

Justice for Syrians Under the International Criminal Court: Applying the Myanmar Model of Territorial Jurisdiction for Cross-Border Crimes

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ABSTRACT

The ongoing civil war in Syria has come at a great cost to the people of Syria who have been subjected to atrocities and violence. To date, there has been limited recourse for crimes against humanity committed by the Assad regime. This article assesses whether the International Criminal Court Pre-Trial Chamber statement of September 2018 that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh has created a precedent for jurisdiction over crimes committed at least partially in the territory of a State party by nationals of a State not party to the Statute. By comparing the legal elements of the crime of deportation as it has affected the Rohingya and Syrian populations, this article suggests that precedence could exist for the International Criminal Court to exercise its jurisdiction over responsible senior officials in Syria.

Keywords: International Criminal Court, Rohingya, Myanmar, Bangladesh, Syria, deportation, genocide, crimes against humanity, international criminal jurisdiction.

Introduction

This article concerns international criminal law as it applies to nationals of States that are not party to the Rome Statute of the International Criminal Court¹ (the Rome Statute), and for whom, therefore, options for triggering International Criminal Court (ICC or the Court) jurisdiction are

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¹ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (hereinafter “Rome Statute”).

more limited. The Syrian Arab Republic (Syria), a country from which evidence of large-scale and systemic international crimes have been emerging for a number of years, is one of these States.² Many international legal scholars, as well as the United Nations (UN) and human rights organisations, have contemplated the need for criminal accountability for the atrocities that have taken place in Syria. Several proposed avenues for justice in this context have been suggested but progressed with limited success.³ For example, while the UN Security Council has the power to refer matters to the ICC, seven draft resolutions on the war in Syria have been vetoed by at least one permanent member at any given time, creating a sense of urgency in the international community to find an alternative path of action.⁴

In September 2018, the ICC Pre-Trial Chamber issued a decision in relation to jurisdiction over crimes committed against the minority Rohingya population of Myanmar.⁵ The Chamber held that despite Myanmar not being party to the Rome Statute, the Court could exercise jurisdiction relating to crimes committed against Rohingya refugees currently residing in the territory of Bangladesh where part of the *actus reus* of the crime has occurred, given that it is a State party to the Rome Statute.⁶ This article will assess the applicability of this finding to Syrian refugees in Jordan, considering that while Syria is also not party to the Rome Statute, Jordan is.

This article argues that the statement made in relation to Rohingya refugees has relevance for Syrian refugees by nature of the

² Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/42/51, 15 August 2019.

³ Annika Jones, "Seeking International Criminal Justice in Syria," *International Law Studies*, Vol. 89, 2013, p. 802; Ingrid Elliot, "'A meaningful Step towards Accountability'? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria," *Journal of International Criminal Justice*, Vol. 15, No. 2, 2017, 239.

⁴ Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice," *Journal of International Criminal Justice*, Vol. 15, 2017, 211.

⁵ International Criminal Court (ICC), *Request under Regulation 46(3) of the Regulations of the Court*, Case No. ICC-RoC46(3)-01/18, Decision (Jurisdiction, Pre-Trial Chamber I), 6 September 2018.

⁶ *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 42.

common crime of deportation, and should be used to argue for the jurisdiction of the ICC in order to prevent criminal impunity of the Assad regime. This finding therefore supports the proposition that the Pre-Trial Chamber has created precedent for the prosecution of crimes against humanity committed at least partially in the territory of a State party against nationals of States not party to the Rome Statute. Counterarguments to this emerging proposition, as well as challenges and risks of the approach, are considered in this article.

This article begins by considering the key findings of the Pre-Trial Chamber and the possible applicability of these findings to Syrian refugees by virtue of crimes against humanity of a cross-border nature being committed in both contexts. The following more substantial section conducts an analysis of the law of crimes against humanity as it would apply to events involving Rohingya and Syrian refugees, and the implications for ICC jurisdiction of the prosecution of crimes committed in Syria thereafter.

The approach of the Pre-Trial Chamber is a novel and innovative one for establishing jurisdiction for serious international crimes that may otherwise go unpunished. This approach is not without risks and challenges, including whether States are likely to support an approach to establishing jurisdiction that may be seen as conflicting with the principle of State sovereignty. These practical issues are considered in the third and final section of this article. While non-State actors have also been involved in the Syrian civil war, the persecution of the Rohingya and breaches of international law that have occurred in these respective contexts, the scope of this article is confined to acts perpetrated by the State and its related agencies as the primary actor in the international legal system.

ICC Pre-Trial Chamber Statement

Following a submission by Global Rights Compliance on 31 March 2018 and a request by the ICC Prosecutor in April 2018, the Pre-Trial Chamber considered the matter of jurisdiction for crimes against humanity committed against the Rohingya. The submission included a report filed on behalf of 400 Rohingya women and children from the Tula Toli village in Myanmar, alleged victims of the crime against humanity of

deportation.⁷ The ICC Office of the Prosecutor exercised its independent discretion to seek a ruling from the Pre-Trial Chamber given the “consistent and credible public reports” of ethnic cleansing and genocide, as to the jurisdiction of the Court over crimes crossing an international border onto the territory of a State which is party to the Rome Statute.⁸

In its statement, the Pre-Trial Chamber held that the violent persecution of the minority Rohingya population in the Rakhine State by the Myanmar military may amount to deportation, and that since this deportation has been to Bangladesh, a State party to the Rome Statute, jurisdiction exists to take these claims to the ICC.⁹ Jurisdiction was established in this case under Articles 5, 11 and 12 of the Rome Statute, which deal with jurisdiction *rationae materiae*, *ratione temporis* and *ratione loci*, respectively.

The territorial element of jurisdiction (*ratione loci*) found in Article 12(2)(a) requires that “the conduct in question occurred” in the territory of a State party.¹⁰ In the case of *Ruto and Sang* in 2012, the Court found that deportation is an open-conduct crime, and “that the perpetrator may commit several different conducts which can amount to ‘expulsion or other coercive acts,’ so as to force the victim to leave the area where he or she is lawfully present.”¹¹

In September 2018, the Chamber stated that the crime of deportation necessarily involves “displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States.”¹² By virtue of the deportation of the Rohingya population directly from Myanmar where the crime was initiated, to Bangladesh where the crime was completed, the Court found that it could, in principle, exercise jurisdiction over the relevant crimes.¹³

⁷ *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 5.

⁸ ICC, *Application under Regulation 46(3)*, ICC-RoC46(3)-01/18-1, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018.

⁹ *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 6.

¹⁰ Rome Statute, above note 1.

¹¹ ICC, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, Decision (Confirmation of Charges), 23 January 2012, p. 91.

¹² *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 6.

¹³ *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 14.

In November 2019, the Court authorized the Prosecutor to initiate investigation into the matter of alleged crimes in Bangladesh and Myanmar. In this decision, the Court recalled its interpretation of Article 12(2)(a) in its prior decision of 2018 and reaffirmed its applicability due to conduct that occurred in more than one territory. On the basis of this determination the Court authorized the commencement of investigations “for crimes committed at least in part on the territory of Bangladesh.”¹⁴ The Court also considered the meaning of the word “conduct” in the context of Article 12(2)(a) to be encompassing of more than the notion of an act, and inclusive of a victim’s behavior that is caused by or attributable to the alleged perpetrator.¹⁵

Victims’ representations of the alleged coercive acts that underpinned the mass deportation of 2017 were also considered and included alleged killings, alleged arbitrary arrests and infliction of pain and injuries, destruction of houses and other buildings and alleged discriminatory intent.¹⁶ The decision considered that such coercive acts must result in the victim leaving the area in order to constitute deportation and it was this act of fleeing that was completed in the territory of Bangladesh.¹⁷

The Guernica Centre for International Justice (Guernica) in London filed a submission with the ICC Prosecutor in July 2018 arguing the case that Syrian civilians have been deported to Jordan in a manner akin to that of the Rohingya. Guernica emphasized the gravity of the crimes committed and the need for accountability in the case of Syria. In their *Amicus Curiae Observations*, Guernica argued that like Bangladesh, Jordan is a party to the Rome Statute and therefore capable of conferring

¹⁴ ICC, *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, Case No. ICC-01/19, Decision (Authorisation of an Investigation, Pre-Trial Chamber III), 14 November 2019, pp. 53-54.

¹⁵ *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, above note 14, p. 22.

¹⁶ *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, above note 14, pp. 13-17.

¹⁷ *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, above note 14, pp. 23-24.

jurisdiction for the crime of deportation committed against Syrians into Jordanian territory.¹⁸

In the case of justice for crimes committed against the Syrian population, the Guernica Centre highlights that there are a number of parallels between the situation concerning the Rohingya in Bangladesh and Syrians in Jordan, the most important common factor being deportation.¹⁹ In a press statement, Guernica expressed hopefulness that the Court would “accept the argument that it has jurisdiction over certain crimes suffered by the Syrian civil population.”²⁰ This article conducts the requisite legal analysis of the elements of the relevant crimes against humanity to support the claim, and show that indeed while the acts committed against the Rohingya and Syrian populations may be different in terms of specific factual circumstances, both events satisfy the legal elements required; thus, the ICC should find that jurisdiction also exists for Syrian refugees in Jordan to take a claim to the ICC.

Contestation exists as to whether this line of reasoning is feasible. For example, Payam Akhavan argues that “such expansive interpretations of jurisdiction under the ICC are misplaced if they fail to appreciate that because ‘deportation or forcible transfer’ is a distinct crime, they also have different *mens rea* requirements.”²¹ He argues that the situation of the Rohingya is uniquely distinct as it involves deportation on the basis of illegality. However, as this article proves, it is the comparable nature of the *actus reus* and *mens rea* elements of the crime against humanity of deportation and the transboundary nature of the crime that gives rise to jurisdiction.

In relation to the decision of the Pre-Trial Chamber itself, scholars express broad support for the approach and discovery of a possible new

¹⁸ ICC, *Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)*, ICC-RoC46(3)-01/18, 18 June 2018, 61.

¹⁹ Guernica Centre for International Justice, “Press Statement - The Guernica Centre for International Justice Files Article 15 Communication with the ICC Office of the Prosecutor on the Situation in the Syrian Arab Republic,” *Pro Justice*, 4 March 2019, available at: <https://pro-justice.org/wp-content/uploads/2019/03/Microsoft-Word-190301-Syria-Press-Statement-Final-Version-EL-.doc.pdf> (accessed 23 June 2020).

²⁰ Guernica Centre for International Justice, above note 19, p. 3.

²¹ Payam Akhavan, “The Radically Routine *Rohingya* Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute,” *Journal of International Criminal Justice*, Vol. 17, No. 2, 2019, p. 331.

referral mechanism to pursue justice for the crime of deportation even where the likelihood of the Myanmar government being tried may still be low.²² Some scholars express more serious reservations about the risk associated with the Court's reasoning, including that States will resist the finding and that voluntary participation is a necessary element of successful prosecution.²³ This argument is considered in section V and is balanced against the need for justice and accountability. The approach of this article is to accept the reasoning of the Pre-Trial Chamber despite the possible risks.

Crimes against Humanity

International legal scholarship and human rights reports indicate that the persecution of the Rohingya Muslim population in Myanmar is likely to constitute genocide, as it was accompanied by "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."²⁴

Over 700,000 Rohingya were forced to flee to Bangladesh following attacks in August 2017 by the military. The Rohingya were systematically portrayed as aliens, dangerous, influenced by Islamic extremism, and intent on "overtaking the homeland" by political authorities.²⁵ Such forms of dehumanization are often precursory to genocide and can be evidence of an intention to commit genocide.²⁶ Conversely, the war in Syria is heavily characterized by breaches of

²² Victoria Colvin and Phil Orchard, "The Rohingya jurisdiction decision: a step forward for stopping forced deportations," *Australian Journal of International Affairs*, Vol. 73, No. 1, 2018, p. 16.

²³ Douglas Guilfoyle, "The ICC re-trial chamber decision on jurisdiction over the situation in Myanmar," *Australian Journal of International Affairs*, Vol. 73, No. 1, 2019, p. 2.

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 2187 UNTS 78, 9 December 1948 (entered into force 12 January 1951), Art. 2; Fortify Rights, "They gave them long swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar," July 2018; International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Order (Provisional Measures), 23 January 2020.

²⁵ Elliot Higgins, "Transitional Justice for the Persecution of the Rohingya," *Fordham International Law Journal*, Vol. 42, 2018, p. 102.

²⁶ Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar*, International State Crime Initiative, London, 2015.

international humanitarian law including attacks against civilians and civilian objects such as schools and hospitals.²⁷

This essay focuses on the third main category of international crimes, crimes against humanity, as the facts of both case studies give rise to crimes against humanity. Deportation, by its transboundary nature, is the specific crime that gives rise to the possibility of ICC jurisdiction in both these cases. The approach of the Pre-Trial Chamber is a novel one with regard to jurisdiction but builds on existing case law on the matter of deportation. Deportation has been recognized as a crime against humanity in several international legal instruments, in addition to the Rome Statute.²⁸

Article 7 of the Rome Statute is the substantive provision for crimes against humanity and provides an expansive list of specific acts that can give rise to criminal liability. The statute requires “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present”²⁹ and for such acts to be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”³⁰ The key elements—of (a) forcible expulsion; (b) lawful presence; (c) awareness of the factual circumstances that established the lawfulness of the presence; (d) part of a widespread or systematic attack against a civilian population; and (e) knowledge or intent of the fact that the acts were part of a widespread or systematic attack—are assessed below in light of the situation in Myanmar and Syria to show that such acts have indeed occurred in these respective territories.

(a) Forcible Expulsion

With respect to this first element, the Pre-Trial Chamber itself acknowledged that the *actus reus* allows for the perpetration of several

²⁷ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Annex XIV, 22nd session, UN Doc. A/HRC/22/59, 5 February 2013.

²⁸ UNSC Res. 827, 25 May 1993, as amended by UNSC Res. 1877, 7 July 2009, art. 5(d) (hereinafter “ICTY Statute”); UNSC Res. 955, 8 November 1994, Annex (hereinafter “ICTR Statute”).

²⁹ Rome Statute, above note 1, Art. 7(2)(e).

³⁰ Rome Statute, above note 1, Art. 7(1)(d).

different acts that amount to forcible expulsion or coercion.³¹ These may typically include “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”³² The “forcible” character of deportation need not involve the movement of people with force. It may be caused through physical or psychological force that causes “fear of violence, duress, detention, psychological oppression or abuse of power.”³³

In its decision of November 2019 the ICC Pre-Trial Chamber III of the Court noted that “a reasonable prosecutor could believe that coercive acts towards the Rohingya forced them to flee to Bangladesh, which may amount to the crime against humanity of deportation.”³⁴ This conclusion was drawn based on material submitted during interviews of the Rohingya, 92% of whom expressed that they had suffered or witnessed a major incident prompting them to flee.³⁵

In August of 2017, the Myanmar Army conducted “clearance operations” in northern Rakhine State. Hundreds of Rohingya people were brutally murdered, women and girls were raped and mutilated, children were thrown into rivers and victim’s bodies were burned in piles.³⁶ Over 700,000 people fled the violence in what was the quickest mass exodus since the Rwandan genocide.³⁷ Human rights groups such as Fortify Rights have conducted significant research on the events that took place in 2017 in Myanmar providing compelling testimonies affirming that many of the acts listed above were committed, and showing the harrowing trauma and physical injuries resulting from the same.³⁸

³¹ *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 35.

³² ICC, *Prosecutor v Ruto and Sang*, Case No. ICC-01/09-01/11, Decision (Confirmation of Charges, Pre-Trial Chamber II, 4 February 2012).

³³ ICC, *Elements of Crimes*, The Hague, 2011, p. 5; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Radislav Krstic*, Trial Judgement, 2 August 2001.

³⁴ *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, above note 14, p. 49.

³⁵ *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, above note 14, 48.

³⁶ Fortify Rights, above note 24, p. 59.

³⁷ United Nations High Commissioner for Refugees (UNHCR), “Rohingya Emergency”, *UNHCR Asia Pacific*, 31 July 2019, available at: <https://www.unhcr.org/rohingya-emergency.html> (accessed 1 August 2019).

³⁸ Fortify Rights, above note 24, p. 23.

For Syria, in more than eight years of conflict since the revolution, acts of concern to the international community include the targeting and unlawful killing of civilians, destruction and looting of property, rape, restriction of humanitarian assistance, arbitrary arrest, enforced disappearances, torture and ill-treatment.³⁹ United Nations reports as recent as March 2020 indicate that “hostilities show little sign of abating in several parts of the country... [rendering] distant the prospect of improving the immediate protection environment for civilians.”⁴⁰ Amongst the various parties to the conflict, the Assad regime has been documented as playing a significant role in many, if not all of these crimes.⁴¹

The Assad regime is also responsible for the significant majority of deaths in Syria, which in total allegedly amount to over 190,000, although the numbers are disputed.⁴² These deaths have predominantly been caused by “air attacks and shelling of civilian areas, blocking humanitarian aid to the opposition-controlled areas or killing the citizens of Syria in detention centers and prisons as a result of torture.”⁴³ Furthermore, thousands of women and girls have fled Syria in fear of rape.⁴⁴

The Human Rights Council of the United Nations has summarized the issue of displacement of the Syrian population as “directly induced by the failure of warring parties to take all feasible precautions as required by international humanitarian law or due to

³⁹ Annika Jones, “Seeking International Criminal Justice in Syria,” *International Law Studies*, Vol. 89, 2012, p. 803; Human Rights Council, “Without a trace: enforced disappearances in Syria,” *Office of the United Nations High Commissioner for Human Rights*, 19 December 2013; UNHRC Res. S-25/1, 21 October 2016.

⁴⁰ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/43/57, 24 February-20 March 2020, p. 1.

⁴¹ Seema Kassab, “Justice in Syria: Individual Criminal Liability for the Highest Officials in the Assad Regime,” Vol. 9, *Michigan Journal of International Law*, 2018, pp. 283-287.

⁴² Yavuz Gucturk, “War Crimes and Crimes Against Humanity in Syria,” *Insight Turkey*, Vol. 7, 2015, p. 32.

⁴³ *Ibid.*

⁴⁴ Lisa Davis, “Syrian women refugees: out of the shadows,” *CUNY School of Law Academic Works*, 2015, available at: https://academicworks.cuny.edu/cl_pubs/54/?utm_source=academicworks.cuny.edu%2Fcl_pubs%2F54&utm_medium=PDF&utm_campaign=PDFCoverPages (accessed 1 August 2019).

unlawful conduct by the parties, which carried out indiscriminate and deliberate attacks with little regard for civilian life.”⁴⁵

In *Krstic*, the Trial Chamber held that the Bosnian Muslims “were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight.”⁴⁶ The involuntariness of the decision of the Rohingya and Syrian people to flee should be considered in this context. Given the high number of civilian deaths that have occurred during both the cleansing operations of the Myanmar military and the Syrian civil war, as well as their widespread and serious nature, these acts can easily be argued to create a fear of violence and would likely be classed as such by the ICC. The Court should view the displacement of both Rohingya and Syrian refugees not as a choice, but as an outcome of events that caused such extreme deprivation of human rights and left no practicable option but to flee the persecuting state.

(b) Lawful Presence

“Lawful presence” simply requires that the persons of concern either have nationality or some other legal basis to be present on the territory from which they have been forcibly displaced.⁴⁷ In the case of the Rohingya, domestic laws and policies have systemically excluded the minority from civic and economic participation. In fact, Myanmar excludes the Rohingya from full citizenship.⁴⁸ As a result, the Rohingya are considered a stateless population, and many individuals are not even issued birth certificates.⁴⁹

However, the legality of a deportation cannot be assessed purely on domestic law and requires reference to international law, which disallows arbitrary and discriminatory deprivation of human rights.⁵⁰ In

⁴⁵ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/39/65, 9 August 2018.

⁴⁶ *Prosecutor v. Radislav Krstic*, above note 33, para. 530.

⁴⁷ *Elements of Crimes*, above note 33, p. 6.

⁴⁸ Benjamin Zawacki, “Defining Myanmar’s Rohingya Problem,” *Human Rights Brief*, Vol. 20, 2012, p. 18.

⁴⁹ Joseph Powderly, William Schabas and N. Prud’homme, “Crimes against Humanity in Western Burma,” *Irish Centre for Human Rights*, 2010, p. 112.

⁵⁰ *Ibid.*; Vincent Chetail, “Is there any blood on my hands? Deportation as a crime of international criminal law,” *Leiden Journal of International Law*, Vol. 92, 2016, p. 925.

this case, arbitrary deprivation of nationality is protected against in international human rights law.⁵¹ It is thus arguable that the deprivation of nationality the Rohingya have been subjected to since 1982 amounts to illegal conduct under international law. The illegality or lack of recognition under domestic law therefore does not deprive them of lawful presence.⁵²

With the exception of refugee children born in exile, an overwhelming majority of Syrian refugees hold valid Syrian nationality.⁵³ In this way, the facts around the lawful presence element with regard to Syrians can be distinguished from the Rohingya as more clear and undisputed from a national perspective. However, from an international legal standpoint, both Rohingya and Syrian civilians have a legal basis to be present in their respective territories of origin and would thus be likely to be viewed by the ICC as such.

(c) The Perpetrator was Aware of the Factual Circumstances that Established the Lawfulness of Such Presence

The perpetrator need not have an understanding of the relevant provisions of international law that regulate the matter, it is sufficient that they be aware of the general factual circumstances that would give rise to unlawful deportation.⁵⁴ As such, a court would likely find that, as State actors, the Assad regime and the Myanmar military would be likely to have an understanding of the legal status of the victims of crimes perpetrated by the State. The case of Syria would present a clearer case for this element given that the Rohingya have been historically characterized as “illegal” inhabitants of Myanmar.

⁵¹ Human rights and arbitrary deprivation of nationality – Report of the Secretary-General, UN Doc. A/HRC/25/28, 19 December 2013.

⁵² Md. Mahbubul Haque, “Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma,” *Journal of Muslim Minority Affairs*, Vol. 37, 2017, p. 454.

⁵³ Zahra Albarazi and Laura van Waas, “Understanding statelessness in the Syria refugee context,” *Norwegia Refugee Council*, 2016, p. 6.

⁵⁴ Guenael Mettraux, *International Crimes: Law and Practice*, Vol. II, Oxford University Press, Oxford, 2020, p. 481.

(d) Part of a Systematic or Widespread Attack against a Civilian Population

A systematic and widespread attack carried out against a civilian population is the final element to establish the *actus reus* of the crime against humanity of deportation and requires a “course of conduct involving the multiple commission of acts... pursuant to or in furtherance of a State or organizational policy to commit such an attack.”⁵⁵ Such an attack need not be military in nature⁵⁶ although both factual situations discussed in this article would be likely to be classified as such.

The Pre-Trial Chamber has previously interpreted systematic or widespread to mean that the attack should be of large scale, with a high number of victims and of considerable seriousness.⁵⁷ “The relevant acts of deportation need not be widespread or systematic provided that they are part of a broader attack which meets this requirement.”⁵⁸ The scale of impact of the conflict in Syria on civilian life has been significant, and likely to be viewed by the Court as sufficient within the meaning of this provision. Of a total population of more than twenty million prior to the commencement of the conflict, over five million have fled Syria, and an estimated thirteen million have been in urgent humanitarian need since.⁵⁹ These numbers suggest that the vast majority of people in Syria have been impacted by human rights violations or fear of violations so grave that they have been compelled to flee; the requirements are arguably met by the relevant acts committed in Myanmar and Syria.

The requirement of a State policy to commit the attack suggests that there has been preparation for the attack and a consistent pattern to the attacks.⁶⁰ This is shown by the clearance operations conducted by the Myanmar Military which involved the disarming of Rohingya civilians by confiscating any items that could be used as a weapon, the removal of

⁵⁵ Elements of Crimes, above note 33, p. 5.

⁵⁶ *Ibid.*

⁵⁷ ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision (Pre-Trial Chamber II), 15 June 2009, para. 83.

⁵⁸ Vincent Chetail, “Is There any Blood on my Hands? Deportation as a Crime of International Law,” *Leiden Journal of International Law*, Vol. 29, 2016, Section 3.2.2.

⁵⁹ UNHCR, “Syria Emergency”, available at: <https://www.unhcr.org/syria-emergency.html> (accessed 9 June 2020).

⁶⁰ *Ibid.*

fences protecting Rohingya homes, the training and arming of non-Rohingya communities, the suspension of humanitarian aid and access, enforcement of a curfew, and the unusually large military presence in Rohingya communities.⁶¹ These were all planned actions by the State that facilitated the subsequent mass atrocities committed in the latter half of 2017.

In the Syrian context, the Commission for International Justice and Accountability (CIJA) has collected and analysed hundreds of thousands of pages of evidence from the Syrian regime and drafted a 400-hundred page legal brief which “traces the systematic torture and murder of tens of thousands of Syrians to a written policy approved by President Bashar Al-Assad, coordinated among his security intelligence agencies, and implemented by regime operatives.”⁶² Evidence includes signed orders progressing down the chain of command, and reports describing exactly what was being done. Killings of at least 10,000 people can be documented to the highest levels. This final requirement for the *actus reus* of forced deportation as a crime against humanity is therefore likely satisfied in both situations and a court could be compelled to make the same finding.

(e) *Mens Rea*

The perpetrator of crimes against humanity must have knowledge of the attack and that their act comprises part of that attack, or an intention to commit the underlying offence.⁶³ The ICC tends to prosecute high-order officials as perpetrators of crimes against humanity as “large-scale and systematic commission of international crimes is usually planned and set in motion by senior political and military leaders”⁶⁴ and relies on the joint criminal enterprise doctrine to establish liability, given that the physical

⁶¹ Fortify Rights, above note 24, pp. 10-11.

⁶² Ben Taub, “The Assad Files”, *Pulitzer Center*, available at: <https://pulitzercenter.org/projects/assad-files> (accessed 1 August 2019); S. Kassab, above note 41, p. 287.

⁶³ *Elements of Crimes*, above note 33, p. 5; ICTY, *The Prosecutor v. Mitar Vasiljevic*, Judgement (Trial Chamber II), 29 November 2002, para. 37; ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgement (Appeals Chamber), 12 June 2002, para. 102.

⁶⁴ Hector Olasalo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Hart Publishing, 2009, p. 13.

acts are often not carried out by the same high-level officials. The evidence analysed above with reference to a State policy goes towards showing knowledge and intention in both contexts on behalf of senior officials and leaders of either the Myanmar military forces or the Assad regime, to commit the acts of rape, murder, etc. which thereafter resulted in displacement. This element would need to be verified on a case-by-case basis to understand the specific intentions of the person indicted against the context of a more generalized policy intention.

A United Nations fact-finding mission in Myanmar confirmed that sufficient evidence exists to implicate senior officials in the military's chain of command, as well as possibly Aung San Suu Kyi.⁶⁵ Furthermore, American lawyer Stephen Rapp has also stated in the global media that evidence of international crimes in Syria is the strongest since Nazi war crimes in World War II and would also allow for the charging of cases "against the top level of the Syrian regime for murder, torture, crimes against humanity and war crimes."⁶⁶

An intention to forcibly displace specifically is more difficult to establish. However, the Rome Statute requires only that "in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."⁶⁷ As also established above in the analysis of the *actus reus* elements, the consequence of fleeing across international borders was a foreseeable if not certain consequence, and measure of survival, in light of the atrocities committed against the Rohingya and Syrian civilians. In the *Katanga* case, a consequence had to be a virtually certain result of an act.⁶⁸ Depending on how the Court interprets the facts, the existence of crimes against humanity may turn on this mental element.

⁶⁵ "Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes – UN report," *UNHRC*, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23475> (accessed 1 August 2019).

⁶⁶ Eleanor Hall, "Syrian war crimes evidence strongest since Nuremberg trials, says prosecutor," *ABC News*, 3 December 2018, available at: <https://www.abc.net.au/news/2018-12-03/syrian-war-crimes-evidence-strongest-since-nuremberg-trials/10577206> (accessed 1 August 2019).

⁶⁷ Rome Statute, above note 1, Art. 30.

⁶⁸ ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, Decision (Appeals Chamber), 25 September 2009.

An argument put forward by some scholars is that “[i]n Myanmar, it is beyond doubt that the junta intended to drive the Rohingya into Bangladesh. In Syria, by contrast, it is not evident that the Assad regime cared what happened to the civilians they forcibly displaced.”⁶⁹

This article argues that in both cases the deportation of civilians was caused by the coercive conduct of the perpetrator. To this effect, a tribunal would consider “the environment and context in which departures took place, the risks incurred by those who stayed, evidence of mistreatment of the population, the destruction of properties, the number of incidents of violence.”⁷⁰

Implications for Jurisdiction

Thus, due to analogous liabilities arising from crimes committed against the Rohingya and Syrian civilians, namely deportation, the ICC Pre-Trial Chamber finding should apply to Syrian refugees residing in Jordan as well as Rohingya refugees in Bangladesh. It relies on territorial jurisdiction of an objective nature, whereby an offence is commenced abroad, but completed in a State that is party to the ICC Statute or that has accepted its jurisdiction.⁷¹

This proposition relies on the use of precedence and how it applies to the statement of the Pre-Trial Chamber. Generally speaking, international courts and tribunals are not obliged to use *stare decisis*, the doctrine of precedent. Article 21(2) does specify however that among other key sources, “the Court may apply principles and rules of law as interpreted in its previous decisions.” Indeed, quantitative studies of citation patterns have shown that the ICC relies most heavily on case law, including its own, compared to other sources of law in its decision-making.⁷²

⁶⁹ Kevin Jon Heller, “The ICC and the Deportation of Civilians from Syria to Jordan,” *Opinio Juris*, 25 March 2019, available at: <http://opiniojuris.org/2019/03/25/the-icc-and-the-deportation-of-civilians-from-syria-to-jordan/> (accessed 19 June 2020).

⁷⁰ G. Mettraux, above note 54, p. 479.

⁷¹ HCA, *Ward v. The Queen*, 142 CLR 308.

⁷² Steward Manley, “Referencing Patterns at the International Criminal Court,” *European Journal of International Law*, Vol. 27, 2016, p. 121.

Despite not being bound by their own prior decisions, international courts and tribunals do give great weight to them.⁷³ Given that the elements, both physical and mental, are likely to have been met in that crimes against humanity of deportation have been committed against the Syrian population by the Assad regime, the ICC would be compelled to at least consider a similar line of reasoning with regard to jurisdiction, unless swayed by some other principle of law. In their submission, Guernica also argues that any departure from a ruling consistent with that formulated in relation to the Rohingya would be inconsistent and would represent a differing approach.⁷⁴

Assuming that this approach to precedent is adopted by the ICC Pre-Trial Chamber, the question that follows is whether related crimes are also under the Court's jurisdiction and to what extent they must be related to acts of deportation. The Chamber considered that if 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.⁷⁵

The decisions of the Court in relation to the Rohingya have also indicated an expansive approach to considering particular crimes as transboundary. Article 7(1)(h) of the Rome Statute includes within its jurisdiction, "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender... or other grounds... in connection with any act referred to in this paragraph." "In connection with any act referred to in this paragraph" was taken to mean by the ICC Pre-Trial Chamber as indicative of jurisdiction over other types of crimes including murder, deprivation of liberty, torture, rape, and particularly in the case of the Rohingya, extermination, provided that such acts are committed pursuant to Article 7(1)(h).⁷⁶ This thus opens up jurisdiction for crimes beyond forced deportation where they are still related. In the Prosecutor's Decision to authorize investigation in November 2019, persecution was considered as another possible transboundary crime, if deportation could be shown to have occurred on

⁷³ Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement*, Vol. 2, 2011, p. 5.

⁷⁴ Guernica Centre for International Justice, above note 19.

⁷⁵ *Request under Regulation 46(3) of the Regulations of the Court*, above n 2, 42.

⁷⁶ *Ibid.*

discriminatory grounds.⁷⁷ This approach means that an intention to displace need not be established in order for the relevant conduct to be within scope of the Court's jurisdiction.

Risks and Challenges

The drafters of the Rome Statute were determined to put an end to impunity with the Preamble stating that the most serious crimes of concern to the international community as a whole must not go unpunished. Despite evidence suggesting that breaches of international criminal law have occurred in Syria, there have been no charges brought before the ICC to date.

In December 2017, the United Nations General Assembly established an independent mechanism to assist in the investigation and prosecution of international crimes in Syria.⁷⁸ This measure was taken in light of inaction on the part of the Security Council. A number of States objected to the establishment of the mechanism—some claiming a lack of legal authority of the General Assembly to do so, but mostly based on the objection that it would interfere in the domestic affairs of States.⁷⁹

It would be safe to speculate that States are likely to object to the approach to jurisdiction discussed in this article based on similar concerns of sovereignty. Douglas Guilfoyle highlights the necessity of having the territorial cooperation of responsible governments for effective prosecution, as well as a number of examples where the ICC has failed.⁸⁰ Indeed, it was established in the *SS Lotus Case* that “restrictions upon the independence of States cannot...be presumed.”⁸¹ Myanmar has already expressed grievances with the proposed approach of the ICC Pre-Trial Chamber. On 13 April 2018, the Government of Myanmar stressed that “Myanmar is not a party to the Rome Statute” and “the proposed claim for extension of jurisdiction... exceed the well enshrined principle that the

⁷⁷ *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar*, above note 14, p. 49.

⁷⁸ UNGA Res. 71/248, 11 January 2017.

⁷⁹ *Ibid.*

⁸⁰ D. Guilfoyle, above note 23, p. 5.

⁸¹ Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 1927 PCIJ (ser. A) No. 10, Judgment, 7 September 1927, p. 18.

ICC is a body which operates on behalf of, and with the consent of States Parties”⁸²

However, entitlement to State sovereignty is not absolute and this is an important but nuanced compromise that should surely be made in relation to crimes that are of the most serious concern to the international community. The ICC has what is termed “complementary jurisdiction.” “Although a State continues to exercise jurisdiction over everyone within its country, it shares such jurisdiction with the ICC for the defined crimes of genocide, crimes against humanity and war crimes.”⁸³ The sacrifice of sovereignty in this respect occurs only where States are “unable or unwilling” to prosecute domestically, putting the onus on the State to demonstrate that prosecution will occur. Arguably, where the crimes are carried out by the State and its agencies as a form of policy and with the requisite *mens rea*, which this article finds are met in both case studies, the unable and unwilling doctrine is satisfied. Since heads of State are unlikely to go before a national court⁸⁴, a solution at the international level is necessary and the creation of such new form of referral to the ICC should be supported.

Conclusion

This article has sought to provide a novel contribution to the literature on criminal justice in Syria and States not party to the Rome Statute, in general. Through an analysis of the facts that have taken place in Syria and Myanmar, it has shown that the displacement of the Rohingya and Syrian people is of an involuntary nature, due to a widespread and systematic attack, and with the requisite elements of *mens rea* on the part of the perpetrating States. It therefore amounts to deportation within the meaning of the Rome Statute.

Therefore, the ICC Pre-Trial Chamber statement of late 2018 and the affirmation of its reasoning in its 2019 authorization to investigate, that claims of crimes against humanity can be taken to the ICC where

⁸² *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, Annex E to Prosecution Notice of Documents for Use in Status Conference.

⁸³ Ebru Coban-Ozturk, “The International Criminal Court, Jurisdiction and the Concept of Sovereignty,” *European Scientific Journal*, Vol. 10, 2014, p. 151.

⁸⁴ *Ibid.*

forced deportation has been completed in the territory of States Parties, should hold true for any claims brought to the ICC. This argument could apply to other situations of deportation to countries not States Parties including those with ongoing protracted conflicts that have caused mass displacement to States Parties' territories due to coercive conduct, such as in Iraq, South Sudan or Yemen.

The criticism is often made that "international criminal institutions continue to lack independent legal power and remain largely dependent on political support to pursue their work."⁸⁵ Vesting this form of jurisdiction in the Court provides an avenue grounded in ICC case law to pursue criminal prosecution where other options have failed due to politicization, honoring the noble goal of the drafters of the Rome Statute to end impunity for the most serious crimes.

Establishing the novel approach to jurisdiction discussed in this article may also provide a much-needed means for Syrian state officials to be held accountable in a global public forum, with the impartiality of the ICC behind the investigations. Given that the conflict in Syria is ongoing, prosecution could entail not only a measure of justice for the Syrian population but also a possible means of stabilizing the conflict and preventing further atrocities.⁸⁶

⁸⁵ Alex Whitling, "An Investigation Mechanism for Syria," *Journal of International Criminal Justice*, Vol. 15, 2017, p. 235.

⁸⁶ Y. Gucturk, above note 42, p. 35.