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INTRODUCTORY NOTE TO DECISION ON THE "PROSECUTION'S REQUEST FOR A RULING ON JURISDICTION UNDER ARTICLE 19(3) OF THE STATUTE" (INT'L CRIM. CT.)

BY SARAH FREUDEN*

[September 6, 2018]

Introduction

On September 6, 2018, Pre-Trial Chamber I of the International Criminal Court (Court) issued its "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute.'" The decision is notable both for the procedural posture—the Prosecution submitted its request prior to opening a preliminary examination—and the majority's conclusion that the Court may exercise territorial jurisdiction over alleged deportation from Myanmar, a nonstate party to the Rome Statute of the International Criminal Court (Rome Statute or Statute), to a state party, Bangladesh.

Background

Since August 2017, "clearance operations" instituted by Myanmar security forces have caused over 725,000 Rohingya Muslims to flee from Myanmar to neighboring Bangladesh.[1] The plight of the Rohingya has garnered significant attention, with international outcry over alleged crimes against humanity—including forced deportation—and, potentially, genocide.[2]

Under Article 19(3) of the Rome Statute, the Prosecutor is permitted to "seek a ruling from the Court regarding a question of jurisdiction or admissibility."[3] On April 9, 2018, after reviewing "consistent and credible public reports"[4] from "*prima facie* reliable sources,"[5] the Prosecution submitted a request to the Court's Pre-Trial Division seeking a ruling on "whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh."[6]

The request marked the first time the Prosecution sought a ruling on a question of jurisdiction. Its timing was unusual; the request was submitted before the Prosecutor opened a preliminary examination.[7] Ordinarily, the Prosecution would not engage the Pre-Trial Chamber prior to seeking authorization to open a formal investigation, a mandatory step in the process that occurs after the conclusion of the preliminary examination.[8]

Under Article 12(2)(a) of the Rome Statute, the Court may exercise jurisdiction, inter alia, if the "State on the territory of which the conduct in question occurred" is a party to the Statute.[9] Myanmar is not a state party. Thus, absent Myanmar's consent, the Court may not exercise territorial jurisdiction over alleged crimes committed against the Rohingya unless the "conduct" at issue "occurred" on the territory of Bangladesh or another state party.[10] In its request, the Prosecution submitted that the crime against humanity of deportation, like a cross-border shooting, often necessarily occurs on the territory of more than one state and that the Court may exercise territorial jurisdiction if at least one element of a crime occurred on the territory of a state party.[11]

Both Bangladesh and Myanmar were given the opportunity to respond to the Prosecutor's request. Bangladesh did so confidentially on June 11, 2018.[12] Myanmar refused to engage formally with the Court, but issued public statements on April 13, 2018, and August 9, 2018, objecting to the proceedings and arguing against the Court's jurisdiction.[13]

The Pre-Trial Chamber's Decision

The Pre-Trial Chamber split 2-1 on the issue of the Court's authority to rule on the Prosecution's request. The majority determined that the Court had authority to issue a ruling on jurisdiction and concluded that it possesses territorial jurisdiction over crimes that occur in part on the territory of a state party. Judge Brichambaut dissented on the ground that the decision was premature and effectively amounted to an advisory opinion, which the Court lacks authority to issue.

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The majority opinion is noteworthy for three reasons. First, it skirted the issue of whether Article 19(3) applies prior to the situation or case stage.[14] Instead, the majority invoked Article 119(1) of the Statute, which gives the Court the authority to resolve disputes over the Court's judicial functions,[15] as well as the international law principle of *la compétence de la competence* (or *Kompetenz-Kompetenz*), by which an international tribunal "has the power to determine the extent of its own jurisdiction."[16] Both Article 119(1) and the principle of *la compétence de la competence* were deemed to permit the Court to issue a ruling because the Prosecutor's request involved a concrete "dispute" over a question of the Court's jurisdiction.[17]

Second, the majority addressed and rejected Myanmar's argument in its public statements that the Court lacks jurisdiction over nonstate parties, because a treaty "does not create either obligations or rights for a third State without its consent."[18] Although it was not responsive to the Prosecutor's request, the majority engaged in a lengthy discussion of the Court's "objective international personality," which gives it the ability to interact with and impact even nonstates parties under certain circumstances.[19]

Finally, the majority ruled that the Court's territorial jurisdiction extended to the situation presented by the Prosecution. It agreed that "deportation" and "forcible transfer" are distinct crimes against humanity and determined that the crime of "deportation," unlike that of "forcible transfer," necessarily occurs on the territory of more than one state.[20] The majority then concluded that Article 12(2)(a), read in context and in light of the object and purpose of the statute, clearly permits the exercise of jurisdiction if "at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party."[21]

Thus, the majority incorporated the principles of "subjective" and "objective" territoriality into the Rome Statute. Although these extensions of territorial jurisdiction are permissible under international law—and are contained in numerous international legal instruments and the national legislation of many states[22]—this determination is significant, because it opens the door to expansion of the Court's jurisdiction over nonstate parties that, like Myanmar, have expressed a desire not to be bound by the Rome Statute. Moreover, the implications of this ruling might be quite broad because the majority indicated that its reasoning could be applied to other crimes within the Court's jurisdiction, such as persecution and "other inhumane acts" committed in connection with deportation, even though those crimes would not *necessarily* occur on the territory of more than one state.[23]

In dissent, Judge Brichambaut argued that the Prosecutor's request was not ripe for resolution and the Court lacked authority to resolve the question of territorial jurisdiction at this nascent stage. He rejected the Prosecutor's arguments regarding the applicability of Article 19(3) prior to the "case" stage on legal and prudential grounds and criticized the majority for failing to pronounce on the sole legal basis for the Prosecutor's request.[24] Judge Brichambaut also disagreed with the majority's conclusions on Article 119(1) and the principle of *la compétence de la competence*. There was no "dispute" for the Court to resolve: Myanmar had refused to participate in the proceedings and, to the extent that its public statements could be considered, they were not actually responsive to the Prosecutor's request.[25] Even assuming there was a "dispute" under Article 119(1), the request was hypothetical and premature, the dispute artificial, and the majority's analysis unconvincing.[26]

Despite their disagreement on the threshold issues, both the majority and dissent urged the Prosecutor to open a preliminary examination into the alleged crimes.[27] On September 18, 2018, the Prosecutor did open a preliminary examination of the alleged deportation of Rohingya people from Myanmar to Bangladesh as well as potential other crimes under Article 7 of the Rome Statute.[28]

Conclusion

Myanmar's Rohingya Muslims continue to suffer as a result of the "clearance operations" initiated in 2017, yet there has been little sign of action from the Security Council due to Russian and Chinese veto threats. That is true despite widespread credible reporting of killings, rapes, destruction of property, forced disappearance, and forced displacement.[29] Human rights practitioners and others seeking accountability undoubtedly will view the decision of the Pre-Trial Chamber as a welcome development because it provides the ICC an avenue to investigate this conduct and potentially provide redress for the many victims.

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Nevertheless, as the dissent stresses, the ICC's decision to rule on a question of jurisdiction prior to the initiation of a preliminary examination takes a very broad approach to the concept of "dispute," approaching an advisory opinion. This precedent could create the risk of inconsistent judgments and generate other negative consequences down the line. Even more significantly, the substance of the ruling extending the Court's territorial jurisdiction has the potential to generate significant backlash and to further strain the resources of the ICC at a time when support for the Court is at an ebb and cooperation of even state parties, much less nonstate parties, has proven challenging.[30]

ENDNOTES

1 Rep. of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64, at 8 (Sept. 12, 2018).

2 Human Rights Council Res., UN Doc. A/HRC/39/L.22 (Sept. 25, 2018), *available at* http://undocs.org/A/HRC/39/L.22 (taking note of the Court's decision here).

3 Rome Statute of the International Criminal Court art. 19(3), July 17, 1998, 37 ILM 1002 (1998); 2187 UNTS 90 [hereinafter Rome Statute]. Pursuant to Regulation 46(3), if there is no situation assigned to a Pre-Trial Chamber, then the request is directed by the president of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the president.

4 Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ICC-RoC46(3), ¶ 2 (Apr. 9, 2018) [hereinafter Request].

5 *Id.* ¶ 7. These sources included, inter alia, the work of several UN bodies and the independent fact-finding mission on Myanmar established by the UN Human Rights Council, as well as human rights organizations such as Human Rights Watch, Amnesty International, and the International Refugee Commission. *Id.* ¶¶ 7, 9–10.

6 *Id.* ¶ 1.

7 *See* Rome Statute, *supra* note 3, art. 15; ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

8 *See* Rome Statute, *supra* note 3, art. 15(3)–(4); Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC-RoC46(3)-01/1-Anx-ENG, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, ¶ 1 (Sept. 6, 2018) [hereinafter Dissent] (noting that the Prosecution's request "comes at a highly unusual juncture before even a preliminary examination of a situation has been initiated by the Prosecutor").

9 Rome Statute, *supra* note 3, art. 12(2)(a).

10 If an alleged crime occurs on the territory of a state that is not party to the Rome Statute, then the Court typically may not exercise jurisdiction in the absence of that state's consent, unless the acts in question were committed by a national of a state party to the Rome Statute, or the case was referred to the Court by the UN Security Council. Rome Statute arts. 12(2)–(3), 13(b).

11 Request, *supra* note 4, ¶¶ 13–50. The Prosecutor also contemplates that deportation would occur without entry into another territory if the individual were deported to the high seas. *See id.* ¶ 16 n.32.

12 Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," ICC-RoC46(3)-01/1-Anx-ENG, ¶¶ 3, 6 (Sept. 6, 2018) [hereinafter Decision].

13 *See id.* ¶¶ 11, 13, 16, 28 n.6, 34–35; *see also* Government of the Republic of the Union of Myanmar, Ministry of the Office of State Counsellor, Press Release (Aug. 9, 2018), http://www.statecounsellor.gov.mm/en/node/2084; Government of the Republic of the Union of Myanmar, Ministry of the Office of State Counsellor, Press Release (Apr. 13, 2018), http://www.statecounsellor.gov.mm/en/node/1884. The Pre-Trial Chamber also permitted responses from victims as well as several human rights organizations and other nongovernmental actors. *See* Decision, *supra* note 12, ¶¶ 8–9.

14 *Id.* ¶¶ 26–27 and n.34.

15 *Id.* ¶ 28.

16 *Id.* ¶¶ 30–32. The majority reasoned that the Court had the ability to apply the international law principle of *la competence de la competence* under Article 21(1)(b) of the Rome Statute. *Id.* ¶ 29.

17 *Id.* ¶ 33.

18 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; *see also* Decision, *supra* note 12.

19 Decision, *supra* note 12, ¶¶ 37–48.

20 *Id.* ¶¶ 52–61, 71. It did so, however, without addressing the Prosecutor's assertion that it is possible to be deported without entering the territory of another state, which is not necessarily settled law. *See, e.g.*, Kevin Jon Heller, *Three Cautionary Thoughts on the OTP's Rohingya Request*, OPINIOJURIS (Apr. 9, 2018), http://opiniojuris.org/2018/04/09/some-thoughts-on-the-otps-rohyingya-request/; Michael G. Karnavas, *Revisiting the ICC's Ruling on the OTP's Rohingya Request over Jurisdiction: A More Critical Look. Part 1 – The Majority's Decision*, MICHAELGKARNAVAS.NET/BLOG (Oct. 10. 2018), http://michaelgkarnavas.net/blog/2018/10/09/icc-rohingya-ruling-pt1/#more-3355.

21 *Id.* ¶¶ 64–72.

22 *Id.* ¶ 66 & n.107–10; *see also* Restatement (Fourth) of Foreign Relations Law: Jurisdiction §212 TD No 2 (2016).

23 *See* Decision, *supra* note 12, ¶¶ 74–79; *see also* Kevin Jon Heller, *The ICC Has Jurisdiction over One Form of Genocide in the Rohingya Situation*, OPINIOJURIS (Sept. 7, 2018), http://opiniojuris.org/2018/09/07/33644/ (highlighting that the Pre-Trial Chamber "notably did not limit the Court's territorial jurisdiction to crimes whose essential elements necessarily take place in two states").

24 Specifically, Judge Brichambaut analyzed Article 19(3) in the context of Article 19 as a whole as well as Rule 58(2) of the Rules of Procedure and Evidence, concluding that the provision

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cannot be invoked prior to the existence of a "case," and cautioned that permitting the Prosecutor to invoke Article 19(3) could lead to a proliferation of abstract or hypothetical requests and/or circumvention of established procedures and appropriate methods of conduct. Dissent, *supra* note 8, ¶¶ 2, 7, 10–12.

25 *Id.* ¶ 16.

26 *Id.* ¶¶ 19–23.

27 *See id.* ¶¶ 40–41; Decision, *supra* note 12, ¶¶ 84–86.

28 Myanmar continues to reject the Court's jurisdiction. *See, e.g.*, *Myanmar Says International Criminal Court Has No Jurisdiction in Rohingya Crisis*, REUTERS (Sept. 7, 2018), https://www.reuters.com/article/us-myanmar-rohingya-icc/myanmar-says-international-criminal-court-has-no-jurisdiction-in-rohingya-crisis-idUSKCN1LN22X.

29 *See* Michelle Nichols, *U.N. Security Council Mulls Myanmar Action; Russia, China Boycott Talks*, REUTERS (Dec. 17, 2018), https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ.

30 *E.g.*, Douglas Guilfoyle, *The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar*, AUSTL. J. INT'L AFF., 5 (Oct. 29, 2018), https://www.tandfonline.com/doi/pdf/10.1080/10357718.2018.1538316?needAccess=true.

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DECISION ON THE "PROSECUTION'S REQUEST FOR A RULING ON JURISDICTION UNDER ARTICLE 19(3) OF THE STATUTE" (INT'L CRIM. CT.)*

[September 6, 2018]

Cour Pénale Internationale

International Criminal Court

Original: English

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

Date: **6 September 2018**

PRE-TRIAL CHAMBER I

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

REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE COURT

Public

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

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

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

Counsel for the Defence

Legal Representatives of Victims
Megan Hirst
Wayne Jordash

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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

Amicus Curiae
Ian Seiderman, International
Commission of Jurists
Fannie Lafontaine, Canadian Partnership
for International Justice
Shireen P. Huq, Naripokkho
Siobhan Hobbs, Women's Initiatives for
Gender Justice
Andreas Schüller, European Center for
Constitutional and Human Rights
Sara Hossain
Toby Cadman, Almudena Bernabeu and Carl Buckley, Guernica 37
International Justice Chambers
Manzoor Hasan and Perween Hasan, Bangladeshi Non-
Governmental Representatives

REGISTRY

Registrar
Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER I (the "Chamber") of the International Criminal Court (the "Court" or the "ICC") issues this decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (the "Request" or the "Prosecutor's Request").[1]

I. PROCEDURAL HISTORY

1. On 9 April 2018, the Prosecutor filed her Request pursuant to regulation 46(3) of the Regulations of the Court (the "Regulations") and article 19(3) of the Rome Statute (the "Statute"), seeking a ruling from the Pre-Trial Chamber on the question whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh").[2]

2. On 11 April 2018, the President of the Pre-Trial Division assigned the Request to the Chamber.[3]

3. On 7 May 2018, the Chamber invited the competent authorities of Bangladesh to submit observations on the Prosecutor's Request pursuant to rule 103(1) of the Rules of Procedure and Evidence (the "Rules").[4]

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4. On 11 May 2018, the Chamber issued an order convening a status conference to be held on 20 June 2018, in closed session, only in the presence of the Prosecutor.[5]

5. On 31 May 2018, the Chamber received, pursuant to article 19(3) or, alternatively, article 68(3) of the Statute, a submission filed by Global Rights Compliance on behalf of 400 Rohingya women and children, who were allegedly victims of the crime against humanity of deportation.[6]

6. On 11 June 2018, Bangladesh submitted confidentially its observations on the Prosecutor's Request.[7]

7. On 14 June 2018, the Registry submitted to the Chamber information related to 21 victim application forms received in relation to the Prosecutor's Request.[8]

8. Between 29 May 2018 and 14 June 2018 the Chamber granted leave to the following organisations and persons to submit *amici curiae* observations on the Prosecutor's Request: the International Commission of Jurists;[9] members of the Canadian Partnership for International Justice;[10] the Women's Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights (jointly);[11] Guernica 37 International Justice Chambers;[12] and the Bangladeshi Non-Governmental Representatives.[13] The Chamber received their written observations on 18 June 2018.[14]

9. On 19 June 2018, the Chamber received "Observations on behalf of victims from Tula Toli" village in Myanmar, pursuant to article 19(3) of the Statute.[15]

10. On 20 June 2018, the status conference took place in closed session, only in the presence of the Prosecutor.[16]

11. On 21 June 2018, the Chamber invited the competent authorities of Myanmar to submit observations on the Prosecutor's Request pursuant to rule 103(1) of the Rules.[17]

12. On 29 June 2018, the Registry transmitted to the Chamber a *note verbale* and a submission made by Bangladesh, dated 28 June 2018, whereby Bangladesh sought to respond to one of the *amici curiae* submissions, pursuant to regulation 24(3) of the Regulations.[18]

13. On 5 July 2018, the Registry submitted its report on the implementation of the Chamber's decision inviting the competent authorities of Myanmar to submit observations on the Prosecutor's Request.[19] The Registry informed the Chamber that the Embassy of Myanmar to the Kingdom of Belgium had refused to accept the delivery of either the Chamber's decision or the Prosecutor's Request, which were returned to the Court.[20]

14. On 11 July 2018, the Chamber issued its "Decision on the Reclassification of Certain Documents and Orders".[21]

15. On 11 July 2018, the Prosecutor filed her observations on the five *amici curiae* submissions mentioned in paragraph 8 above and the submissions of the two groups of alleged victims mentioned in paragraphs 5 and 9 above.[22]

16. On 17 August 2018, the Prosecutor filed a "Notice of the Public Statement Issued by the Government of Myanmar" (the "17 August 2018 Notice/Request").[23]

II. PRELIMINARY ISSUES

1. CLASSIFICATION OF THE PRESENT DECISION

17. The present decision is classified as public although it refers to documents which have been submitted and are currently treated as confidential. The Chamber considers that these references are required by the principle of publicity and judicial reasoning. It has, however, kept such references to a minimum, without endangering the interests concerned and without defeating the very purpose of confidentiality.

2. THE RESPONSE SUBMITTED BY BANGLADESH

18. Pursuant to regulation 24(3) of the Regulations, Bangladesh submitted a response to the submissions presented by one of the *amici curiae*.[24]

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19. The Chamber recalls that it initially invited Bangladesh to submit observations on certain matters pursuant to rule 103(1) of the Rules.[25] Therefore, the involvement of Bangladesh is limited to submitting the observations requested by the Chamber under this rule. Since rule 103 of the Rules does not provide for an automatic right of response on the part of a State, organization or person submitting observations, the Chamber decides, pursuant to regulation 29 of the Regulations, to set aside the response submitted by Bangladesh.

3. THE VICTIMS' STANDING

20. The victims contend that they have standing to submit observations to the Chamber pursuant to, *inter alia,* article 19(3), second sentence, of the Statute or, in the alternative, article 68(3) of the Statute.[26]

21. The Chamber considers that the victims have standing to submit observations pursuant to article 68(3) of the Statute. This article provides that, "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court [. . .]". Furthermore, the Chamber is of the view that rule 93 of the Rules gives it discretion to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate. The Chamber considers that the victims' personal interests are affected by the Request in view of the fact that their applications are linked to, *inter alia,* alleged deportations from Myanmar to Bangladesh in August 2017.[27] In addition, since their observations concern the specific legal question arising from the Request, the Chamber finds it appropriate, in these particular circumstances, to hear from the victims at this stage.

4. THE 17 AUGUST 2018 NOTICE/REQUEST

22. In the 17 August 2018 Notice, the Prosecutor drew the Chamber's attention to a public statement issued by the Government of Myanmar on 9 August 2018 concerning the current proceedings before the Court. The Prosecutor requests either to disregard this statement in its entirety[28] or, "should the Pre-Trial Chamber [. . .] be minded to take the Public Statement into consideration, to be granted leave to file brief observations in response".[29]

23. The Chamber accepts the Prosecutor's position that, for the purpose of relying on the recent statement of 9 August 2018 or any other statement issued by the Government of Myanmar, such statement should, in principle, be part of the Court's official record. On its face, this is not the case, given that "Myanmar has declined to engage with the ICC by way of a formal reply".[30] Nevertheless, this does not deny the fact that, in limited circumstances depending on the complexity of the matter (as the case may be), the Chamber may rely on one or more statement(s) – such as those made by Myanmar – if any of these statements are brought to the attention of the Chamber through the Prosecutor's *official* filings. Thus, the information provided therein becomes part of the record.

24. Having said that and in view of the available information before the Chamber, which is considered sufficient, the Chamber does not deem it necessary for the Prosecutor to file any observations in response. Accordingly, the Chamber rejects the 17 August 2018 Request.

III. APPLICABLE LAW

25. The Chamber notes articles 2, 4, 7(1)(d), (h), and (k), 12(2)(a), 13, 19, 21(1)(a) and (b), (2) and (3), 87(6) and 119(1) of the Statute, rules 58, 59 and 93 of the Rules, regulation 29 of the Regulations, and the Relationship Agreement between the Court and the United Nations, especially its preamble and articles 7, 15, 17 and 18.

IV. THE POWER OF THE CHAMBER TO ENTERTAIN THE REQUEST

26. The Prosecutor has filed her Request pursuant to article 19(3) of the Statute. The Prosecutor submits that this provision empowers her to seek a ruling on a question of jurisdiction or admissibility at any stage of the proceedings.[31] She bases this argument, firstly, on a plain reading of the terms of article 19(3) of the Statute, which do not make a distinction between the situation stage and the case stage. She further submits that the context of article 19(3) of the Statute should not be taken to confine its application to a particular stage – the case stage.[32] Lastly, the Prosecutor advances that the object and purpose of article 19(3) of the Statute support a broad interpretation, "allowing

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judicial consideration of certain fundamental questions [. . .] *before* embarking on a course of action which might be contentious".[33]

27. The position advanced by the Prosecutor relying on article 19(3) of the Statute is quite controversial based on the different readings of the Court's statutory documents and the literature interpreting this provision.[34] The Chamber recalls that the core question raised by the Prosecutor is a question of jurisdiction, *i.e.* "whether the Court may exercise jurisdiction under article 12(2)(a) over the alleged deportation of the Rohingya people from Myanmar to Bangladesh".[35]

28. The Chamber observes that, based on the material available in the record, the jurisdiction of the Court is clearly subject to dispute with Myanmar.[36] According to article 119(1) of the Statute, "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court". This provision has been interpreted as including questions related to the Court's jurisdiction.[37] It follows that the Chamber is empowered to rule on the question of jurisdiction set out in the Request in accordance with article 119(1) of the Statute. Consequently, the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings.

29. In addition, since the Prosecutor's Request is premised on a question of jurisdiction, the Chamber considers that it could also entertain the Request in accordance with the established principles of international law, pursuant to article 21(1)(b) of the Statute.

30. It is an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction. This principle is commonly referred to as *la compétence de la compétence*, in French, or *Kompetenz-Kompetenz*, in German, and has been recognized by numerous international courts and tribunals. As early as 1953, the International Court of Justice (the "ICJ") held that "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction".[38] It recognized this principle to be a "rule of general international law" which conferred upon it the competence to adjudicate on its own jurisdiction even in the absence of article 36(6) of its Statute.[39] This principle has been reaffirmed by the ICJ in its subsequent jurisprudence.[40]

31. Since then, the principle of *la compétence de la compétence* has been reaffirmed by several other judicial bodies, including the Inter-American Court of Human Rights (the "IACtHR"),[41] the Appellate Body of the World Trade Organization,[42] tribunals or *ad hoc* committees constituted under the aegis of the International Centre for Settlement of Investment Disputes[43] and elsewhere.[44] International criminal courts and tribunals have made no exception. The International Criminal Tribunal for the former Yugoslavia (the "ICTY") held in 1995 that this "well-entrenched principle of general international law",

> known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done.[45]

The same approach was adopted also by the Special Tribunal for Lebanon.[46]

32. There is no question that this Court is equally endowed with the power to determine the limits of its own jurisdiction. Indeed, Chambers of this Court have consistently upheld the principle of *la compétence de la compétence*. Pre-Trial Chamber II held in the *Situation in Uganda* in 2006 that "[i]t is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence".[47] Later on, Pre-Trial Chamber II stressed – on different occasions and in different compositions – in the same line as the ICTY, that this power existed "even in the absence of an explicit reference to that effect" as an "essential element in the exercise by any judicial body of its functions".[48] The same approach was followed by Pre-Trial Chamber III.[49]

33. In the light of the above, the Chamber considers that it also has the power pursuant to the principle of *la compétence de la compétence* to entertain the Prosecutor's Request. The Chamber does not consider it necessary

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to pronounce itself on the limits or conditions of the exercise of its *compétence de la compétence* for the purposes of the Request *sub judice*. Suffice it to note that, as highlighted by the Prosecutor herself, the jurisdictional question raised in the Request is not an abstract or hypothetical one, but it is a concrete question that has arisen in the context of individual communications received by the Prosecutor under article 15 of the Statute as well as public allegations of deportation of members of the Rohingya people from Myanmar to Bangladesh.[50] Having said that, the Chamber will now turn to the merits of the Request.

V. THE INTERNATIONAL LEGAL PERSONALITY OF THE COURT

34. Ahead of the 20 June 2018 status conference and, later on, in its 17 August 2018 Notice, the Prosecutor drew the attention of the Chamber to public statements issued by the Government of Myanmar on 13 April and 9 August 2018 respectively, with regard to the current proceedings before the Court.[51] While it is regretful that Myanmar has not submitted any observations before the Court following the Chamber's invitation, the Chamber finds it pertinent to set forth its understanding regarding certain issues raised in Myanmar's public statements. The Chamber expresses its hope that Myanmar's position will change.[52]

35. In its 13 April 2018 statement, the Government of Myanmar stressed that "Myanmar is not a party to the Rome Statute" and "[t]he proposed claim for extension of jurisdiction [. . .] exceed[s] the well enshrined principle that the ICC is a body which operates on behalf of, and with the consent of States Parties".[53] Recalling the 1969 Vienna Convention on the Law of Treaties, the Government of Myanmar underlined that "no treaty can be imposed on a country that has not ratified it".[54] In its 9 August 2018 statement, Myanmar once again expressed its concern that "[t]he actions of the Prosecutor, constitute an attempt to circumvent the spirit of article 34 of the Vienna Convention".[55]

36. According to article 34 of the 1969 Vienna Convention on the Law of Treaties, "[a] treaty does not create either obligations or rights for a third State without its consent".[56] The Chamber recognizes the paramount importance of the principle of *pacta tertiis nec nocent nec pro sunt*. It should be recalled though that this principle is not without exceptions (see, for example, article 38 of the Vienna Convention on the Law of Treaties,[57] as well as other exceptions[58]).

37. The Chamber further recalls the pronouncement of the ICJ in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* ("*Bernadotte*"), where the ICJ famously held that the United Nations (the "UN") possessed objective international personality. In the words of the ICJ, "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone".[59]

38. In addition to the recognition of a *locus standi* for the UN for reparations of harms caused to its functionaries and agents, the main legacy of the aforementioned *dictum* of the ICJ is the judicial confirmation of the competence of the UN (Security Council) in case of a threat to the peace and security, a competence which extends to non-Member States of the UN. Furthermore, with due regard to the special nature of preambles in the law of international treaties, it is worth remembering that the UN Charter contains purposes and considerations that are not *inter partes* but *erga omnes* in character.[60]

39. The Chamber is mindful of the main doctrinal approaches that have been developed regarding the eventual applicability of the criteria set out by the ICJ to international organizations (or entities) other than the UN and, in particular, the ICC, and has studied carefully arguments in favour and against the applicability of these criteria to the ICC.[61]

40. After the entry into force of the UN Charter, States committed themselves to establishing an "international penal tribunal" in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is an instrument of quasi-universal participation nowadays.[62] It was anticipated that this "international penal tribunal" would have similar competences and working principles as the ICC, which was established fifty years later.[63]

41. The Chamber acknowledges the similarities, as well as the differences, between the creation and vocation of the UN and that of the Court, as reflected in the UN Charter and the Statute of the Court, respectively. It is worth

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noting that the Statute was adopted on 17 July 1998 by a vote of 120 to 7, with 21 countries abstaining. At the time, the number of UN Member States was 185 (as of 2011, there are 193 UN Member States).

42. Moreover, even those States which cast a negative vote on the adoption of the Statute were acting during the Rome Diplomatic Conference – as well as prior or after this Conference, during the Preparatory Committee or Commission – as fervent promoters of the establishment of the ICC. They provided as reasons for their eventual negative votes alleged flaws, missing crimes or certain formulations which, to them, seemed not appropriate or not precise enough. Two of them, namely the United States (the "US")[64] and Israel,[65] later became signatory States, although the US withdrew its signature shortly after. Israel also expressed its decision not to ratify the Statute.[66] Russia signed the Statute, but withdrew its signature in 2016.[67] China did not sign the Statute[68] and India expressed great concerns at the opening of the Rome Diplomatic Conference *vis-à-vis* the envisaged procedures and mechanisms, but not towards the idea of the establishment of the ICC.[69] At the opening of the Conference, Iran's position was also in favour of the establishment of the ICC,[70] notwithstanding the fact that the Iranian representative enumerated a number of items in relation to which his Government wished to see substantive changes.[71] (Iran's signature has not yet been followed by ratification.) The Chamber does not hereby qualify the decisions or reasons of these States, but highlights that while these States criticized certain formulations, competences or practices, they fully recognized in 1998-2002 the necessity of an international criminal court and supported its establishment. Moreover, at the Assembly of States Parties, States acting as observers – for example, the US[72] and China[73] – while recalling their concerns, also emphasized the importance of the ICC on the international plane.

43. The Chamber further notes that the drafters of the Statute intended to bring the Court into relationship with the UN.[74] In this regard, it is recalled that, when the Security Council refers a situation on the territory of a State not Party to the Statute, such a State – provided that it is a UN Member State – is duty bound to cooperate with the Court in case the Security Council requires such cooperation. This duty stems from its membership in the UN. If this country is not a UN Member State, which is a theoretical hypothesis nowadays, the competences of the Security Council pursuant to Chapter VII of the UN Charter suffice to force the cooperation of the State in case of a threat to the peace. In such a situation, the objective legal personality of the UN assists the ICC to act accordingly.

44. In addition, the Chamber observes that, under particular circumstances, the Statute may have an effect on States not Party to the Statute, consistent with principles of international law.

45. First, such effects may arise because of certain general characteristics of the Statute. As with the UN Charter, the Preamble of the Statute sets forth purposes and considerations of an *erga omnes* character.[75] The Statute also contains a number of formulations adopted *verbatim* from quasi-universal treaties (such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1899, 1907, 1954 Hague Conventions, the 1949 Geneva Conventions and their 1977 and 2005 Additional Protocols, and the 1989 Convention on the Rights of the Child).[76] Furthermore, several provisions are generally considered to be customary law (*i.e.* "pure codification" elements, such as substantial parts of articles 7 and 8 of the Statute), while other provisions represent a "progressive evolution" of custom.[77] Yet other formulations contained in the Statute reflect well-established judicial interpretations of the laws of war by, for example, the Nuremberg and Tokyo tribunals, the ICTY, the International Criminal Tribunal for Rwanda (the "ICTR"), and other international or hybrid tribunals.

46. Second, the application of certain provisions of the Statute may also produce effects for States not Party to the Statute. For example, if a perpetrator is charged and found guilty before this Court in accordance with the relevant jurisdictional parameters, his or her conviction may be duly taken into account before any national jurisdiction in order to avoid double jeopardy (*ne bis in idem re*), including by a State not Party to the Statute that chooses to do so, given the customary law character of this principle (or, according to certain doctrines, its status as a general principle of law). Similarly, if a sentence pronounced by the Court is executed in a State Party to the Statute, it may also be taken into account by States not Party to the Statute that wish to do so. This is especially the case if there is a bilateral agreement between the Court and the State in question on the enforcement of sentences.

47. Third, such effects may manifest themselves as a result of the decision of States not Party to the Statute (including permanent members of the Security Council) to cooperate with the Court.[78] Such cooperation may concern, for instance, the arrest and surrender of suspects,[79] the explicit approval of Security Council resolutions

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referring situations to the ICC,[80] refraining from exercising the veto power, participating as observers in the works of the Assembly of States Parties,[81] or consenting to outreach activities.[82]

48. In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.

49. Having said that, the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 14 and 15 of the Statute. Accordingly, the Chamber turns to the assessment of its jurisdiction in relation to the matter *sub judice.*

VI. THE JURISDICTION OF THE COURT IN RELATION TO DEPORTATION AS A CRIME AGAINST HUMANITY

50. The Chamber underlines that the present proceedings are limited in scope. As correctly stated by the Prosecutor, the issue *sub judice* is "a pure question of law".[83] In more specific terms, the central question before the Chamber is whether the Court may exercise jurisdiction over allegations that members of the Rohingya people from Myanmar (a State not Party to the Statute) were deported to Bangladesh (a State Party to the Statute).[84] This means that, although it has carefully considered the submissions provided in relation to the situation of the Rohingya people in Myanmar and Bangladesh,[85] the Chamber is not called upon to make any findings of fact concerning the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh. The present decision is, thus, without prejudice to any possible decision on the merits of these factual allegations.

51. Turning to the issue *sub judice,* the Chamber considers that it must first determine the scope of article 7(1)(d) of the Statute before it can address the question whether the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute have been satisfied in relation to the aforementioned allegations. These matters will, therefore, be discussed in turn.

1. ARTICLE 7(1)(d) OF THE STATUTE

52. Article 7(1)(d) of the Statute lists "[d]eportation or forcible transfer of population" among the crimes against humanity within the jurisdiction *ratione materiae* of the Court. The question arising from the wording and structure of this provision is whether it embodies either a single crime or two separate crimes.

53. In this regard, the Chamber agrees with the Prosecutor that article 7(1)(d) of the Statute sets forth two separate crimes, namely deportation and forcible transfer.[86] This finding is based on the following reasons.

54. This conclusion arises, in the first place, out of "the ordinary meaning to be given to the terms of" article 7(1)(d) of the Statute.[87] As mentioned above, this provision reads: "[d]eportation or forcible transfer of population". According to the Oxford Dictionary, "or" is "[u]sed to coordinate two (or more) sentence elements between which there is an alternative" and "[t]hings so coordinated may differ in nature [. . .]".[88] This means that the reference to "or" in article 7(1)(d) of the Statute signifies that this provision includes two alternatives, namely two distinct crimes.[89]

55. The Elements of Crimes pertaining to article 7(1)(d) of the Statute support this interpretation. The underlying conduct ("deported or forcibly transferred") and the destination ("another State or location") also contain references to "or". In this manner, the Elements of Crimes link the conduct and the destinations. In more specific terms, "deported" is linked to the destination of "another State", while "forcibly transferred" is linked to the destination of "another [. . .] location" (which specifically entails, *a contrario,* another location within the same State). This means that, provided that all other requirements are met, the displacement of persons lawfully residing in an area

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to another State amounts to deportation, whereas such displacement to a location within the borders of a State must be characterised as forcible transfer.[90] These linkages are, therefore, consistent with an interpretation of article 7(1)(d) of the Statute as including two separate crimes that are distinguished from each other by the destination of the forced displacement.

56. In this regard, the Chamber further considers that footnote 13 to the Elements of Crimes does not affect its interpretation of article 7(1)(d) of the Statute. This footnote specifies that "'[d]eported or forcibly transferred' is interchangeable with 'forcibly displaced'". The Elements of Crimes must, in general, be "consistent with" the Statute.[91] Considering the abovementioned wording of article 7(1)(d) of the Statute, footnote 13 to the Elements of Crimes cannot be interpreted in a manner to modify the interpretation of this article as differentiating between deportation and forcible transfer. This footnote is rather a clarification that, in line with article 7(2)(d) of the Statute, the underlying acts for both crimes concern forced displacement.[92]

57. The Chamber finds, in addition, that the rules of international law concerning deportation and forcible transfer reinforce its interpretation of article 7(1)(d) of the Statute.[93] The prohibition against deportation as a crime against humanity is strongly embedded in international law. This crime has been included in a number of international instruments, including Statutes of international tribunals.[94] Moreover, individuals have been held accountable for this crime by different international courts and tribunals, including the International Military Tribunal sitting at Nuremberg.[95] On the other hand, the prohibition against forcible transfer as a crime against humanity was first expressed following the recognition of deportation as a crime against humanity.[96] What is more, in international law, these crimes are distinguished on the basis of the destination requirement, namely displacement across national borders in the case of deportation and displacement within national borders in the case of forcible transfer.[97] This means that the crimes against humanity of deportation and forcible transfer exist independently from each other in international law. Therefore, also when considered in this light, article 7(1)(d) of the Statute must be interpreted to enshrine two separate crimes.

58. Furthermore, in the view of the Chamber, the object and purpose of the Statute lend additional support to the conclusion that deportation and forcible transfer are separate crimes.[98] The legal interest commonly protected by the crimes of deportation and forcible transfer is the right of individuals to live in their area of residence. However, the legal interest protected by the crime of deportation further extends to the right of individuals to live in the State in which they are lawfully present. Therefore, in order to give effect to these different legal interests, article 7(1)(d) of the Statute must be interpreted to express two separate crimes.

59. Finally, the Chamber notes that its interpretation of article 7(1)(d) of the Statute is consistent with the jurisprudence of the Court.[99] After finding that there were substantial grounds to believe that certain persons had been forcibly displaced without grounds permitted under international law from the areas where they were lawfully present, Pre-Trial Chamber II stated that "[t]he factor of where they 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 is [. . .] to be decided by the Trial Chamber".[100] The finding that the destination requirement distinguishes between deportation and forcible transfer implies that two separate crimes are included in article 7(1)(d) of the Statute.

60. In line with the Chamber's finding that deportation is a separate crime within article 7(1)(d) of the Statute, it follows that the first element of the Elements of Crimes associated with this article requires that "[t]he perpetrator deported [. . .], without grounds permitted under international law, one or more persons to another State [. . .], by expulsion or other coercive acts" (footnotes omitted). In this regard, the Chamber further considers that the requirement of displacement across a border constitutes a specific element of the crime of deportation under article 7(1)(d) of the Statute.[101] The reason is that, as discussed, the destination requirement is essential to article 7(1)(d) of the Statute as it determines the appropriate legal qualification to be assigned to the behaviour criminalised under this provision.

61. Having clarified that article 7(1)(d) of the Statute comprises the crimes of deportation and forcible transfer, the Chamber also considers it appropriate to reiterate the interpretation afforded to the element of "expulsion or other coercive acts" by the Court. As held by Pre-Trial Chamber II, "deportation or forcible transfer of population is an open-conduct crime", meaning that a "perpetrator may commit several different conducts which can amount to

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'expulsion or other coercive acts'".[102] This entails that, in the context of the allegations contained in the Request, various types of conduct may, if established to the relevant threshold, qualify as "expulsion or other coercive acts" for the purposes of the crime against humanity of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.[103]

2. ARTICLE 12(2)(a) OF THE STATUTE

62. Article 12(2)(a) of the Statute provides in the relevant part that, "[i]n the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) [t]he State on the territory of which the conduct in question occurred [. . .]".

63. To date, the application of this provision has generally been uncontroversial in most of the situations and related cases before the Court. The reason is that most of them are geographically limited to the borders of a State Party to the Statute. However, in the present Request, the Prosecutor submits that the reference to "conduct" in article 12(2)(a) of the Statute "means only that 'at least one legal element of an article 5 crime' must occur on the territory of a State Party".[104] Accordingly, the contours of this provision require further specification.[105]

64. In this regard, the Chamber considers that the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.

65. First, this finding is based on a contextual interpretation of article 12(2)(a) of the Statute, which takes relevant rules of international law into account.[106] In this regard, the Chamber observes that public international law permits the exercise of criminal jurisdiction by a State pursuant to the aforementioned approaches.

66. In general, the Permanent Court of International Justice has found that "[t]he territoriality of criminal law [. . .] is not an absolute principle of international law and by no means coincides with territorial sovereignty".[107] More specifically, a number of national jurisdictions have adopted legislation to the effect that the exercise of criminal jurisdiction requires the commission of at least one legal element of the crime on the territory of a State.[108] By the same token, numerous States have adopted legislative frameworks based on the principle that criminal jurisdiction may be asserted if part of a crime takes place on the territory of a State.[109] Such a notion of criminal jurisdiction has also been set forth in different international instruments.[110]

67. In this respect, the Chamber further highlights that Myanmar is party to different international treaties that require it to take measures to establish its jurisdiction over certain offences, *inter alia,* in cases where the alleged offender is present in its territory, irrespective of the location of the commission of the alleged offence or the nationality of the alleged offender.[111] What is more, the penal code of Myanmar provides that "[a]ny person liable, by any law in force in the Union of Burma, to be tried for an offence committed beyond the limits of the Union of Burma shall be death [sic] with according to the provisions of this Code for any act committed beyond the Union of Burma in the same manner as if such act had been committed within the Union of Burma".[112]

68. The Chamber also notes, along similar lines, that the penal code of Bangladesh sets forth that "[e]very person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Bangladesh".[113] In this regard, the Supreme Court of Bangladesh has interpreted the reference to "within Bangladesh" as necessitating merely that part of a crime be committed in Bangladesh.[114] In addition, the penal code of Bangladesh includes certain offences requiring that conduct takes place both within and outside Bangladesh.[115]

69. Second, the Chamber's interpretation of article 12(2)(a) of the Statute finds further support in the object and purpose of the Statute.[116]

70. In general, article 12(2)(a) of the Statute is the outcome of the compromise reached by States at the Rome Conference that allows the Court to assert "jurisdiction over the most serious crimes of concern to the international community as a whole" on the basis of approaches to criminal jurisdiction that are firmly anchored in international

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law and domestic legal systems.[117] Thus, the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute. It follows that a restrictive reading of article 12(2)(a) of the Statute, which would deny the Court's jurisdiction on the basis that one or more elements of a crime within the jurisdiction of the Court or part of such a crime was committed on the territory of a State not Party to the Statute, would not be in keeping with such an object and purpose.

71. In addition, and more specifically, the inherently transboundary nature of the crime of deportation further confirms this interpretation of article 12(2)(a) of the Statute. As discussed, an element of the crime of deportation is forced displacement across international borders, which means that the *conduct* related to this crime necessarily takes place on the territories of at least two States. What is more, the drafters of the Statute did not limit the crime of deportation from one State Party to another State Party. Article 7(2)(d) of the Statute only speaks of displacement from "the area in which they were lawfully present" and the elements of crimes generally refer to deportation to "another State". Therefore, the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, *inter alia,* allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is committed on the territory of a State Party.[118]

72. Accordingly, the Chamber finds that, interpreted in the context of the relevant rules of international law and in the light of the object and purpose of the Statute, the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute.

3. CONCLUSION

73. In the light of the foregoing, the Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. It follows that, in the circumstances identified in the Request, the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold. This conclusion is without prejudice to subsequent findings on jurisdiction at a later stage of the proceedings.

VII. THE JURISDICTION OF THE COURT IN RELATION TO OTHER CRIMES

74. The Chamber considers it appropriate to emphasise that the rationale of its determination as to the Court's jurisdiction in relation to the crime of deportation may apply to other crimes within the jurisdiction of the Court as well. If it were established that at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute. In this regard, the Chamber refers to the following two examples.

75. First, article 7(1)(h) of the Statute identifies, as a crime against humanity within the jurisdiction of the Court, "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph [. . .]". The reference to "any act referred to in this paragraph" signifies that persecution must be "committed in connection with any other crime within the jurisdiction of the Court",[119] which includes the crime against humanity of deportation, provided that such acts are committed pursuant to any of the grounds mentioned in article 7(1)(h) of the Statute.

76. Therefore, if it were established to the applicable threshold that members of the Rohingya people were deported from Myanmar to Bangladesh on any of the grounds enumerated in article 7(1)(h) of the Statute, the Court might also have jurisdiction pursuant to article 12(2)(a) of the Statute over the crime against humanity of persecution, considering that an element or part of this crime (i.e. the cross-border transfer) takes place on the territory of a State Party.[120]

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77. Second, article 7(1)(k) of the Statute stipulates that "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", amount to a crime against humanity within the jurisdiction of the Court. The Chamber notes that, following their deportation, members of the Rohingya people allegedly live in appalling conditions in Bangladesh and that the authorities of Myanmar supposedly impede their return to Myanmar.[121] If these allegations were to be established to the required threshold, preventing the return of members of the Rohingya people falls within article 7(1)(k) of the Statute. Under international human rights law, no one may be arbitrarily deprived of the right to enter one's own country.[122] Such conduct would, thus, be of a character similar to the crime against humanity of persecution, which "means the intentional and severe deprivation of fundamental rights contrary to international law".[123] Furthermore, preventing a person from returning to his or her own country causes "great suffering, or serious injury [. . .] to mental [. . .] health". In this manner, the anguish of persons uprooted from their own homes and forced to leave their country is deepened. It renders the victims' future even more uncertain and compels them to continue living in deplorable conditions.

78. In these circumstances, the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute might be fulfilled as well. This is because an element or part of this crime (i.e. unlawfully compelling the victims to remain outside their own country) takes place on the territory of Bangladesh, a State Party, provided that the allegations are established to the required threshold.

79. Finally, the Chamber considers that, in the event that the Prosecutor requests authorization to commence an investigation pursuant to article 15 of the Statute or initiates an investigation pursuant to another legal basis, it falls within her prerogatives to apply the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute in accordance with the present decision. This is so if it were to be established that at least one element of another crime within the jurisdiction of the Court or part of such crime occured on the territory of a State Party to the Statute.

VIII. FINAL REMARKS

80. The Chamber finds it necessary to make two final remarks with regard to the Prosecutor's preliminary examination.

81. Firstly, the Prosecutor appears to situate her Request in the context of a pre-preliminary examination. She notes in her submissions before the Chamber that her Request "*precedes* any preliminary examination by the Prosecution".[124] "[I]f the Pre-Trial Chamber in its ruling confirms that the Court may in principle exercise jurisdiction under article 12(2)(a), [she] will proceed to consider whether to formally announce the opening of a preliminary examination".[125]

82. The Chamber wishes to highlight that the statutory documents of the Court do not envisage a pre-preliminary examination stage. A plain reading of article 15, in particular paragraphs (1), (2) and (6), in conjunction with rule 48 of the Rules reveals that the preliminary examination is the pre-investigative assessment through which the Prosecutor analyses the seriousness of the information "received" or "made available"[126] to her against the factors set out in article 53(1)(a)-(c) of the Statute.[127] The Chamber notes that the Prosecutor has received 42 individual communications under article 15 of the Statute, which she has – in her submission – already reviewed, together with a number of reports and public information relating to crimes allegedly committed against members of the Rohingya people.[128] In submitting this Request, the Prosecutor has further given consideration to the criterion set out in article 53(1)(a) of the Statute, at least in part. It is the Chamber's view that such steps do not precede a preliminary examination, but are part of it, whether formally announced or not. The language of article 15(6) of the Statute does not leave room for any other interpretation.

83. Secondly, the Prosecutor submits that "if the Court agrees with [her] view of the Court's jurisdiction, then [she] will be able to continue her factual analysis and decide how to proceed [,] [. . .] whether to seek authorisation to open an investigation".[129]

84. The Chamber recalls at this juncture Pre-Trial Chamber III's pronouncement that "the preliminary examination of a situation pursuant to article 53(1) of the Statute and rule 104 of the Rules must be completed within a reasonable time [. . .] regardless of its complexity".[130] If the Prosecutor reaches a positive determination according to

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the "reasonable basis" standard under articles 15(3) and 53(1) of the Statute, she "*shall submit*" to the Chamber a request for authorization of the investigation.[131] As held by this Chamber in a previous composition, "the presumption of article 53(1) of the Statute, as reflected by the use of the word 'shall' in the *chapeau* of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts".[132] It follows that a prolongation of a preliminary examination beyond that point is, in principle, unwarranted.

85. The Chamber recalls that the "reasonable basis" to proceed standard applicable at this stage is the lowest evidentiary standard provided for in the Statute.[133] Therefore, the preliminary examination as such "does not necessitate any complex or detailed process of analysis",[134] and the information available is not expected to be "comprehensive" or "conclusive",[135] particularly taking into account the limited investigative powers at the Prosecutor's disposal,[136] compared to those provided for in article 54 of the Statute at the investigation stage.[137]

86. In addition, an investigation should in general be initiated without delay and be conducted efficiently in order for it to be effective, since "[w]ith the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and thus the prospects that any effective investigation can be undertaken will increasingly diminish".[138] Even Trial Chambers at the Court have noted the profound impact and detrimental effect that the length of time between the occurrence of the crimes and the moment in which evidence is presented at trial can have on the reliability of evidence presented before a Chamber. In particular, with the passage of time, victims "who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account".[139]

87. Lastly, the Chamber recalls the Appeals Chamber's statement in the context of article 21(3) of the Statute that, "the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court".[140] The preliminary examination is no exception to this fundamental principle and this concerns not only its result but also its conduct.

88. This means that the Prosecutor is mandated to respect the internationally recognized human rights of victims with regard to the conduct and result of her preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations, as already established in the jurisprudence of this Court.[141] Moreover, the Chamber notes that the IACtHR has established that "it is necessary to act with special promptness when, owing to the design of the domestic laws, the possibility of filing a civil action for damages depends on the criminal proceeding".[142] Within the Court's legal framework, the victims' rights both to participate in the proceedings and to claim reparations are entirely dependent on the Prosecutor starting an investigation or requesting authorization to do so. The process of reparations is intrinsically linked to criminal proceedings,[143] as established in article 75 of the Statute, and any delay in the start of the investigation is a delay for the victims to be in a position to claim reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court.

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FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS the Request in accordance with Parts IV, VI and VII of the present decision.

Judge Marc Perrin de Brichambaut appends a partially dissenting opinion.

Done in both English and French, the English version being authoritative.

Judge Péter Kovács
Presiding Judge

Judge Marc Perrin de Brichambaut

Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Thursday, 6 September 2018

At The Hague, The Netherlands

ENDNOTES

1 Prosecutor's Request, ICC-RoC46(3)-01/18-1.

2 Prosecutor's Request, ICC-RoC46(3)-01/18-1, paras 1 and 63.

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

4 Pre-Trial Chamber I, 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", 7 May 2018, ICC-RoC(3)-01/18-3.

5 Pre-Trial Chamber I, Order Convening a Status Conference, 11 May 2018, ICC-RoC46(3)-01/18-4. The annex to this Order (ICC-RoC46(3)-01/18-4-Anx) contains a list of questions that the Prosecutor was ordered to address at the status conference.

6 Submission on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ICC-RoC46(3)-01/18-9, with two public annexes ("Global Rights Compliance Submission on Behalf of Alleged Victims"). For the sake of judicial economy, the Chamber will refer to the submissions made on behalf of the alleged victims only to the extent necessary to adjudicate the matter *sub judice*.

7 Observations of the People's Republic of Bangladesh 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)-01/18-14-Conf, with one confidential annex.

8 Information on Victims' Applications Received in relation to the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" notified on 9 April 2018 (ICC-RoC46(3)-01/18-1), ICC-RoC46(3)-01/18-19, with one confidential *ex parte* annex, only available to the Registry ("Information on Victims' Applications").

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9 Pre-Trial Chamber I, Decision on the "Request for Leave to Submit Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules)", 29 May 2018, ICC-RoC46(3)-01/18-7.

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

11 Pre-Trial Chamber I, Decision on the "Joint Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules", 11 June 2018, ICC-RoC46(3)-01/18-15.

12 Pre-Trial Chamber I, Decision on the "Request for Leave to Submit Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)", 14 June 2018, ICC-RoC46(3)-01/18-17.

13 Pre-Trial Chamber I, Decision on the "Request for Leave to Submit Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules)", 14 June 2018, ICC-RoC46(3)-01/18-18.

14 **International Commission of Jurists:** Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules), ICC-RoC46(3)-01/18-20 ("Observations of the International Commission of Jurists"); **Bangladeshi Non-Governmental Representatives:** Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules) on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-21, with three public annexes ("Observations of the Bangladeshi Non-Governmental Representatives"); **Women's Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights** : Joint Observations Pursuant to Rule 103 of the Rules, ICC-RoC46(3)-01/18-22 ("Observations of the Women's Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights"); **Guernica 37 International Justice Chambers**: Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules), ICC-RoC46(3)-01/18-24 ("Observations of Guernica 37 International Justice Chambers"); **Members of the Canadian Partnership for International Justice**: Amicus Curiae Observations on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-25 ("Observations of Members of the Canadian Partnership for International Justice"). The Chamber observes that the members of the Canadian Partnership for International Justice submitted their observations twice: ICC-RoC46(3)-01/18-23 and ICC-RoC46(3)-01/18-25, with one public annex. The Chamber has considered the latter submission for the purposes of the current proceedings. For the sake of judicial economy, the Chamber will refer to the submissions of the *amici curiae* only to the extent necessary to adjudicate the matter *sub judice*.

15 Observations on behalf of victims from Tula Toli, ICC-RoC46(3)-01/18-26 ("Submission on Behalf of Alleged Victims from Tula Toli"). For the sake of judicial economy, the Chamber will refer to the submission made on behalf of the alleged victims only to the extent necessary to adjudicate the matter *sub judice*.

16 Transcript of the status conference, ICC-RoC46(3)-01/18-T-1-Red-ENG. The transcript was made public on 26 July 2018, in redacted form, pursuant to Pre-Trial Chamber I's "Decision on the Reclassification of Certain Documents and Orders", 11 July 2018, ICC-RoC46(3)-01/18-32.

17 Pre-Trial Chamber I, Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar 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", 21 June 2018, ICC-RoC46(3)-01/18-28.

18 Transmission of a *Note Verbale* and a Submission from the People's Republic of Bangladesh, ICC-RoC46(3)-01/18-30-Conf, with two confidential annexes.

19 Registry's Report on the Implementation of the Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar 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" ("Registry Implementation Report"), ICC-RoC46(3)-01/18-31, with three confidential annexes.

20 Registry Implementation Report, para. 4.

21 Pre-Trial Chamber I, Decision on the Reclassification of Certain Documents and Orders, 11 July 2018, ICC-RoC46(3)-01/18-32.

22 Prosecution Response to Observations by Intervening Participants, ICC-RoC46(3)-01/18-33 ("Prosecutor's Response to the *Amici Curiae* and Alleged Victims Submissions").

23 Notice of the Public Statement Issued by the Government of Myanmar, ICC-RoC46(3)-01/18-36, pp. 3-4.

24 Annex II to the Transmission of a *Note Verbale* and a Submission from the People's Republic of Bangladesh, ICC-RoC46(3)-01/18-30-Conf-AnxII, para. 1.

25 Pre-Trial Chamber I, 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", 7 May 2018, ICC-RoC(3)-01/18-3.

26 Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, para. 120; Submission on Behalf of Alleged Victims from Tula Toli, ICC-RoC46(3)-01/18-26, paras 76-87. *See also* Prosecutor's Response to the *Amici Curiae* and Alleged Victims Submissions, ICC-RoC46(3)-01/18-33, paras 15-17.

27 Information on Victims' Applications, ICC-RoC46(3)-01/18-19, paras 10, 13, 17.

28 17 August 2018 Notice, ICC-RoC46(3)-01/18-36, para. 2.

29 17 August 2018 Notice, ICC-RoC46(3)-01/18-36, para. 4.

30 17 August 2018 Notice, ICC-RoC46(3)-01/18-36, para. 1.

31 Prosecutor's Request, ICC-RoC46(3)-01/18-1, paras 3, 51 and 53.

32 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 53.

33 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 54 (emphasis in the original). *See also* Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, paras 4-16.

34 See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), p. 487; W. Schabas, *An Introduction to the International Criminal Court* (2017), p. 275; M. El Zeidy, *The Principle of Complementarity in*

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International Criminal Law: Origin, Development and Practice (2008), pp. 265-266; M. El Zeidy, "Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court", 19 *Leiden Journal of International Law* (2006), p. 745; *conversely see* C. Hall, D. Ntanda Nsereko and M. Ventura, "Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case", in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (2016), pp. 874-875.

35 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 63, *also* paras 1 and 4.

36 In advance of the 20 June 2018 status conference, the Prosecutor submitted to the Chamber a public statement made by the Office of the State Counsellor of Myanmar on 13 April 2018. The statement reads, in the relevant part: "The Government of Myanmar expresses serious concern on the news regarding the application by the International Criminal Court (ICC) Prosecutor to claim jurisdiction over the alleged deportation of the Muslims from Rakhine to Bangladesh. Myanmar is not a party to the Rome Statute. The proposed claim for extension of jurisdiction may very well reap serious consequences and exceed the well enshrined principle that the ICC is a body which operates on behalf of, and with the consent of State Parties which have signed and ratified the Rome Statute. [. . .] Nowhere in the ICC Charter does it say that the Court has jurisdiction over States which have not accepted that jurisdiction [. . .]"; *see* Prosecution Notice of Documents for Use in Status Conference, ICC-RoC46 (3)-01/18-27, Annex E, ICC-RoC46(3)-01/18-27-AnxE. Through her 17 August 2018 Notice, the Prosecutor again brought to the attention of the Chamber that, according to the Government of Myanmar, "the Court has no jurisdiction on Myanmar whatsoever"; *see* Press Release of the Government of Myanmar dated 9 August 2018, referred to by the Prosecutor in her 17 August 2018 Notice, ICC-RoC46(3)-01/18-36, footnote 5. *Conversely see* Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 12. On the definition of a dispute, *see mutatis mutandis:* Permanent Court of International Justice, *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, Series A, No. 2, p. 11: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"; International Court of Justice ("ICJ"), *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, para. 22: "The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties"; *see ibid*. for further references to ICJ jurisprudence.

37 R. S. Clark, "Article 119: Settlement of disputes", in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), p. 2276; M. El Zeidy, "Ad Hoc Declarations of Acceptance of Jurisdiction", in C. Stahn, *The Law and Practice of the International Criminal Court* (2015), pp. 196-197. Article 119(1) of the Statute was reaffirmed by the Assembly of State Parties in its Resolution on the "Activation of the jurisdiction of the Court over the crimes of aggression"; Assembly of State Parties, Resolution ICC-ASP/16/Res.5, 14 December 2017, para. 3.

38 ICJ, *Nottebohm case (Liechtenstein v. Guatemala)* (Preliminary Objections), Judgment of 18 November 1953, [1953] ICJ Rep. 111, p. 119. For earlier pronouncements on this principle, *see* the **Permanent Court of International Justice**, *Interpretation of the Greco-Turkish Agreement on December 1st, 1926 (Final Protocol, Article IV),* Advisory Opinion of 28 August 1928, Series B, No. 16, p. 20: "as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction". In the field of **international arbitration**, *see*: *The Walfish Bay Boundary Case (Germany, Great Britain)*, Award of 23 May 1911, Reports of International Arbitral Awards, vol. XI, p. 263, para. LXVII: "it is a constant doctrine of public international law that the arbitrator has powers to settle questions as to his own competence by interpreting the range of the agreement, submitting to his decision the questions in dispute"; *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, Reports of International Arbitral Awards, vol. VI, p. 131, at pp. 135-136: "Whatever be the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal Tribunal a power, and indeed a duty, to entertain, and in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business [. . .]. In our opinion, this power can only be taken away by a provision framed for that express purpose"; *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Award of 15 December 1933, Reports of International Arbitral Awards, vol. VIII, p. 160, at p. 186: "I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it".

39 ICJ, *Nottebohm case (Liechtenstein v. Guatemala)* (Preliminary Objections), Judgment of 18 November 1953, [1953] ICJ Rep. 111, p. 120. Article 36(6) of the ICJ's Statute reads: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".

40 ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep. 53, p. 68, para. 46.

41 IACtHR, *Constitutional Court v. Peru* (Competence), Judgment of September 24, 1999, para. 31: "The Inter-American Court, as with any court or tribunal, has the inherent authority to determine the scope of its own competence (*compétence de la compétence/Kompetenz-Kompetenz*)"; IACtHR, *Ivcher-Bronstein v. Peru* (Competence), Judgment of September 24, 1999, para. 32; IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits, Reparations and Costs), Judgment of June 21, 2002, para. 17.

42 World Trade Organization, *United States — Anti-Dumping Act of 1916*, Report of the Appellate Body, 28 August 2000, WT/DS136/AB/R and WT/DS162/AB/R, para. 54, footnote 30: "We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it"; World Trade Organization, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, 6 March 2006, WT/DS308/AB/R, para. 45: "WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction".

43 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment,

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3 May 1985, International Law Reports, vol. 114, p. 243, at pp. 251-252, para. 17: "It is neither contestable nor contested that the arbitrators have 'the power to determine their own jurisdiction' (*la compétence de la compétence*), subject only to the check of the *ad hoc* Committee in the case of annulment proceedings provided by the Washington Convention's system"; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award of 22 April 2009, para. 94: "In light of the importance of jurisdiction as a foundation for arbitral decisions and the special competence granted to arbitral tribunals to determine their jurisdiction, the Tribunal considers it important to address, albeit briefly, the question of jurisdiction despite the current agreement between the parties".

44 *See* the Arbitration Commission of the Conference on Yugoslavia (the "Badinter Commission") recalling the ICJ's pronouncement in the *Nottebohm case*, cited in A. Pellet, "L'activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", XXXVIII *Annuaire Français de Droit International* (1992), p. 223.

45 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 18-19; *see*, more broadly, paras 10-22.

46 Special Tribunal for Lebanon, *In the Matter of El Sayed*, Case No. CH/AC/2010/02, Appeals Chamber, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 43; *see*, more broadly, paras 38-43. *See also* Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 13.

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

48 Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 23; *Prosecutor v. William Samoei Ruto et al.*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-1, para. 8; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ("Ruto *et al*. Confirmation of Charges Decision"), 23 January 2012, ICC-01/09-01/11-373, para. 24.

49 Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 11.

50 Prosecutor's Request, ICC-RoC46(3)-01/18-1, paras 4 and 7; Transcript of the status conference, ICC-RoC46(3)-01/18-T-1-Red-ENG, p. 8, line 24 to p. 9, line 1. *See also* Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 10.

51 Annex E to Prosecution Notice of Documents for Use in Status Conference, ICC-RoC46(3)-01/18-27-AnxE and 17 August 2018 Notice, ICC-RoC46(3)-01/18-36.

52 The Chamber notes that Myanmar has taken steps aimed at facilitating repatriation and is mindful of the practical difficulties encountered in their full implementation. *See* the "Arrangement on Return of Displaced Persons from Rakhine State" signed between Myanmar and Bangladesh in November 2017, available at: http://www.theindependentbd.com/assets/images/banner/linked_file/20171125094240.pdf.

On 13 April 2018, Bangladesh concluded a Memorandum of Understanding with the Office of the United Nations High Commissioner for Refugees (the "UNHCR"); UNHCR Press Release, "Bangladesh and UNHCR agree on voluntary returns framework for when refugees decide conditions are right", 13 April 2018, available at: http://www.unhcr.org/news/press/2018/4/5ad061d54/bangladesh-unhcr-agree-voluntary-returns-framework-refugees-decide-conditions.html.

On 6 June 2018, a tripartite Memorandum of Understanding was concluded between Myanmar, the United Nations Development Programme (the "UNDP") and UNHCR, a fact which was also brought to the attention of the Chamber by the Submission on Behalf of Alleged Victims from Tula Toli, ICC-RoC46(3)-01/18-26, para. 57, referring to: Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, Press Release, 6 June 2018, available at: http://www.moi.gov.mm/moi:eng/?q=announcement/7/06/2018/id-13771; and UNDP Press Release, "UNHCR and UNDP sign MOU with Myanmar to support the creation of conditions for the return of refugees from Bangladesh", 6 June 2018, available at: http://www.undp.org/content/undp/en/home/news-centre/news/2018/UNDP-UNHCR-MOU-Myanmar.html; *see* the text of the Memorandum in draft form at: https://progressivevoicemyanmar.org/2018/06/29/memorandum-of-understanding-between-myanmar-government-undp-and-unhcr/. The Chamber observes that article 6 of the tripartite Memorandum provides that "[t]he Status of those displaced persons who decide not to avail themselves of the voluntary repatriation programme that has been established shall continue to be governed by applicable international laws". The Chamber recalls that, as Bangladesh is a State Party to the Statute, the body of "applicable international laws" on the territory of Bangladesh comprises the Statute.

53 Annex E to Prosecution Notice of Documents for Use in Status Conference, ICC-RoC46(3)-01/18-27-AnxE.

54 Annex E to Prosecution Notice of Documents for Use in Status Conference, ICC-RoC46(3)-01/18-27-AnxE. The statement of the Government of Myanmar reads in its entirety as follows:

> "The Government of Myanmar expresses serious concern on the news regarding the application by the International Criminal Court (ICC) Prosecutor to claim jurisdiction over the alleged deportation of the Muslims from Rakhine to Bangladesh.
>
> Myanmar is not a party to the Rome Statute. The proposed claim for extension of jurisdiction may very well reap serious consequences and exceed the well enshrined principle that the ICC is a body which operates on behalf of, and with the consent of State Parties which have signed and ratified the Rome Statute. This consensual approach is underlined throughout the ICC Statute. There is an important principle of law or legal maxim 'Ubi lex voluit, dicit; ubi noluit, tacit' i.e. 'if

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the law means something, it says it; if it does not mean something, it does not say it'. Nowhere in the ICC Charter does it say that the Court has jurisdiction over States which have not accepted that jurisdiction. Furthermore, the 1969 UN Vienna Convention on International Treaties states that no treaty can be imposed on a country that has not ratified it.

The extension of jurisdiction to non-parties may have a reverberating effect to all non-parties in the world and challenges long established legal principles such as legal certainty. What the Prosecutor is attempting to do is to override the principle of national sovereignty and non-interference in the internal affairs of other states, in contrary (*sic*) to the principle enshrined in the UN Charter and recalled in the ICC Charter's Preamble.

Myanmar reiterates that it has not deported any individuals in the areas of concern and in fact has worked hard in collaboration with Bangladesh to repatriate those displaced from their homes. Several bilateral agreements have been signed such as the 'Arrangement on Return of Displaced Persons from Rakhine State' dated 23 November 2017 between the Governments (*sic*) of the Republic of the Union of Myanmar and the Government of the People's Republic of Bangladesh. All requirements for repatriation are in place. Work is proceeding steadily on this front. The Union Minister for Social Welfare, Relief and Resettlement has just visited Bangladesh to meet the displaced persons and brief them on the development, resettlement process, food supply, housing projects, vocational training, easy access to education and healthcare in Rakhine State and that Myanmar is ready for repatriation".

55 *See* 17 August 2018 Notice, ICC-RoC46(3)-01/18-36, footnote 5. The statement of the Government of Myanmar reads more fully as follows:

> "The International Criminal Court ('the Court' or 'ICC') was established through the Rome Statute of the International Criminal Court ('the Rome Statute'). The ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity and war crimes. Myanmar is **not party** to the Rome Statute and the Court has no jurisdiction on Myanmar whatsoever.
>
> Regardless, the ICC's Prosecutor has made a *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* ('the Request') to the ICC and has requested Myanmar to submit its opinion.
>
> Myanmar has declined to engage with the ICC by way of a formal reply due to the reasons stated below.
>
> Bad Faith (*Mala Fides*)
>
> 1. The Request by the Prosecutor may be interpreted as an indirect attempt to acquire jurisdiction over Myanmar which is not a State Party to the Rome Statute.
>
> 2. Myanmar, as a non-State Party, is under no obligation to enter into litigation with the Prosecutor at the ICC or even to accept *notes verbales* emanating from their Registry by reference to article 34 of the Vienna Convention on the Law of Treaties ('Vienna Convention').
>
> 3. The actions of the Prosecutor, constitute an attempt to circumvent the spirit of article 34 of the Vienna Convention. By allowing such a contrived procedure, the ICC may set a dangerous precedent whereby future populistic causes and complaints against non -State Parties to the Rome Statute may be litigated at the urging of biased stakeholders and non-governmental organizations and even then, selectively based on the political current of the times.
>
> 4. The Prosecutor appears to have chosen to ignore the fact that the United Nations Security Council has issued a Presidential Statement stressing the need for transparent investigations of alleged human rights abuses while, at the same time, recognizing Myanmar's sovereignty and territorial integrity. Respect for Myanmar's sovereignty would permit it to continue to investigate all violations of international humanitarian law whether committed by its own forces or by elements hostile to the Government authorities such as the forces of the Arakan Rohingya Salvation Army ('ARSA') [. . .]" (emphasis in the original).

56 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155, p. 331.

57 Article 38 of the Vienna Convention on the Law of Treaties reads: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such".

58 Peremptory norms of international law (*jus cogens*), "objective regimes", collateral agreements, repetition of well-established custom (if the State was not a persistent objector when the custom in legal terms was still in *statu nascendi*), or reappearance/repetition of the State's commitments contracted elsewhere.

59 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174, p. 185. The "vast majority" of States the ICJ referred to ought to be read in context, representing, in 1945, 50 States out of approximately 72. These States were: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, The Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, the Union of South Africa, the Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela and Yugoslavia. The defeated European Axis countries – Bulgaria, Finland, Germany, Hungary and Romania – as well as Japan were of course absent. Some neutral countries were also missing: e.g. Afghanistan, Iceland, Ireland, Portugal, Spain, Sweden and Switzerland. Some countries were under reconstruction from the Axis yoke: Austria, Albania, etc.

60 Preamble of the UN Charter:

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

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to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the *equal rights* of men and women and *of nations large and small*, and

to *establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and *live together in peace* with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, *that armed force shall not be used, save in the common interest*, and

to employ international machinery for the promotion of the economic and social advancement of all peoples [. . .]" (emphasis added).

61 Three main doctrinal approaches can be identified: (i) in favour of the objective legal personality of the ICC, either *expressis verbis* or *per analogiam* to the objective legal personality of international organizations in general; (ii) against the objective legal personality of the ICC; and (iii) the question should be decided only according to the practice of the ICC and States, especially the practice in the relationship between the ICC and non-States Parties.

For the first approach, *see for example* A. Pellet: "Le droit international à l'aube du XXIème siècle (La société internationale contemporaine – Permanences et tendances nouvelles)", cours fondamental in *Cours Euro-méditerranéens Bancaja de droit international* (1997), vol. I, available at: http://pellet.actu.com/wp-content/uploads/2015/11/PELLET-1997-Cours-Bancaja.pdf, p. 78; A. Pellet, "Entry into Force and Amendment", in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court* (2002), vol. I, p. 147; A. Pellet, "Le projet de Statut de Cour Criminelle Internationale Permanente – Vers la fin de l'impunité?", in H. Gros Espiell, *Amicorum liber: Persona humana y derecho internacional / Personne humaine et droit international / Human Person and International Law* (1997), vol. II, available at: http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-1997-Le-projet-de-statut-de-cour-criminelle-internationale-permanente-vers-la-fin-de-limpunité.pdf, pp. 1080-1081 and 1082-1083; J. Crawford, *Change, Order, Change: The Course of International Law: General Course on Public International Law* (2014) § 247-248, pp. 201-202; G. M. Danilenko, "The ICC Statute and Third States", in A. Cassese, P. Gaeta, J. Jones (eds), *The Rome Statute of the International Criminal Court* (2002), vol. II, p. 1873; G. M. Danilenko, "The Statute of the International Criminal Court and Third States", 21 *Michigan Journal of International Law* (2000), pp. 450-451, available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1390&context=mjil; K. S. Gallant, "The International Criminal Court in the System of States and International Organizations", 16 *Leiden Journal of International Law* (2003), p. 557; R. Cryer, "The International Criminal Court and its Relationship to Non-States Parties", in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 261; D. F. Orentlicher, "Politics by Other Means: The Law of the International Criminal Court", 32 *Cornell International Law Journal* (1999), p. 490; S. Rolf Lüder, "The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice", 84 *Revue Internationale de la Croix Rouge*, no. 845 (March 2002), available at: https://www.icrc.org/eng/assets/files/other/079-092_luder.pdf, pp. 82 and 91; W. M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century, Constitutive Process and Individual Commitment* (2012), p. 226: "[. . .] the Statute of the International Criminal Court represented a *collective decision by the member States of the United Nations against* a universal jurisdiction for national courts, reposing contingent criminal jurisdiction in an international jurisdiction" (emphasis added); A. Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (2012) p. 155; A. Boyle and C. Chinkin, *The Making of International Law* (2007) pp. 240-241.

For the second approach, *see for example* W. Rückert, "Article 4", in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), p. 105; G. Cahin, "Article 4", in J. Fernandez and X. Pacreau (eds), *Statut de Rome de la Cour pénale internationale* (2012), pp. 356 and 358-359; O. Svaček, "Review of the International Criminal Court's Case-Law 2013", 13 *International and Comparative Law Review* (2013), available at: https://www.degruyter.com/downloadpdf/j/iclr.2013.13.issue-2/iclr-2016-0068/iclr-2016-0068.pdf, p. 10.

For the third approach, *see for example* V. Engström, "Article 4(2)", Case Matrix Network, Commentary on the Rome Statute of the International Criminal Court, available at: https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-1/#c1176; F. Martines, "Legal Status and Powers of the Court", in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court* (2002), vol. I, pp. 207, 210-211 and 216; E. David, "La Cour pénale internationale", 313 RCADI (2005), pp. 359, 364 and 368.

62 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS vol. 78, p. 277, article VI: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

63 On the living relationship between the Statute and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as well as between the Court and the "international penal tribunal" envisaged by said Convention, *see further* (albeit in the context of possible exceptions from head of state immunity), Minority Opinion of Judge Marc Perrin de Brichambaut to Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302-Anx, paras 10-18, and in particular paras 11-13.

64 President William J. Clinton's Statement on the Rome Treaty on the International Criminal Court, 31 December 2000: "The

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United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000, deadline established in the treaty. *We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.* [. . .]" (emphasis added), available at: http://www.presidency.ucsb.edu/ws/?pid=64170. *See further,* United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en. On the US policy *vis-à-vis* the ICC *see especially*: D. J. Scheffer, "Staying the Course with the International Criminal Court", 35 *Cornell International Law Journal*, pp. 47-100, available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1497&context=cilj.

65 See Israel's Declaration upon signature, United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en: "*Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the Rome Statute, the Government of the State of Israel is proud to thus express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity.*

As one of the originators of the concept of an International Criminal Court, Israel, through its prominent lawyers and statesmen, has, since the early 1950's, actively participated in all stages of the formation of such a court. [. . .]

Today, [the Government of Israel is] honoured to express [its] sincere hopes that the Court, guided by the cardinal judicial principles of objectivity and universality, will indeed serve its noble and meritorious objectives" (emphasis in the original).

66 In a communication received on 28 August 2002, the Government of Israel informed the Secretary-General of the following: "[. . .] in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [. . .] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty", available at: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-10&chapter=18&lang=en#4.

67 Statement by the Russian Foreign Ministry, 16 November 2016: "On November 16, the President of the Russian Federation signed the Decree 'On the intention not to become a party to the Rome Statute of the International Criminal Court'. The notification will be delivered to the Depository shortly. Russia has been consistently advocating prosecuting those responsible for the most serious international crimes. Our country was at the origins of the Nuremberg and Tokyo tribunals, participated in the development of the basic documents on the fight against genocide, crimes against humanity and war crimes. These were the reasons why Russia voted for the adoption of the Rome Statute and signed it on September 13, 2000", available at: http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566. *See further,* United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en: "In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the following: I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000".

68 Ministry of Foreign Affairs of the People's Republic of China, China and the International Criminal Court, 28 October 2003: "[. . .] The Chinese Government consistently understands and supports the establishment of an independent, impartial, effective and universal international criminal Court. If the operation of the court can really make the individuals who perpetrate the gravest crimes receive due punishment, this will not only help people to establish confidence in the international community, but also will be conducive to international peace and security at long last", available at: http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tyfl_665264/2626_665266/2627_665268/t15473.shtml.

69 Statement by Mr. Dilip Lahiri, Additional Secretary (UU) Ministry of External Affairs, Head of the Indian Delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, available at: https://www.legal-tools.org/uploads/tx_ltpdb/doc27815.pdf: "Mr. President, the Conference must address all these matters of substance which are critical to the establishment of the International Criminal Court. A purist approach reflecting a particular group position alone would not be adequate. The international community does not have to repeat the past mistakes as seen in the attempts to pursue narrow national agendas on human rights matters in various UN human rights fora. Instead, the best way to find solutions to these problems lies in recognising genuine diversity, and striving for a broad based Statute capable of wide acceptance and participation by States. Despite the odds, this is a course worth pursuing for all those committed to the basic objectives of establishing an universal international criminal court. My delegation assures you of our support in such an endeavour". *See also* an article by Mr. Lahiri, written in 2010 already in a personal capacity and examining the pros and cons of an eventual change in India's policy towards the ICC where he is advocating for a signature; D. Lahiri, "Should India continue to stay out of ICC?", available at: https://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc/.

70 Statement by H.E.M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, 17 June 1998, available at: https://www.legal-tools.org/doc/036269/pdf/: "*We all want to see the establishment of an independent judicial body* free from the influence and interference of political organs. [. . .] In conclusion, *my delegation hopes that we will all witness, in the near future, the establishment of an independent and impartial international criminal court*, which could exercise justice in international community and help realize the aspirations of the human society; a Court that contributes to eliminate and deter acts of cruelty and inhumanity throughout the globe, and thus paves the way for a more humane world order in which peace and justice compliment each other" (emphasis added).

71 These items concerned mostly the envisaged role of the Security Council and the independence and objectivity of the

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Prosecutor in the selection of cases; Statement by H.E.M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, 17 June 1998, available at: https://www.legal-tools.org/doc/036269/pdf/. For an analysis of this statement, as well as the previous and subsequent events and experts' discussions on the question of the compatibility of the Statute with the Iranian legal system, *see* H. Abtahi, "The Islamic Republic of Iran and the ICC", 3 *Journal of International Criminal Justice* (2005), pp. 635-648, available at: https://academic.oup.com/jicj/article- pdf/3/3/635/9615321/mqi050.pdf.

72 Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties, 8 December 2017: "The United States strongly supports justice and accountability for war crimes, crimes against humanity, and genocide, including through support of domestic accountability efforts. We appreciate the efforts of the ICC and the Parties to the Rome Statute to pursue these objectives. At the same time, recent developments in connection with a request by the Office of the Prosecutor to open an investigation into the situation in Afghanistan raise serious and fundamental concerns that we wish to register today [. . .]", available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16- USA.pdf.

73 Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the States Parties to the Rome Statue of the ICC, Mr. Ma Xinmin, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (New York, 7 December 2017): "[. . .] China has always supported law-based efforts to fight against and punish grave crimes that threaten international peace and security and we expect that the International Criminal Court plays a constructive role in this regard [. . .]", available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-CHI.pdf.

74 Article 2 of the Statute on the "Relationship of the Court with the United Nations" reads: "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf". *See also*, in particular, the preamble and articles 7, 15, 17 and 18 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

75 Preamble of the Statute:

"The States Parties to this Statute,

Conscious that *all peoples are united by common bonds, their cultures pieced together in a shared heritage*, and concerned that this delicate mosaic may be shattered at any time,

Mindful that *during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that *the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*,

Determined *to put an end to impunity for the perpetrators of these crimes* and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that *nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State*,

Determined to these ends and for the sake of present and future generations*, to establish an independent permanent International Criminal Court in relationship with the United Nations system*, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice, Have agreed as follows:" (emphasis added).

76 As of 2018, Myanmar for example is bound as a contracting party by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions, UNTS vol. 75, pp. 31, 85, 135 and 287; the 1989 Convention on the Rights of the Child, UNTS vol. 1577, p. 3; and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography of 25 May 2000, UNTS vol. 2171, p. 227; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, UNTS vol. 1015, p. 163; the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, UNTS vol. 1975, p. 45; and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNTS vol. 249, p. 215.

77 On the importance of the distinction, *see for example* ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Germany/The Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3.

78 Interview with Fatou Bensouda, Chief Prosecutor of the International Criminal Court (ICC), "We Should at All Costs Prevent the ICC from Being Politicized", 62(1) *VEREINTE NATIONEN – German Review on the United Nations* (2014), available at https://www.dgvn.de/fileadmin/user_upload/DOKUMENTE/English_Documents/Interview_Fatou_B ensouda.pdf, pp. 6-7:

"- How is your cooperation with non-states parties?

- We have received assistance from non-States Parties in many instances. I can give you the example of Bosco Ntaganda. He was indicted by the Court in 2006 for, amongst other things, recruiting child soldiers. In March 2013, he decided to walk into the American Embassy in Kigali (Rwanda) and requested to be transferred to the ICC. Neither Rwanda nor the US is a State Party to the Court. [. . .]

Another example is Russia. We have a preliminary examination on-going in Georgia, in the wake of the August 2008 armed conflict in South Ossetia. Georgia, which is a State Party, has given us documents; we have also visited the country on several occasions. But Russia, a non-State Party, has also sent more than 3000 documents to the Office. This

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shows that being a non-State Party does not necessarily preclude you from working with the Court".

See also Ms. Fatou Bensouda, Speech at the African Leadership Centre's Simulation Seminar:

"A Season of Changes in Africa: Is Africa's Voice Getting Louder?", African Leadership Centre Keynote, 22 February 2012, available at: http://www.africanleadershipcentre.org/attachments/article/174/ALC%20Keynote%201%20-%20Ms%20Fatou%20Bensuda.pdf, p. 7: "In our Libya situation, we have received very good cooperation from the Libyan authorities, and we visited Tripoli at the end of last year".

79 Fatou Bensouda (then Deputy Prosecutor), "Africa and the International Criminal Court", 31 May 2007, Pretoria, South Africa, available at: http://www.africalegalaid.com/download/afla_lecture_series/Africa_and_the_International_Criminal_Court_ICC.pdf, p. 5: "One of the militia commanders – Raska Lukwiya – was killed in a confrontation with the Ugandan army. At the request of the Government of Uganda, forensic experts from the Office of the Prosecutor helped to identify his body. While the four remaining LRA commanders are still at large, the Court has made a significant impact on the ground. This case shows how arrest warrants issued by the Court can contribute to the prevention of atrocious crimes.

The Court's intervention has galvanized the activities of the states concerned. Uganda and the DRC, parties to the Rome Statute and legally bound to execute the arrest warrants, have expressed their willingness to do so. *The Sudan, a non-State Party, has voluntarily agreed to enforce the warrants*" (emphasis added).

80 UN Press Release, "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters", 26 February 2011, New York, available at https://www.un.org/press/en/2011/sc10187.doc.htm: "VITALY CHURKIN (Russian Federation) said he supported the resolution because of his country's deep concern over the situation, its sorrow over the lives lost and its condemnation of the Libyan Government's actions. He opposed counterproductive interventions, but he said that the purpose of the resolution was to end the violence and to preserve the united sovereign State of Libya with its territorial integrity. Security for foreign citizens, including Russian citizens, must be ensured.

LI BAODONG (China) said that China was very much concerned about the situation in Libya. The greatest urgency was to cease the violence, to end the bloodshed and civilian casualties, and to resolve the crisis through peaceful means, such as dialogue. The safety and interest of the foreign nationals in Libya must be assured. Taking into account the special circumstances in Libya, the Chinese delegation had voted in favour of the resolution [. . .].

Noting that five Council members were not parties to the Rome Statute that set up the International Criminal Court, including India, that country's representative said he would have preferred a 'calibrated approach' to the issue. However, he was convinced that the referral would help to bring about the end of violence and he heeded the call of the Secretary-General on the issue, while stressing the importance of the provisions in the resolution regarding non-States parties to the Statute".

81 The delegation of United States actively participated as an observer State at the Kampala Review Conference in 2010; *see* Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010, Official Records, RC/11, pp. 3-4, para. 4 and p. 126, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf.

82 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the Office's visit to Israel and Palestine from 5 to 10 October 2016, 5 October 2016, available at https://www.legal-tools.org/doc/449145/pdf/: "As part of its commitment to promote a better understanding of the work of the Office of the Prosecutor (the 'Office') of the International Criminal Court ('ICC'), a delegation from the Office will visit Israel and Palestine from 5 to 10 October 2016.

The purpose of this visit will be to undertake outreach and education activities with a view to raising awareness about the ICC and in particular, about the work of the Office; to address any misperceptions about the ICC and to explain the preliminary examination process. *Such visits are standard practice, even in countries that are not State Parties to the Rome Statute*. In accordance with its usual practice at this stage of its work, the delegation will not engage in evidence collection in relation to any alleged crimes; neither will the delegation undertake site visits, or assess the adequacy of the respective legal systems to deal with crimes that fall within ICC jurisdiction.

The delegation is scheduled to travel to Tel Aviv, Jerusalem and Ramallah and will hold meetings with Israeli and Palestinian officials at the working levels. The delegation will also participate in two events at academic institutions and engage in television and newspaper interviews in both Israel and Palestine. In addition, the delegation will hold a courtesy meeting with United Nations agencies under the auspices of the United Nations Special Coordinator for the Middle East Peace Process ('UNSCO'). Given the limited duration of the visit, the delegation will not engage in unscheduled events or meetings.

The Office is grateful to both the Israeli and Palestinian authorities for facilitating the visit and to UNSCO for providing logistical support. [. . .]" (emphasis added).

83 Transcript of the status conference, ICC-RoC46(3)-01/18-T-1-Red-ENG, p. 8, line 21 and p. 9, lines 3-5.

84 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 4.

85 Prosecutor's Request, ICC-RoC46(3)-01/18-1, paras 7-11. *See also* Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, paras 11-33; Submission on Behalf of Alleged Victims from Tula Toli, ICC-RoC46(3)-01/18-26, paras 15-57; Observations of the Bangladeshi Non-Governmental Representatives, ICC-RoC46(3)-01/18-21, paras 7-20; Observations of the Women's Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights, ICC-RoC46(3)-01/18-22, paras 7-11; Observations of Guernica 37 International Justice Chambers, ICC-RoC46(3)-01/18-24, paras 2.1-2.41.

86 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 13. *See also* Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, paras 36-46; Observations of Guernica 37 International Justice Chambers, ICC-RoC46(3)-01/18-24, paras 4.4-4.11; Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 32; Prosecutor's Response to the *Amici Curiae* and Alleged Victims Submissions, ICC-RoC46(3)-01/18-33, paras 20-34.

87 Article 31(1) of the Vienna Convention on the Law of Treaties; Prosecutor's Re qu est, ICC-RoC46(3)-01/18-1, para. 22. *See*

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also Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, para. 10.

88 Oxford English Dictionary, 'Or', available at http://www.oed.com/view/Entry/132129.

89 *See also* Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute ("Lubanga Article 74 Judgment"), 14 March 2012, ICC-01/04-01/06-2842, para. 609.

90 *See also* Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, para. 39; Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, paras 19-21; Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 44.

91 Article 9(3) of the Statute.

92 *See also* global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, para. 36.

93 Article 31(3)(c) of the Vienna Convention on the Law of Treaties; Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 15. *See also* Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, paras 6-8; Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, paras 42, 45-46.

94 *See for example* article 6(c) of the Charter of the International Military Tribunal (Nuremberg) (notably, the crime of deportation contained in this Charter was not only included in the provision concerning crimes against humanity, but also the war crimes provision, which reads as follows: "deportation to slave labor or for any other purpose of civilian population of or in occupied territory" (article 6(b) of this Charter); article 5(c) of the Charter of the International Military Tribunal for the Far East (Tokyo); article II(1)(c) of Control Council Law No. 10; principle VI(c) of the ILC Principles of International Law Recognised in the Charter of the Nuremberg Tribunal; article 2(11) of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind; article 5(d) of the Statute of the ICTY, article 3(d) of the Statute of the ICTR; article 18(g) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind. *See also* article 2(d) of the Statute of the Special Court for Sierra Leone; article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia; article 13(d) of the Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office.

95 *See for example* Judgment of the International Military Tribunal (Nuremberg), Vol I (1947), pp. 227, 244, 297, 329, 319.

96 *See for example* article 18(g) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind.

97 *See for example* 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, Commentary, p. 49; ICTY, *Prosecutor v. Milomir Stakić,* Case No. IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006, para. 300; ICTY, *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-A, Appeals Chamber, Judgement, 17 March 2009, para. 304.

98 Article 31(1) of the Vienna Convention on the Law of Treaties; Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 17. *See also* Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, paras 42, 46; Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, paras 27-40; Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 47.

99 Article 21(2) of the Statute; Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 26. *See also* Observations of the Women's Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights, ICC-RoC46(3)-01/18-22, paras 29-35.

100 Ruto *et al.* Confirmation of Charges Decision, para. 268.

101 The Chamber considers that, for the purposes of the present decision, it is not necessary to discuss the nature of the border, since the Prosecutor's Request alleges that members of the Rohingya people were deported across the *de jure* border between Myanmar and Bangladesh.

102 Ruto *et al.* Confirmation of Charges Decision, para. 244.

103 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 9. *See also* Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, para. 15; Observations of the Bangladeshi Non-Governmental Representatives, ICC-RoC46(3)-01/18-21, paras 9-20; Observations of the Women's Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights, ICC-RoC46(3)-01/18-22, paras 13-19.

104 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 28. *See also* Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, paras 47-58; Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, paras 51-56, 73-83; Observations of the Bangladeshi Non-Governmental Representatives, ICC-RoC46(3)-01/18-21, para. 21; Observations of Guernica 37 International Justice Chambers, ICC-RoC46(3)-01/18-24, paras 4.16-4.45; Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, paras 18-31; Prosecutor's Response to the *Amici Curiae* and Alleged Victims Submissions, ICC-RoC46(3)-01/18-33, paras 41-46.

105 The Chamber also notes that, in the context of the negotiations concerning the crime of aggression, certain delegates expressed the view that the interpretation of article 12(2)(a) of the Statute "was best left to be determined by the Court". *See* Assembly of States Parties, Report of the Special Working Group on the Crime of Aggression, 20 February 2009, ICC-ASP/7/SWGCA/2, para. 39.

106 Article 31(3)(c) of the Vienna Convention on the Law of Treaties. *See also* Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 19.

107 Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, Series A. No. 70, Judgment, 7 September 1927, p. 20.

108 *See for example* **Argentina**: article 1(1) of the Codigo Penal de la Nacion, as published on 29 October 1921, last amended on 1 February 2018 ("*Por delitos cometidos o cuyos efectos deban producirse en el territorio de la Nación Argentina, o en los lugares sometidos a su jurisdicción*"); **Australia**: section 14.1, paragraph 2(b) of the Criminal Code Act, as published on 15 March 1995, last amended on 13 December 2017 ("If this section applies to a particular offence, a person does not commit the offence unless: [. . .] (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs: (i) wholly or partly in Australia"); **China**: article 6(3) of the Criminal Law of the People's Republic of China ("PRC"), as published on 1 July 1979, last amended on 14 March 1997 ("When either the act or consequence of a crime takes place within the PRC territory, a

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crime is deemed to have been committed within the PRC territory"); **Colombia**: article 14 of the Codigo Penal, as published on 24 July 2000 ("[. . .] *La conducta punible se considera realizada: [. . .] (3) En el lugar donde se produjo o debió producirse el resultado*"); **Czech Republic**: section 4(2)(b) of the Criminal Code, as published on 8 January 2009 ("A criminal offence shall be considered as committed in the territory of the Czech Republic [. . .] (b) if an offender violated or endangered an interest protected by criminal law or if such a consequence was supposed to occur, even partially, within the territory, even though the act was committed abroad"); **Egypt**: Court of Cassation, Appeal No. 109 Judicial Year 57, 1/4/1987 Year No. 38, p. 530; also Appeal No. 23201 Judicial Year 63 3/10 /1995 Year No. 46, p. 1055; **Estonia**: section 11 of the Criminal Code, as passed on 6 June 2001 ("An act is deemed to be committed at the place where: [. . .] (3) the consequence which constitutes a necessary element of the offence occurred"); **Georgia**: article 4(2), first sentence, of the Criminal Code ("A crime shall be considered to have been committed in the territory of Georgia if it began, continued and terminated or ended in the territory of Georgia"); **Germany**: section 9(1) of the Criminal Code, as published on 13 November 1998, last amended on 31 October 2017 ("An offence is deemed to have been committed in every place where the offender acted or, in the case of an omission, should have acted, or in which the result if it is an element of the offence occurs or should have occurred according to the intention of the offender"); **New Zealand**: section 7 of the Crimes Act 1961, as published on 1 November 1961, last amended on 28 September 2017 ("For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event"); **Romania**: article 8(4) of the Criminal Code, as published on 12 November 2012 ("The offense is also considered as having been committed on the territory of Romania when on that territory [. . .] an action was committed with a view to perform, instigate or aid in the offense, or the results of the offense have been manifest, even if only in part"); **Switzerland**: article 8(1) of the Criminal Code of the Swiss Confederation, as published on 21 December 1937, last amended on 1 January 2017 ("A felony or misdemeanour is considered to be committed at the place where the person concerned commits it or unlawfully omits to act, and at the place where the offence has taken effect"). *See also* article 2 of the 1931 Projet de l'Institut de Droit International ("*Une infraction peut être considerée comme ayant été commise sur le territoire d'un Etat aussi bien lorsqu'un acte (de commission ou d'omission) qui la constitue y a été (ou tenté), que lorsque le résultat s'y est produit (ou devait s'y produire)*").

109 *See for example* **Afghanistan**: article 15(1) of the Criminal Code of 1976 ("Provisions of this Law are also applicable to the following persons: 1. Any person who commite [*sic*] an act outside Afghanistan as a result of which he is considered the performer of or accomplice in a crime which has taken place in whole or in part in Afghanistan"); **Australia**: section 14.1, paragraph 2(a) of the Criminal Code Act, as published on 15 March 1995, last amended on 13 December 2017 ("If this section applies to a particular offence, a person does not commit the offence unless: (a) the conduct constituting the alleged offence occurs: (i) wholly or partly in Australia"); **Colombia**: article 14 of the Codigo Penal, as published on 24 July 2000 ("[. . .] *La conducta punible se considera realizada: (1) En el lugar donde se desarrolló total o parcialmente la acción*"); **Czech Republic**: section 4(2)(a) of the Criminal Code, as published on 8 January 2009 ("A criminal offence shall be considered as committed in the territory of the Czech Republic (a) if an offender committed the act here, either entirely or in part, even though the violation or endangering of an interest protected by the criminal law occurred or was supposed to occur, either entirely or in part abroad"); **Tanzania**: section 7 of the Criminal Code of 1945, last amended 1991 ("When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction"); **Timor-Leste**: article 6 of the Criminal Code, as approved on 18 March 2009 ("An act is considered to have been committed in the place where, by any means, the action or omission occurred, wholly or in part, as well in wherever the typical result has or should have been caused").

110 *See for example* article 3 of the 1935 Codification of International Law: Draft Convention on Jurisdiction with Respect to Crime ("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 [. . .]"); Council of Europe, European Committee on Crime Problems, "Extraterritorial Criminal Jurisdiction" (1990), p. 8 ("*Dans de nombreux Etats membres, mais pas dans tous, afin de permettre, l'exercise de la compétence conformément au principe de territorialité, on determine le lieu de l'infraction en s'appuyant sur ce qu'on appelle la doctrine de l'ubiquité; selon celle-ci, une infraction tout entière peut être considérée comme ayant été commise à l'endroit où une partie de celle-ci l'a été*") ; article 7(1) of the European Convention on Extradition, 13 December 1957, UNTS vol. 359, p. 273 ("The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory"); article 4(f) of the Model Treaty on Extradition, annexed to the United Nations ("UN") General Assembly Resolution 45/116, 14 December 1990, UN Doc. A/RES/45/116 ("Extradition may be refused in any of the following circumstances: [. . .] If the offense is regarded under the law of the requested State as having been committed in whole or in part within that State"); article 4(1) of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, UNTS vol. 2802, p. 225 ("Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory"); article 17(1)(a) of the Criminal Law Convention on Corruption, 27 January 1999, UNTS vol. 2216, p. 225 ("Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with Articles 2 to 14 of this Convention where: a the offence is committed in whole or in part in its territory"); article 13(1)(a) of the African Union Convention on Preventing and Combating Corruption, 11 July 2003, UNTS vol. 2860, p. 113 ("Each State Party has jurisdiction over acts of corruption an related offences when: (a) the breach is committed wholly or partially inside its territory [. . .]"); article 17(1)(a) of the Directive 2011/92/EU of the European Parliament and of the Council, 13 December

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2011 ("Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where: (a) the offence is committed in whole or in part within their territory [. . .]"); article 19(1) (a) of the Directive (EU) 2017/541 of the European Parliament and of the Council, 15 March 2017 ("Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 12 and 14 where: (a) the offence is committed in whole or in part in its territory [. . .]").

111 While the matters regulated by such treaties do not currently fall within the jurisdiction of the Court, the following are examples of such treaties: the International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UNTS vol. 2149, p. 256 (article 6(4) of this Convention provides that: "[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article"); the International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UNTS vol. 2178, p. 197 (article 7(4) of this Convention provides that: "[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, UNTC vol. 1582, p. 95 (article 4(2) of this Convention provides that: "[e]ach Party : (a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground: (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or (ii) That the offence has been committed by one of its nationals; (b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party").

112 Chapter I, Introduction, paragraph 3 of the Penal Code of the Union of Myanmar of 1861. In addition, this Code provides that "[a] person abets an offence within the meaning of this Code who, in the Union of Burma, abets the commission of any act without and beyond the Union of Burma which would constitute an offence if committed in the Union of Burma". *See* Chapter V, paragraph 118(a) of the Penal Code of the Union of Myanmar of 1861. This Code further stipulates that "[w]hoever, being a citizen of the Union of Burma or ordinarily resident within the Union, commits High Treason outside the Union shall be punished with death or transportation for life. *See* Chapter VI, paragraph 122(a) of the Penal Code of the Union of Myanmar of 1861.

113 Article 2 of the Penal Code of Bangladesh (Act No. XLV) of 1860.

114 *Abdus Sattar v. State*, 50 DLR (AD) 1998, p. 187.

115 *See for example* Articles 360 ("[k]idnapping from Bangladesh") and 366B ("[i]mportation of girl from foreign country") of the Penal Code of Bangladesh (Act No. XLV) of 1860.

116 Article 31(1) of the Vienna Convention on the Law of Treaties.

117 *See* H.-P. Kaul, "Preconditions to Exercise of Jurisdiction", in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, p. 607; S. Williams, "Article 12", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), MN 14.

118 *See also* Global Rights Compliance Submission on Behalf of Alleged Victims, ICC-RoC46(3)-01/18-9, para. 49

119 Pre-Trial Chamber III, *Situation in the Republic of Burundi*, Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017 ("Burundi Article 15 Decision"), 9 November 2017, ICC-01/17-9-Red, para. 131.

120 *See also* Observations of the International Commission of Jurists, ICC-RoC46(3)-01/18-20, paras 25-26; Observations of the Bangladeshi Non-Governmental Representatives, ICC-RoC46(3)-01/18-21, paras 54-82.

121 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 11. The Chamber is mindful of the repatriation agreement concluded between Myanmar and Bangladesh and the Memoranda of Understanding concluded by both States with the UNDP and/or UNHCR and the existing difficulties in their implementation; s*ee* footnote 52 above.

122 Article 12(4) of the International Covenant on Civil and Political Rights, 16 December 1966, UNTS vol. 999, p. 171; article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS vol. 660, p. 195; article 2(c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, UNTS vol. 1015, p. 243.

123 Article 7(2)(g) of the Statute.

124 Prosecutor's Response to the *Amici Curiae* and Alleged Victims Submissions, ICC-RoC46(3)-01/18-33, para. 7, footnote 10 (emphasis in the original).

125 Prosecutor's Response to the *Amici Curiae* and Alleged Victims Submissions, ICC-RoC46(3)-01/18-33, para. 37.

126 In the terms of articles 15(2) and 53(1) of the Statute and rule 104(1) of the Rules.

127 *See also* Pre-Trial Chamber II, *Request under Regulation 46 (3) of the Regulations of the Court*, Decision on the "Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014 ", 12 September 2014, ICC-RoC46(3)-01/14-3, para. 6.

128 Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 7.

129 Transcript of the status conference, ICC-RoC46(3)-01/18-T-1-Red-ENG, p. 9, lines 14-17.

130 Pre-Trial Chamber III, *Situation in the Central African Republic*, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6, p. 4.

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131 Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ("Kenya Article 15 Decision"), 31 March 2010, ICC-01/09-19-Corr, para. 20 (emphasis added).

132 Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia,* Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation ("Comoros Article 53 Decision"), 16 July 2015, ICC-01/13-34, para. 13.

133 Kenya Article 15 Decision, para. 34; Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire*, 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 ("Côte d'Ivoire Article 15 Decision"), 3 October 2011, ICC-02/11-14-Corr, para. 24; Burundi Article 15 Decision, para. 30.

134 Comoros Article 53 Decision, para. 13.

135 Kenya Article 15 Decision, para. 27; Côted'I voire Article 15 Decision, para. 24; Pre-Trial Chamber I, *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 25; Burundi Article 15 Decision, para. 30.

136 For the need to use rule 47 of the Rules to preserve evidence at the preliminary examination stage, *see* Burundi Article 15 Decision, para. 15.

137 Kenya Article 15 Decision, para. 32; Comoros Article 53 Decision, para. 13.

138 European Court of Human Rights ("ECtHR"), *Varnava and others v. Turkey*, Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment (Grand Chamber), 18 September 2009, para. 161; ECtHR, *Palić v. Bosnia and Herzegovina*, Application No. 4704/04, Judgment, 15 February 2011, para. 49; ECtHR, *Gürtekin and others v. Cyprus*, Applications Nos. 60441/13, 68206/13 and 68667/13, Decision, 11 March 2014, para. 22.

139 Lubanga Article 74 Judgment, para. 103. *See also* Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 83.

140 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA4), para. 37.

141 Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, ICC-01/09-24, para. 5; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, paras 31-44.

142 IACtHR, *Gonzales Lluy et al. v. Ecuador*, Series C No. 298, Judgment, 1 September 2015, para. 312; IACtHR, *Suárez Peralta v. Ecuador*, Series C No. 261, Judgment, 21 May 2013, para. 102.

143 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to repatriations" of 7 August 2012, 3 March 2015, ICC-01/04-01/06-3129 (A A2 A3), para. 65.

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PARTIALLY DISSENTING OPINION OF JUDGE MARC PERRIN DE BRICHAMBAUT

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I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. Interpreting article 19(3) of the Statute in a manner that allows it to be applied at the "pre-preliminary examination" stage may open the door for the Prosecutor to put to the Pre-Trial Chamber hypothetical or abstract questions of jurisdiction that do not arise from a concrete case or even a situation. It might also allow the Prosecutor to circumvent the procedures otherwise applicable, delay her decision-making, or even shift the burden of assembling a case onto the Pre-Trial Chamber. Such prosecutorial attempts would not only be inappropriate, but also inconsistent with the four-phase procedure for preliminary examinations that the Office of the Prosecutor has itself determined and described as a "statutory-based approach".[6] The purpose of this incremental and cumulative process is to marshal the evidence necessary for the Court to decide whether there is a reasonable basis to proceed with an investigation. In the present instance, the Prosecutor has deviated from that established practice and offered no compelling argument for such an unprecedented aberration, confusing a sequence it has itself designed.

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

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

15. Importantly, as stated above, it is necessary to interpret article 119(1), as all other provisions of the Statute, with regards to its context, according to general principles of international law governing treaty interpretation as

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enshrined in article 31 of the Vienna Convention on the Law of the Treaties. When a contextual interpretation of article 119(1) of the Statute is elaborated upon, three particular concerns arise.

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

17. Additionally, I cannot share the interpretation of the jurisprudence cited in the Majority's decision[14] to ground its finding of an ongoing "dispute" between Myanmar and the Prosecutor. At first, it is worth underscoring that both the Permanent Court of International Justice (the "PCIJ") and the International Court of Justice (the "ICJ") have jurisdiction only over interstate litigation: the reference is thus originally biased since, in the present instance, the alleged "dispute" arises between a State and an organ of an international organization, namely the Prosecutor of the ICC, a situation in no case comparable to those adjudicated by the PCIJ and the ICJ. Furthermore, neither the PCIJ nor the ICJ presented their definitions of "dispute" as quoted at a stage of the proceedings comparable to the phase in which the Chamber found itself in the present case.[15] Finally, and perhaps more importantly, when carefully reviewed, those references provide further guidance as to the determination of what constitutes a "dispute". The PCIJ, after providing the above-mentioned defining elements of a "dispute", specified that a disagreement "certainly possesses these characteristics [when a party] is asserting its own rights by claiming [from the other] an indemnity on the ground that [it] has been treated by the [other party] in a manner incompatible with certain international obligations which they were bound to observe".[16] As regards the ICJ, it is worth noting that the definition of "dispute" is further explained asserting that "[i]n order to establish the existence of a dispute, '[i]t must be shown that the claim of one party is positively opposed by the other [. . .]'" and that a dispute exists when a party "has, rightly or wrongly, formulated complaints of fact and law against [the other party] which the latter has denied". It is "[b]y virtue of this denial [that] there is a legal dispute".[17] In light of the aforementioned analysis of the ongoing dynamics related to the alleged "dispute" in the present instance, it can be inferred that the specific cases illustrated by the PCIJ and the ICJ do not correspond to the contents of the request made by the Prosecutor. This means that the latter doesn't correspond to the general definition of "dispute" as provided by the international courts cited by the Majority.

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

19. Also in this regard, it is worth noting that, even assuming that Myanmar's 13 April 2018 public statement does give rise to a dispute within the meaning of article 119(1) of the Statute, resorting to that article is equally

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premature as the Prosecutor has not as of yet asked the Court to effectively *assert* its jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh. Her Request merely purports to seek the Chamber's position on whether those facts give rise to jurisdiction under article 12(2)(a) of the Statute "to assist in her further deliberations concerning any preliminary examination she may independently undertake [. . .]".[19]

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

21. Thirdly, the Majority asserts that article 119(1) of the Statute "has been interpreted [by scholars] as including questions related to the Court's jurisdiction".[21] However, such an interpretation is affirmed without any previous jurisprudence by any judicial institution and it only refers to academic writings and non-binding resolutions.[22] Additionally, when strictly scrutinized, these references provide a more nuanced perspective. For instance, regarding the citation of the Majority in footnote 37, the author appears to present "tentative suggestions" of what may be included in the category of "questions concerning the judicial functioning of the Court", the object of article 119(1), asserting that "probably" they include "questions of jurisdiction".[23] The tacitly suggested universality of the Majority's finding is thus far from being evident.

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

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

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

24. Shifting from the power to make a ruling on jurisdiction of a case, which is explicitly conferred upon the Court by article 19(3) of the Statute, to those arising from interpretations of customary international law, is to venture onto precarious ground. The Prosecution contends that the "bedrock importance of jurisdiction [is] reflected in the general principle known as '*compétence de la compétence*'".[26] The Majority appears to concur, stating that "[i]t is an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction".[27]

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

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

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

> In the legal framework of this Court, 'inherent powers' should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure [. . .]The notion of 'inherent powers' – or 'incidental jurisdiction' – refers to judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ('inherent to') other powers specifically provided for, in that they are essential to the judicial

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> body's ability to perform the judicial functions assigned to it by such constitutive instruments. The nature and type of the concerned power [. . .] are relevant considerations to determine whether there are gaps justifying recourse to subsidiary sources of law or invocation of 'inherent powers.[28]

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

27. The Majority's decision bolsters the Prosecution's brief mention of the principle of *la compétence de la compétence* with substantial case law indicating that numerous international courts and tribunals[30] have raised it to circumscribe their own jurisdiction, including, *inter alia*, the ICJ,[31] the Inter-American Court of Human Rights,[32] the *ad hoc* International Tribunal for the former Yugoslavia,[33] and the Special Tribunal for Lebanon.[34] References to the ICC's own jurisprudence[35] include the decisions of Pre-Trial Chamber II regarding *Situation in Uganda*[36] and in the case of *Prosecutor v. William Samoei Arap Ruto et al.*[37] as well as the decisions of Pre-Trial Chamber II and Pre-Trial Chamber III in *Prosecutor v. Jean-Pierre Bemba Gombo*.[38]

28. However, none of these citations supports the proposition that this or any other Court has made such a ruling at stages of proceedings analogous to the present instance, where neither a *case* nor a *dispute* is present.[39] Even in the case of advisory opinions[40] rendered by the ICJ or other bodies, the Court or Tribunal has been seized of a question by an outside party or referring entity, and has not arrived at the issue in response to a request by a criminal prosecution.[41] In fact, as the Majority notes, the ICJ has emphasized and defined a dispute as *sine qua non* for an assertion of the principle of *la compétence de la compétence*.[42]

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

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

B. THE QUESTION OF JURISDICTION SHOULD BE PRESERVED FOR SUBSEQUENT PROCEEDINGS

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

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

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

33. Elsewhere, I have cautioned against this Court rendering advisory opinions, noting "that the Appeals Chamber has held that it will not render 'advisory opinions on issues that are not properly before it'".[46] I maintain that position, *mutatis mutandis*, in the present case for the following reasons.

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

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

36. The Prosecutor asserts, and the Majority concurs, that "the jurisdictional question raised in the Request is not an abstract or hypothetical one, but it is a concrete question that has arisen in the context of individual communications received by the Prosecutor under article 15 of the Statute as well as public allegations of deportation of the Rohingya people from Myanmar to Bangladesh".[48] However, besides the analysis of the crime of deportation, the "concrete" facts submitted appear to be brief and vague. Moreover, while the Prosecutor confines herself to a request on a ruling of jurisdiction over the crime of deportation, of the four pages in the request devoted to submissions on the facts, many of the allegations appear to indicate other alleged crimes sharing a common nexus as continuing crimes, on which the Prosecution does not elaborate.

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

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

39. Furthermore, it should be noted that it is hard to clearly understand the legal nature of the Majority's decision due to various reasons. The first among them is the lack of clarity and the ambiguity that characterize the Prosecutor's Request, which she grounds on article 19(3) of the Statute thus expecting that, if entertained, it shall lead this Chamber to issue a "ruling". If a ruling were to be rendered, it would be legally binding on the parties at the present instance, including the Prosecutor. However, in her Request the Prosecutor specifies that the requested "ruling" would only "assist in her further deliberations concerning any preliminary examination she may independently undertake [. . .]",[50] thus seemingly excluding any binding character of the latter. Secondly, the Majority is equally unclear as to the legally binding value of its present decision, since this question is not specifically addressed in its text. This reinforces the impression that this "ruling" has no binding character, especially towards the Prosecutor. It logically follows from this conclusion that the aforementioned finding that Pre-Trial Chamber I's present decision actually is tantamount to an advisory opinion, which is of no binding value to the parties, is correct.

VI. Conclusion

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

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

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

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

Judge Marc Perrin de Brichambaut

Dated this 6 September 2018

At The Hague, Netherlands

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

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

2 Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18 (the "PTC I Decision"), para. 27 (footnote omitted).

3 PTC I Decision, paras 28-33.

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

5 Article 31(1) of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155, p. 331. The Appeals Chamber has confirmed that the principles of treaty interpretation set out in article 31 of the Vienna Convention on the Law of Treaties also apply to the interpretation of the Statute (*see* Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para. 277). *See also* Permanent Court of International Justice (the "PCIJ"), *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, "Advisory Opinion of 12 August 1922", Series B, No. 2, p. 23: "it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".

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

7 PTC I Decision, para. 28.

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

9 PTC I Decision, para. 28.

10 PTC I Decision, para. 28.

11 Black's Law Dictionary (10th ed. 2014).

12 *See* PTC I Decision, footnote 36.

13 Notice of the Public Statement Issued by the Government of Myanmar, 17 août 2018, ICC-RoC46(3)-01/18-36, para. 1.

14 *See* PTC I Decision, footnote 36 which refers to: PCIJ, *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, Series A, No. 2, p. 11 ("*Mavrommatis Palestine Concessions*"): "A dispute is a disagreement on a point of law or fact,

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a conflict of legal views or of interests between two persons"; ICJ, *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, para. 22 ("*East Timor (Portugal v. Australia)"*): "The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties".

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

16 PCIJ, *Mavrommatis Palestine Concessions*, pp. 11, 12.

17 International Court of justice (the "ICJ"), *East Timor (Portugal v. Australia)*, para. 22, second and third sentences.

18 E. Décaux, « Article 119 – Règlement des différends », in J. Fernandez et X. Pacreau, *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, Editions A. Pedone, pp. 2095-2101.

19 Prosecutor's Request, para. 3.

20 *See above* footnote 18.

21 PTC I Decision, para. 28.

22 PTC I Decision, footnote 37.

23 R. S. Clark, "Article 119: Settlement of disputes", in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), p. 2276.

24 *See supra* note 8.

25 PTC I Decision, para. 28.

26 Prosecutor's Request, para. 53.

27 PTC I Decision, para. 30.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Opinions, and Orders of the Permanent Court of International Justice, ST/LEG/SER.F/1/Add.4, p. 45 (2012).

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

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

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

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

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

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

48 PTC I Decision, para. 33.

49 ICC-RoC46(3)-01/18-T-1-Red-ENG, p. 8, line 21.

50 Prosecutor's Request, para. 3.

51 Prosecutor's Request, para. 54.

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