisdiction of the Court […] Phase 3 focu[s]es on the admissibility of potential cases in terms of complementarity and gravity pursuant to article 17 […] Phase 3 leads to the submission of an 'Article 17 report' [...] Phase 4 examines the interests of justice. It results in the production of an 'Article 53(1) report").

established practice and offered no compelling argument for such an unprecedented aberration, confusing a sequence it has itself designed.

III. Article 119(1) of the Statute is irrelevant and inapplicable

14. The approach followed by the Majority which relies on article 119(1) of the Statute as an alternative legal basis to entertain the Prosecutor's Request[7] leaves room for perplexity for two reasons. First, article 119(1) is invoked *proprio motu* by the Majority, as the Prosecutor did not resort to it herself. Second, I note that invoking this article is unprecedented in the jurisprudence of the Court. However, the Majority does not explain why it is appropriate to invoke such provision at this stage of the proceedings, which would have been consistent with the Court's duty to present the reasons underlying its judicial decisions,[8] other than concluding that "this provision has been interpreted [by scholars] as including questions related to the Court's jurisdiction".[9] At the very least, the choice of article 119(1) of the Statute as an alternative basis is questionable in light of its nature, since it is one of the "Final Clauses" provided for in Part 13 of the Statute and, thus, not directly related to issues of jurisdiction before this Court, which is addressed by specific statutory provisions. Hence, I find that the decision of the Majority to rely on article 119(1) of the Statute to entertain the Prosecutor's Request is not persuasive.

15. Importantly, as stated above, it is necessary to interpret article 119(1), as all other provisions of the Statute, with regards to its context, according to general principles of international law governing treaty interpretation as enshrined in article 31 of the Vienna Convention on the Law of the Treaties. When a contextual

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[7] PTC I Decision, para. 28.
[8] *See for instance* Pre-Trial Chamber II, *The Prosecutor vs. Dominic Ongwen,* Separate opinion of Judge Marc Perrin de Brichambaut, dated 19 May 2016 and translation registered on 6 June 2016, ICC-02/04-01/15-422-Anx-tENG, paras 3 et seq.
[9] PTC I Decision, para. 28.

interpretation of article 119(1) of the Statute is elaborated upon, three particular concerns arise.

16. First, article 119(1) of the Statute applies only when there is a *dispute* concerning a judicial function of the Court. In that context, I cannot concur with the Majority's finding that "[…] the jurisdiction of the Court is clearly subject to dispute with Myanmar".[10] In my view, there are at least two series of arguments relativizing such a stance. First of all, the Majority asserts that a "dispute" has arisen regarding a question of jurisdiction of the Court between a non-State party, namely Myanmar, and one of the Court's organs, i.e. the Prosecutor. No precise explanation with regards to the elements constituting such a "dispute", which can be defined as "[a] conflict or controversy",[11] is provided by the Majority.[12] Such a finding is questionable since the alleged "dispute" takes place outside of the current debate before the Court. Indeed, the alleged disagreement between Myanmar and the Prosecutor is merely based on diplomatic statements made by the former, with no relation to the official filings presented to the Court, since "Myanmar has declined to engage with the ICC by way of a formal reply".[13] This state of affairs does not amount to a "dispute" within the meaning of article 119(1) of the Statute. First, Myanmar simply refused to cooperate with the Court, which in my view does not establish the existence of any disagreement, in the legal sense, between the latter and a non-State party. Accordingly, the only interested party at this point is the Prosecutor. Second, when analysing the public statement of the Office of the State Counsellor of Myanmar on 13 April 2018, referred to in footnote 36 of the Majority's decision to identify the alleged "dispute" ("Myanmar's 13 April 2018 public

[10] PTC I Decision, para. 28.
[11] Black's Law Dictionary (10th ed. 2014).
[12] *See* PTC I Decision, footnote 36.
[13] Notice of the Public Statement Issued by the Government of Myanmar, 17 août 2018, ICC-RoC46(3)-01/18-36, para. 1.

statement"), it is worth noting that it is limited to reminding that the Court does not have jurisdiction over non-State parties. The content of this statement cannot be deemed to equate to the question raised by the Prosecutor in her Request, i.e. whether the Court can exercise its jurisdiction over the alleged crimes of deportation of the Rohingya people. Hence, no actual disagreement on a point of law can be identified.

17. Additionally, I cannot share the interpretation of the jurisprudence cited in the Majority's decision[14] to ground its finding of an ongoing "dispute" between Myanmar and the Prosecutor. At first, it is worth underscoring that both the Permanent Court of International Justice (the "PCIJ") and the International Court of Justice (the "ICJ") have jurisdiction only over interstate litigation: the reference is thus originally biased since, in the present instance, the alleged "dispute" arises between a State and an organ of an international organization, namely the Prosecutor of the ICC, a situation in no case comparable to those adjudicated by the PCIJ and the ICJ. Furthermore, neither the PCIJ nor the ICJ presented their definitions of "dispute" as quoted at a stage of the proceedings comparable to the phase in which the Chamber found itself in the present case.[15] Finally, and perhaps more importantly, when carefully reviewed, those references provide further guidance as to the determination of what constitutes a "dispute". The PCIJ, after providing the above-mentioned defining elements of a "dispute", specified that a

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[14] *See* PTC I Decision, footnote 36 which refers to: PCIJ, *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, Series A, No. 2, p. 11 ("*Mavrommatis Palestine Concessions*"): "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"; ICJ, *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, para. 22 ("*East Timor (Portugal v. Australia)*"): "The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties".

[15] In *Mavrommatis Palestine Concessions* (PCIJ) the question of jurisdiction emerged during proceedings that were already engaged, pleadings and hearings having taken place. In *East Timor (Portugal v. Australia)* (ICJ) jurisdiction was the object of a preliminary objection to well-engaged proceedings.

disagreement "certainly possesses these characteristics [when a party] is asserting its own rights by claiming [from the other] an indemnity on the ground that [it] has been treated by the [other party] in a manner incompatible with certain international obligations which they were bound to observe".[16] As regards the ICJ, it is worth noting that the definition of "dispute" is further explained asserting that "[i]n order to establish the existence of a dispute, '[i]t must be shown that the claim of one party is positively opposed by the other […]'" and that a dispute exists when a party "has, rightly or wrongly, formulated complaints of fact and law against [the other party] which the latter has denied". It is "[b]y virtue of this denial [that] there is a legal dispute".[17] In light of the aforementioned analysis of the ongoing dynamics related to the alleged "dispute" in the present instance, it can be inferred that the specific cases illustrated by the PCIJ and the ICJ do not correspond to the contents of the request made by the Prosecutor. This means that the latter doesn't correspond to the general definition of "dispute" as provided by the international courts cited by the Majority.

18. In a similar vein, some argue that article 119 of the Statute can be said to "*affirme[r] une sorte de compétence de la compétence*".[18] As it will be further demonstrated in the following parts of this Opinion, the principle of *la compétence de la compétence* also requires a dispute or a case to be considered by a court to entertain the question relating to its own jurisdiction. Hence, the analogy between this general principle of international law and the statutory provision under scrutiny reinforces my position that the latter can only be applied when a clear dispute arises, which is not the case in the present instance.

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[16] PCIJ, *Mavrommatis Palestine Concessions*, pp. 11, 12.
[17] International Court of justice (the "ICJ"), *East Timor (Portugal v. Australia)*, para. 22, second and third sentences.
[18] E. Décaux, « Article 119 – Règlement des différends », in J. Fernandez et X. Pacreau, *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, Editions A. Pedone, pp. 2095-2101.

19. Also in this regard, it is worth noting that, even assuming that Myanmar's 13 April 2018 public statement does give rise to a dispute within the meaning of article 119(1) of the Statute, resorting to that article is equally premature as the Prosecutor has not as of yet asked the Court to effectively *assert* its jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh. Her Request merely purports to seek the Chamber's position on whether those facts give rise to jurisdiction under article 12(2)(a) of the Statute "to assist in her further deliberations concerning any preliminary examination she may independently undertake […]".[19]

20. Second, again assuming the existence of a "dispute", the Majority omits to address the question of who can validly present a "dispute concerning the judicial functions of the Court" to the latter. This is of pivotal concern when seeking to assess whether article 119(1) of the Statute can be applied in the present instance. In my view, uncertainty remains as to knowing whether the "dispute" must arise between States or from a disagreement among the parties to judicial proceedings or even third parties.[20] Indeed, as the second paragraph of this article clearly addresses only "dispute[s] between two or more States Parties", the same restriction would weigh in on article 119(1) disputes "concerning the judicial functions of the Court", were article 119(1) interpreted contextually.

21. Thirdly, the Majority asserts that article 119(1) of the Statute "has been interpreted [by scholars] as including questions related to the Court's jurisdiction".[21] However, such an interpretation is affirmed without any previous jurisprudence by any judicial institution and it only refers to academic writings and non-binding

[19] Prosecutor's Request, para. 3.
[20] *See above* footnote 18.
[21] PTC I Decision, para. 28.

resolutions.[22] Additionally, when strictly scrutinized, these references provide a more nuanced perspective. For instance, regarding the citation of the Majority in footnote 37, the author appears to present "tentative suggestions" of what may be included in the category of "questions concerning the judicial functioning of the Court", the object of article 119(1), asserting that "probably" they include "questions of jurisdiction".[23] The tacitly suggested universality of the Majority's finding is thus far from being evident.

22. As a result, the alleged "dispute" can only be considered as an argument that is invoked to artificially create a legal basis for a decision. Apart from being unconvincing, this approach does not comply with the obligation of the Chambers to underpin their judicial decisions with sufficiently substantiated reasons.[24]

23. Because of these concerns, which, in my view, render the Majority's interpretation of article 119(1) erroneous, I regret that I cannot join the Majority's decision as regards the fact that "the Chamber is empowered to rule on the question of jurisdiction set out in the Request in accordance with article 119(1) of the Statute".[25]

IV. The principle of *la compétence de la compétence* cannot serve as an alternative basis to entertain the Prosecutor's Request

24. Shifting from the power to make a ruling on jurisdiction of a case, which is explicitly conferred upon the Court by article 19(3) of the Statute, to those arising from interpretations of customary international law, is to venture onto precarious ground. The Prosecution contends that the "bedrock importance of jurisdiction [is]

[22] PTC I Decision, footnote 37.
[23] R. S. Clark, "Article 119: Settlement of disputes", in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), p. 2276.
[24] *See supra* note 8.
[25] PTC I Decision, para. 28.

reflected in the general principle known as '*compétence de la compétence*'".[26] The Majority appears to concur, stating that "[i]t is an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction".[27]

25. I believe there are two primary reasons why it would be imprudent to assert the principle of *la compétence de la compétence* in the present case: to so do (1) would be inconsistent with the principle's purpose and previous jurisprudence; and (2) could potentially predetermine a subsequent review of jurisdiction at more appropriate stages of any future proceedings.

A. Relying on the principle of *la compétence de la compétence* would be inappropriate in the present instance and risks misinterpreting previous jurisprudence

26. As the Appeals Chamber explicitly observed in its Judgment on the Appeals of the Prosecutor and the Defendants in the *Bemba et al.* case:

> In the legal framework of this Court, 'inherent powers' should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure […]The notion of 'inherent powers' – or 'incidental jurisdiction' – refers to judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ('inherent to') other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments. The nature and type of the concerned power […] are relevant considerations to determine whether

[26] Prosecutor's Request, para. 53.
[27] PTC I Decision, para. 30.

> there are gaps justifying recourse to subsidiary sources of law or invocation of 'inherent powers.[28]

Invoking the principle of *la compétence de la compétence* "is a significant event".[29] The *raison d'être* for this principle is to serve as a mechanism to resolve conflicts of law and prevent a unilateral obstruction by litigation or arbitration. To assert the principle of *la compétence de la compétence* without a conflict or obstruction is to infer an inherent power absent from the Statute.

27. The Majority's decision bolsters the Prosecution's brief mention of the principle of *la compétence de la compétence* with substantial case law indicating that numerous international courts and tribunals[30] have raised it to circumscribe their own jurisdiction, including, *inter alia*, the ICJ,[31] the Inter-American Court of Human Rights,[32] the *ad hoc* International Tribunal for the former Yugoslavia,[33] and the Special

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[28] Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber III entitled "Decision on Sentence pursuant to Article 76 of the Statute, 8 March 2018, ICC-01/05-01/13-2276-Red (the "Judgment on the Appeals of the Prosecutor and the Defendants"), paras 75-76 (emphasis added and internal citations omitted).

[29] P. Y. Lo, *Master of One's Own Court*, 34 HONG KONG L. J. 47, 55 (2004).

[30] In addition to actual cases, PTC I Decision cites numerous arbitral decisions. Given the exceedingly tenuous relevance of arbitral proceedings to the development of international criminal jurisprudence, I am of the opinion that they do not merit contemplation and obfuscate an already complex issue. However, it is perhaps worth noting, that these, like the other cited cases, were all final determinations of arbitral awards, rather than pre-preliminary rulings similar to the matter with which the Chamber is presently seized.

[31] ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep. 53.

[32] Inter-American Court of Human Rights, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgment of June 21, 2002 (a final judgment on the merits, including determination of reparations and costs).

[33] ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995 [a final appellate decision following after "the invocation of an error of law by the applicant, allegedly committed by the trial chamber in its judgment concerning its jurisdiction over the present case."(at paragraphs 18-19) (emphasis added)].

Tribunal for Lebanon.[34] References to the ICC's own jurisprudence[35] include the decisions of Pre-Trial Chamber II regarding *Situation in Uganda*[36] and in the case of *Prosecutor v. William Samoei Arap Ruto et al.*[37] as well as the decisions of Pre-Trial Chamber II and Pre-Trial Chamber III in *Prosecutor v. Jean-Pierre Bemba Gombo*.[38]

28. However, none of these citations supports the proposition that this or any other Court has made such a ruling at stages of proceedings analogous to the present instance, where neither a *case* nor a *dispute* is present.[39] Even in the case of advisory opinions[40] rendered by the ICJ or other bodies, the Court or Tribunal has been seized of a question by an outside party or referring entity, and has not arrived at the issue

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[34] Special Tribunal for Lebanon, *In the Matter of El Sayed*, Case No. CH/AC/2010/02, Appeals Chamber, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, (an appeal of the pre-trial chamber's previous determination about jurisdiction).

[35] All of citations in PTC I Decision pertain to matters already at the situation or case phase (*see infra* footnotes 18-21).

[36] Pre-Trial Chamber II, *Situation in Uganda*, "Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005", 9 March 2006, ICC-02/04-01/05-147, paras 22-23; *Prosecutor v. Joseph Kony et al.*, "Decision on the admissibility of the case under article 19(1) of the Statute", 10 March 2009, ICC-02/04-01/05-377, para. 45.

[37] Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto et al.*, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", 8 March 2011, ICC-01/09-01/11-1, para. 8; *Prosecutor v. William Samoei Ruto et al.*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373, para. 24.

[38] Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, para. 23; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", 10 June 2008, ICC-01/05-01/08-14-tENG, para. 11.

[39] Arguably, the most analogous citations may be an arbitral decision on a preliminary motion of jurisdiction introduced by one of the parties [*Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, Reports of International Arbitral Awards, vol. VI, p. 131, an "opinion [that] is not concerned with the merits of the claim itself" (at paragraphs 135-136)] and an ICJ judgment at the preliminary objections stage in which the court, according to its typical procedure, was compelled to comment on its own jurisdiction in the context of a referral by the parties [ICJ, *Nottebohm case (Liechtenstein v. Guatemala)* (Preliminary Objections), Judgment of 18 November 1953, [1953] ICJ Rep. 111, p. 119].

[40] *See infra* Part V regarding the impropriety of the ICC rendering advisory opinions.

in response to a request by a criminal prosecution.[41] In fact, as the Majority notes, the ICJ has emphasized and defined a dispute as *sine qua non* for an assertion of the principle of *la compétence de la compétence*.[42]

29. In *obiter dicta*, this Court has cautioned explicitly against advancing the Court's powers based on conjecture or application of secondary authorities, holding: "In accordance with article 21 of the Statute, the Court shall apply in the first place the Statute and the Rules. Recourse to the subsidiary sources of law enumerated at paragraphs 1 (b) and (c) of the same provision may only be made in case there exists a lacuna in the primary sources of law when interpreted in accordance with the applicable canon of interpretation".[43] As the Appeal Chamber has held, "in order to determine whether the absence of a power constitutes a 'lacuna', it has previously considered whether '[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions".[44] I am not satisfied that a lacuna here exists to warrant recourse to the principle of *la compétence de la compétence*, which is claimed to be an established principle of international law.[45]

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[41] *See e.g.* PCIJ, *Interpretation of the Greco-Turkish Agreement on December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion of 28 August 1928, Series B, No. 16, p. 20 ("any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction") There, the Greek and Turkish delegations to the Mixed Commission established to negotiate a peace settlement between the parties "agreed to ask the Mixed Commission to settle their dispute." Summaries of Judgments, Advisory Opinions, and Orders of the Permanent Court of International Justice, ST/LEG/SER.F/1/Add.4, p. 45 (2012).

[42] PTC I Decision, footnote 36 ["A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*quoting* PCIJ, *Mavrommatis Palestine Concessions*, p. 11)]. *See also* PTC I Decision, ["The Court Recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views of interests between parties." (*quoting* ICJ, *East Timor (Portugal v. Australia)*, para. 22)].

[43] Judgment on the Appeals of the Prosecutor and the Defendants, para. 76.

[44] Judgment on the Appeals of the Prosecutor and the Defendants, para. 76.

[45] *But see* T. Hartly, Constitutional Problems of the European Union (Oxford and Portland, Oregan: Harr, 1999) (asserting that the European Union does not have *Kompetenz-Kompetenz*).

30. Were the Chamber to opine on jurisdictional matters under a general premise of the principle of *la compétence de la compétence*, it would risk exceeding or transgressing its mandate. Shall the Court hereafter step-in and pronounce when, where, and what matters it is competent to review prior to any substantive examination and presentation of facts? To do so would be to usurp the role of the Prosecutor, as delineated by article 15 of the Statute.

B. The question of jurisdiction should be preserved for subsequent proceedings

31. Second, the rule against superfluity holds that a statute should not be interpreted in such a way as to render portions thereof superfluous or duplicative. Given the Court's obligations under article 19(1) of the Statute to "satisfy itself that it has jurisdiction *in any case* brought before it", if the matter of the Rohingya were to proceed, it would be necessary for the Pre-Trial Chamber to conduct an analysis of jurisdiction.

32. 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.

V. Rendering the ruling requested by the Prosecutor at this phase would be tantamount to delivering an advisory opinion, which this Court is expressly prohibited from doing

33. Elsewhere, I have cautioned against this Court rendering advisory opinions, noting "that the Appeals Chamber has held that it will not render 'advisory opinions

on issues that are not properly before it'".[46] I maintain that position, *mutatis mutandis*, in the present case for the following reasons.

34. That the Statute makes no provision for advisory opinions is no coincidence. During its negotiations, such a role was contemplated and rejected.[47]

35. The authority of the Court (and its potential influence) should derive from coherent jurisprudence, relying on well-motivated decisions on *cases* that progressively interweave the different legal cultures of the States Parties to the Statute. A dogmatic approach dependent on abstract pronouncements conveyed through advisory opinions or similar rulings would most likely frustrate such effort.

36. The Prosecutor asserts, and the Majority concurs, that "the jurisdictional question raised in the Request is not an abstract or hypothetical one, but it is a concrete question that has arisen in the context of individual communications received by the Prosecutor under article 15 of the Statute as well as public allegations of deportation of the Rohingya people from Myanmar to Bangladesh".[48] However, besides the analysis of the crime of deportation, the "concrete" facts submitted

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[46] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al Bashir", Minority Opinion of Judge Marc Perrin de Brichambaut, 11 December 2017, ICC-02/05-01/09-319-Anx [citing Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 38 and *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 68. *See also Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 16 December 2013, ICC-02/11-01/11-572, para. 54].

[47] *See* K. S, Gallant, *The ICC in the System of States and international Organizations*, *in* Essays on the Rome Statute of the International Criminal Court 19, footnote 74 (Flavia Lattanzi & William Schabas, eds. 1999) ("Were the ICC to become a 'specialized agency' under the UN Charter, the GA would be able to authorize the ICC to make requests for advisory opinions directly").

[48] PTC I Decision, para. 33.

appear to be brief and vague. Moreover, while the Prosecutor confines herself to a request on a ruling of jurisdiction over the crime of deportation, of the four pages in the request devoted to submissions on the facts, many of the allegations appear to indicate other alleged crimes sharing a common nexus as continuing crimes, on which the Prosecution does not elaborate.

37. The present matter therefore is not at all concrete, in the sense of ordinary criminal procedure. For the Chamber to properly fulfil its obligations and conduct a serious analysis of jurisdiction, the Prosecution must provide sufficient information to support that the requirements have been met. Here, the Prosecutor has asked the Chamber to provide telescopic clarity to what remains unfocused and nebulous.

38. At the same time that she contends the question *sub judice* is not abstract, the Prosecutor maintains that it is a "pure question of law".[49] However, rulings of law exist in relation to alleged facts. Where the two are disjointed, what is left is the possibility of a speculative advisory opinion, despite claims to the contrary.

39. Furthermore, it should be noted that it is hard to clearly understand the legal nature of the Majority's decision due to various reasons. The first among them is the lack of clarity and the ambiguity that characterize the Prosecutor's Request, which she grounds on article 19(3) of the Statute thus expecting that, if entertained, it shall lead this Chamber to issue a "ruling". If a ruling were to be rendered, it would be legally binding on the parties at the present instance, including the Prosecutor. However, in her Request the Prosecutor specifies that the requested "ruling" would only "assist in her further deliberations concerning any preliminary examination she may independently undertake […]",[50] thus seemingly excluding any binding character of the latter. Secondly, the Majority is equally unclear as to the legally

[49] ICC-RoC46(3)-01/18-T-1-Red-ENG, p. 8, line 21.
[50] Prosecutor's Request, para. 3.

binding value of its present decision, since this question is not specifically addressed in its text. This reinforces the impression that this "ruling" has no binding character, especially towards the Prosecutor. It logically follows from this conclusion that the aforementioned finding that Pre-Trial Chamber I's present decision actually is tantamount to an advisory opinion, which is of no binding value to the parties, is correct.

VI. Conclusion

40. I would like to stress that the ambiguities of the Request in no way preclude the Prosecutor from undertaking her responsibilities and examining more closely the allegations with regard to the Rohingya people. Indeed, this Opinion clearly doesn't seek to suggest that accountability for grave alleged crimes can be avoided or to defer consideration thereof based on technicalities. Nothing in this Opinion should be taken as dissuading the Prosecution from conducting a preliminary examination and subsequently seeking authorization to commence an investigation pursuant to article 15(3) of the Statute into the Rohingya matter by making full use of its prerogatives. In fact, this would have been, in my view, the proper course of action, rather than seeking a ruling on jurisdiction. In this regard, the Prosecutor previously has made extensive use of the instrument of preliminary examinations, for which no jurisdictional review by the Pre-Trial Chamber is required. Nothing stands in her way were she to embark on a similar path. The facts as presented in the *amici curiae* and observations submitted would be valuable assets were she to decide to conduct a preliminary examination with a view to determining whether there is reasonable basis to commence an investigation pursuant to article 15(3) of the Statute. However, in the absence of a concomitant willingness on the part of the Prosecutor to actually do so, a decision on jurisdiction is purely academic and constitutes, as stated above, an advisory opinion.

41. This Chamber has taken very serious note of the allegations of crimes against the Rohingya people, as communicated *a priori* in the *amici curiae*, in numerous reports by governmental, inter-governmental, and non-governmental sources that the Chamber has reviewed. This Opinion is fully cognisant of the seriousness of the situation facing the Rohingya people and is hopeful that the steps the Chamber has taken since receiving the Prosecutor's Request will contribute to the realisation of justice.

42. Finally, I note that the Prosecution references the Court's finite financial, human, and temporal resources to plead in favour of judicial efficiency.[51] However, I deem necessary to reassert that the Court's paramount consideration should always be the interest of justice first, after which other factors may be considered. Expedience cannot come at the cost of full, robust, and in-depth contemplation of the complex issue of jurisdiction.

43. For these reasons, I consider that, at this juncture, the Court cannot rule on the question of jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.

Judge Marc Perrin de Brichambaut

Dated this 6 September 2018

At The Hague, Netherlands

Done in both English and French, with both versions being authoritative.

[51] Prosecutor's Request, para. 54.