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Pénale
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**International
Criminal
Court**

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PRESIDENT OF THE PRE-TRIAL DIVISION

Before: Judge Antoine Kesia-Mbe Mindua

APPLICATION UNDER REGULATION 46(3)

Public

**Prosecution's Request for a Ruling on Jurisdiction
under Article 19(3) of the Statute**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution seeks a ruling on a question of jurisdiction: whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.

2. Consistent and credible public reports reviewed by the Prosecution indicate that since August 2017 more than 670,000 Rohingya, lawfully present in Myanmar, have been intentionally deported across the international border into Bangladesh. The UN High Commissioner for Human Rights has described the Rohingya crisis as “a textbook example of ethnic cleansing”,¹ and according to the UN Special Envoy for human rights in Myanmar, it potentially bears the “hallmarks of a genocide”.² The coercive acts relevant to the deportations occurred on the territory of a State which is not a party to the Rome Statute (Myanmar). However, the Prosecution considers that the Court may nonetheless exercise jurisdiction under article 12(2)(a) of the Statute because an essential legal element of the crime—crossing an international border—occurred on the territory of a State which *is* a party to the Rome Statute (Bangladesh).³

3. Given these exceptional circumstances and the nature of this legal issue, the Prosecutor has exercised her independent discretion under articles 19(3) and 42 to seek a ruling on the question from the Pre-Trial Chamber. This will assist in her further deliberations concerning any preliminary examination she may independently undertake, including in the event an ICC State Party decides to refer the matter to the Court under articles 13(a) and 14.

Submissions

4. The Prosecution seeks a ruling on the Court’s jurisdiction under article 12(2)(a)—specifically, to verify that the Court has territorial jurisdiction when persons are deported from the territory of a State which is *not* a party to the Statute directly into the territory of a State which *is* a party to the Statute. As explained below, this is not an abstract question but a concrete one, affecting whether the Court may exercise jurisdiction under article 12(2)(a) to investigate and, if necessary, prosecute the alleged deportation of Rohingya from Myanmar to

¹ High Commissioner for Human Rights, [Opening Statement to the 36th session of the Human Rights Council](#), 11 September 2011; *see also* OHCHR, [Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report](#), 11 October 2017, para. 10.

² Report of the Special Rapporteur on the situation of human rights in Myanmar, Advance Unedited Version, [A/HRC/37/70](#), 9 March 2018, para. 65.

³ Bangladesh ratified the Rome Statute on 23 March 2010.

Bangladesh. This requires a determination both on the nature of the crime of deportation under article 7(1)(d), and the nature of the territorial jurisdiction granted to the Court under article 12(2)(a).

5. Ruling that the Court has territorial jurisdiction would not only be consistent with the legal framework of the Statute, but would also accord with well-established principles of criminal jurisdiction and recognise the particular concerns which may arise from enforced migration, both for individual victims and the receiving State. Such questions are of acute international concern at the present time.

6. Mindful that this is the first time the Prosecution has filed a request under article 19(3) of the Statute, this motion concludes with submissions on the procedural framework. In that context, the President of the Pre-Trial Division should promptly assign this request to a Pre-Trial Chamber under regulation 46(3) of the Regulations of the Court (“Regulations”), so that the assigned Chamber may issue a ruling under article 19(3) based on these submissions and any other relevant observations it may receive.

A. Facts supporting the alleged crime of deportation against the Rohingya population

7. The Prosecution has reviewed a number of reports and other public information alleging that the crime of deportation has been committed against the Rohingya population. These reports and other public information, described below, appear credible and consistent, and emanate from *prima facie* reliable sources,⁴ including: the UN Office of the High Commissioner for Human Rights (OHCHR);⁵ the UN Human Rights Council Independent International Fact-Finding Mission on Myanmar;⁶ the UN Special Rapporteur on the Situation of Human Rights in Myanmar;⁷ the UN Office of the High Commissioner for Refugees (UNHCR);⁸ the International Organization for Migration Inter Sector Coordination

⁴ The reports and other public information referred to in this paragraph collectively support the material facts set out in the following paragraphs. In the interest of brevity, the Prosecution did not repeat those references in relation to each individual fact, save for a few examples. The relevant hyperlinks were last viewed on 9 April 2018.

⁵ [Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh, 13-24 September 2017](#), 11 October 2017; [Report of OHCHR mission to Bangladesh](#), Interviews with Rohingyas fleeing from Myanmar since 9 October 2016, 3 February 2017.

⁶ Statement by Mr Marzuki Darusman, Chairperson of the [Independent International Fact-Finding Mission on Myanmar](#), at the 37th session of the Human Rights Council, 12 March 2018.

⁷ Report of the Special Rapporteur on the situation of human rights in Myanmar, Advance Unedited Version, [A/HRC/37/70](#), 9 March 2018; [Statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council](#), 12 March 2018.

⁸ See [UNHCR web portal on Rohingya Emergency](#); *see also* the related videos, news clips and stories. *See especially* UNHCR – [100 days of horror and hope: A timeline of the Rohingya crisis](#), 1 December 2017.

Group (ISCG);⁹ the UN Children’s Fund (UNICEF);¹⁰ Human Rights Watch;¹¹ Amnesty International;¹² Fortify Rights;¹³ *Médecins Sans Frontières*;¹⁴ and the International Rescue Committee.¹⁵ The Prosecution has also reviewed corroborative material including relevant video footage and media reports,¹⁶ and Professor Azeem Ibrahim’s book *The Rohingyas*:

⁹ ISCG Situation Update: [Rohingya Refugee Crisis, Cox’s Bazar](#), 25 March 2018. Prior versions of the ISCG Situation Updates can be found [here](#).

¹⁰ UNICEF, [Outcast and Desperate, Rohingya refugee children face a perilous future](#), October 2017; UNICEF, [Lives in Limbo - No end in sight to the threats facing Rohingya children](#).

¹¹ Human Rights Watch, [Massacre by the River – Burmese Army Crimes against Humanity in Tula Toli](#), 19 December 2017 (see summary and relate video [here](#)); Human Rights Watch, [Scores of Rohingya Villages Bulldozed - Satellite Images Show Destruction Indicating Obstruction of Justice](#), , 23 February 2018; Human Rights Watch, [40 Rohingya Villages Burned Since October – Satellite Imagery Shows New Destruction in Rakhine State](#), 19 December 2017; Human Rights Watch, [Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 27](#), 2017, 26 September 2017 (see also [here](#)); Human Rights Watch, [Burma Military Commits Crimes Against Humanity – Expulsions, Murder, Rape, Persecution of Rohingya](#), 25 September 2017; Human Rights Watch, [All My Body Was Pain – sexual violence of Rohingya women and girls in Burma](#), 16 November 2017; Human Rights Watch, [Burma: Rohingya Recount Killings, Rape, and Arson – Video Testimony Matches Satellite Images of Attacks](#), 21 December 2016; Human Rights Watch, [All You Can Do is Pray – Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State](#), 22 April 2013; For more Human Rights Watch reports and videos on the Rohingya crisis, see [here](#).

¹² Amnesty International, [Myanmar: Scorched-earth campaign fuels ethnic cleansing of Rohingya from Rakhine State](#), 14 September 2014; Amnesty International, [Myanmar: We are at breaking point - Rohingya: persecuted in Myanmar, neglected in Bangladesh](#), 19 December 2016; Amnesty International, [Myanmar: Crimes against humanity terrorize and drive Rohingya out](#), 18 October 2017; Amnesty International, [Myanmar: Caged without a roof: Apartheid in Myanmar’s Rakhine State](#), 21 November 2017; Amnesty International, [Myanmar: Fresh evidence of ongoing ethnic cleansing as military starves, abducts and robs Rohingya](#), 7 February 2018; Amnesty International, [Briefing: Myanmar forces starve, abduct and rob Rohingya, as ethnic cleansing continues](#), 7 February 2018. For more Amnesty International reports on the Rohingya crisis, see [here](#).

¹³ Fortify Rights, [“They Tried to Kill Us All” Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar](#), November 2017; Fortify Rights, [Policies of Persecution – Ending Abusive State Policies Against Rohingya Muslims in Myanmar](#), February 2014.

¹⁴ *Médecins Sans Frontières*, [Myanmar/Bangladesh: MSF surveys estimate that at least 6,700 Rohingya were killed during the attacks in Myanmar](#), 12 December 2017; *Médecins Sans Frontières*, [Rohingya crisis in Bangladesh: A summary of findings from six pooled surveys](#), 12 December 2017.

¹⁵ International Rescue Committee, [Assessment Report: Undocumented Myanmar Nationals Influx to Cox’s Bazar, Bangladesh](#), 7 October 2017.

¹⁶ Channel 4 documentary, [‘A boy with no name for a people with no identity’](#), 18 September 2017; *The Guardian* documentary, [The Battle for Myanmar’s Buddhist spirit](#), 8 September 2017; BBC documentary, [Rohingya crisis: ‘Rape and murder’ in the Village of Tula Toli](#), 14 November 2017; *France 24*, [Exclusive report: Burma in denial over Rohingya crisis](#), 3 November 2017; Al Jazeera documentary, [The Rohingya: Silent Abuse - Al Jazeera World](#), 13 August 2017; CNN, [Islamophobia on the rise in Myanmar](#), 26 November 2017; Channel 4, [More than 6000 Rohingya Muslims killed in one month in Myanmar say MSF](#), 14 December 2017 (see also additional Channel 4 reports [here](#)); *Time*, [The Villages are Burning Down.’ Fear and Fire Send Rohingya Fleeing to Bangladesh](#), 31 August 2017; CBS News, [Rohingya Muslims fleeing Myanmar watch homes burn](#), 15 September 2017; Global News, [They burned our home: Rohingya Muslims watch as soldiers destroy villages in Myanmar](#), 15 September 2017; *The New York Times*, [Rohingya Recount Atrocities: ‘They Threw My Baby Into a Fire’](#), 11 October 2017; *The New York Times*, [Rohingya Were Raped Systematically by Myanmar’s Military, Report Says](#), 16 November 2017; *The New York Times*, [‘No Such Thing As Rohingya’: Myanmar Erases a History](#), 2 December 2017; *The Guardian*, [‘When they began slaughtering us we ran for our lives’: Rohingya trapped inside Myanmar](#), 14 November 2017; *Time*, [Waves of Rohingya Refugees Are Overwhelming Aid Workers and Authorities in Bangladesh](#), 19 October 2017; Al Jazeera, [Rohingya: more refugees flee fearing violence, torture](#), 13 November 2017; *The Guardian*, [Rohingya crisis: drone footage shows scale of refugee camp in Bangladesh – video](#), 9 October 2017 (aerial video of the Balukhali refugee camp); *The Guardian*, [Witness to a massacre: the former Myanmar soldier who saw his village burn](#), 5 February 2018; *The Guardian*, [Myanmar government bulldozing mass grave to hide evidence](#), 19 February 2018; Reuters, [Visualizing the](#)

Inside Myanmar's Genocide.¹⁷ Finally, the Prosecution has reviewed 42 individual communications relating to crimes allegedly committed against the Rohingya,¹⁸ received under article 15, some of which refer to other relevant open source information.

8. According to the available information, Myanmar security forces, acting in concert with other individuals and without grounds permitted under international law, have deported ethnic Rohingya, who were lawfully present in Myanmar, to Bangladesh. Although such crimes have been reported since at least 2012, they escalated on 25 August 2017 to a significant new level and continued at this scale for several months.

9. Members of the Rohingya minority have suffered years of persecution within Myanmar, and during that time they have been increasingly deprived of various fundamental rights, including eventually being stripped of their Myanmar citizenship. Events significantly deteriorated with the initiation on 25 August 2017 of a “clearance operation” aimed at deporting all remaining Rohingya across the border to Bangladesh. Myanmar security forces, acting in concert with other individuals, attacked the Rohingya population in particular in Rakhine State. These attacks allegedly included killings, rape, torture, and enforced disappearance, affecting thousands of victims. They also allegedly included the destruction and looting of hundreds of villages, as well as livestock, crops and other personal property. The attackers appear to have targeted in particular people and objects representing the cultural and religious identity of the Rohingya.

10. The available information suggests that attacks directed against the civilian population were well-organised, coordinated and systematic, and intended to drive the Rohingya population out of Myanmar.¹⁹ The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, described the operations of Myanmar's security forces against the Rohingya population as “a textbook example of ethnic cleansing”.²⁰ The reported attack on the village

[influx of Rohingya refugees](#), 21 September 2017; Reuters, [Life in the Camps](#), 4 December 2017; Reuters, [Massacre in Myanmar](#), 8 February 2018.

¹⁷ Ibrahim, *The Rohingyas: Inside Myanmar's Genocide*, 2nd Ed. (London: Hurst & Company, 2018).

¹⁸ Of these communications, 22 specifically concern the most recent events that took place from 2017 onwards.

¹⁹ See e.g. OHCHR, [Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report](#), 11 October 2017, paras. 1-3; OHCHR, [Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017](#), 11 October 2017, p. 1; Human Rights Watch, [Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 27, 2017](#), 26 September 2017.

²⁰ High Commissioner for Human Rights, [Opening Statement to the 36th session of the Human Rights Council](#), 11 September 2011; see also OHCHR, [Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report](#), 11 October 2017, para. 10.

of Tula Toli on 30 August 2017 is a notable example. Hundreds of men were allegedly separated from women and children, rounded up along the river bank, and executed in front of their families. Many women and children were then killed or raped, and the village looted and burned, before the survivors, many bearing injuries, fled to neighbouring Bangladesh.²¹

11. The International Organization for Migration's ISCG has estimated that more than 670,000 Rohingya have been driven out from Myanmar to Bangladesh since 25 August 2017,²² joining more than 160,000 Rohingya refugees who were forced out of Myanmar in previous years. About half of the Rohingya refugees in Bangladesh are children, 5,000 of which are unaccompanied and separated from their families. They live in squalid conditions. According to the Independent International Fact-Finding Mission on Myanmar, during the second half of March 2018, the number of new arrivals in camps in Bangladesh was continuing at a pace of up to 1,000 persons per week.²³ Beyond the incalculable human cost to these direct victims, such an influx of refugees has caused a humanitarian crisis in Bangladesh, an ICC State Party.

B. Events in Bangladesh-Myanmar raise a question of jurisdiction

12. The Prosecution considers that the Court has jurisdiction in this situation.

13. First, consistent with customary international law, article 7(1)(d) of the Statute contains two related but distinct crimes: deportation and forcible transfer. Deportation is distinguished from forcible transfer by the legal requirement that the victim is forced to cross an international border, whether *de jure* or *de facto*. In circumstances where the enforced border-crossing takes the victim *directly* into the territory of another State, this legal element is completed in that second State. Such a scenario is similar to a 'cross-border shooting', in which a perpetrator on the territory of one State fires a weapon and a victim on the territory of a neighbouring State is struck and injured.

²¹ See e.g. BBC documentary, [Rohingya crisis: 'Rape and murder' in the Village of Tula Toli](#), 14 November 2017; Human Rights Watch, [Massacre by the River – Burmese Army Crimes against Humanity in Tula Toli](#), 19 December 2017 (see summary and related video [here](#)); *The Guardian*, [Massacre at Tula Toli: Rohingya recall horror of Myanmar army attack](#), 7 September 2017; *The Guardian*, [Myanmar: satellite imagery confirms Rohingya village of Tula Toli razed](#), 19 September 2017; *The Guardian*, [Witness to a massacre: the former Myanmar soldier who saw his village burn](#), 5 February 2018.

²² See e.g. ISCG Situation Update: [Rohingya Refugee Crisis, Cox's Bazar](#), 25 March 2018.

²³ Statement by Mr Marzuki Darusman, Chairperson of the [Independent International Fact-Finding Mission on Myanmar](#), at the 37th session of the Human Rights Council, 12 March 2018.

14. Second, a correct interpretation of article 12(2)(a) of the Statute must include scenarios of this kind within the territorial jurisdiction of the Court. This is not a contentious proposition. Indeed, in exercising their own sovereign powers, States commonly assert their criminal jurisdiction over conducts that occur on the territories of *multiple* States. The drafters of article 12(2)(a) were careful to frame the provision in terms which did not contradict this principle. Furthermore, the Prosecution has already espoused this interpretation in its preliminary examination in the *Republic of Korea* situation.²⁴

B.1. Deportation under article 7(1)(d) of the Statute is a distinct crime which is only completed when the victim has been forced across an international border

15. The crime of deportation—the enforced displacement of individuals across an international border—has long been known to international law. For example, it was expressly recognised as a crime against humanity in the Nuremberg Charter,²⁵ and included from the outset in the ICTY, ICTR and other *ad hoc* tribunals’ statutes.²⁶ By contrast, forcible transfer—the enforced displacement of individuals within a territory, but *without* crossing an international border²⁷—was first given express recognition only in the ILC’s 1996 Draft Code,²⁸ and prosecuted before the ICTY and ICTR only within the framework of “other inhumane acts” as a crime against humanity.²⁹

16. Although deportation and forcible transfer are both crimes of enforced displacement, and thus closely related, “the two are *not* synonymous in customary international law.”³⁰ As the Appeals Chamber of the ICTY has repeatedly affirmed, the legal distinction between deportation and forcible transfer is that deportation requires “the forced displacement [...]

²⁴ [Situation in the Republic of Korea, Article 5 Report](#), June 2014, para. 39.

²⁵ [Charter of the International Military Tribunal](#), art. 6(c).

²⁶ [ICTY Statute](#), art. 5(d), [ICTR Statute](#), art. 3(d). See also [SCSL Statute](#), art. 2(d); [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia](#), as amended, art. 5; [Law on Kosovo Specialist Chambers and Specialist Prosecutor’s Office](#), art. 13(d).

²⁷ See e.g. [Draft Code of Crimes against the Peace and Security of Mankind with commentaries \(“ILC Draft Code”\)](#), 1996, art. 18(g), commentary, p. 49 (“Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State”).

²⁸ See [ILC Draft Code](#), art. 18(g) (including among the other crimes against humanity the “[a]rbitrary deportation or forcible transfer of population”). See also Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge: CUP, 2011), p. 86 (“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 state. Protection against deportation is much better embedded in international law than population transfer”).

²⁹ [Stakić AJ](#), para. 317.

³⁰ See [Krstić TJ](#), para. 521, 531-532 (emphasis added). See also [Brđanin TJ](#), para. 542

across a *de jure* State border or, in certain circumstances, a *de facto* border”,³¹ whereas forcible transfer does not. Indeed, as a factual matter, deportation will often mean that the victim is not only compelled to leave the State in which they are lawfully present but *to enter* another.³² This is exactly the situation in Myanmar-Bangladesh, and forms the context for this request.

17. This distinction between deportation and forcible transfer is necessary to give effect to the different values protected by the two crimes. While both safeguard the right of individuals to “live in their communities and homes”,³³ 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.³⁴ Even if the circumstances of the victims in the originating State may have been less than ideal, they will still generally be better than those available to them in a State to which they are unlawfully deported. Such victims typically will not share the culture, speak the language or enjoy the rights of the citizens of the State into which they are displaced. They will be forced to live in a foreign State, subjected to foreign laws and authorities, and with no role in the political decision-making process. They will not only be deprived of a home and immediate community, but will be forced to become refugees, with all the consequences that such status entails.

18. The Rome Statute preserves this distinction. Under article 7(1)(d), the ICC has jurisdiction *ratione materiae* over both deportation and forcible transfer as crimes against humanity. The express recognition of forcible transfer as a crime against humanity in the Statute was an *addition* to the well-established recognition of the crime of deportation—but it would make no sense, in this regard, to understand that the drafters intended to collapse the

³¹ [Stakić AJ](#), paras. 278. *See also* paras. 288-302, 317 (discussing the distinction between deportation and forcible transfer and dismissing the sole decision taking the opposite view that no cross-border transfer is required for deportation); [Prlić TJ, Vol. I](#), para. 47; [Krajišnik AJ](#), para. 304. *Contra* [Prosecutor v. Dragan Nikolić, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995 \(“Nikolić Rule 61 Decision”\)](#), para. 23. *See further* [Simić TJ](#), paras. 122-123; [Krnojelac TJ](#), paras. 474-476 (also rejecting the approach of the *Nikolić Rule 61 Decision*).

³² 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. Hence, customary international law has emphasised consideration of the kinds of borders that might suffice: *see e.g.* [Stakić AJ](#), para. 300; [Dorđević AJ](#), paras. 533-536; [Prlić TJ, Vol. I](#), para. 47; [Popović TJ](#), para. 892.

³³ [Krnojelac AJ](#), para. 218.

³⁴ *See e.g.* [Universal Declaration of Human Rights](#), art. 13(2); [International Covenant on Civil and Political Rights](#), art. 12.

distinction between the two. To the contrary, the Rome Statute expressly includes both forcible transfer and deportation, referring to them disjunctively in the following manner:

(d) Deportation *or* forcible transfer of population;³⁵

19. The Elements of Crimes likewise mirror the distinction:

The 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.³⁶

20. Academic commentators largely agree that, under the Statute, deportation and forcible transfer constitute two separate offences, notwithstanding their inclusion in the same provision.³⁷ This is not uncommon within the Statute. For example, in *Lubanga*, both the Trial and Appeals Chambers interpreted article 8(2)(e)(vii) in a similar way, finding that conscripting or enlisting children under the age of fifteen into armed forces, or using them to participate actively in hostilities, constitute *three* alternative offences—even though enumerated within the same provision. In their analysis, both the Trial Chamber and the Appeals Chamber saw the drafters’ use of the disjunctive “or” as significant.³⁸ Other provisions of the Statute which likewise encompass several legally distinct crimes include articles 7(1)(g), 8(2)(a)(vii), 8(2)(b)(iv), and 8(2)(b)(viii). Sometimes this is reflected in the *Elements of Crimes* by setting out alternative groups of elements, but not always.³⁹ Indeed,

³⁵ [Statute](#), art. 7(1)(d) (emphasis added).

³⁶ [Elements of Crimes](#), art. 7(1)(d), Element 1 (emphasis added).

³⁷ See Hall and Stahn, ‘Article 7’, in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 192-198, mns. 44-47. See also Werle and Jessberger, *Principles of International Criminal Law*, 3rd Ed. (Oxford: OUP, 2014), pp. 358-359; Cassese, ‘Crimes against humanity’, in Cassese, Gaeta, and Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (Oxford: OUP, 2002), pp. 373-374 (in respect of deportation or forcible transfer, the Rome Statute is consistent with and sets forth elements of customary international law); Ambos, *Treatise on International Criminal Law*, Vol. II (Oxford: OUP, 2014), p. 85-87; Hebel and Robinson, ‘Crimes within the jurisdiction of the Court’, in Lee (ed.), *The International Criminal Court, The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), p. 99 (“[f]orcible transfer of population’ was added as an alternative to ‘deportation’ so to encompass large-scale movements within a country’s borders”); Goy, ‘Article 7(1)(d)’, in Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher, 2017), p. 44 (“Pre-Trial Chamber II in *Ruto et al.* distinguished between forcible transfer and deportation”). *But see* Boas, Bischoff, and Reid, *International Criminal Law Practitioner Library. Volume II: Elements of Crimes under International Law* (Cambridge: CUP, 2008), p. 113; Jurovics, ‘Article 7: crimes contre l’humanité’, in Fernandez and Pacreau (eds.), *Statut de Rome de la cour pénale internationale* (Paris: Pedone, 2012), pp. 428-430; Acquaviva, [Forced Displacement and International Crimes](#), Legal And Protection Policy Research Series (UNHCR, June 2011), p. 18 (“the ICC Statute does not appear to make a clear distinction between the two”).

³⁸ [ICC-01/04-01/06-2842 \(“Lubanga TJ”\)](#), para. 609 (“Bearing in mind the use of the word ‘or’ in article 8(2)(e)(vii), in the Chamber’s view the three alternatives [...] are separate offences”). See also para. 618; [ICC-01/04-01/06-3121-Red \(“Lubanga AJ”\)](#), para. 305.

³⁹ Thus, the Elements of Crimes expressly separate (with different headings) the elements for each kind of sexual violence under article 7(1)(g), and the elements of unlawful confinement and deportation/forcible transfer in

the apparently haphazard practice of the Elements of Crimes in this respect precludes any interpretive inference being drawn on this basis.

21. Applying the principles of interpretation under the Vienna Convention on the Law of Treaties (“VCLT”),⁴⁰ article 7(1)(d) must be interpreted as encompassing two separate crimes with distinct elements. The ordinary meaning of the terms in the article, read in context, and in light of their object and purpose lead to this conclusion.

22. First, the plain terms of article 7(1)(d) refer disjunctively to “deportation *or* forcible transfer”. Following the approach in *Lubanga*, this strongly suggests the existence of two separate crimes with distinct elements.⁴¹ Although footnote 13 of the Elements of Crimes states that “[d]eported or forcibly transferred’ is interchangeable with ‘forcibly displaced’”,⁴² this can only be understood to mean that the prohibited conduct (deportation *and* forcible transfer) falls within the definition in article 7(2)(d) of the Statute, and is the same as that punished by article 8(2)(e)(viii)—which only refers generally to enforced “displacement”. It cannot be understood to mean that “deportation” and “forcible transfer” are the same as one another, since this is contradicted by the plain wording of Element 1, which refers to “deport[ation] or forcibl[e] transfer[] [...] to *another State or location*”.

23. If the drafters of the Statute and Elements had understood ‘deportation’ and ‘forcible transfer’ to mean the same thing, this would not only render meaningless the disjunctive reference to different forms of conduct (“deported *or* forcibly transferred”) but also the specific alternative destinations (“another State *or* location”). This cannot be correct. As Hall and Stahn emphasise, there is a “basic presumption that no words in a treaty should be seen as

article 8(2)(a)(vii) as well as for other crimes (including some crimes such as article 8(2)(b)(vii) where the distinctions are quite subtle), but do not take this approach for articles 8(2)(b)(iv) or 8(2)(b)(viii) or 8(2)(e)(vii).

⁴⁰ See e.g. [ICC-ACRed-01/16](#), para. 56; [ICC-01/09-01/11-1598](#), para. 105; [ICC-01/04-168](#), para. 33; [Lubanga AJ](#), para. 277.

⁴¹ See above fn. 38.

⁴² [Elements of Crimes](#), art. 7(1)(d), Element 1, fn. 13.

surplus”,⁴³ and this presumption is reinforced in the context of article 7(1)(d) by the specific drafting history.⁴⁴

24. Second article 7(1)(d) must be read in context. It is clear that the Statute refers at various points to “deportation”, “forcible transfer”, and “enforced displacement”, with the terminology used varying according to the particular provision in question.⁴⁵ The prevailing usage again recognises both “deportation” and “transfer” as distinct alternatives, notwithstanding the potential use of “enforced displacement” as ‘legal shorthand’ to mean *both* alternatives.

25. Third, the object and purpose of the Statute support the conclusion that deportation and forcible transfer are separate crimes with distinct elements, having regard to the distinct values protected by each of them. This is especially apposite at a time when many States around the world are wrestling with the humanitarian and practical problems posed by enforced migrations across international borders. Furthermore, customary international law is clear that deportation and forcible transfer are distinct crimes.⁴⁶ Whether or not there is a ‘lacuna’ in the Statute justifying recourse to customary international law under article 21(1)(b) of the Statute—and the Prosecution maintains that there is none—the established position in customary international law is highly relevant to understanding the intention of the States Parties in drafting articles 7 and 8, as part of the VCLT analysis.⁴⁷

26. The relationship between deportation and forcible transfer under article 7(1)(d) may also be illuminated by the case law of this Court. For example, in *Ruto*, on the one hand, Pre-

⁴³ Hall and Stahn, ‘Article 7’, in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 196-198, mn. 47. Alf Ross also emphasised that “[i]n the drafting of statutes, where greater care is needed, it is usual to endeavour to avoid saying anything more than what is necessary. The presupposition exists that a statute does not contain redundancies, and an apparent coincidence of two norms therefore is an inducement to interpret one of them in such a way that the apparent redundancy disappears”: Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), p. 132.

⁴⁴ Hall and Stahn, ‘Article 7’, in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 196-198, fn. 300 (discussing the drafting history of paragraphs 1(d) and 2(d): “The drafting of the predecessor of article 7 paras. 1(d) and 2(d) in the Preparatory Committee suggests the delegates recognised a distinction between ‘mass deportations or forced transfer of persons from the territory of a State [or from an area within a state]’ but the grammatical structure could be read so that deportations and transfers each could apply to both cross-frontier and intra-state boundary movements. However, no delegate at the Preparatory Committee or at the Diplomatic Conference publicly contested the distinction between the two terms [...]. Government delegates involved with the drafting agree that the addition of the separate term, forcible transfer, was intended to apply to transfers within national borders”).

⁴⁵ See e.g. [Statute](#), arts. 7(1)(d), 7(2)(d), 8(2)(a)(vii), 8(2)(b)(viii), 8(2)(e)(viii).

⁴⁶ See *above* paras. 15-17.

⁴⁷ See *further below* para. 43.

Trial Chamber II used the terminology of a “unique crime” with “two labels”. Yet it is unclear what legal significance different “labels” can have if they do not reflect a difference in the constituent legal elements—and thus constitute, in reality, *two* crimes, rather than one. In practice, furthermore, the *Ruto* Pre-Trial Chamber confirmed charges both of deportation and forcible transfer, and left it to be established at trial, based on the evidence, “where [the victims] have finally relocated as a result of these acts (*i.e.*, within the State or outside the State) *in order to draw the distinction between deportation and forcible transfer*”.⁴⁸ Such alternative charging is not uncommon, and, arguably, this approach would not have been necessary if there was no legal distinction between the two crimes. Indeed, on other occasions, ICC Pre-Trial Chambers have confirmed charges *only* of forcible transfer and *not* deportation,⁴⁹ further indicating that the two crimes were regarded as distinct in their legal elements. This is consistent with ICTY jurisprudence that deportation has “an additional element”—the crossing of a border—compared to forcible transfer.⁵⁰ Since crossing an international border is the element distinguishing deportation from forcible transfer, it follows that the crime of deportation is not completed until the victim has been forced to cross a *de jure* or *de facto* international border.⁵¹ By way of contrast, the crime of forcible transfer is completed at such time as the victim is displaced from the place where they are lawfully present to another location.

27. In this manner, the crime of deportation is analogous to a cross-border shooting: the crime, for example murder, is not completed until the bullet (fired in one State) strikes and

⁴⁸ [ICC-01/09-01/11-373](#), para. 268 (emphasis added). Pre-Trial Chamber II further noted that the Trial Chamber would be presented with evidence indicating whether the victims relocated “within the State or outside the State”. In other words, the relocation across a State border was seen as the distinguishing element required to label the conduct as deportation. See also paras. 244-245 (explaining that for both deportation and forcible transfer the Prosecution must prove that the accused’s acts produced the effect to deport or forcibly transfer the victim). See further Goy, ‘Article 7(1)(d)’, in Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher, 2017), p. 44 (“While element 1 of the Elements of Crimes provides that the victims must be displaced ‘to another State or location’, it does not explicitly limit deportation to displacement to another State, nor does it limit forcible transfer to displacement within a State. Nevertheless, *Ruto et al.* distinguished between forcible transfer and deportation based on ‘where [the victims] have finally relocated as a result of these acts (*i.e.* within the State or outside the State)’”); Gillett, ‘Collective displacement; crimes of displacement, property deprivation and discrimination under international criminal law’, in Katselli Proukaki (ed.), *Armed Conflict and Forcible Displacement* (London: Routledge, 2018), pp. 228-229.

⁴⁹ [ICC-01/04-02/06-309](#), paras. 36, 64-68; [ICC-02/05-01/09-1](#), p. 7; [ICC-02/05-01/07-2-Corr](#), pp. 7, 10, 15; [ICC-02/05-01/07-3-Corr](#), pp. 8, 10, 16; [ICC-02/05-01/12-1-Red](#), pp. 29-30; [ICC-02/05-01/12-2](#), pp. 8-9.

⁵⁰ [Popović TJ](#), para. 892 (emphasis added). See also paras. 890-895; [Simić TJ](#), para. 123. See further Hall and Stahn, ‘Article 7’, in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 196-198, mn. 47 (“Apart from this *fundamental distinction* and specificities in application, the element of these two crimes are essentially the same”, emphasis added).

⁵¹ As a matter of fact, this will most usually be directly *into* another State, but also could take place without entering another State (for example, on to the high seas).

kills the victim (standing in another State). In both scenarios, the occurrence on the territory of the second State is not, in legal terms, the mere remote effect of a completed criminal conduct on the territory of the first State—rather, it is a *legally required element* of the crime, and thus part of the “conduct in question” for the purpose of article 12(2)(a).⁵²

B.2. Article 12(2)(a) requires at least one legal element of an article 5 crime to have occurred on the territory of a State Party

28. Article 12(2)(a) provides that “the Court may exercise its jurisdiction” if the “State on the territory of which the conduct in question occurred” is a State Party to the Statute. Consistent with the previous practice of the Prosecution,⁵³ this “conduct” requirement means only that “at least one legal element of an article 5 crime” must occur on the territory of a State Party. Accordingly, when a person is deported *directly* into the territory of a second State (and thus the required legal element—to cross an international border—is established on the facts only when they *enter* the second State), the Court may exercise jurisdiction under article 12(2)(a) *either* if the originating State is a State Party to the Court *or* if the receiving State is a State Party to the Court.⁵⁴ This is irrespective of the fact that the coercive act(s) leading to the deportation may have occurred solely in the originating State, since the coercion and the movement of the victim are distinct legal elements under article 7(1)(d), both constituting different facets of the “conduct in question”.⁵⁵ It follows therefore that the Court may in principle exercise jurisdiction over any crimes of deportation from Myanmar directly into Bangladesh.

29. This interpretation of article 12(2)(a) is not only correct within the specific context of the Rome Statute, but also gives effect to the general and long established approach of the international community in exercising criminal jurisdiction. Contemporary debates largely address whether States can and should exercise criminal jurisdiction where *none* of the conduct in question occurs upon their territory;⁵⁶ by contrast, exercising jurisdiction when *some* of the conduct occurs upon their territory is uncontroversial.

30. By contrast, the Prosecution has struggled to find support for the proposition that territorial criminal jurisdiction can only ever be exercised when *all* the constituent elements

⁵² See below paras. 28, 46.

⁵³ [Situation in the Republic of Korea, Article 5 Report](#), June 2014, para. 39.

⁵⁴ See further below para. 31.

⁵⁵ See further below para. 46 (second bullet point).

⁵⁶ See e.g. Shaw, *International Law*, 7th Ed. (Cambridge: CUP, 2013), pp. 499-505 (addressing the ‘effects doctrine’, which “goes *beyond* the objective territorial principle”, emphasis added). See also below fn. 59.

of a crime occur on a State's territory. Such a notion would disregard human realities, in which people live, work, speak, and by all other means 'cross' international borders all the time, and would render the prosecution of trans-border criminality extremely difficult, if not impossible.⁵⁷ International law recognises this phenomenon by permitting multiple States to claim jurisdiction over such conduct, including based on multiple forms of territoriality, and then providing various mechanisms to settle *which* State(s) will in practice take action.⁵⁸ There appears to be no reason why the Rome Statute should adopt a different approach to determining issues of territorial jurisdiction, or operate in a vacuum from applicable domestic and international practice.

B.2.a. Territorial jurisdiction is a permissive concept, requiring only "part" of a crime to occur on a State's territory

31. It is well known that, as a matter of public international law, States may exercise jurisdiction based on various principles, including territoriality (in various forms), personality (active and passive) and, according to some, the 'effects' doctrine. This request is concerned only with the principle of territoriality, and does not rely on the 'effects' doctrine.⁵⁹

32. Commentators agree that States can exercise jurisdiction in relation to crimes that occurred only *in part* on their territory,⁶⁰ including based on "subjective territoriality" (when crimes were *commenced* on a State's territory, but completed in another) and "objective territoriality" (when crimes were *completed* on a State's territory, but commenced in another).⁶¹ What is important in both scenarios is States' legitimate interest in conduct which occurs *partially* on their territory, resulting in their exercise of jurisdiction.

⁵⁷ See e.g. Ryngaert, 'Territory in the law of jurisdiction: imagining alternatives,' [2016] 47 *Netherlands Yearbook of International Law* 49, p. 57 (the notion of a "territory-based jurisdictional order[which] does away with overlapping jurisdictional allegiance" is "an ideal" rather than "reality" since "acts and events cannot be located in just one place, in our current inter-connected world").

⁵⁸ See below paras. 37-40.

⁵⁹ The 'effects' doctrine is not concerned with where the *crime* is committed, in whole or in part, but where its *effects* are felt. This principle is potentially broader than territoriality, and has a different focus. Objective territoriality encompasses States upon whose territory *part* of a crime is committed, but not States where *no part* of the crime is committed but which merely experience ill *effects*. Thus, if victims of cross-border deportation subsequently move to a third State, which is a State Party, their mere presence in that State will not *ipso facto* establish the Court's jurisdiction on the basis of objective territoriality.

⁶⁰ See e.g. O'Keefe, *International Criminal Law* (Oxford: OUP, 2015), p. 10, mn. 1.29; Shaw, *International Law*, 7th Ed. (Cambridge: CUP, 2013), pp. 475-476; Guilfoyle, *International Criminal Law* (Oxford: OUP, 2016), p. 32; Cassese et al, *Cassese's International Criminal Law*, 3rd Ed. (Oxford: OUP, 2013), pp. 275-276; Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 2007), p. 40; Rastan, 'Jurisdiction,' in Stahn (ed.), *The Law and Practice of the International Criminal Court*, (Oxford: OUP, 2015), p. 166.

⁶¹ Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge: CUP, 2014), pp. 16-22.

33. The *Lotus* case at the Permanent Court of International Justice (“PCIJ”) is widely acknowledged as “[t]he starting point for any discussion of states’ jurisdiction”.⁶² This judgment recognised that, consistent with the framework of positive rules of international law, a State may exercise jurisdiction on its territory over conduct which commenced abroad.⁶³ Hence, on the facts, the PCIJ held that Turkey could properly exercise its jurisdiction over a French sailor responsible for a fatal collision with a Turkish ship.⁶⁴ The core premise of *Lotus*, at least, is regarded as “unimpeachable”⁶⁵ and its status as providing a foundation for objective territorial jurisdiction “generally accepted”.⁶⁶

34. Indeed, just eight years later, the “influential” 1935 *Harvard Draft Convention on Jurisdiction with Respect to Crime* expressly reaffirmed the principle of objective territorial jurisdiction—even though in other respects this instrument may be seen as critical of *Lotus*.⁶⁷ Thus, article 3 recognises that a State may properly exercise jurisdiction:

with respect to any crime committed *in whole or in part* within its territory [including [...] (a) Any participation *outside its territory* in a crime committed in whole or *in part within its territory* [...].⁶⁸

35. In the view of the panel of experts which produced the *Harvard Draft Convention*, this provision reflected the “modern trend” in international and comparative law towards “the

⁶² O’Keefe, *International Criminal Law* (Oxford: OUP, 2015), p. 6, mn. 1.16. See also Cassese et al, *Cassese’s International Criminal Law*, 3rd Ed. (Oxford: OUP, 2013), p. 272; Ryngaert, ‘Territory in the law of jurisdiction: imagining alternatives,’ [2016] 47 *Netherlands Yearbook of International Law* 49, p. 55.

⁶³ See e.g. South Africa, [National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another](#) [2014] ZACC 30, para. 26 (the Constitutional Court of South Africa characterising the *Lotus* case as establishing, *inter alia*, that States “retain a wide measure of discretion to exercise jurisdiction within their own territory, with regard to acts committed beyond their borders”).

⁶⁴ See [Permanent Court of International Justice, Lotus Case, 1927](#), p. 19. This particular scenario has since, however, been expressly regulated by international treaty. See below fn. 74.

⁶⁵ O’Keefe, *International Criminal Law* (Oxford: OUP, 2015), p. 9, mn. 1.21. See further pp. 7-9, mns. 1.19-1.21 (concerning the *Arrest Warrant* case at the ICJ); Shaw, *International Law*, 7th Ed., (Cambridge: CUP, 2013), pp. 476-477; Cassese et al, *Cassese’s International Criminal Law*, 3rd Ed. (Oxford: OUP, 2013), pp. 272-274. Some suggest there may be a specific permissive rule allowing extraterritorial jurisdiction at least for international crimes, which would apply *a fortiori* to doctrines such as objective territoriality: see [Arrest Warrant of 11 April 2000 \(Democratic Republic of Congo v. Belgium\)](#), Judgment, ICJ Reports 2002, Dissenting Opinion of Judge Van Den Wyngaert, paras. 51-57, 67. On the justification for such criminal jurisdiction, see also generally Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP, 1994), pp. 76-77.

⁶⁶ Clapham, *Brierly’s Law of Nations*, 7th Ed. (Oxford: OUP, 2012), p. 246.

⁶⁷ Ryngaert, ‘Territory in the law of jurisdiction: imagining alternatives,’ [2016] 47 *Netherlands Yearbook of International Law* 49, p. 55. See also p. 56 (noting that “[t]he territorial bias of the Harvard Draft Convention has cast a long shadow in the practice of states”).

⁶⁸ ‘Codification of International Law: Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention),’ *Supp. to the American Journal of International Law*, Vol. 29, 1935, p. 439 (emphasis added).

conclusion that a crime is committed wherever any essential element of the crime is accomplished”.⁶⁹

36. This understanding was accepted without controversy. For example, fifty years on, the *Third Restatement of Foreign Relations Law* recognised a State’s jurisdiction when “conduct [...], wholly or in substantial part, takes place within its territory” and described these territorial “links” as “universally recognised”.⁷⁰

37. Consistent State practice has illustrated these same principles. For example, underlining the absence of a restrictive approach to “territorial” jurisdiction, more than 20 multilateral treaties, cumulatively ratified by at least 188 States, simply require States Parties to establish jurisdiction over designated crimes in their “territory”. These treaties do not elaborate on what such jurisdiction entails, but merely state instead that this requirement does not limit States Parties’ domestic laws on jurisdiction, without prejudice to the general rules of international law.⁷¹ Tellingly, however, in guiding States in meeting their obligation under

⁶⁹ ‘Codification of International Law: Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention),’ *Supplement to the American Journal of International Law*, Vol. 29, 1935, p. 494 (comment to article 3 of the Harvard Draft Convention). See also p. 495 (“The modern formula [...] recognizes that there is territorial jurisdiction of any crime which is committed in whole or in part within the territory. A crime is committed ‘in whole’ within the territory when every constituent element is consummated within the territory; it is committed ‘in part’ within the territory when any essential constituent element is consummated there. If it is committed either ‘in whole or in part’ within the territory, there is territorial jurisdiction”).

⁷⁰ See e.g. *Restatement (Third) of Foreign Relations Law*, 1987, s. 402, and associated comment. It should be noted that the Third Restatement distinguishes between jurisdiction to prescribe and jurisdiction to adjudicate—and in the latter respect applies an approach wholly different from the Rome Statute in that it focuses on whether the relationship of the forum state with the matter to be adjudicated is “such as to make the exercise of jurisdiction reasonable”. Yet it still recognises ‘objective’ territorial links—for example, if the person concerned “had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state”—as a circumstance which makes the exercise of jurisdiction reasonable: see s. 421. Furthermore, in the United States’ own judicial practice, the broader approach of the Harvard Draft Convention to the exercise of jurisdiction to adjudicate appears to have greater sway than the Third Restatement: see e.g. Doyle, [Extraterritorial Application of American Criminal Law](#), Congressional Research Service, 31 October 2016, p. 13. See further below fn. 95.

⁷¹ See e.g. [Council of Europe Convention on Offence Relating to Cultural Property](#), CETS 221, 2017, arts. 12(1) and (5) (not yet entered into force); [Council of Europe Convention against Trafficking in Human Organs](#), CETS 216, 2015, art. 10(1), (8) (5 States Parties); [Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence](#), CETS 210, 2011, art. 44(1), (7) (28 States Parties); [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#), CETS 201, 2007, art. 25(1), 25(9) (42 States Parties); [Council of Europe Convention on Action against Trafficking in Human Beings](#), CETS 197, 2005, art. 31(1), (5) (47 States Parties); [Council of Europe Convention on the Prevention of Terrorism](#), CETS 196, 2005, art. 14(1), (4) (39 States Parties); [International Convention for the Suppression of Acts of Nuclear Terrorism](#), UN GA Res. 59/290, 2005, art. 9(1), (5) (113 States Parties); [United Nations Convention against Corruption](#), UN GA Res. 58/4, 2003, art. 42(1), (6) (183 States Parties); [Convention on Cybercrime](#), ETS 185, 2001, art. 22(1), (4) (56 States Parties); [United Nations Convention against Transnational Organized Crime](#), UNGA Resolution 55/25, 2000, art. 15(1), (6) (188 States Parties); [International Convention for the Suppression of the Financing of Terrorism](#), UN GA Res. 54/109, 1999, art. 7(1), (6) (188 States Parties); [Criminal Law Convention on Corruption](#), ETA 173, 1999, art. 17(1), (4) (48 States Parties); [International Convention for the Suppression of Terrorist Bombings](#), UN GA Res. 52/164, 1997, art. 6(1), (5) (170 States Parties); [Inter-American Convention against Corruption](#), 1996 art. 5(1), (4) (34 States

one of these treaties—the widely-ratified UN *Convention against Transnational Organized Crime*⁷²—the UN Office on Drugs and Crime provides that States may establish jurisdiction over offences “[c]ommitted [wholly or partly] within the territory”.⁷³

38. Going further, and more specifically, at least 168 States have ratified at least one international treaty which *requires them* to recognise that another State Party may exercise jurisdiction over conduct which occurs only partly on their territory. For example, the UN *Convention on the Law of the Sea* provides that a coastal State may exercise criminal jurisdiction over acts occurring on foreign ships passing through its territorial waters if “the consequences of the crime extend to the coastal State” or “the crime is of a kind to disturb the peace of the country or the good order of the territorial sea” or to suppress “illicit traffic in narcotic drugs or psychotropic substances”.⁷⁴

39. Furthermore, at least 66 States have also accepted international obligations *to exercise* domestic jurisdiction over serious crimes occurring only in part within their territory.⁷⁵ For example, 38 member States of the African Union have accepted an obligation to exercise jurisdiction over certain crimes of corruption when “committed wholly or partially inside

Parties); [Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#), 10 March 1988, art. 6(1), (5) (166 States Parties); [International Convention against the Taking of Hostages](#), UN GA 34/146, 17 December 1979, art. 5(1), (3) (176 States Parties); [Convention on the Physical Protection of Nuclear Material](#), 26 October 1979, art. 8(1), (3) (156 States Parties); [Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents](#), 14 December 1973, art. 3(1), (3) (180 States Parties); [Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation](#), 23 September 1971, art. 5(1), (3) (188 States Parties); [Convention for the Suppression of Unlawful Seizure of Aircraft](#), 16 December 1970, art. 4(1), (3) (185 States Parties). *See also* [Convention on Offences and Certain Other Acts Committed On Board Aircraft](#), 14 September 1963, arts. 3-4 (186 States Parties).

⁷² [United Nations Convention against Transnational Organized Crime](#), UNGA Res. 55/25, 2000, art. 15(1)(a).

⁷³ [UNODC, Model Legislative Provisions against Organized Crime](#), 2012, p. 25 (square brackets in the original, signifying possible options for States to consider when adopting implementing legislation).

⁷⁴ [United Nations Convention on the Law of the Sea](#), 10 December 1982, art. 27(1) (168 States Parties). By contrast, where ships collide on the high seas, or an “incident of navigation” involving “penal or disciplinary responsibility” arises on the high seas, only the flag State of the vessel concerned, or the State of which such person is a national, may exercise jurisdiction: art. 97(1).

⁷⁵ It is important to note in this context that even a requirement for States to exercise jurisdiction over certain crimes—and, *a fortiori*, a permissive rule allowing States to exercise jurisdiction—does not mean that States are required to interfere in the sovereign affairs of other States; they remain bound by the principle of non-intervention, and hence the acts associated with the exercise of jurisdiction (for example, the conduct of an investigation) must remain confined to their territory. *See e.g.* South Africa, [National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another](#) [2014] ZACC 30, paras. 29 (“The exercise of enforcement jurisdiction is confined to the territory of the state seeking to invoke it. The principle of non-intervention safeguards the principle of territoriality. Domestic criminal jurisdiction [...] therefore applies to prescriptive jurisdiction but can apply also to adjudicative jurisdiction, subject to the constraints of territoriality”), 78 (“An investigation within the South African territory does not offend against the principle of non-intervention”).

[their] territory”.⁷⁶ Likewise, the 28 member States of the European Union must exercise their jurisdiction over a considerable variety of serious crimes when committed on their territory “in whole or in part”.⁷⁷

40. Many States also make express general provision in their domestic law establishing jurisdiction over crimes committed in part on their territory, including but not limited to circumstances of ‘objective territoriality’. For example:

- Argentina, which provides for criminal jurisdiction over “crimes committed or whose effects occur” in the territory;⁷⁸
- Canada, which provides that no person “shall be convicted in Canada for an offence committed outside of Canada”,⁷⁹ but where criminal jurisdiction may nonetheless properly be asserted where a “significant portion” of the “activities constituting that offence took place in Canada”;⁸⁰
- the People’s Republic of China (“PRC”), which provides that “a crime is deemed to have been committed within PRC territory” when “either the act or consequence of a crime takes place within PRC territory”;⁸¹
- England and Wales, where courts have recently emphasised the ‘flexible’ approach to jurisdiction in the common law which moves away from “definitional obsessions and

⁷⁶ See e.g. African Union, [African Union Convention on Preventing and Combating Corruption](#), 1 July 2003, art. 13(1)(a) (38 States Parties).

⁷⁷ See e.g. European Union, [Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA](#), 17 December 2011, art. 17(1)(a); [Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on Attacks against Information Systems and Replacing Council Framework Decision 2005/222/JHA](#), 14 August 2013, art. 12(1)(a); [Directive \(EU\) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA](#), 31 March 2017, art. 19(1)(a).

⁷⁸ Argentina, [Penal Code](#), art. 1(1) (unofficial translation). Even if the reference to “effect” might even be interpreted more broadly to mean an effect which is *not* a legally required element of the crime, the Prosecution understands this provision necessarily to include results which *are* a legally required element of the crime.

⁷⁹ Canada, [Criminal Code, R.S.C., 1985, c. C-46](#), s. 6(2).

⁸⁰ See Canada, [Libman v. the Queen \[1985\] 2 SCR 178](#), especially pp. 212-213. See also pp. 213 (noting that “[t]he outer limits of the test may, however, well be coterminous with the requirements of international comity”), 214 (“I also agree with the sentiments expressed by Lord Salmon in *Director of Public Prosecutions v. Doot*, [...] that we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother’s keepers”).

⁸¹ People’s Republic of China, [Criminal Law of the People’s Republic of China, adopted by the Second Session of the Fifth National People’s Congress on July 1, 1979, and amended by the Fifth Session of the Eighth National People’s Congress on March 14, 1997](#), art. 6. Even if the reference to “consequence” might even be interpreted more broadly to mean an effect which is *not* a legally required element of the crime, the Prosecution understands this provision necessarily to include results which *are* a legally required element of the crime.

technical formulations”, and allowed jurisdiction where “a substantial measure” of the crime occurs within the territory;⁸²

- France, which provides that an offence is deemed to have been committed on the territory of France if one of the “constituent elements” has taken place in the territory of France;⁸³
- Germany, which provides that an offence is “deemed to have been committed” in “every place where the offender acted” (or made a culpable omission) *as well as* places “in which the result if it is an element of the offence occurs or should have occurred according to the intention of the offender”;⁸⁴
- the Islamic Republic of Iran, which provides that an offence is “deemed as having been committed inside the Islamic Republic of Iran” when “part” of the offence “or its result occurred inside Iranian territory”;⁸⁵
- Italy, which provides that “the crime is deemed to have been committed on the territory of the State when either the action or omission [...] in whole or in part or when the [legally required] resulting event took place on its territory”;⁸⁶
- Japan, which provides for criminal jurisdiction over persons who “commit[] a crime within the territory of Japan”;⁸⁷ interpreted to include circumstances when not all elements of the crime have occurred in the territory;⁸⁸
- the Republic of Korea, which provides for criminal jurisdiction over persons “who commit crimes in the territory of the Republic of Korea”;⁸⁹ interpreted to include circumstances when not all elements of the crime have occurred in the territory;⁹⁰

⁸² England and Wales, *R. v. Wallace Duncan Smith* [1996] 2 Cr. App. R. 1, at 20, per Rose, LJ (quoting with approval the judgment of the UK Privy Council in *Liangsiriprasert v. Government of the United States of America* [1991] 1 AC 225, at 250A, per Lord Griffiths). These same authorities provide, however, that the courts of England and Wales should *not* exercise jurisdiction in these circumstances where “it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country”. See also *R. v. Smith (Wallace Duncan) (No 4)* [2004] QB 1418, at 1437-1438, per Lord Woolf, CJ (affirming the reasoning of Lord Justice Rose in *Smith*).

⁸³ France, [Code Pénal](#), art. 113(2) (“*L’infraction est réputée commise sur le territoire de la République dès lors qu’un de ses faits constitutifs a eu lieu sur ce territoire*”).

⁸⁴ See e.g. *The German Criminal Code: a Modern English Translation* (trans. M. Bohlander) (Oxford: Hart, 2008), p. 38 (s. 9(1)). See also Bohlander, *Principles of German Criminal Procedure* (Oxford: Hart, 2012), p. 46. German law recognises the doctrine of “ubiquity”: see further below fn. 95.

⁸⁵ Islamic Republic of Iran, [Islamic Penal Code, 2013 \(unofficial English translation by the Iran Human Rights Documentation Centre, 2014\)](#), Book I, Ch. 2, art. 4.

⁸⁶ See e.g. Italy, *Codice Penale e di Procedura Penale e Leggi Complementari*, 46th Ed. (Piacenza: La Tribuna, 2017), art. 6(2).

⁸⁷ Japan, [Penal Code \(Act No. 45 of 1907\)](#), art. 1(1).

⁸⁸ See e.g. Japan, Judgment of the Supreme Court of Judicature, 16 June 1911, Law Reports, Vol. 17, p. 1202 (in Japanese). See also Ono, *Time and Location of a Crime*, 1923 (in Japanese).

- South Africa, where legislation governing the *local* jurisdiction of domestic courts appears also to have been regarded as declaratory of the territorial jurisdiction of the courts of the Republic as a whole;⁹¹ and which provides that a person may be tried by a magistrate’s court “as if he had been charged with an offence committed within the district” if they are charged with an offence “begun or completed within the district”;⁹²
- the United States, where federal courts will give domestic statutes ‘extraterritorial’ effect if this is consistent with the intent of the US Congress *and* international law provides a basis for such jurisdiction, including based on objective territoriality; and where state courts will commonly allow the forum state to assert jurisdiction “in cases where some of the elements of the offense are committed within the state’s borders”.⁹³

41. There have also been notable domestic prosecutions in such situations: for example, in recent years, Italy has routinely exercised jurisdiction over crimes committed against migrants on the high seas, including on charges such as conspiracy to commit murder and facilitating illegal immigration.⁹⁴ Likewise, some years ago, Scottish courts of the United Kingdom exercised jurisdiction over the Lockerbie bombing, in which a bomb allegedly placed aboard an *American* registered aircraft by *foreign* agents exploded over *UK* territory.

42. Indeed, the practice of some domestic jurisdictions in recent years—like Canada, England and Wales, and Germany—may be moving away from formalistic analyses of where particular *legal* elements of a crime took place, and instead looking more broadly at the

⁸⁹ Republic of Korea, [Criminal Act](#), art. 2 (translation into English).

⁹⁰ See Park Jae-Yoon, *Commentary on Criminal Law* (Korean Judicial Administration Association, 2011), pp. 111-112 (unofficial translation from Korean: “not only the place of action but also where the result takes place can be the place of crime”, citing a decision of the Supreme Court of the Republic of Korea, dated 28 November 1998). See also Kim Il-Soo, *Criminal Law: General Introduction* (Park-young-sa, 1999), p. 170 (in Korean); Bae Jong-Dae, *Criminal Law: General Introduction* (Hong-moon-sa, 2001), p. 105 (in Korean); Lee Jae-Sang, *Criminal Law: General Introduction* (Park-young-sa, 2003), p. 14 (in Korean).

⁹¹ See e.g. South Africa (“Republic of Transkei”), *State v. Ntwana and Others*, 11 August 1978, 69 *International Law Reports* 127, pp. 129-131 (reasoning that an accused could not be deemed to have submitted to the jurisdiction of a magistrate’s court, under s. 154(2) of the *Criminal Procedure Act 56 of 1955*, if no magistrate’s court could properly have exercised jurisdiction—but apparently accepting the premise that legislation governing the local jurisdiction of magistrates’ courts could be determinative of whether or not an offence was indeed “committed in a foreign country”). *But see also* pp. 132-133. “Transkei” was an entity which South Africa had declared to be independent in 1976, and which South Africa regarded as a foreign State, but which was not recognised by any other State. Transkei was reintegrated into South Africa in 1994.

⁹² South Africa, [Magistrates’ Courts Act 32 of 1944](#), s. 90(2)(e). See also Du Toit et al, *Commentary on the Criminal Procedure Act* (Cape Town: Juta, 2007), pp. 16-1 to 16-4.

⁹³ Doyle, [Extraterritorial Application of American Criminal Law](#), Congressional Research Service, 31 October 2016, pp. 22-23 (*especially* fns. 118, 121-122).

⁹⁴ See e.g. Italy, Corte di Cassazione, Prima Sezione Penale, n. 18354/2014; Corte di Cassazione, Prima Sezione Penale, n. 3514/2015

nature, causes, and consequences of the crime on its facts to determine if exercising jurisdiction is appropriate.⁹⁵ Yet even this approach still favours recognising, for example, jurisdiction based on objective territoriality. As the allegations underlying this request illustrate, the Rohingya people were specifically and intentionally deported *into* Bangladesh.⁹⁶ To say that a receiving State does not have a sufficient interest in the matter to assert its own criminal jurisdiction over this conduct would be nonsensical. Indeed, forced deportations over international borders have been recognised as one of the specific contemporary phenomena requiring a “move beyond our traditional notions of Westphalia”—*i.e.*, jurisdiction solely rooted in a 17th century concept of sovereign territory—“if we are to engage effectively with these challenges.”⁹⁷

B.2.b. Article 12(2)(a) is correctly interpreted to require a crime to occur either ‘in whole or in part’ on the territory of a State Party

43. Consistent with this framework of general international law, the Prosecution submits that article 12(2)(a) of the Statute is correctly interpreted to require a crime to occur on the territory of a State Party either in whole or in part. This is not only the common conclusion of academic commentators⁹⁸ but, more importantly still, follows from the ordinary meaning of

⁹⁵ See also Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge: CUP, 2014), pp. 22-24 (describing the concept of the “doctrine of ubiquity”, in which a State has jurisdiction to prosecute crimes committed in part within its territory *irrespective* whether the part in question formed a constituent element of the crime in the strict sense); 31-36, 196, 285; Vagias, ‘The Territorial Jurisdiction of the International Criminal Court: A Jurisdictional Rule of Reason for the ICC?’, [2012] 59(1) *Netherlands International Law Review* 43, pp. 63-64 (describing a jurisdictional “rule of reason” requiring a “sufficiently close connection” between the crime and the State asserting jurisdiction, assessed on a case-by-case basis); Rastan, ‘Jurisdiction,’ in Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), pp. 166-167, *especially* fn. 118 and text (“arguably intention and motive could be taken into account as a further factor where the suspect aimed for the consequence to occur within the territory of another state”). See *further above* fns. 80, 82, 84.

⁹⁶ See *above* para. 9. This situation is different from a mass exodus of civilians from one State caused for instance by an ongoing armed conflict, without evidence of deportation *per se*. See *above* fn. 59.

⁹⁷ Bethlehem, ‘The end of geography: the changing nature of the international system and the challenge to international law,’ [2014] 25(1) *European Journal of International Law* 9, p. 18. See *also* pp. 15-16.

⁹⁸ See *e.g.* Bourgon, ‘Jurisdiction *ratione loci*’, in Cassese, Gaeta, and Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (Oxford: OUP, 2002), p. 567 (“there is no reason to believe that the ICC could not exercise its jurisdiction even if only one of the States had ratified the Statute”); Ryngaert, *Jurisdiction in International Law*, 2nd Ed (Oxford: OUP, 2015), p. 76 (“[i]n international criminal law, it is commonly accepted that it is necessary and sufficient that one constituent consistent element of the act or situation has been consummated in the territory of the State that claims jurisdiction”); M. Wagner, ‘The ICC and its Jurisdiction—Myths, Misperceptions, and Realities,’ [2003] 7 *Max Planck Yearbook of United Nations Law* 409, pp. 484-485 (“in cases in which the alleged perpetrator is a national of a non-State party and one of the territorial states is not a State party, [...] [r]ecourse should thus be had to more general principles regarding jurisdictional bases. [...] [I]t is now possible to state that jurisdiction can be claimed by all states with a connection to the conduct in question. Thus, in a situation in which poison is delivered by an airplane flying over its own territory but in which this agent is [...] dispersed over the territory of a State party, the ICC-Statute would grant jurisdiction over this conduct”). See *also* Rastan, ‘The Jurisdictional Scope of Situations Before the International Criminal Court’, [2012] 23(1) *Criminal Law Forum* 1; [Mailart, ‘Article 12\(2\)\(a\) Rome Statute: the missing piece of the jurisdictional puzzle,’ EJIL: Talk!, 7 August 2014](#). Other commentators assume the meaning of article 12(2)(a), without reasoned analysis, but in doing so recognise the sufficiency of one element of an article 5 crime to

the terms used, read in context, and in light of their object and purpose.⁹⁹ Notably, the VCLT emphasises that “[t]here shall be taken into account, together with the context [...] [a]ny relevant rules of international law applicable in the relations between the parties.”¹⁰⁰ Simply put, States’ consistent understanding of the broad scope of territorial jurisdiction—including objective territoriality¹⁰¹—may be highly relevant in assessing their intentions in drafting the Statute.¹⁰²

44. The plain terms of article 12(2)(a) refer to the Court’s jurisdiction when the “conduct” in question “occurred” on the territory of a State Party. These terms, in their ordinary meaning, do not explain *how much* conduct is required or *what constitutes* conduct. Nor do they explain whether an ‘occurrence’ necessarily includes the beginning and end of such “conduct”, or merely a passage of relevant events in between.

45. Therefore, the ordinary meaning of the plain terms of article 12(2)(a) does not offer any clarity on whether: i.) all legal elements of an article 5 crime need occur on the territory of a State Party; ii.) only one legal element of an article 5 crime need occur on the territory of a State Party; or iii.) not all legal elements of an article 5 crime need occur on the territory of a State Party, but they must include those elements directly relating to the acts of the accused person.¹⁰³ Nor do the other, equally authoritative,¹⁰⁴ linguistic versions of the Statute clarify

establish territorial jurisdiction under article 12(2)(a): *see e.g.* Chaumette, ‘International criminal responsibility of individuals in case of cyberattacks,’ [2018] *International Criminal Law Review*, Advance Access, p. 23.

⁹⁹ *See above* fn. 40.

¹⁰⁰ [Vienna Convention on the Law of Treaties](#), art. 31(3)(c).

¹⁰¹ *See above* paras. 31-42.

¹⁰² *See further e.g.* Aust, *Modern Treaty Law and Practice*, 3rd Ed. (Cambridge: CUP, 2013), pp. 216-217; Gardiner, *Treaty Interpretation*, 2nd Ed. (Oxford: OUP, 2015), p. 323 (“Courts and tribunals, national and international, appear to have no hesitation over using provisions in treaties other than the one being applied as aids to interpretation where the same, similar, or different term sheds light on the meaning under consideration [...] The reason for this is not hard to see.] [...] ‘Each state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has entered with other states. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before.’”). Similar considerations would apply to threshold concepts, such as jurisdiction, which may be applied in domestic legislation, and other such materials.

¹⁰³ *See e.g.* Vagias, [The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues](#), Bynkers Hoek Publishing, Amsterdam 2011, pp. 120-121 (noting “the problems that could potentially arise from the wording finally employed revolve around the possibility of the use of subjective territoriality to the exclusion of other acceptable forms of jurisdiction under international law” but observing that “the use of this formulation in article 12(2)(a) [...] could be the result of inopportune drafting”); Vagias, ‘The Territorial Jurisdiction of the ICC for Core Crimes Committed Through the Internet’, [2016] 21(3) *Journal of Conflict and Security Law* 523, pp. 526-527 (noting that “it could be argued that ‘conduct in question’ in Article 12(2)(a) refers only to conduct, thus excluding jurisdiction on the basis of the territory where the consequences manifested” but concluding “the interpretation of Article 12(2)(a) is a difficult exercise, which does not allow for unequivocal conclusions [...] The troublesome language of Article 12 is probably the result of the difficult drafting process, insulated from other parts during the negotiations, without submission to the Drafting Committee due to lack of time and with no consultation among all states present at the conference”). *See also* [ICC-01/09-19-Corr](#), para. 67 (noting that

this question—the Prosecution understands informally that the meaning of the word equating to “conduct” in article 12(2)(a) is similarly variable, according to its context, in Arabic, Chinese, French, Russian, and Spanish, as it is in English.

46. Assessing the context in the Statute of the word “conduct” likewise underlines that it must be approached with caution. Given the section of the Statute in which article 12 is located (“Part 2: Jurisdiction, Admissibility and Applicable Law”), there is a strong indication that the term “conduct” should be understood in the context of the generally applicable rules on the assertion of jurisdiction.¹⁰⁵ More specifically, the statutory context also suggests that *no priority* is given for the purpose of article 12(2)(a) to legal elements concerning the personal acts of the perpetrator, excluding one of the possibilities offered by the plain terms in their ordinary meaning.¹⁰⁶

- First, interpreting the provision of article 12(2)(a) as a whole suggests that the term “conduct” (for the purpose of that provision) is synonymous with the term “crime”. This is because of the apparent parallel drawn between territorial jurisdiction on land (based on the occurrence of the “conduct in question”) and territorial jurisdiction on registered vessels and aircraft (based on the “crime” being “committed”). It would be illogical for the test to vary according to the physical characteristics of the particular location. Article 12(2)(b) likewise refers to the “crime”. Various chambers of the Court have also equated “conduct” for the purpose of article 12(2)(a) with “crime”, although the legal significance of these terms has not been at issue in their decisions.¹⁰⁷
- Second, notwithstanding article 30 and the language of the ‘General Introduction’ to the Elements of Crimes,¹⁰⁸ the drafters were conscious of the difficulty in distinguishing between “conduct” and “consequence”—“the dividing line [...] is not

“many fundamental questions remained unresolved until the very end of the Rome Conference, including [...] essential questions relating to jurisdiction, such as the preconditions for the Court to exercise jurisdiction”).

¹⁰⁴ [Statute](#), art. 128.

¹⁰⁵ *See also above* para. 43.

¹⁰⁶ *See above* para. 45 (option iii.).

¹⁰⁷ *See e.g.* [ICC-01/04-01/07-262](#), para. 14 (purporting to quote ICC-01/04-100-Conf-Exp, para. 88, and requiring that “the relevant *crime* was committed in the territory of a State Party”, emphasis added). The Prosecution notes, however, that the original reference appears to have been a factual observation as to where certain alleged crimes occurred, and not an attempt to interpret the terms in article 12(2)(a): *see* ICC-01/04-100-Conf-Exp, paras. 91-93. Subsequent Pre-Trial Chambers, however, have consistently continued to adopt this understanding of article 12(2)(a): *see e.g.* [ICC-01/09-19-Corr](#), para. 175 (“The *crime* must [...] occur on the territory of a State Party”, emphasis added); [ICC-02/11-14-Corr](#), para. 187 (“The *crime* must occur in the territory of [...] a State Party”, emphasis added).

¹⁰⁸ *See e.g.* [Elements of Crimes](#), General Introduction, para. 7.

always clear, and [...] sometimes views on where to draw the line [...] differed.”¹⁰⁹ Thus, even the so-called “conduct” requirement for certain crimes—such as murder, and also deportation—actually contains *multiple* distinct legal elements, which extend beyond the perpetrator’s acts *stricto sensu* to include their legally required result (“consequences”).¹¹⁰

47. It follows from these observations that nothing would support reading the notion of “conduct” in article 12(2)(a) to focus solely on the acts personally carried out by the perpetrator to the exclusion of their legally required result(s). Such a view is inconsistent not only with the direct parallel in article 12(2)(a) between “conduct” and the broader concept of “crime”, but also the protean concept of “conduct” in the Elements of Crimes themselves.

48. It is true that the statutory context provides less insight into the more telling question whether article 12(2)(a) requires *all* the elements of an article 5 crime to be committed on the territory of a State Party, or whether it is sufficient for just one of them to have been committed thereon. It may be significant that articles 17-19 recognise the possibility (by referring at various points to “a State”) that multiple States may have jurisdiction over a case—although whether this may arise due to multiple territorial claims under article 12(2)(a), or claims under the different heads of jurisdiction in articles 12(2)(a) and (b), is not clear.

49. Crucially, the object and purpose of article 12(2)(a) further confirms that this provision *must* be read to require *only one* legal element of an article 5 crime to have occurred on the territory of a State Party.

¹⁰⁹ Kelt and Von Hebel, ‘What are elements of crimes?’ in Lee et al (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 1999), p. 15. Nor is any further light shed on this question by the reference to “conduct” in paragraph 9 of the General Introduction to the Elements of Crimes, which reflected a failure by the States to elaborate any more specific rules: Kelt and Von Hebel, ‘General principles of criminal law and the Elements of Crimes,’ in Lee et al (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 1999), pp. 39-40. Notably, Kelt and Von Hebel are unable to give a specific definition of “consequence”, or to articulate how in principle it differs from the definition of “conduct” as relating to the “prohibited act or omission”: *see e.g.* Kelt and Von Hebel, ‘What are elements of crimes?’, and Kelt and Von Hebel, ‘General principles of criminal law and the Elements of Crimes,’ in Lee et al (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 1999), pp. 14-15, 26-27.

¹¹⁰ *See* [Elements of Crimes](#), General Introduction, para. 7(a) (the first element of each crime is a ‘conduct’ element). For example, the content of “Element 1” of murder under article 7(1)(a) (the perpetrator killed one or more persons) in fact comprises *two* elements, specifically a.) the perpetrator acted or made a culpable omission which caused b.) the death of the victim. Likewise, the content of “Element 1” of deportation under article 7(1)(d) (the perpetrator deported one or more persons to another State) comprises *three* elements, specifically: a.) the perpetrator acted or made a culpable omission which coerced, b.) without grounds permitted under international law, c.) the victim to cross an international border.

- First, article 12(2)(a) itself functions to delegate to the Court the States Parties' own "sovereign ability to prosecute" article 5 crimes.¹¹¹ Yet this intention would be entirely frustrated if territorial jurisdiction under article 12(2)(a) were to be interpreted *more narrowly than a national court* would interpret the State's own territorial jurisdiction for the purpose of domestic proceedings for article 5 crimes. This would stand the logic of the Statute, and especially the complementarity regime,¹¹² on its head.
- Second, to any extent that article 12 may have been intended to represent a 'jurisdictional brake' on the Court, this can only have been intended as a limited departure from other bases of jurisdiction not applicable under the Statute (such as passive personality or universality)—which customary law would otherwise recognise for most article 5 crimes.¹¹³ But there is no evidence at all that the drafters of the Statute intended to adopt a narrower view of territorial jurisdiction than that known to international law in general.¹¹⁴ It suffices merely that article 5 criminality extends into the territory of a State which chose to ratify the Statute. Article 12 continues to fulfil the function of excluding the jurisdiction of the Court, absent a resolution of the UN Security Council, where no part of an article 5 crime occurs on the territory of a State Party and the perpetrator is not a national of a State Party.
- Third, in adopting the Statute as a whole, the drafters manifestly intended to grant the Court "jurisdiction over the most serious crimes of concern to the international community as a whole".¹¹⁵ This expressly included the crime of deportation, which has an inherently transnational character. If it was understood *arguendo* that article 12(2)(a) jurisdiction was only established where *all* the elements of a crime were

¹¹¹ See Schabas and Pecorella, 'Article 12', in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 681-683, mn. 15. See also Akande, 'The jurisdiction of the International Criminal Court over nationals of non-Parties: legal basis and limits,' [2003] 1(3) *Journal of International Criminal Justice* 618, pp. 621-622, 625, 633-634.

¹¹² See further below para. 50.

¹¹³ See e.g. Shaw, *International Law*, 7th Ed. (Cambridge: CUP, 2013), pp. 482-493; Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP, 1994), pp. 58-63, 65-69; *Restatement (Third) of Foreign Relations Law*, 1987, s. 404 ("A state has jurisdiction to define and prescribe punishment for certain offenses recognised by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes [...] even where none of the bases of jurisdiction indicated in [s.] 402 is present"); South Africa, *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, paras. 28, 42-49, 61-64, 78; Arbour, 'Will the ICC have an impact on universal jurisdiction?', [2003] 1(3) *Journal of International Criminal Justice* 585, pp. 586-587.

¹¹⁴ See above para. 43.

¹¹⁵ [Statute](#), Preamble.

committed on the territory of a State Party, this would exclude the Court’s jurisdiction over deportation—which *requires* one element that always occurs *beyond* the territory of the victims’ State of origin—unless both States are Parties to the Rome Statute.¹¹⁶ Moreover, as a factual matter, many other article 5 crimes are likely, in practice, to have a cross-border element. Accordingly, the only way to give meaningful effect to the object and purpose of the Statute as a whole is to recognise that the reference to “conduct” in article 12(2)(a) means no more than ‘one legal element of an article 5 crime’.

50. Finally, also relevant to the question of the object and purpose of the Statute, and its jurisdictional provisions, is the ICC’s admissibility regime. This is significant because it demonstrates that the Statute has its own means of resolving potential concern about *competing claims* of jurisdiction—which is the only potential reason *arguendo* to consider taking a narrow view of territorial jurisdiction as such.¹¹⁷ First, article 12 is in express terms concerned with the “jurisdiction of the Court”,¹¹⁸ and is not concerned with the ‘horizontal’ allocation of jurisdiction between States. Second, because article 17 provides that cases are inadmissible at this Court when *any* State with jurisdiction genuinely carries out an investigation or prosecution of that case, there can be no concern about ‘vertical’ allocation of jurisdiction between the Court and States. Recognising the Court’s territorial jurisdiction to be consistent with territorial jurisdiction in public international law more generally can never supplant or compete with States’ own exercises of jurisdiction; to the contrary, genuine State

¹¹⁶ See *above* paras. 15-27.

¹¹⁷ For example, the common law of England and Wales subjects its jurisdictional test to a further analysis of “comity” between States, and the Third Restatement suggested that the exercise of jurisdiction to adjudicate should be evaluated on the basis of what is “reasonable”: see *above* fns. 70, 82. Likewise, various treaties require relevant States Parties to consult with a view to determining the most “appropriate” jurisdiction to take action when multiple claims are asserted: see e.g. [Council of Europe Convention on Offences Relating to Cultural Property](#), CETS 221, 2017, arts. 12(4) (not yet entered into force); [Council of Europe Convention against Trafficking in Human Organs](#), CETS 216, 2015, art. 10(7); [Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence](#), CETS 210, 2011, art. 44(6); [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#), CETS 201, 2007, art. 25(8); [Council of Europe Convention on Action against Trafficking in Human Beings](#), CETS 197, 2005, art. 31(4); [Council of Europe Convention on the Prevention of Terrorism](#), CETS 196, 2005, art. 14(5); [United Nations Convention against Corruption](#), UN GA Res. 58/4, 2003, art. 42(5); [Convention on Cybercrime](#), ETS 185, 2001, art. 22(5); [United Nations Convention against Transnational Organized Crime](#), UNGA Resolution 55/25, 2000, art. 15(5); [International Convention for the Suppression of the Financing of Terrorism](#), UN GA Res. 54/109, 1999, art. 7(5). See also [EUROJUST, Guidelines for Deciding ‘Which Jurisdiction Should Prosecute?’](#), revised 2016, pp. 2-3 (referring to various factors which might be “considered when making a decision on which jurisdiction should prosecute”).

¹¹⁸ See e.g. [Statute](#), art. 12, throughout. See also Clapham, *Brierly’s Law of Nations*, 7th Ed. (Oxford: OUP, 2012), p. 255 (“Complaints about excessive assertions of jurisdiction are less about what states are entitled to do under international law, and more about fears that national courts will be used to mount ideological or political attacks on particular regimes. These fears can be assuaged, in part, by the increasing use of international criminal courts”).

action will always prevail. Yet why would the Court *not* be able to exercise its complementary function in the same circumstances when States Parties might exercise their own territorial jurisdiction, including based on objective territoriality? This would impose a needless limitation on the drafters' intention to "put an end to impunity" by establishing a Court which is "complementary to national criminal jurisdictions", on the assumption that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".¹¹⁹ Third, and finally, the "sufficient gravity" criterion in article 17(1)(c) ensures that the Court will not exercise its jurisdiction inappropriately.

C. The President of the Pre-Trial Division should assign this matter to a Pre-Trial Chamber to issue a ruling on jurisdiction

51. Turning to the question of procedure, as the following paragraphs explain, the Prosecutor is entitled to request a ruling on jurisdiction under article 19(3), even when a situation has not yet been assigned to a Pre-Trial Chamber. In such circumstances, the President of the Pre-Trial Division should promptly assign the request to a Pre-Trial Chamber for determination.

C.1. The Prosecutor may request a ruling on jurisdiction at this stage

52. Article 19(3) of the Statute empowers the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction or admissibility". This concise provision is necessarily broad in its scope—for example, it refers generally to any "question of jurisdiction", and thus permits the Prosecution to request a ruling on the full range of jurisdictional matters arising under the Statute including articles 5-8*bis* (substantive jurisdiction), 11 (temporal jurisdiction), 12 (territorial and personal jurisdiction), and 13-15*ter* (triggers for jurisdiction).

53. Article 19(3) is not confined to any particular stage of proceedings—in its own terms, it draws no distinction between a requested ruling on the Court's jurisdiction in a particular case or a situation as a whole. Nor does its context require such an interpretation. Although article 19(1) requires the Court to be satisfied that it has "jurisdiction in any *case* brought before it" (emphasis added), judicial practice nonetheless exhibits the Court's power to address such questions even before a case is opened.¹²⁰ This is entirely logical, given the bedrock

¹¹⁹ [Statute](#), Preamble. See also Arbour, "Will the ICC have an impact on universal jurisdiction?", [2003] 1(3) *Journal of International Criminal Justice* 585, p. 588 (noting the possible benefit of a "market-place" of national jurisdictions if it leads to an "honest and vigorous enforcement" of international law).

¹²⁰ See e.g. [ICC-02/05-01/07-1-Corr](#), para. 13. See also [ICC-01/04-169](#), paras. 42-53. A case at the Court is legally commenced when a Pre-Trial Chamber grants an application under article 58 of the Statute.

importance of jurisdiction—which is not only illustrated by article 19(1) itself but also reflected in the general principle known as “*compétence de la compétence*”.¹²¹ Moreover, in the *DRC* situation, the Appeals Chamber expressly left open the possibility that article 19(3)—which in any event remains a distinct provision from article 19(1)—might apply prior to the opening of a case.¹²² Academic commentators endorse this view.¹²³

54. The object and purpose of article 19(3) is also instructive, supporting the broad interpretation suggested by its terms and surrounding context. Appropriate use of the article 19(3) procedure promotes judicial economy—and, particularly, the apt use of the limited resources allocated to the Prosecutor—by allowing judicial consideration of certain fundamental questions, if the Prosecutor thinks appropriate,¹²⁴ *before* embarking on a course of action which might be contentious. The value of the unique mechanism in article 19(3) would be greatly diminished if it were arbitrarily confined to later stages of proceedings. Although ordinary *inter partes* litigation may well raise similar threshold questions, and thus serve a corrective function, it will necessarily do so at a time when the Court’s proceedings are already well under way.

55. The Prosecution is mindful that this is the first occasion on which it has sought a ruling under article 19(3). This course of action is justified by the exceptional circumstances at hand and it has been decided by the Prosecutor based on the discretion and independence vested in her by article 42 of the Statute. Indeed, when reading articles 19(3) and 42 together, it is clear that there is no mechanism by which the Prosecution can be obliged to bring an article 19(3) request, nor can any other person or body bring such a request, with a view to influencing the conduct of a preliminary examination or investigation. The Prosecutor will exercise her discretion concerning the use of article 19(3) guided only by the particular circumstances and the nature of the issue in question.

¹²¹ See further [ICC-02/05-01/07-1-Corr](#), para. 13 (reasoning that, “irrespective of the terms of article 19(1) [...] every international court has power to determine its own jurisdiction”); [ICC-01/05-01/08-424](#), para. 23

¹²² [ICC-01/04-169](#), para. 30. The Appeals Chamber considered, in the context of an admissibility decision made prior to the opening of a case, that “it is not necessary to rule on the applicability of article 19(3) of the Statute in general”. However, it further acknowledged that, “in the present circumstances” (*i.e.* at the situation stage), even if the right to victim participation in the second sentence of article 19(3) (and thus article 19(3) as a whole) “is applicable”, it must of necessity be restricted in its enforcement” given the *ex parte* nature of proceedings at that stage. It thus determined only that the “second sentence” of article 19(3) was inapplicable, while leaving open the broader question of the scope of the Prosecutor’s power under the *first* sentence: para. 31.

¹²³ Hall, Nsereko, and Ventura, ‘Article 19’, in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 875, mn. 36 (“In contrast to the wording in paragraphs 1 and 2, the Prosecutor’s ability under paragraph 3 to ‘seek a ruling [...]’ is not limited to a ‘case’”).

¹²⁴ See *below* para. 55.

56. In the particular circumstances of this situation, and considering the unique nature of the issue in question, the Prosecutor therefore considers it appropriate to seek an article 19(3) ruling.

C.2. A Pre-Trial Chamber should promptly be assigned to this matter

57. In order to give effect to this request under article 19(3), the matter should promptly be assigned to a Pre-Trial Chamber.

58. Regulation 46(3) states that “[a]ny matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber”. Accordingly, this provision expressly contemplates the possibility that some requests under the Statute may arise absent a situation referred to the Court under article 13, or prior to the Prosecutor’s communication under regulation 45. This request under article 19(3) is such a matter.

59. As Judge Van den Wyngaert reasoned, regulation 46(3) “leaves the President of the Pre-Trial Division with little discretion”—motions filed under this provision *must* be assigned to a Pre-Trial Chamber, based on a pre-established roster, unless their subject-matter “falls outside the competence of the Pre-Trial Chamber” or is “manifestly frivolous”.¹²⁵

60. For the reasons previously described, this motion is manifestly within the competence of the Pre-Trial Chamber.

C.3. The assigned Pre-Trial Chamber should rule on the request, and may hear from other participants if necessary

61. Since the events triggering this request are not subject to a State or UN Security Council referral under article 13, and no relevant “situation” currently exists before the Court, it appears that no State or participating victim is *formally* entitled to file additional observations on this matter under article 19(3).¹²⁶ Nonetheless, the assigned Pre-Trial Chamber may invite the Office of Public Counsel for Defence and the Office of Public Counsel for Victims to file

¹²⁵ [ICC-RoC46\(3\)-01/14-1](#), para. 3.

¹²⁶ [Statute](#), art. 19(3) (“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court”). See also [ICC-01/04-169](#), para. 30.

observations,¹²⁷ and States, organisations and other persons to request leave under rule 103 to file observations as *amicus curiae*.¹²⁸

62. Consistent with the need for a prompt determination of this request, the Prosecution submits that an expeditious schedule should be set and maintained.

Conclusion

63. For all the reasons above, the Prosecution requests the President of the Pre-Trial Division to assign this matter promptly to a Pre-Trial Chamber, pursuant to regulation 46(3), and the assigned Pre-Trial Chamber to rule under article 19(3) on the question whether the Court may exercise jurisdiction under article 12(2)(a) over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.



Fatou Bensouda, Prosecutor

Dated this 9th day of April 2018

At The Hague, The Netherlands

¹²⁷ See e.g. [ICC-ACRed-01/16](#), paras. 9-16.

¹²⁸ See rules 58-59.