Leiden Journal of International Law (2018), 31, pp. 981–1002
 doi:10.1017/S0922156518000481

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The Prosecutor's Request Concerning the Rohingya Deportation to Bangladesh: Certain Procedural Questions

MICHAIL VAGIAS*

Abstract

On 9 April 2018, the Prosecutor of the International Criminal Court filed a request seeking the composition of a Pre-Trial Chamber, in order to decide whether the Court has territorial jurisdiction over the Rohingya deportation from Myanmar to Bangladesh as a crime against humanity. This filing is a first for the Court on at least two fronts; it is the first time the Prosecutor has asked the Court to interpret Article 12(2)(a) and apply qualified territoriality; it is also the first time the Prosecutor has asked for a ruling on jurisdiction under Article 19(3).

This study explores certain procedural questions emerging from this request, such as the Court's authority to decide while its jurisdiction is 'dormant'; the function of Article 19(3) within the Rome Statute's overall system concerning jurisdictional determinations; issuing a decision on jurisdiction, while avoiding prejudice to subsequent proceedings and without rendering meaningless the right to challenge jurisdiction under Article 19(2) of the Statute. The article accepts that the request is a step in the right direction, as it signals the Prosecutor's determination to investigate the Rohingya crisis. However, the manner and timing of its presentation give rise to plausible claims of incompatibility with the Court's procedural framework. Arguably, the Court may well instruct the Prosecutor to assume the risk of wasting precious resources and proceed with further investigations, pending the final determination of the jurisdictional question at a later stage.

Keywords

Bangladesh; jurisdiction; Myanmar; Rohingya; territory

1. INTRODUCTION

On 9 April 2018, the Prosecutor of the International Criminal Court (ICC or the Court) asked the Court to rule on its jurisdiction over crimes connected to the mass movement of the Rohingya from Myanmar – a state not party – to the territory of

* Ph.D., LL.M. (adv.) (Hons.); Senior Lecturer in Law, The Hague University of Applied Sciences, Faculty of Public Management, Law and Safety [m.vagias@hhs.nl].

The article benefited greatly from the excellent remarks of the anonymous reviewers, for which I am very grateful. Moreover, I gratefully acknowledge the valuable discussions with and remarks of Gérardine Goh-Escolar and Marina Lostal. The Research Fund of the Platform 'Good Governance for a Safe and Secure World' of The Hague University of Applied Sciences provided financial support for the preparation of this article. All errors are my own.

Bangladesh – a state party to the Rome Statute.[1] Specifically, the Prosecutor argued that the Rohingya eviction from Myanmar amounts to deportation as a crime against humanity under Article 7(1)(d) of the Statute.[2] Moreover, she maintained that the Court has territorial jurisdiction because part of the offence – the crossing of an international border – was committed on the territory of Bangladesh, a state party to the Statute.[3] The filing was made under Article 19(3) of the Statute, which provides that '[t]he prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility'.[4] At that time, no trigger mechanism had been used under Article 13 and no defined situation was under investigation. The Pre-Trial Chamber was constituted two days later.[5] On 7 May 2018, the Pre-Trial Chamber issued a decision under Rule 103(1), inviting Bangladesh to submit its observations to the Prosecutor's request by 11 June 2018.[6]

This request breaks new ground in the Court's practice on two fronts. It is the first time the Court has been requested to make a finding specifically on the meaning of Article 12(2)(a) of the Statute and the scope of the Court's territorial jurisdiction.[7] Moreover, it is the first time that the Prosecutor has used her power under Article 19(3) to request a ruling from the Court on a question of jurisdiction.

The Court's decision may hold significant implications for its future. For one, a positive ruling on commission in part would affirm the ambit of the Court's jurisdiction over international crimes occurring partly within state party territory, and increase the likelihood of prosecution of nationals of states not parties. Unsurprisingly, affected states not parties would be unhappy with this development. Presently, Myanmar – a state not party – was quick to express its 'deep concern' and to protest that the request constitutes an encroachment of its sovereignty and a violation of the *pacta tertiis* rule.[8] The Prosecutor replied that she is mandated to carry out her responsibilities under the Statute robustly, and 'with full respect for the sovereignty of states and the limits of its jurisdiction'.[9] The Court's decision,

---

[1] Application under Regulation 46(3), Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018 (hereinafter: 'the request').

[2] Ibid., para. 3.

[3] Ibid., para. 2.

[4] Art. 19 (3) of the 1998 Rome Statute of the International Criminal Court, 37 ILM 999 (1998) (hereinafter 'the Statute' or 'RS').

[5] Decision assigning the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' to Pre-Trial Chamber I, ICC-RoC46(3)-01/18-2, President of the Pre-Trial Division, 11 April 2018.

[6] Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18-3, Pre-T. Ch., 7 May 2018, para. 7(a).

[7] The Prosecutor made reference to objective territoriality in the *Situation in Afghanistan*, Public redacted version of 'Request for authorization of an investigation pursuant to article 15', ICC-02/17-7-Conf-Exp, Pre-T. Ch., 20 November 2017, fn. 49 and in *Situation in the Republic of Korea*, Article 5 Report, June 2014, para. 39.

[8] 'Myanmar says "seriously concerned" over war crimes prosecutor move on Rohingya jurisdiction', *Reuters*, 13 April 2018, available at www.reuters.com/article/us-myanmar-rohingya-court/myanmar-says-seriously-concerned-over-war-crimes-prosecutor-move-on-rohingya-jurisdiction-idUSKBN1HK1QA (accessed 30 April 2018); 'Myanmar says ICC lacks jurisdiction to probe Rohingya crisis', *ABS-CBN News*, 13 April 2018, available at news.abs-cbn.com/overseas/04/13/18/myanmar-says-icc-lacks-jurisdiction-to-probe-rohingya-crisis (accessed 30 April 2018).

[9] Reuters, ibid.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

therefore, brings to the fore sensitive issues concerning the application of the Statute over states not parties' nationals for crimes committed in part on state party territory.[10]

For another, an affirmative decision may create procedural opportunities for a decision on jurisdiction at the Prosecutor's pleasure; a procedural 'carte blanche' to request a jurisdictional ruling at any stage. However, acknowledging such license might upset the Court's procedural scheme as regards jurisdictional determinations and render largely meaningless subsequent proceedings on jurisdiction. Conversely, a strict adherence to the Statute's procedural system might render the Prosecutor's right under Article 19(3) meaningless. This tension comes squarely before the Court for the first time as well.

Following a concise presentation of the facts, the article focuses on certain procedural matters concerning the request, such as its content and procedural timeliness. It will then turn to the legal effect of an eventual decision and conclude with a discussion on the role of the Appeals Chamber in case of an appeal against an eventual negative decision or a direct referral by the Pre-Trial Chamber.

In closing, this article takes the position that this request is a step in the right direction – although perhaps a procedurally flawed one. It is too early to draw conclusions on its eventual practical effect, in terms of arrests or the stimulation of domestic prosecutions. However, the request is also a symbol. It is testament to the Court's willingness to address the criminal dimension of forced population movements, arguably one of the most troublesome issues of our time. It also shows the Prosecutor's determination to proceed with cases of commission in part on state party territory, regardless of the nationality of the perpetrators. In an inter-connected, globalized world, this message is warranted in order to bolster the Statute's deterrent effect and fulfil the Court's mission to end impunity.

2. THE REQUEST

The Rohingya population in Myanmar appear to have been victims of discrimination and ill-treatment from the creation of that state after the Second World War, if not earlier.[11] The latest incident of this long saga can be traced to August 2017, when state and non-state actors in Myanmar launched a campaign against the Rohingya,[12] which was classified by UN officials as 'ethnic cleansing'.[13] Many were killed, raped

[10] This is a different issue from the liability of remote perpetrators; namely, e.g., whether a perpetrator in Pyongyang can be liable for contributing to a crime in the DRC. The Prosecutor – somewhat optimistically – has considered the matter settled in favour of the Court's jurisdiction. *Situation in Afghanistan*, *supra* note 7, para. 47.

[11] Among many others E. Abdelkader, 'The Rohingya Muslims in Myanmar: Past, Present and Future', (2013) 15 *Oregon Review of International Law* 393, at 394–6.

[12] The request, *supra* note 1, paras. 2, 13, 26.

[13] UN Secretary General, Report of the Secretary General on conflict-related sexual violence, UN Doc. S/2018/250, 23 March 2018, para. 10; 'UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein highlights human rights concerns around the world in an address to the 36th session of the Human Rights Council in Geneva', *United Nations, Office of the High Commissioner for Human Rights*, 11 September 2017, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E (accessed 15 April 2018).

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

or seriously injured.[14] More than 600,000 Rohingya were forced to leave Myanmar and cross the border to find safety in neighbouring Bangladesh, a state party to the Rome Statute.[15] Myanmar is not party to the Statute.

The Prosecutor asserts in her request that due to these events, the ICC has jurisdiction for the crime of deportation as a crime against humanity, because a part of the offence – the crossing of an international border – was committed on the territory of a state party.[16] As a matter of structure, the Prosecutor first dissects the crime of deportation in its constituent elements according to the Statute and Elements of Crimes.[17] She notes that one of its constituent elements of deportation is the crossing of an international border.[18] She then turns to a territoriality analysis and argues that an interpretation of Article 12(2)(a) extending the Court's jurisdiction to commission in part is consistent with general international law and the text, context, purpose, and object of the treaty.[19] The Prosecutor concludes that this situation falls within the jurisdiction of the Court, because deportation as a crime against humanity took place in part on state party territory.[20]

Having addressed briefly the facts and main submission of the request, the next section will discuss the charges and procedural timeliness.

3. The charges and the procedural moment of the request

The request asks the Court to assert jurisdiction over the crime of deportation due to its alleged commission in part within Bangladesh. It chooses to do so, before the activation of any of the trigger mechanisms under Article 13 of the Statute. This choice raises questions concerning the request's content, procedural propriety and the legal effect of the ultimate decision of the Pre-Trial Chamber. Each will be addressed in turn.

3.1. On the content: Prosecutorial strategy and jurisdictional minimalism

The Rome Statute recognizes that the Prosecutor is an independent organ of the Court.[21] In order to safeguard this independence,[22] she enjoys prosecutorial discretion in the selection of situations and cases,[23] subject to certain ambiguous limits in

[14] The request, *supra* note 1, para. 10 with extensive references to NGO and media reports.
[15] Ibid., paras. 2, 11.
[16] Ibid., paras. 2, 13.
[17] Ibid., paras. 8–14.
[18] Ibid., para. 11.
[19] Ibid., paras. 13, 27, 28–30.
[20] Ibid., paras. 4–6.
[21] Art. 42(1) of the Statute.
[22] M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', (2004) 2 *Journal of International Criminal Justice* 71, at 76.
[23] M. O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold', (2012) 10 *Journal of International Criminal Justice* 525, at 526, 544; R. Rastan, 'Comment on Victor's Justice & the Viability of Ex Ante Standards', (2010) 43 *The John Marshall Law Review* 569, at 570–1; C.K. Hall, 'The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity', (2004) 17 *Leiden Journal of International Law* 121–39.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

very limited instances.[24] The Prosecutor has articulated certain criteria that guide the selection process.[25] Regardless, the lack of clear selection criteria in the Statute and the limited resources of the Prosecutor's Office suggest that the relevant choice is informed by political considerations.[26] Within this discretionary regime, nothing in the Statute seems to restrict the authority of the Prosecutor to select and charge only one or two crimes, if this is warranted in her opinion.[27]

In the present case, the request is intentionally minimalistic in the presentation of the charges and the territorial theory, probably in order to ensure its success. For one, the request concerns *only* deportation as a crime against humanity committed in part, intentionally and directly in the territory of Bangladesh.[28] Conversely, it does *not* concern *indirect* transfer of population;[29] it also does *not* concern mass exodus of refugees fleeing an armed conflict.[30]

Furthermore, it does *not* discuss possible war crimes. The existence, nature and scope of an armed conflict in Myanmar's Rakhine province is not implausible. The independent Kofi Annan Advisory Commission on the Rakhine State report released shortly before the August 2017 incidents made the following comment:

> the [Rakhine] state is marked by protracted inter-communal tension, which – as seen in 2012 – has the potential to develop into large-scale violent confrontations between the two communities. Second, anti-government sentiments have led elements within both communities to take up armed struggle against the Government. As such, Myanmar's security forces face challenges from both Rakhine and Muslim non-state armed groups, such as the Arakan Army (AA) and the Arakan Rohingya Salvation Army (ARSA).[31]

The Commission further noted that the proceeds acquired by cross-border drug smuggling and trafficking are used to finance the conflict.[32] The November 2017 Security Council Presidential Statement on Myanmar provides further indications of an armed conflict.[33] It notes that the Arakan Rohingya Salvation Army attacked Myanmar state forces on 25 August in the Rakhine State; that since 25 August a

---

[24] Art. 53, paras. 1 and 2 RS; Policy Paper on the Interests of Justice, *ICC-OTP*, September 2007, available at www.legal-tools.org/doc/bb02e5/ (accessed 15 April 2018); Policy Paper on Preliminary Examinations, *ICC-OTP*, November 2013, available at www.legal-tools.org/doc/acb906, paras. 67–71 (accessed 15 April 2018); T. de Souza Dias, '"Interests of Justice": Defining the scope of prosecutorial discretion in Article 53(1)(c) and 2(c) of the Rome Statute of the International Criminal Court', (2017) 30 *Leiden Journal of International Law* 731–51.

[25] For a detailed discussion, A. Smeulers, M. Weerdesteijn and B. Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance', (2015) 15 *International Criminal Law Review* 1, at 5–7.

[26] W.A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court', (2010) 43 *The John Marshall Law Review* 535, at 547–9.

[27] Draft Paper on Case Selection and Prioritisation, *ICC-OTP*, 29 February 2016, para. 5, available at www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf (accessed 15 April 2018). The first case before the Court focused on three crimes. *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch., 14 March 2012, paras. 1–3.

[28] The request, *supra* note 1, para. 42.

[29] The request, *supra* note 1, paras. 4, 28, 45, fn. 51; further, paras. 28, 45.

[30] The request, *supra* note 1, paras. 29, 31 and fn. 96.

[31] Final Report, Advisory Commission on Rakhine State, August 2017, at 53, available at www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf (accessed 15 April 2018).

[32] Ibid., at 45.

[33] UN Security Council, Presidential Statement, UN Doc. S/PRST/2017/22, 6 November 2017.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

mass displacement occurred; and finally that human rights violations and abuses have been committed 'including by Myanmar state forces', which the Council condemns.[34] This sequence suggests that the violations against the Rohingya population in August 2017 were not an isolated historical incident but rather the latest conflagration in the context of a protracted confrontation involving Myanmar state forces and paramilitary groups acting alone or with foreign state support. War crimes charges, however, are not explored in the request.

Additionally, the request does *not* discuss genocide charges. Allegations of rape as a means of genocide against the Rohingya have been made by high-level UN officials.[35] It also does *not* discuss continuous offences that started in Myanmar and continued in Bangladesh. Enforced disappearances or hostage-taking are typical but not the only examples of continuous crimes in the ICC Statute.[36] In *Lubanga*, the Court accepted that the crimes of Article 8(2)(e)(vii) of the Statute continue to occur until the child soldier reaches the age of 15 or leaves the armed group.[37] For present purposes, one could imagine charges due to the continued deprivation of fundamental rights suffered by the uprooted population during their forced eviction from Myanmar,[38] or due to the rape-induced pregnancies that continued in Bangladesh.[39] Therefore, violations that commenced in Myanmar and continued in Bangladesh could be discussed, although they are not.

At present, it appears premature to draw definite conclusions from this choice and its likely effect on future charges. Hopefully, once the jurisdictional issue is settled, more charges will be presented later on.

For another, the request's territorial theory is uncontroversial in substance. It argues that the Court has jurisdiction because a part of the offence was committed within state party territory. The Prosecutor invokes objective territoriality essentially as established by the 1927 *Lotus* judgment[40] and elaborated upon by the 1934 Harvard Draft Convention.[41] Regardless, its argumentation calls for certain critical remarks.

First, the request does not argue only in favour of a certain approach to territorial jurisdiction. It also distinguishes it from other approaches and then proceeds to

[34] Ibid., paras. 1–3.

[35] 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; S. Quadir, 'U.N. Official says will raise sexual violence against Rohingya with ICC', *Reuters*, 12 November 2017, available at www.reuters.com/article/us-bangladesh-myanmar/u-n-official-says-will-raise-sexual-violence-against-rohingya-with-icc-idUSKBN1DCoN7 (accessed 15 April 2018); A. Ibrahim, *The Rohingyas: Inside Myanmar's Genocide* (2018).

[36] These are the classic examples of continuous crimes. J.J. Paust, 'Ten Types of Israeli and Palestinian Violations of the Laws of War and the ICC', (2015) 31 *Connecticut Journal of International Law* 27, at 48–9; A. Nissel, 'Continuing Crimes in the Rome Statute', (2004) 25 *Michigan Journal of International Law* 653, at 668.

[37] *Prosecutor v. Lubanga*, Decision on the confirmation of Charges, ICC-01/04-01/06, Pre-T.Ch. I, 29 January 2007, para. 248.

[38] Art. 7(1)(a) of the Statute.

[39] May 2018 marked nine months since the August 2017 campaign and NGOs in the field are reported to prepare for a number of rape-related births in refugee camps. M. Safi and S. Azizur Rahman, 'Nine months after Myanmar assaults, Rohingya camps ready for spate of births', *The Guardian*, 1 May 2018, available at www.theguardian.com/world/2018/may/01/nine-months-after-myanmar-assaults-rohingya-camps-ready-for-spate-of-births (accessed 15 May 2018).

[40] *SS Lotus case* (*France v. Turkey*), PCIJ Rep. Series A No. 10, at 19–20.

[41] 'Codification of International Law: Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention)', (1935) 29 *American Journal of International Law* (suppl.) 439.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

summarily discard some of them implicitly or explicitly.[42] It is understandable why the request would benefit from a solid legal argument on objective territoriality. However, it is submitted that rejecting other approaches was not necessary for present purposes. The facts and the law as presented are evidently not calling for their application here. Therefore, this reasoning risks introducing self-imposed limitations to the scope of the Court's territorial jurisdiction by precluding doctrinal tools that might prove useful in the future.

Second, the request stresses Bangladesh's interest to exercise its own jurisdiction for crimes committed in part in its territory. At the end on the territorial analysis, it notes that:

> the Rohingya people were specifically and intentionally deported *into* Bangladesh ... 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.[43]

Respectfully, the reference to Bangladesh's interest in this instance is at least odd. Arguably, it is used to buttress the territorial connection to the Court's authority. Presumably, if Bangladesh holds a legal interest due to its territorial connection to the crime, so does the Court. This construction makes sense as a combined reading of the doctrine of delegation[44] and the 'rule of reason',[45] or perhaps a policy statement used to strengthen the legitimacy of a purported jurisdictional assertion. As such, it calls for certain remarks.

To begin with, the request does not discuss delegation as the basis of the Court's jurisdiction. Although there is a strong argument in its favour, delegation of authority does not provide all the answers for the Court's authority under the Statute.[46] Additionally, the request has rejected the 'rule of reason' as a 'wholly different' approach to that of the Rome Statute.[47] It is therefore questionable whether buttressing Bangladesh's interest to assert its own jurisdiction takes place in order to convince of the 'reasonableness' of the Court's own jurisdictional authority under international law or as a tool for interest-balancing competing claims[48] – which presently do not exist in any event.

As a matter of fact, no one disputes that Bangladesh has a sufficient interest in this matter to assert its own jurisdiction. However, so far Bangladesh has neither initiated its own proceedings for crimes against humanity, nor referred this situation to the Court. Presumably, this signals a divergence between the Court's interest

[42] The request, *supra* note 1, para. 31 (the effects doctrine), para. 36 (rule of reason), para. 40 (ubiquity).
[43] Ibid., para. 42 (emphasis in the original; footnote omitted).
[44] R. Rastan, 'Jurisdiction', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 164–5.
[45] *Restatement (Third) of Foreign Relations Law*, American Law Institute 1987, Sections 402–3; further, C. Ryngaert, *Jurisdiction in International Law* (2015), 152–6.
[46] C. Stahn, 'Limits of the Nemo Dat Quod Non Habet Doctrine', (2016) 49 *Vanderbilt Journal of Transnational Law* 443, at 446–8; C. Kress and K. Prost, 'Article 98', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary* (2016) at 2132–3. The authors explain that international criminal law is not a matter of delegation but rather a manifestation of a universal *jus puniendi* of the international community as a whole; D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', (2003) 1 *Journal of International Criminal Justice* 618, at 626 (delegation is both universal under international law criminalizing conduct as well as territorial due to state authorization).
[47] The request, *supra* note 1, para. 36, fn. 70.
[48] Ryngaert, *supra* note 45.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

to do justice and Bangladesh's interest to sort out the Rohingya crisis through other avenues. In these circumstances, defending Bangladesh's interest to exercise jurisdiction is somewhat incongruous, particularly in the absence of a referral or competing jurisdictional claims.

As a matter of law, the Court's territorial reach is not tethered to any one state's approach or interest. Under Article 19(1) of the Statute, the decision on the proper interpretation of Article 12(2)(a) lies with the Court; it is not outsourced to any one state or its domestic law. Therefore, Bangladesh's interest to assert its *own* jurisdiction is one matter; the Court's interest to do so with its jurisdiction is another. If both express that interest and assert jurisdiction, Article 17 provides for solutions.

Finally, as a matter of policy, this statement may be read as an attempt to bolster the legitimacy of the proposed jurisdictional assertion. However, it is submitted that the Court's interest is not necessarily the aggregate whole of the individual interests of states parties, which may well align, conflict or compete in any given situation. It involves a variety of other interests, such as those of the victims and the international community writ large. Under the Preamble, the Court is beholden to assert its 'jurisdiction over the most serious crimes of concern to the international community as a whole'.[49] In the Kampala declaration, the ICC Assembly of States Parties recently recognized the mission of the Court within:

> a multilateral system that aims to end impunity, establish the rule of law, promote and encourage respect for human rights and achieve sustainable peace, in accordance with international law and the purposes and principles of the Charter of the United Nations.[50]

In the Kampala resolution on the victims, the Assembly encouraged the Court 'to improve the way in which it addresses the concerns of victims and affected communities, paying special attention to the needs of women and children'.[51] In that light, one should probably refrain from attaching too much significance to Bangladesh's interest to exercise its own criminal jurisdiction on the matter. The emphasis should be on the Court's own jurisdiction.

In closing, the request presents one charge on the basis of a conservative approach to territorial jurisdiction. It may be faulted for lacking legal imagination, but that is not a ground for its rejection. In all likelihood, however, the request can be refused on procedural grounds. This possibility will be discussed next.

3.2. Procedural timeliness: Has the request been filed too soon?

The Prosecutor's request comes at a procedural moment, when the Court's jurisdiction has not been 'triggered' pursuant to Article 13 of the Statute. This is a first for the Court. It poses new and interesting questions on the procedure surrounding jurisdictional determinations.

---

[49] Preamble of the Rome Statute, *supra* note 4, para. 9.

[50] Declaration, RC/Decl.1, adopted on 1 June 2010 by consensus, preambular para. 2, available at asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf (accessed 15 April 2018).

[51] Resolution, RC/Res. 2, adopted on 8 June 2010 by consensus, operative para. 2, available at asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf (accessed 15 April 2018).

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

3.2.1. Jurisdictional assessments while the Court's jurisdiction is 'dormant'

To begin with, there is a question of principle concerning the power of the Court to decide on the request, because the Court's jurisdiction was not activated at the time through the use of a triggering mechanism under Article 13 of the Statute.

Specifically, the term 'triggers' under Article 13 denotes a referral by a state party or the UN Security Council, or a prosecutorial decision to open an investigation coupled with an authorization to do so by the Pre-Trial Chamber. These 'triggers' do not vest in the Court jurisdiction that it would otherwise not have.[52] One of their primary functions is to 'awaken' the otherwise 'dormant' jurisdiction of the Court.[53] For present purposes, no referral has been filed by the Security Council or a state party. There is also no decision by the Prosecutor to open an investigation and no authorization issued by a Pre-Trial Chamber under Article 15(3). As the request candidly notes, the outcome of this request will be critical for the Prosecutor's future deliberations 'concerning any preliminary examination she may independently undertake'.[54] Thus, for the first time in the Court's history, the Prosecutor has invoked the authority of the Court to make jurisdictional determinations while its jurisdiction is still 'dormant'. In these circumstances, it is debatable whether the Court will proceed to do so.

The Prosecutor argues that the Court has the *kompetenz-kompetenz* to do so.[55] However, it is debatable whether that is indeed the case. The matter seems to hinge on the interaction between Articles 13 and 19(1) of the Statute. The latter provision stipulates that '[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it'. A strict literal approach to this provision would suggest that the Court does not have the power to issue a jurisdictional decision in the absence of a case. This has been rejected in the Court's jurisprudence. Case law suggests that Article 19(1) confirms that the Court has an inherent power with a much broader scope. In *Bemba* the Chamber explained *obiter* that:

> notwithstanding the language of Article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived from the well-recognised principle of "la compétence de la compétence".[56]

In *Kony*, the Pre-Trial Chamber invoked this power, in order to validate its initiative to conduct an admissibility review of the case following the creation of a Special Division within the High Court of Uganda on international crimes.[57] In *Ruto*,

[52] L. Condorelli and S. Villalpando, 'Can the Security Council Extend the Jurisdiction of the International Criminal Court', in A. Cassesse, et al. (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, at 571.

[53] H. Olasolo, *The Triggering Procedure of the International Criminal Court* (2005), 136–41; M. Bloommestijn and C. Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir', (2010) 6 *Zeitschrift für Internationale Strafrechtsdogmatik* 428, at 436, fn. 56.

[54] The request, *supra* note 1, para. 3.

[55] Ibid., para. 53.

[56] *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Pre-T. Ch., 15 June 2009, para. 23.

[57] *Prosecutor v. Joseph Kony and Vincent Otti*, Decision on the admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-T. Ch., 10 March 2009, para. 45.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

the Pre-Trial Chamber again referred *obiter* to this power, when it confirmed in summary its jurisdiction to issue summons to appear under Article 58.[58]

If one adheres to this approach, the Court could decide on the Prosecutor's request regardless of a trigger under Article 13, in the exercise of its inherent powers. Perhaps one might even read Regulation 46(3) as providing the necessary legislative foundation for such determination, insofar as it explicitly allows for the creation of a chamber regardless of the procedural moment. From this perspective, the Court could even discuss the issue in the context of its *kompetenz-kompetenz*, irrespective of the ultimate fate of the request.

On the other hand, transposing these *dicta* as dispositive statements of law lock, stock and barrel to the present proceedings raises questions. *Obiter* or not, they were made in the context of identified cases where the Court's jurisdiction was already activated. However, the proceedings under examination take place prior to any trigger and the identification of any situation or case. This difference in context cannot be simply wished away. To do so might raise concerns that the Court is dispensing arbitrarily with the jurisdictional safeguards embedded in Article 13 of the Statute. Effectively, it would circumvent required procedural actions (letter of referral, opening a preliminary examination into the situation/filing a request for authorization under Article 15/obtaining authorization). Such circumvention is not anticipated in the Statute and could engender further criticism of judicial law-making wholly inconsistent with the effective interpretation of Article 13.[59] From this viewpoint, therefore, *kompetenz-kompetenz* is tethered to limits set by Articles 13 and 19, which the Court cannot ignore.

In closing, this is an arguable issue. Both sides are defensible. The Court will probably need to discuss and decide whether the lack of a 'trigger' means that it has to reserve its judgment for subsequent proceedings, as it will be demonstrated below.

3.2.2. The right procedural moment under Article 19(3): 'Carte blanche' and systemic concerns

The Prosecutor's request is filed pursuant to Article 19(3) of the Rome Statute, which provides that:

> [t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. 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.

The Prosecutor submits that the first sentence of Article 19(3) vests in her Office a right to seek a ruling on a question of jurisdiction not confined to a specific stage of the proceedings.[60] The Prosecutor argues that this is allowed by the 'broad wording of the provision'[61] as well as judicial practice and Triffterer's

[58] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', ICC-01/09-01/11-1, Pre-T. Ch., 8 March 2011, para. 8.
[59] On effective interpretation see *infra* note 80 and text.
[60] The request, *supra* note 1, para. 53.
[61] Ibid., para. 52.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

Commentary.[62] Finally, the Prosecutor relies on the purpose and object of the provision. In her view, Article 19(3) seeks to safeguard procedural economy and the Prosecutor's resources before embarking on a contentious course of action.[63] *A contrario*, she maintains that the value of this provision would be 'greatly diminished if it were arbitrarily confined to later stages of proceedings'.[64] In sum, the Prosecutor assures the Court that this course of action is justified by 'the exceptional circumstances at hand'.[65]

At the outset, one may readily agree that Article 19(3) lays down the Prosecutor's right to raise a question of jurisdiction. One can also agree that its broad wording allows for any jurisdictional question to be raised. However, it is less clear whether this provision offers to the Prosecutor a '*carte blanche*' to raise questions of jurisdiction at any procedural moment. Equally, it is unclear whether this is the proper procedural moment for such a request under the Statute and the Rules.

To begin with, the Prosecutor's argument is difficult to reconcile with an ordinary reading of the provision. The Prosecutor contends that Article 19(3) contains two self-standing rules by separating the two sentences of the same provision but fails to explain convincingly why they should be divorced. Specifically, the 2006 DRC Admissibility Appeal invoked by the Prosecutor does not seem to assist her argument. This ruling was raised after an investigation in a situation was launched and discussed admissibility, i.e., certain restrictions to the exercise of jurisdiction under Article 17, not the existence of jurisdiction and the conditions for its exercise under Article 12. Moreover, this decision does not appear to interpret conclusively the provision one way or another. The Appeals Chamber simply noted that:

> it is not necessary to rule on the applicability of Article 19(3) of the Statute in general but in the present circumstances even if this right is applicable it must of necessity be restricted in its enforcement due to the under seal and ex parte, Prosecutor only, nature of the proceedings.[66]

Therefore, the question of timing of the Prosecutor's right under Article 19(3) of the Statute remains open. Conversely, there seems to exist no cogent reason to separate the sentences of the provision. In its ordinary meaning, Article 19(3) of the Statute stipulates that when the Prosecutor makes such a request, other parties have the right to submit observations. This is corroborated by Rule 59 of the Court's Rules of Procedure, which provides explicitly that the Registrar must inform of any question on jurisdiction under Article 19(3) those who referred the situation as well as the victims.[67] In the present case, the request takes place at an earlier procedural moment,

[62] Ibid., para. 53.
[63] Ibid., para. 54.
[64] Ibid., para. 54.
[65] Ibid., para. 55.
[66] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006, para. 30.
[67] Rule 59 of the Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC ASP/1/3 and Corr.1), part II.A (hereinafter: The Rules).

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

prior to the use of a 'trigger' mechanism or the identification of any specific victims. Therefore, the request would appear to be premature as a matter of procedure.

Moreover, the Prosecutor argues that filing a request is a matter of discretion and part of her independent function, untethered to procedural limitations.[68] Simultaneously, she appears to appease concerns of possible abuse, arguing that this early filing is due to exceptional circumstances and motivated by the need to spare the Court's scant resources.[69]

Contrary to the Prosecutor's position, procedural limitations to her discretion under Article 19(3) may be deduced through a contextual interpretation of this provision in the light of the jurisdictional system of the Rome Statute as a whole. This systemic perspective is important for the Appeals Chamber. The latter has already noted that, as a matter of legal principle, the Chambers should strive to preserve the Statute's ordinary procedure on the adjudication of jurisdictional issues and avoid procedural replication. Specifically, when deciding whether 'organizational policy' was a jurisdictional or substantive issue under Article 7, the Appeals Chamber opined in *Ruto* as follows:

> It would make little sense to consider and determine, for the purposes of "jurisdiction", the interpretation of "organizational policy" and whether the Prosecutor had submitted sufficient evidence to establish substantial grounds to believe that the crimes were committed in furtherance of such policy *prior to holding a confirmation hearing designed to resolve precisely the same issues*.[70]

And the Chamber continued:

> In light of the above and in the context of this case, treating the interpretation and existence of "organisational policy" as jurisdictional matters conflates the separate concepts of jurisdiction and the confirmation process; yet it is the latter that is designed to consider the matters raised on these appeals and filter unmeritorious cases from progressing to trial. To find that the grounds that Mr Ruto and Mr Sang raise in these appeals relate to jurisdiction would duplicate what was covered by the confirmation process.[71]

It is true that in *Ruto*, the problem was not only a matter of interpretation, but also of the existence of an organizational policy on the facts. Therefore, one might suggest that it is inapposite for present purposes as the Prosecutor appears to seek a ruling only on a question of law.

However, it is submitted that *Ruto* is still relevant here for two reasons. First, the requested jurisdictional determination cannot take place without any consideration of the facts, unless this is a request for an advisory opinion – *quod non*.[72] At least *prima*

[68] The request, *supra* note 1, para. 54.
[69] Ibid., paras. 54–5.
[70] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 Entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-01/11-414, A.Ch., 24 May 2012, para. 28 (emphasis added).
[71] Ibid., para. 29.
[72] The Appeals Chamber has made it clear that its role is not to issue advisory opinions. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, A. Ch., 25 September 2009, paras. 37–8, fn. 62.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

facie, some facts, some acts, and the victimization of certain individuals must be considered. In this context, *Ntaganda OA2* does not assist the Prosecutor's case. Judge van den Wijngaert writing for the Appeals Chamber made it clear that there was no problem deciding on the legal issue of jurisdiction over child soldiers, because 'no *additional* factual or evidentiary determinations are required in the present case in order to resolve the legal issue raised by Mr Ntaganda'.[73]

The Ntaganda challenge was heard at a later stage in the proceedings compared to this request. The Appeals Chamber had *already* established certain facts without much controversy and the legal question could be discussed against that background. However, it is unclear whether the Court would be able to do so in the present case, where no facts have been established to any degree. Additionally, it would seem incongruous to speak of facts and charges connected to a situation prior to its authorization and delimitation under Article 15 and in the absence of a referral.

Second, *Ruto* is invoked here as a matter of principle. At the risk of reading too much into it, the Appeals Chamber decision may be construed as an admonition that the chambers should not depart from ordinary procedure barring exceptional circumstances, in order to avoid stepping on each other's toes.

Against that background, therefore, the question emerges; is there a pre-ordained procedural moment, designed to address concerns of jurisdictional overreach at this stage of the proceedings? If so, would a determination under Article 19(3) address what should be covered elsewhere?

The Statute provides that the Court has a duty to satisfy itself of its jurisdiction[74] and allows for this possibility at numerous moments, depending – among others – on the type of trigger mechanism under Article 13. For present purposes, there is no Security Council or state referral. Therefore, in the ordinary course of events, the critical moment would be the Pre-Trial Chamber's assessment of the Prosecutor's request to open an investigation under Article 15. As the Pre-Trial Chamber in the Situation in Kenya explained, this process was introduced, precisely because the drafters 'feared the risk of politicising the Court and thereby undermining its "credibility". In particular, they feared that providing the Prosecutor with such "excessive powers" to trigger the jurisdiction of the Court might result in its abuse'.[75]

This gate-keeping function of the Pre-Trial Chamber under Article 15 has many facets. One of the most important is the delimitation of the scope of the situation. Specifically, the Pre-Trial Chamber authorizes an investigation within certain temporal, territorial, and other parameters, which the Prosecutor cannot exceed in the presentation of the charges.[76] Against that backdrop, an argument could be made that the proper procedural moment to assess whether the Prosecutor abuses her

[73] *Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1225, A.Ch., 22 March 2016, para. 37 (emphasis added, hereinafter: Ntaganda OA2).

[74] Art. 19(1) of the Statute.

[75] *Situation in Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, Pre-T. Ch., 31 March 2010, para. 18.

[76] *Situation in Kenya*, ibid., para. 206; *Situation in the Republic of Côte d'Ivoire*, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC-02/11-14-Corr., Pre-T. Ch., 15 November 2011, paras. 178–9.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

powers as a matter of jurisdiction is the Pre-Trial Chamber's assessment of a request for the authorization of an investigation under Article 15 of the Statute.[77] To paraphrase the Appeals Chamber, it would make little sense to consider and determine for the purposes of jurisdiction the notions of 'deportation' and 'commission in part', prior to an Article 15 procedure designed to resolve precisely the same issues. In the alternative, in the unlikely event of a state or Security Council referral, the assessment of the request for the issuance of an arrest warrant under Article 58 by a Pre-Trial Chamber would be the first such opportunity.

From this point of view, the request should be rejected as inadmissible, because it comes at an inopportune or premature procedural moment. This matter should be resolved by a Pre-Trial Chamber, once the Prosecutor files an Article 15 request for authorization, or a request for an arrest warrant in the event of a state or Security Council referral. Clearly, this solution does little to spare the Prosecutor's resources. However, it seems to be the price to be paid for the preservation of the Court's procedural framework on the adjudication of jurisdictional matters.

3.3. The legal effect of an affirmative decision and 'without prejudice'

Having addressed certain questions of procedure, this part will discuss first the legal effect of an eventual positive ruling. At the outset, Article 21(2) makes it clear that any decision of this Chamber will not be binding upon other Chambers of the Court. In the absence of an identified situation or case, the legal effect of the Court's decision is not clear. Commentators suggest that:

> even if the ruling ... did not have a *res judicata* effect on subsequent challenges, it would, as a practical matter, likely limit the scope of subsequent situation or case challenges (at least with respect to admissibility) to newly discovered information which could not have been discovered with due diligence or to significantly changed circumstances.[78]

For these authors, it is contested whether such a request should be filed as regards an entire situation, although they favour it, 'so that these issues do not have to be relitigated case by case'.[79]

Perhaps this is the right position. However, it needs to be made clear whether this ruling will be the final word on the issue. Asserting that an Article 19(3) decision on a situation – 'for practical purposes' – would preclude subsequent discussions on point absent new evidence in the context of a specific case comes very close to vesting in it a *res judicata* effect, albeit in not so many words. In this event, it might render other provisions in the Statute 'meaningless'.

For present purposes, 'meaningless' signifies depriving other provisions of their 'appropriate effect'.[80] Consider, for example, Article 19(2)(b) or (c). Under these

---

[77] *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12, Pre-T. Ch., 27 January 2016, para. 3.

[78] C.K. Hall, D.D. Nsereko and M.J. Ventura, 'Article 19', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court – A Commentary* (2016), 849 at 875.

[79] Ibid.

[80] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70, at 125, paras. 132–4; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

provisions, Myanmar has a right to submit challenges against the jurisdiction of the Court either as a state with jurisdiction investigating these crimes, or as a state not party from which an acceptance to jurisdiction is required. The appropriate effect of such challenge would arguably be a full consideration of the merits of the request, which – if successful – would lead to a decision finding that the Court lacks jurisdiction to hear a specific case or a situation. It is unclear to what extent the right to challenge the Court's jurisdiction would maintain its legal effect, if these crucial issues are already discussed and decided at this early stage. This is no less important because Myanmar is not a 'party' to these proceedings strictly speaking.[81]

However, such predicaments are not new for the Court. In the 2006 Admissibility Appeal decision, the Appeals Chamber circumscribed narrowly its reply and stressed that its decision was without prejudice to future proceedings, particularly since the only party involved was the Prosecutor.[82]

It would seem that the Prosecutor anticipates such arguments. Not only did she delimit her submissions very narrowly; she also noted that if the request is accepted, jurisdictional challenges would retain a 'corrective' function and would take place when proceedings are well under way.[83]

It is not clear what the Prosecutor means by 'corrective' function. Presumably, the Court should make a determination now, as a matter of principle, without prejudice to subsequent issues that may arise later involving specific cases and their factual background. The right to challenge jurisdiction would still be 'meaningful', as it would correct the application of the principle to the facts of a specific case.

Perhaps subsequent filings will shed more light on this residual corrective function of the right to challenge jurisdiction. Be that as it may, it remains questionable whether this is a proper interpretation of Article 19(2). It is certainly not foreseen or excluded by the text of the treaty.

Conversely, the effect of an eventual ruling might be more moderate. After all, the Statute provides for many instances of jurisdictional assessments without requiring the participation of interested states. Arguably, a decision on this request would not affect the right to challenge jurisdiction any more than an Article 15 authorization decision would. Myanmar could still challenge the exercise of the Court's jurisdiction on other grounds. On that note, nothing precludes the possibility that Myanmar will abstain entirely from the proceedings, either due to voluntary relinquishment of jurisdiction or to avoid legitimizing the process.

Be that as it may, were the Court to accept the Prosecutor's request, it would likely spare no effort to ensure that its determination would be 'without prejudice' to any subsequent proceedings. The same may be expected, if the Court decides that Article 19(3) of the Statute is limited to later stages, but nonetheless proceeds to issue a decision relying on its inherent powers.

2009, [2009] ICJ Rep. 123, at 267–8, paras. 50–3; further, U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 373.

[81] The Prosecutor has asked the Court to invite observations from other parties under Rule 103. The request, *supra* note 1, para. 61.

[82] *Situation in the Democratic Republic of the Congo*, *supra* note 66.

[83] The request, *supra* note 1, para. 55.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

4. The role of the Appeals Chamber

The Appeals Chamber may also have a role to play in these proceedings. In the ordinary course of events, an eventual decision on the substance of the Prosecutor's request may be subject to an appeal under Article 82(1)(a). In the alternative, the Pre-Trial Chamber may take the extraordinary step and refer the matter directly to the Appeals Chamber due to its novelty and significance.

4.1. Appealability under Article 82(1)(a)

An eventual rejection of the Prosecutor's request would bring to the fore the issue of appealability of the decision. Specifically, would this decision amount to a 'decision with respect to jurisdiction' for the purposes of Article 82(1)(a)?

The jurisprudence of the Appeals Chamber evidences a concern to ensure that this provision is not abused by disguising submissions as jurisdictional, in order to bypass the leave to appeal requirement under Article 82(1)(d).[84] In the Kenya situation, the defence attempted to obtain an appellate ruling on the confirmation of charges decision by presenting certain matters as jurisdictional. The Appeals Chamber interpreted Articles 19(6) and 82(1)(a) to the effect that, in order to qualify as a decision 'with respect to jurisdiction':

> the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility ... [T]he right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial Chamber or a Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of a case.[85]

Subsequent jurisprudence suggests that the nature of the determination also plays a role.[86] Specifically, the Appeals Chamber recently held that an important factor to consider under Article 82(1)(a) of the Statute is whether the challenges, if successful, would 'eliminate the legal basis for a charge on the facts alleged by the Prosecutor'.[87] Accordingly, the Appeals Chamber decided that the question of restrictions in the category of persons that may be victims of certain war crimes was a legal issue jurisdictional in nature.[88]

It is clear that in the present situation, if the Court rejects the Prosecutor's interpretation as regards either Article 7(1)(d) (subject-matter jurisdiction) or Article 12(2)(a) (territorial jurisdiction), it would eliminate the legal basis for further

---

[84] H. Friman, 'Interlocutory Appeals in the Early Practice of the International Criminal Court', in G. Sluiter and C. Stahn (eds.), *The Emerging Practice of the International Criminal Court* (2009), 553 at 555–6.

[85] *Situation in Republic of Kenya*, Decision on the admissibility of the Appeal of the Republic of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the rules of Procedure and Evidence', ICC-01/09-78, A.Ch., 10 August 2011, paras. 15–17; further, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', ICC-01/13 OA, A. Ch., 6 November 2015, para. 44.

[86] W.A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2016), 1226.

[87] *Prosecutor v. Bosco Ntaganda*, *supra* note 73, para. 39.

[88] Ibid., para. 40.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

proceedings on deportation as a crime committed in part in Bangladesh. Therefore, this decision would fall within the scope of Article 82(1)(a) of the Statute. The fact that this is a 'request' and not a challenge is probably not important. After all, Rule 59 explicitly provides that it is equally applicable to both challenges and requests, for the purposes of Article 19(3).[89] In that light, it would seem that the Prosecutor would be able to appeal the Pre-Trial Chamber's decision directly to the Appeals Chamber under Article 82(1)(a).

If the request is rejected on procedural grounds alone, the matter is less clear. The wording and nature of the decision should be scrutinized. Arguably, such decision would probably not eliminate the Prosecutor's case, but merely consign the jurisdictional determination to later proceedings. Therefore, an appeal – if at all possible – might require prior leave under Article 82(1)(d) of the Statute.

4.2. The Appeals Chamber as a court of first and last instance; referral and jurisdictional relinquishment

The previous parts have discussed the substantive and procedural viability of the request in question. Notwithstanding these observations and entirely in the alternative, this part will venture into a different direction. Specifically, if procedural innovation is the order of the day due to the 'exceptional circumstances' surrounding this request, it cannot be excluded that the Pre-Trial Chamber might choose to have the matter decided by the Appeals Chamber directly by way of relinquishment of jurisdiction or referral.

The possibility to relinquish jurisdiction or simply to refer the case to the Appeals Chamber is not explicitly permitted or prohibited by the Statute. Article 19(3) stipulates that the Prosecutor may seek a ruling from 'the Court' – it does not specify the Chamber. Arguably, the specification is made by the judge-made Regulation 46(3).[90] This issue therefore raises a question of procedural legality; namely, whether the silence of the Court's instruments on point may be interpreted as a license or a prohibition.

As a matter of the ICC system as a whole, Sluiter has explained that the Court tends to err on the side of procedural legality and argued that this is not always useful, due to the 'many gaps in the legal framework'.[91] The Appeals Chamber has noted that the advent and use of unwritten (implied or inherent) powers should be reserved for procedural gaps, namely instances where an objective is not given effect by the Statute's and the Rules' provisions.[92] Their invocation would be 'incorrect where the Court's

[89] Rule 59 of the Court's Rules of Procedure, *supra* note 67, is entitled 'Participation in proceedings under article 19, paragraph 3' and provides in paragraph 1 that '[f]or the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3 . . .'.

[90] The Regulation provides that the matter will be assigned by the President of the Pre-Trial division to a Pre-Trial Chamber. This took place on 11 April 2018. See *supra* note 5.

[91] Ibid., at 590.

[92] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA 3, A. Ch., 13 July 2006, para. 39.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

legal framework provides for a conclusive legal basis'.[93] The critical question therefore is whether there is a gap that should be addressed by recourse to a procedural vehicle designed to promote the efficient administration of justice.

On balance, the strongest argument would seem to be that no procedural gap exists here and therefore that no relinquishment or referral is possible. For one, contrary to the Special Tribunal of Lebanon[94] or the European Court of Human Rights,[95] this option is not provided in the Statute or the Rules. For another, the function of the different judicial instances is laid down at length in the Statute. Even if the Pre-Trial Chamber might have such power, the ambit of the Appeals Chamber's authority is limited to decisions following an appeal against the preliminary or final decision[96] or exceptionally to few issues as a matter of primary jurisdiction which do not include this eventuality.[97] Moreover, Article 19(6) imposes a duty on specific Chambers of the Court to make decisions in the first instance on jurisdictional challenges. This division of labour may be considered applicable also to Article 19(3) requests. For these reasons, it would seem untenable to use unwritten powers, in order to introduce new procedural vehicles; doing so might be criticized as a substitution of the Assembly of States Parties in the promulgation and amendment of the Rules of the Court. Finally, as a matter of practice, the Appeals Chamber has endorsed a 'minimalistic' and 'cautious' exercise of its powers, even when its jurisdiction is not in question.[98] It has underlined that its role is not to give advisory opinions on legal issues.[99] Against that background, it appears unlikely that the Appeals Chamber would be prepared to hear and decide on the request in the first and last instance.

In the alternative, an argument could be made in favour of the power of the Pre-Trial Chamber to relinquish jurisdiction or refer, and the Appeals Chamber to receive and decide on the request. Arguably, even if there is no procedural *lacuna*, there is still no 'conclusive legal basis' that would exclude this option. A more flexible approach may be useful, one that would provide for the exercise of unwritten (implied or inherent) powers on the part of the Pre-Trial and the Appeals Chambers on matters left unregulated by the Court's instruments.[100] This can be particularly helpful, when no human rights of the accused are at stake.[101] To date, the Court's practice accepted that such powers exist in matters such as making corrections in

[93] *Prosecutor v. Ruto et al.*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation', ICC-01/09-01/11-1598, A. Ch., 9 October 2014, para. 105.

[94] Special Tribunal for Lebanon, Rules of Procedure and Evidence as amended and corrected on 3 April 2017, Rule 68(G), available at www.stl-tsl.org/images/RPE/RPE_EN_April_2017.pdf (accessed 15 May 2018).

[95] Art. 30 of the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS No. 5.

[96] V. Nerlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 963 at 966.

[97] Art. 46 of the Statute.

[98] Nerlich, *supra* note 96, at 978–80.

[99] Nerlich, ibid.; see further *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 72, paras. 37–8, fn. 62.

[100] G. Sluiter, 'Trends in the development of a unified law of international criminal procedure', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2010), 581, at 589; M. Klamberg, *Evidence in International Criminal Trials: Confronting legal gaps and the reconstruction of disputed events* (2013), 79–80.

[101] Sluiter, ibid., at 590.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

documents issued by the Chamber[102] and a Chamber's power to notify the Security Council of state failure to comply in situations triggered by an SC referral.[103]

The Appeals Chamber is no stranger to procedural innovation when the circumstances warrant so. For example, it did discuss the Prosecutor's request to review a decision refusing leave to appeal, even though it was dubbed 'extraordinary'.[104] No specific reasoning or justification was offered for this course of action. In the present matter, it may well be that the Court would see value in pursuing a 'fast-track' avenue to legal certainty for new and serious questions. Accordingly, it cannot be excluded that the Pre-Trial Chamber might refer the request or relinquish jurisdiction in favour of the Appeals Chamber, in the spirit of the effective administration of justice and procedural economy. Equally, the Appeals Chamber may acknowledge on similar considerations that it has the authority to receive and decide the request.

In that remote possibility, one further difficulty would be to devise a legal standard, on the basis of which this option will be available. On this point, the Court could potentially draw inspiration from the practice of the European Court of Human Rights and the Special Tribunal for Lebanon (STL).

Under Article 30 ECHR:

> Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.[105]

Under Additional Protocol 15, this provision will be amended to omit the prior consent of the Parties.[106] The consent requirement was criticized on many grounds, among others that it could deprive the Court's autonomy in deciding the composition of the bench.[107] Its removal is expected to speed up the proceedings.[108]

This provision is typically used, when 'a chamber is convinced of the significance of the case before it and therefore sees the need for the Grand Chamber being directly concerned with it'.[109] Part of its *raison d'être* seems to be that the Grand

---

[102] *Prosecutor v. Joseph Kony and Vincent Otti*, Decision on the Prosecutor's Urgent Application Dated 26 September 2005, ICC-02/04-01/05, Pre-T. Ch., 27 September 2005, at 3.

[103] *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision informing the United Nations Security Council about the lack of cooperation by the republic of the Sudan, ICC-02/05-01/07, Pre-T. Ch., 25 May 2010, at 6.

[104] Extraordinary Review Appeal, ICC-01/04-168, *supra* note 92. The Appeals Chamber did not discuss why it proceeded to discuss the request, even though it was not provided for in the Statute and the Rules, ibid., para. 3.

[105] *Supra* note 95.

[106] Art. 30 of the 2013 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS No. 213. This amendment to Article 30 was proposed by the Court itself; European Court of Human Rights, 'Opinion of the Court on Draft Protocol no. 15 to the European Convention on Human Rights' (6 February 2013), para. 7, available at www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf (accessed 21 August 2018).

[107] J. Makarczyk, 'Reform of the ECtHR: The Luxembourg Perspective', in Steering Committee for Human Rights, *Reforming the European Convention on Human Rights: A Work in Progress* (2009), 159 at 165.

[108] Explanatory Report to Protocol No. 15, *supra* note 106, para. 16, available at www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf (accessed 15 April 2018).

[109] D. Cole Mark and A. Vandendriessche, 'From Digital Rights Ireland and Schrems in Luxembourg to Zakharow and Szabo/Vissy in Strasbourg', (2016) 2 *European Data Protection Law Review* 121, at 122.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

Chamber is viewed as the constitutional formation of the court,[110] whose decisions are somewhat more authoritative than those of Chambers.[111] The decision to relinquish can be taken at any stage of the proceedings,[112] it does not require particular reasoning and is not subject to a specific methodology or principle.[113]

In the realm of international criminal proceedings, Rule 68(G) of the Rules of the Special Tribunal for Lebanon provides that '[t]he Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment'.[114]

This provision lays down a special procedure in the STL context, used to guide the pre-trial judge in the application of the law in future proceedings.[115] It was introduced in the STL system, in order to ensure consistency in the applicable law throughout the legal process and to speed up the pre-trial and trial proceedings.[116] As Powderly notes, it helps avoid numerous time-consuming interlocutory appeals.[117] In the Tribunal's practice, Rule 68(G) has been used to seek appellate guidance on important matters, such as the crime of terrorism[118] and the crime of criminal association.[119] The decision to refer is usually premised on considerations such as the efficient, coherent and transparent administration of justice[120] or the need to ensure a fair and expeditious trial in the interests of justice.[121]

The practice of the ECHR on relinquishment and the STL on referral to a higher instance is instructive of the different options available in international proceedings. For present purposes, it cannot be excluded – although it appears extremely unlikely absent an explicit Rule – that, due to the ground-breaking significance of this request, the Pre-Trial Chamber would prefer to see this issue dealt with by the Appeals Chamber directly. In that extraordinary event, the Court might highlight the quintessentially 'pilot' nature of the judgment, as it will provide guidance on the Court's future course of action regarding commission in part. On this historic

[110] D. Harris, et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2014), 123.
[111] T. Thienel, 'The ECHR in Iraq: The Judgment of the House of Lords in *R (Al-Skeini) v. Secretary of State for Defence*', (2008) 6 *Journal of International Criminal Justice* 155, at 121.
[112] K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2011), 12.
[113] Recently, *Burmych and others v. Ukraine*, Judgment of 12 October 2017, Grand Chamber (Appl No. 46852/13, 47786/13, 54125/13 et al.). Further, Harris, *supra* note 110, at 124; W.A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), 711–12.
[114] Special Tribunal for Lebanon, Rules of Procedure and Evidence, *supra* note 94.
[115] P. Webb, 'Individual Criminal Responsibility', in A. Alamuddin, N. Nabil Jurdi and D. Tolbert (eds.), *The Special Tribunal for Lebanon: Law and Practice* (2014), at 90, fn. 8.
[116] Rules of Procedure and Evidence – Explanatory Memorandum by the Tribunal's President – 25 November 2010, para. 11, available at www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/explanatory-memoranda/216-rules-of-procedure-and-evidence-explanatory-memorandum-by-the-tribunal-s-president-25-november-2010 (accessed 15 May 2018).
[117] J. Powderly, 'Introductory Observations on the STL Appeals Chamber Decision: Context and Critical Remarks', (2011) 22 *Criminal Law Forum* 347, at 350.
[118] Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G), of the Rules of Procedure and Evidence, STL-11-01/1, Pre-T. Ch., 21 January 2011.
[119] *Prosecutor v. Ayyash et al.*, Order on Preliminary Questions Concerning the Crime of Criminal Association Addressed to the Appeals Chamber Pursuant to Rules 68 (G) and 71 (A) (Ii) of the Rules of Procedure and Evidence, Case No. STL-II-OI/IIPT, Pre-T. Ch., 2 March 2012.
[120] *Supra* note 118, para. 2.
[121] *Supra* note 119, para. 9.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

occasion, a direct ruling by the Appeals Chamber would probably provide legal certainty and advance procedural economy.

5. Conclusions

This article reviewed the Prosecutor's Rohingya request. This landmark document asks the Court, for the first time in its history, to make a determination on the meaning of Articles 12(2)(a) and 19(3). Its argumentation appears to be informed by jurisdictional *realpolitik* and procedural creativity. Its adjudication is likely to have implications for the Court's relationship with states.

This article concedes that the Prosecutor has made a diligent effort to cautiously establish the Court's jurisdiction over a serious international crime committed in part on state party territory. It is premature to speculate on its eventual effects, in terms of arrests or domestic proceedings. However, the request may be seen as a symbol of the Court's determination not to look the other way in the face of serious international crimes taking place in state party territory, regardless of the eventual responsibility of nationals of states not parties. As such, it is in good company with the recent investigations launched into the situations in Georgia and Afghanistan.

Notwithstanding the obvious merits, the request can be criticized on two points. For one, it seems to impart on occasion an underlying spirit of excessive conservatism in the interpretation of the Court's jurisdiction. To be sure, jurisdictional caution is appropriate for the Court. The possible exercise of its jurisdiction over states not parties' nationals is a sensitive issue.[122] Yet, even caution should have some limits. Otherwise, it risks becoming a self-imposed limitation tantamount to jurisdictional relinquishment, at odds with the Court's mission.

For another, the request is procedurally contentious. It places many important and heretofore unresolved procedural questions squarely before the Court for the first time; the limits of its *kompetenz-kompetenz* and the inter-action of Articles 19(2), 19(3), 13, and 15 are only some of them. Arguably, the procedural issues are simply a reflection of the tension between two underlying concerns. On the one side stands the Prosecutor's very real and current need to reserve her scant resources for investigations that fall without doubt within the Court's jurisdiction. This perspective militates in favour of making a decision on this request now. On the other side, there is an institutional interest in maintaining at least an appearance of faithful preservation of the Statute's system and all attendant safeguards against abuse agreed upon by the states parties. From this point of view, there is merit in reserving judgment for subsequent procedural moments, when more information will be available and no doubt will exist as regards the Court's authority to decide on the jurisdictional question. Therefore, the Court is essentially called to decide whether the Prosecutor's need to avoid the risk of wasting resources in the investigation of situations beyond ICC jurisdiction may be reconciled with the Statute's procedural scheme concerning jurisdictional determinations. This is likely to prove a delicate balancing exercise.

[122] For an exhaustive literature overview, *Situation in Afghanistan, supra* note 7, paras. 45–6, fns. 41–2.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press

The matter is now before the judges. Unsurprisingly, Myanmar has already complained[123] and will likely continue to object to the Court's jurisdiction. Bangladesh, however, has remained conspicuously quiet. Maybe this request will spur it into action. Regardless, the law appears to be on the Prosecutor's side – although perhaps one may have to wait for a decision at a later procedural moment. Be that as it may, it is hoped that – whenever such determination ultimately takes place – the Court will not succumb to pressure from Myanmar and will not reject commission in part under Article 12(2)(a) of the Statute. Otherwise, it would need to find a convincing justification to reconcile an enormous jurisdictional loophole of its own making with its mandate 'to put an end to impunity'.[124] In the important litigation ahead, future developments are eagerly anticipated.

[123] See *supra* note 8.
[124] Preamble of the Statute, *supra* note 4, para. 5.

https://doi.org/10.1017/S0922156518000481 Published online by Cambridge University Press