Cour
Pénale
Internationale

International
Criminal
Court

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

Date: **18 June 2018**

PRE-TRIAL CHAMBER I

Before **Judge Peter Kovacs, Presiding Judge**
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Ganso

***Amicus Curiae* submissions pursuant to rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecutions Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'**

Public

Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)

Source: **Guerica 37 International Justice Chambers**

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

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

Counsel for the Defence

Legal Representatives of the Victims
[1 name per team maximum]

Legal Representatives of the Applicants
[1 name per team maximum]

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Introduction

1.1. On 9 April 2018, the Office of The Prosecutor (OTP) at the International Criminal Court (ICC) sought a ruling on a question of jurisdiction, concerning whether the Court "*may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh*".[1] The application arises out of the fact that Myanmar is not a State Party to the Rome Statute of the ICC and the crimes alleged, principally acts of deportation, murder, torture, rape (and other sexual offences), constituting acts of Genocide and Crimes against Humanity, although having taken place on the territory of Myanmar, are alleged to be continuous crimes that transcend national borders that are committed in part on the territory of the People's Republic of Bangladesh, a State Party to the Rome Statute of the ICC.

1.2. On the 11 April 2018, the President of the Pre-Trial Division assigned the Prosecutor's request to the Pre-Trial Chamber.[2]

1.3. On 11 May 2018, the Pre-Trial Chamber considered the request, and issued its order convening a 'status conference' to take place on 20 June 2018.[3]

1.4. In support of the submissions by the OTP, Guernica 37 International Justice Chambers (Guernica 37), on 8 June 2018 filed an application for leave to submit an *Amicus Curiae,* pursuant to Rule 103 of the Rules of Procedure and Evidence of the International Criminal Court.[4]

1.5. On 14 June 2018, that application for leave was granted.

1.6. In accordance with that grant of leave, Guernica 37, now submits an *Amicus Curiae* brief to the Pre-Trial Chamber.

1.7. Guernica 37 would seek to highlight that these submissions have been prepared in the limited time permitted (3 days). As a result of the extremely limited time permitted by the Pre-Trial

[1] https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF at para. 1

[2] 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.

[3] https://www.icc-cpi.int/CourtRecords/CR2018_02522.PDF

[4] https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf

Chamber the issues have been condensed to the most salient issues and do not address, in detail, crimes other than deportation and enforced displacement. In this regard, Guernica 37 respectfully submits that the Pre-Trial Chamber should not limit itself to only the crime of deportation, as the submissions that follow make quite clear, the mass deportation of the Rohingya ethnic minority forms part of a 'formal plan' or 'policy' for the complete removal of the Rohingya from Myanmar that clearly establishes a genocidal intent. For the Pre-Trial Chamber to limit its consideration to deportation would fundamentally undermine the significance of the Prosecutor's initiative and the central aim at providing justice to the victims of the world's most persecuted minority

1.8. However, if it is that the Pre-Trial Chamber is not in a position to consider the matter on 20 June 2018 as originally intended, and the matter is adjourned to a further date, we would seek to make further submissions on a particular point of relevance, if it is that the Chamber grants leave to do so.

1.9. In summary, as is set out in this *Amicus Curiae* brief, the following conclusions are drawn:

a) The acts alleged are crimes within the jurisdiction of the ICC;

b) The acts constitute continuing crimes that continue on the territory of a State Party thereby satisfying the principle of objective territoriality;

c) The acts are sufficiently detailed and well documented to meet the ICC's admissibility criteria;

d) Bangladesh, as a State Party, possesses neither the will nor the ability to try such complex and politically sensitive matters domestically;

e) There is no proper basis for the Pre-Trial Chamber to hear arguments in closed session and it is strongly recommended that it is in the interests of justice that the process be open and fully transparent; and

f) Whilst it is accepted that the Prosecutor's request is novel, in that it has not been exercised in the past, it is noted that the exercise of jurisdiction in this regard is fully consistent with

the scope and application of the Rome Statute and general principles of international law and in doing so it provides victims of the gravest crimes known to man a path to justice that would otherwise remain closed.

2. Background[5]

Historically

2.1. The Rohingya are said to be the world's most persecuted minority. It's peoples are an ethnic Muslim group, based in the majority Buddhist country of Myanmar (Burma), making up approximately 1 million of the total 50 million population.

2.2. Almost all live in 'Rakhine State', with a significant proportion residing in ghetto-like conditions, and further, prevented from leaving without governmental permission.

2.3. The Rohingya are effectively stateless, not being regarded as one of the country's 135 official ethnic groups, and denied citizenship under Myanmar's 1982 Citizenship Law.

2.4. Despite the fact that the Rohingya had enjoyed equal rights since Burma became independent from British rule in 1948, they were stripped of their citizenship almost overnight.

2.5. In the 70 years since then, the Rohingya have been steadily, and systematically persecuted, losing the limited rights that they retained, and increasingly over the years, becoming the victims of violence.

2.6. The worst of this violence (prior to the most recent incidents) erupted in 2012, following the rape of a Buddhist woman, allegedly by Muslim men.

2.7. The incident prompted massive religious and ethnic violence against the Rohingya, forcing 140,000 of them into camps for internally displaced persons.

[5] In highlighting the historical position, it is not the intention of this brief to provide an in-depth analysis of the plight of the Rohingya through the decades; the salient facts and relevant issues are addressed however so as to give the submission made later in this document context.

2.8. The international community sought to exert pressure on the military government, who eventually agreed to grant the Rohingya a much-reduced form of citizenship, but only if they registered as Bengali, and not Rohingya, and therefore a policy specifically designed to remove ethnic, and national identity. Unsurprisingly, given the years of oppression combined with the type of citizenship being offered, it was declined.

2.9. Accordingly, the Rohingya, are effectively rendered stateless.

2.10. The tensions that have existed between the Rohingya and Buddhists in Rakhine State for decades, arguably centuries, continue to persist, and with good reason.

2.11. Myanmar views the Rohingya population as illegal Bangladeshi immigrants, despite many having resided in the area for numerous generations, and as a consequence, there is an overt policy of discrimination towards this ethnic group.

2.12. In October 2012 for instance, President Thein Sein asked the UN to re-settle the Rohingya in other countries saying "*We will take care of our own ethnic nationalities, but Rohingya who came to Burma illegally are not of our ethnic nationalities, and we cannot accept them here"*. This statement clearly confirms the animosity towards the Rohingya and the policy that has subsequently emerged for their removal by creating such intolerable conditions that they are forced to flee. Those conditions have included villages being burnt to the ground, civilians killed, women and young girls being raped and sexually assaulted and the population being driven out of their communities and seeking refuge in neighboring Bangladesh.

2.13. The Rakhine Buddhists meanwhile, see the Rohingya as a distinct race, entirely separate from the majority Burmese. Seeing them as Bengali immigrants, including those whose forefathers settled in the country many generations ago.

2.14. The Policies that have been adopted, have often and continue, to result in instances of extreme violence, with hundreds and thousands raped, murdered, and forcibly displaced.

2.15. Well over 400,000 Rohingya have left or attempted to leave Myanmar in an effort to escape persecution. Many cross into neighboring Bangladesh, however here they have not previously

been recognised as refugees,[6] and on the occasions that they are not forcibly repatriated, they are still exploited, and forced to endure significant discrimination. It is notable that the conditions they endure in Bangladesh are far from ideal, being housed in makeshift camps with the ever-looming threat of being relocated to an uninhabitable island as the monsoon season approaches or being made part of a repatriation agreement between Myanmar and Bangladesh.

Currently

2.16. Reports concerning the treatment and what can only on any objective viewpoint, be seen as the persecution of the Rohingya peoples, have been consistently made for decades, with accusations levied at the Myanmar Government concerning a number of incidents that may amount to the commission of Crimes Against Humanity, and as sections of the international community has recently stated has the 'elements' or 'hallmarks' of Genocide.

2.17. The situation however, has arguably reached a new level of persecution since August 2017 on the basis that as reported in the OTP submission of 9 April 2018, over 670,000 Rohingya citizens, citizens notably "*lawfully present in Myanmar*"[7],[8], have been "*intentionally deported across the international border into Bangladesh*".[9]

2.18. The situation has now reached such a level of gravity, that the UN High Commissioner for Human Rights (UNHCHR) has described the crisis as "*a textbook example of ethnic cleansing*"[10].

2.19. It has been further noted by the UN Special Envoy for Human Rights in Myanmar, and that the situation, as it has developed, could be viewed as having the "*hallmarks of a genocide*".[11]

---

[6] This position has changed given the recent exodus of Rohingya, who have been fleeing unprecedented levels of brutality at the hands of Myanmar government forces, and associated militia groups.

[7] *Ibid* at para. 2

[8] For the purposes of this submission, the assumption is made that the OTP, and therefore the pre-trial Chamber are accepting of the position that the Rohingya are lawful citizens, and not, as is the position advanced by the Government of Myanmar, refugees from Bangladesh and therefore not present lawfully, thus resulting in them not being citizens.

[9] *Ibid*

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

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

2.20. The position continues to develop however, with it now being estimated that as of 24 May 2018, 905,000 refugees have fled to Cox's Bazar.[12]

2.21. It is not only the sheer volume of Rohingya seeking refuge however, as a significant proportion of those arriving in Bangladesh, a majority being women and children, are traumatised because of what they have been through, a number of which are arriving with serious injuries caused by gunshots, shrapnel, fire, and landmines.[13]

2.22. In the month after the latest outbreak of violence, at least 6,700 Rohingya were reported dead, including at least 730 children under the age of five.[14]

2.23. Amnesty international reported that the Myanmar military also raped and abused numerous Rohingya women and girls.[15]

2.24. The Government of Myanmar puts the number of dead at just 400, and suggests that those who were killed were 'militants' that died as a result of 'clearance operations', operations that they maintain ceased on 5 September 2017, despite the wealth of evidence that clearly demonstrates that such operations continued, and further, that they were not limited to involving 'militants', but specifically targeted the civilian Rohingya population.

2.25. The contrary position is that asserted by the Government of Myanmar, who, having purported to conduct their own investigation in November 2017, exonerated itself of any responsibility for the crisis; it denied killing any civilians, burning their villages, raping women and girls, and stealing any possessions.[16]

[12] https://www.unocha.org/rohingya-refugee-crisis

[13] *Ibid*

[14] https://www.bbc.co.uk/news/world-asia-41566561

[15] *Ibid*

[16] *Ibid*

2.26. This position however cannot be substantiated, and is directly contradicted by widely available evidence compiled by numerous media outlets, including the use of satellite imagery,[17] which clearly demonstrates how entire villages have been destroyed.

2.27. It is this position that has given rise to the OTP asking the Pre-Trial Chamber to rule on the issue of jurisdiction.

The Future

2.28. The only definite position, is that the current conditions in Cox's Bazar are not conducive to long-term residence, given the threat to the Rohingya as a result of their vulnerable position, and the threat of natural disaster, specifically flooding and associated landslides[18], which could potentially put hundreds of thousands of lives at risk. As noted earlier, the monsoon season has just started, with one reported death of a Bangladeshi national so far, and considering the conditions in Cox's Bazar the likelihood of further deaths remain high.

2.29. The smallest of storms could wreak havoc amongst the refugee camps as their makeshifts homes are in the main, nothing more than huts and tents, and therefore not able to withstand the elements.

2.30. The Government of Bangladesh are to be rightly applauded for the manner in which they have mobilised to seek to address the situation. However, there is a justifiable fear that the patience of the Government is about to be exhausted and thus the question of what to do next has arisen with some urgency.

2.31. The two options that appear to be being muted is to return or repatriate the refugees to Myanmar, or, and equally worrying, to move the refugees to a previously uninhabited island, which Bangladesh has been developing for just this purpose.

2.32. On 1 June 2018, it was reported that the Government of Myanmar announced that they had reached an agreement with two UN agencies for the return of refugees. This is despite those

[17] https://www.theguardian.com/world/2018/feb/24/myanmar-rohingya-villages-bulldozed-satellite-images

[18] https://www.theguardian.com/world/2018/apr/18/first-monsoon-rain-exposes-risks-for-rohingya-refugees-in-bangladesh

same refugees not being consulted in any appropriate capacity, and further, despite concerns being expressed that not enough had been, or is being, done to guarantee their safety.[19]

2.33. This process commenced in November of 2017 when Myanmar and Bangladesh agreed to begin the repatriation of the Rohingya. However, it was halted following the expression of concern by refugees that they would be 'forced' to return, and in doing so, face unsafe conditions in Myanmar if the process was not monitored by aid groups.[20]

2.34. This position was echoed by the international community, particularly given that the UN had been denied access to Rakhine State.

2.35. The concern, given the lack of detail in the 'plan', was that the proposed 're-settlement' camps, would be nothing more than unofficial open-air prisons, and therefore the previous discrimination and victimisation would continue.[21]

2.36. Further, the Government of Myanmar, in that agreement, made no provision at all for the status of the Rohingya peoples to be changed, and therefore, they would remain 'stateless'.

2.37. As alluded to at paragraph 2.31 above, a further option being considered by the Government of Bangladesh, is to re-locate the refugees to an uninhabited island in the Bay of Bengal.

2.38. The 'silt island' is vulnerable to the frequent cyclones that are prevalent in the region, and simply cannot sustain the suggested 100,00 that are to be moved there; further, the island didn't even exist until 20 years ago, when it emerged from the silt.

2.39. Again, as per the agreement mentioned at paragraph 2.33 between Bangladesh and Myanmar, this has been done without any consultation with refugees, many of whom have confirmed that they don't want to be moved to an island which is even further away from their homeland.

2.40. Hundreds of thousands of innocent civilians have been forcibly displaced from their homes, targeted by a discriminatory and oppressive Government, and the only two options at present

[19] https://www.theguardian.com/global/2018/jun/01/myanmar-and-un-announce-deal-for-safe-return-of-rohingya

[20] *Ibid*

[21] *Ibid*

appear to be either to send them back to face further discrimination, or move them to an island where it is likely that a further humanitarian disaster will ensue.

2.41. It is therefore quite clear, as a consequence, that the Parties be put on notice that the ICC will exercise jurisdiction in this matter.

3. Chronology

3.1. On 9 April 2018, the Office of The Prosecutor (OTP) at the International Criminal Court (ICC) sought a ruling on a question of jurisdiction, concerning whether the Court "*may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh*".[22]

3.2. On the 11 April 2018, the President of the Pre-Trial Division assigned the Prosecutor's request to the Chamber.[23]

3.3. On 11 May 2018, the Pre-Trial Chamber considered the request, and issued its order convening a 'status conference' to take place on 20 June 2018.[24]

3.4. It is also important to note, that on 7 May 2018, the Pre-Trial Chamber invited the Government of Bangladesh to submit observations[25], pursuant to Rule 103(1) of the Rule of Procedure and Evidence (the Rules)[26], to be filed no later that 11 June 2018 at 16:00 hrs.[27]

3.5. In support of the submissions by the OTP, Guernica 37 International Justice Chambers (Guernica 37), on 8 June 2018 filed an application for leave to submit an *Amicus Curiae,* pursuant to Rule 103 of the Rules of Procedure and Evidence of the International Criminal Court.[28]

---

[22] https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF at paragraph 1

[23] 2 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.

[24] https://www.icc-cpi.int/CourtRecords/CR2018_02522.PDF

[25] https://www.icc-cpi.int/CourtRecords/CR2018_02487.PDF

[26] https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf

[27] https://www.icc-cpi.int/CourtRecords/CR2018_02487.PDF at part (a) of the order.

[28] https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf

3.6. On 14 June 2018, that application for leave was granted, with directions made that the *Amicus Curiae* submission ought to be filed no later than Monday 18 June 2018.

3.7. It is anticipated therefore that the Pre-Trial Chamber will rule on the issue on, or about the 20 June 2018.

4. Forced Displacement Constituting a Crime

4.1. These submissions seek to firmly support the OTP's position that the ICC enjoys territorial jurisdiction to investigate the alleged deportation of the Rohingya people from Myanmar to Bangladesh.

4.2. Article 12(2)(a) of the Rome Statute grants the Court jurisdiction to prosecute international crimes if the "*State on the* ***territory of which the conduct in question occurred***" (emphasis added) is a State Party to the Statute, thus following a criterion of territorial jurisdiction, as opposed to universal or passive personality principles. Thus, under Article 12(2)(a) the residence or nationality of the victims are irrelevant factors when seeking to determine the Court's jurisdiction.

4.3. In accordance with the provisions of Article 12(2)(a), the OTP had to analyse whether the *conduct* of the crime of deportation of the Rohingya people took place in the territory of a State Party. After conducting a detailed legal analysis, the OTP reached the conclusion that one essential element of the crime of deportation—namely, crossing an international border—took place in Bangladesh. Consequently, a significant part of the "conduct in question" occurred on the territory of a State Party to the Rome Statute[29], and the ICC should therefore exercise jurisdiction over the crime and open an investigation into the situation concerning the Rohingya peoples and their persecution in Myanmar.

Nature of the Crime of Deportation

[29] Bangladesh ratified the Rome Statute on 23 March 2010.

4.4. In order to reach this conclusion, the OTP analysed, first, the **nature of the crime of deportation,** separating it from the—distinct, although related—crime of forced transfer of civilian population, and characterizing it as a crime with a long tradition and strong protection in the history of international criminal justice.

4.5. According to the ICC Elements of Crimes, the crime against humanity of deportation or forcible transfer of population established in Article 7(1)(d) of the Rome Statute is comprised of the following five elements:

a) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

b) Such person or persons were lawfully present in the area from which they were so deported or transferred.

c) The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

d) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

e) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

4.6. The same document clarifies that the term "forcibly" is not restricted to physical force, but may include threat of force or coercion; and that the terms "deported or forcibly transferred" are interchangeable with "forcibly displaced", the latter corresponding to a more general category involving both types of crimes.

4.7. Although the ICC Elements of Crimes do not include a specific definition of the term "deportation", the position of the OTP is that the act of being forced to abandon the national territory of the State of origin is the element of the crime of deportation that differentiates it from other crimes, as it specifically protects the right to live in a particular State in which the victims

were lawfully present. It is respectfully submitted that interpreting deportation as including the displacement "across a border" is a non-controversial question in International Law, it having been supported by both the case law of ICTY and the doctrine.[30]

4.8. Consequently, according to the OTP, the "conduct element" of the crime of deportation would be that:

a. the perpetrator acted or made a culpable omission which coerced;

b. without grounds permitted under international law; and

c. the victim to cross an international border, and thus, "*the crime of deportation is not completed until the victim has been forced to cross a de jure or de facto international border*".

Following this argument, the actions committed in Bangladesh are, in legal terms, not an effect, but a fundamental element of the crime, and therefore, part of the conduct in question, crucial to consider that the crime has been committed.

4.9. It is submitted that the analysis made by the OTP with regards to the definition of the crime is consistent, legally-correct and relevant to determine the jurisdiction of the ICC regarding the situation of Rohingya people.

4.10. According to the factual reports received by the OTP, Myanmar authorities have, and continue to deport, without grounds permitted under international law, hundreds of thousands of Rohingya, to the State of Bangladesh, by expulsion or other coercive acts. A fundamental part of this element—and consequently, of the conduct in question—would have taken place in Bangladesh, a territory under the ICC's territorial jurisdiction.

[30] See, for example. Cryer et. al (2010), "An Introduction to International Criminal Law and Procedure", *Cambridge University Press,* p. 249-250:

> "*'Deportation' is generally regarded as referring to displacement across a border, whereas 'forcible transfer' is generally regarded as referring to internal displacement. ICTY jurisprudence follows this distinction. In the Stakic case the Appeals Chamber confirmed that 'deportation' must be across a border, usually a de jure border, or in some circumstances a de facto border, but in any event crossing of 'constantly changing frontlines' would not suffice". Deportation or transfer must be forced in order to be a crime against humanity. This does not require actual physical force, but may also include the threat of force or coercion, psychological oppression, or other means of rendering displacement involuntary. Thus, if a group flees of its own genuine volition, for example to escape a conflict zone, that would not be forced displacement. On the other hand, if a group flees to escape deliberate violence and persecution, they would not be exercising a genuine choice*".

4.11. Moreover, by definition, a border situated between two countries belongs to both states, and the actions and policies that occur on the border are understood to have taken place in the territory of both countries. If a crime takes place right on the border of two states, both countries would have jurisdiction to try the matter.

Nature of the territorial jurisdiction

4.12. Second, the OTP analysed the **nature of the territorial jurisdiction** granted to the Court. In this section, the OTP focused its examination on whether the fact that a legal element of the crime had occurred on the territory of a State Party would be sufficient to trigger the territorial jurisdiction of the ICC under Article 12(2)(a) of the Rome Statute. The Office reaches the conclusion that for jurisdictional purposes, it is enough that one element of the crime—and therefore, part of the "conduct"— has been committed in the national territory of a State Party.

4.13. According to the OTP:

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

4.14. The position that it is possible to exercise territorially-based jurisdiction when only part of the crime—in other words, only one or some, not all, of its elements—has been committed in the national territory, has been defended in several international legal instruments—the OTP citing

the UN Convention against Transnational Organized Crime and the UN Convention on the Law of the Sea—as well as by the doctrine with regards to domestic prosecutions. In *Cryer et al.*, the authors defended that under the principle of territoriality, a State has jurisdiction over a crime when the crime originates abroad or is completed elsewhere, "*so long as at least* ***one of the elements of the offence*** *occurs in its territory. If it is the former, it is said to be 'objective' territorial jurisdiction, if it is the latter, then it is 'subjective' territoriality*"[31] (emphasis added). This criterion is consistent with the principle of sovereignty and increases the effectiveness and possibility of prosecution of transnational crimes committed in different countries.

4.15. The OTP then, highlights that the relevant reference to determine whether a State can exercise jurisdiction—having one element of the crime taken place in its territory— is "***States' legitimate interest*** *in conduct which occurs partially on their territory*" (emphasis added). In the instant case, it is beyond doubt that the State of Bangladesh, as the receiving State of thousands of wounded, traumatized and intimidated Rohingya refugees, would have a legitimate interest in the investigation and prosecution of the cause of such a desolating and intentional displacement of people.

ICC Jurisdiction and the Definition of the Term Conduct

4.16. It must be noted that the ICC is not defending an extra-territorial application of its jurisdiction, but more interpreting the content and extent of the relevant conduct that must take place in a territory under its jurisdiction to consider that the ICC is legitimated to open an investigation.

4.17. Neither the OTP in its submission, nor the Rome Statute, defined the concept and specific reach of the terms "conduct" or "occurrence", which according to Article 12(2)(a), are fundamental to determine the territorial jurisdiction of the Court and the reach of the ICC action.

4.18. Therefore, the Pre-Trial Chamber now faces its first opportunity to not only clarify whether the Court has jurisdiction over the specific case of the deportation of Rohingya people to Bangladesh—which we believe the OTP correctly justified, as one relevant element of the crime

[31] Cryer et. al (2010), "An Introduction to International Criminal Law and Procedure", *Cambridge University Press,* p. 46.

took place in a State Party—but also define when a relevant "conduct" for Article 5 purposes has "occurred" in a country—which has been a matter of wide legal discussion, and one on which the Court has not yet established a formal interpretation—, and thus, determine the concrete reach of the territorial jurisdiction of the ICC.

4.19. Noting the fundamental relevance of the decision of the Pre-Trial Chamber for future investigations by the ICC, we seek to contribute to the discussion by providing some guidelines for the determination of these concepts and alert of the risks of opting for a narrow interpretation of the term "conduct".

4.20. In this vein, it is respectfully submitted that there are certain lacunae and inconsistencies in the interpretation made by the OTP submission of the term "conduct" and its relationship with the concepts of crime, elements of crime, results or consequences and effects.

a) First, the OTP equated the terms "conduct" and "crime" and defined "conduct" under Article 12(2)(a) by making exclusive reference to the elements of crime. In page 24 of its submission, the OTP established that the term "conduct" would include the result or consequences of the action, but exclusively when they are "legally required":

> "*the drafters were conscious of the difficulty in distinguishing between "conduct" and "consequence"—"the dividing line […] is not always clear, and […] sometimes views on where to draw the line […] differed.". Thus even the so-called "conduct" requirement for certain crimes—such as murder, and also deportation—actually contains multiple distinct legal elements, which extend beyond the perpetrator's acts stricto sensu to include their* ***legally required result ("consequences").*** *It follows from these observations that nothing would support reading the notion of "conduct" in article 12(2)(a) to focus solely on the acts personally carried out by the perpetrator to the exclusion of their legally required result(s). Such a view is inconsistent not only with the direct parallel in article 12(2)(a) between "conduct" and the broader concept of "crime", but also the protean concept of "conduct" in the Elements of Crimes themselves*".

The same was defended in footnote 78 with regards to the reach of the territorial jurisdiction defined in the Argentinian Criminal Code, which determines that its Courts

would have jurisdiction over "crimes committed or whose **effects** occur" (emphasis added) in the national territory. In the footnote, in order to protect its assimilation of the term "conduct" with the elements of crime, the OTP clarifies that:

> "*Even if the reference to "effect" might even be interpreted more broadly to mean an effect which is not a legally required element of the crime, the Prosecution understands this provision necessarily* ***to include results which are a legally required element of the crime***" (emphasis added).

b) Second, the OTP declared that "a crime is committed wherever any **essential element** of the crime is accomplished" (emphasis added). Nevertheless, the OTP then failed to make any kind of distinction between types of—essential vs. non-essential—elements, arguing that the fact that "*at least one legal element of an article 5 crime" must occur on the territory of a State Party",* would be sufficient to establish the territorial jurisdiction of the Court.

4.21. With regards to our second argument, established in point b., it is the position of these submissions that the OTP is correct in concluding that it is enough for one legal element of the crime to have taken place in the territory of a State party, as the document Elements of Crime does not establish any order of relevance or precedence between the elements of each crime. The reference to "legitimate interest" made by the OTP in its submission should be able to prevent any extravagant and excessive exercise of jurisdiction by the Court.

4.22. The main discussion under this section will thus focus on the first argument, established in point (a) above, on the interpretation of the term "conduct" as including the results or consequences of the action. **Our position is that for jurisdictional purposes under Article 12(2)(a) of the Rome Statute, the term "conduct"— understood as a synonym of crime—should include the direct result of any criminal action, regardless of whether this result is a legally required element of the crime.**

4.23. The tensions between the concepts of "conduct" and "result" in Article 12(2)(a) of the Rome Statute were already identified in the doctrine. As the Rome Statute used the expression "*the territory of which the conduct in question occurred*", as opposed to 'the territory of which the crime was

committed', it could be argued that Article 12 of the Rome Statute limited its territorial jurisdiction to the strict concept of "*conduct*"—understood as the specific actions of the perpetrator—and did not include the results of the criminal action. The OTP rejected this position by equating the "conduct" with the elements of crime, and therefore, if the result is legally required and takes place in a State Party, the ICC could exercise its jurisdiction to investigate and prosecute.

4.24. Jean-Baptiste Maillart also disputed a strict and narrow interpretation of the territorial jurisdiction of the ICC that would not include the results of the criminal action, as it would tremendously limit the possibility of the ICC in seeking to provide justice to the victims from State Parties and would lead to absurd conclusions. Maillart advocated for an expansive interpretation of the term "*conduct*", based on the "*constructive conduct theory*" developed during the 19th century:

> "*It aims at connecting in time the conduct and the result of a crime. Pursuant to this theory, criminal conduct lasts until the result takes place. In this way, from a ratione loci point of view, the conduct is moving and not static as it is with the traditional interpretation*"[32].

4.25. In contrast with the OTP position, the constructive conduct theory would apply irrespective of whether the result or the consequences of the crime are a legally-required element of the Rome Statute.

4.26. Several experts have confirmed this argument and have defended an interpretation consistent with the principle of ubiquity, or objective territoriality. According to this principle, a crime is understood to have been committed in either the territory in which the criminal conduct took place, or where its results appeared. Bassiouni defined the principle of objective territoriality using the following terms:

> "*Closely related to offenses, an element of which occurs within the territory (the basis for assertion of the subjective territorial theory), are those offenses in which the acts or omissions that comprise the offenses take place or are committed wholly beyond the territorial boundaries of the forum state, but whose effect or result*

[32]Maillart, J. B. (2014): "Article 12(2)(a) Rome Statute: The Missing Piece of the Jurisdictional Puzzle", *EJIL: Talk! Blog of the European Journal of International Law,* available at: http://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/, last accessed: 23rd December 2015.

occurs within that state. Those latter offenses provide jurisdiction on the basis of the 'objective territoriality theory'"[33].

4.27. In this spirit, in the article "*The Territorial Jurisdiction of the International Criminal Court — A Jurisdictional Rule of Reason for the ICC?",* Michail Vagias proposed applying Francis Mann's theories of territorial jurisdiction in international law to the International Criminal Court. Following this line of thought, Vagias argued that the Court shall have territorial jurisdiction "*when a crime is sufficiently closely connected to the territory of a State Party*"[34], when the State Party has "*a genuine link, a sufficiently strong interest*" with the crime[35] that could justify the ICC's competence. He maintains that Article 12 of the Rome Statute should be interpreted "*to the effect that the Court has jurisdiction for crimes 'reasonably connected' to State Party territory*"[36].

4.28. This theory has been followed by a wide range of jurisdictions in comparative law, including by British and German courts, the latter requiring a "*reasonable nexus*"[37] between the crime and the territory of the State. The Supreme Court of Canada also followed this interpretation in *Libman v. The Queen*[38], resolving that Canada had territorial jurisdiction over a case in which only the result of a particular fraud (the deprivation of property) took place in Canada, as the country had "*a 'real and substantial link' to the case*".[39]

4.29. The inclusion of the direct results of a particular criminal action as a part of the "conduct" or the "crime" irrespective of it being one of its defining elements, would have practical and real consequences in terms of jurisdiction with regards to certain crimes of the Rome Statute that are do not explicitly require a particular result.

---

[33] Bassiouni, M.C. (1988): "Legal Responses to International Terrorism: U.S. Procedural Aspects", *Martinus Nijhoff Publishers,* p. 159.

[34] Vagias, M. (2012): "The territorial jurisdiction of the International Criminal Court - a jurisdictional rule of reasonforthe ICC?", *Netherlands International LawReview,* LIX, p. 45.

[35] *Idem*, p. 49

[36] *Idem*, p. 54.

[37] *Idem*, p. 53.

[38] Libman v. The Queen, [1985] 2 SCR 178, 200 (Supreme Court of Canada).

[39] Vagias, M. (2012): "The territorial jurisdiction of the International Criminal Court - a jurisdictional rule of reasonforthe ICC?", *Netherlands International LawReview,* LIX, p. 52, citation 40.

4.30. In this vein, the doctrine and the legal practice differentiate between "result crimes" and "conduct crimes".

4.31. Result crimes are those that include "*not only the proscription of a particular conduct but also the requirement of a certain result flowing from the prohibited conduct*"[40]. According to the ICC Elements of Crime, the crime of murder requires the result of "killing one or more persons", and according to the OTP submission, the crime of deportation would include the requirement to cross "an international border".

4.32. Meanwhile, a "conduct crime" is one "*where the act in itself constitutes the crime irrespective of the outcome or result of the said act. In this class of offences the result, if any at all, is not included in the definition of the offence, it is immaterial and so does not have to be proved*". Some traditional examples to illustrate this type of crimes in domestic Criminal Law are administering poison or perjury.

4.33. In the field of International Criminal Law, there are numerous "conduct crimes", including, for example, the deliberate infliction of conditions of life calculated to bring about the physical destruction of a group in whole or in part, an act that could be constitutive of a crime of genocide;[41] the war crimes of employing prohibited bullets, prohibited gases, liquids, materials or devices—as the ICC Elements of Crimes only requires to "employ" such weapons—; or the war crimes of attacking protected objects.[42] With regards to this last type of crime, one must recall that the ICC in its judgment against *Ahmad al Faqi al Mahdi* noted that the jurisprudence of the ICTY was of limited guidance given that, in contrast to the Statute, its applicable law did not govern 'attacks' against cultural objects "*but rather punishes their 'destruction or wilful damage"*[43]. This

[40] Anyanqwe, C. (2015): "Criminal Law: The General Part", *Langaa RPCIG,* Cameroon, p. 94.

[41] See Cryer et. al (2010), "An Introduction to International Criminal Law and Procedure", *Cambridge University Press,* p. 215: "*This category of prohibited acts comprises methods of destruction whereby the perpetrator does not immediately kill the members of the group, but which seek to bring about their physical destruction in the end. The ICC Elements of Crimes interpret the term 'conditions of life' as including but 'not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'. Unlike the two previous categories,* ***this is not a result-based form of the crime*** *but it requires that the conditions are 'calculated' to achieve the result*." (emphasis added).

[42] With regards to the term "attack" and the fact that it refers to a conduct crime, see Kim, S. (2016), "A Collective Theory of Genocidal Intent", *Springer,* Asser Press, vol. 7, p. 142, with regards to the war crime of "intentionally directing attacks against the civilian population". According to the author, such crime as provided in Article 8(2)(b)(i) of the ICC Statute "*is generally classified as a 'conduct crime' in respect of which no showing of 'result' is required. The mere fact of using weapons of mass destruction (without a proof of subsequent actual destruction of a substantial part of a group) might constitute strong evidence of intent to target a substantial part of the group*".

[43] International Criminal Court, Situation in the Republic of Mali, In the case of The Prosecutor v. Ahmad al Faqi al Mahdi, Judgment and Sentence, No.: ICC-01/12-01/15, 27 September 2016.

distinction noted by the ICC with regards of the terms "attack" and "destruction" reflects the difference between a crime of conduct and a crime of result.

4.34. Consequently, there are crimes whose "conduct" may be taken place in the territory of State non-party to the Rome Statute, and have its non-legally-required, but directly damaging and wilful result, in a territory under the jurisdiction of the Court. It is for instance, possible to employ or detonate a weapon containing a prohibited gas in one side of a national border in order to inflict—non-required—damaging cross-border results. This proposal acquires particular relevance when noting the incalculable damage that remote actions carried out through online mechanisms and devices can cause, or the relevance that the OTP provided, for example, to the destruction of the environment in its Policy Paper on Case Selection and Prioritisation of 15 September 2016.

4.35. The possibility to perpetrate international "conduct crimes" in the territory of one State that cause their results in another nation is not a mere theoretical question, but one that has already acquired practical relevance. In 2016, Guernica 37 submitted a communication based on Article 15 before the OTP, calling upon the ICC Prosecutor to investigate the unilateral closure and deliberate canalization and infiltration of large amounts of seawater into the Philadelphia corridor, separating the territories of Egypt and Gaza through the Rafah border.

4.36. The pipes that transported the water were situated on the Egyptian side of the border and therefore, they were officially under Egyptian soil. If—in a theoretical exercise—both countries were considered to be in a situation of international armed conflict, following the theory proposed by the OTP, the ICC would not have jurisdiction over the war crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, established in Article 8 (2) (b) (iv), as none of the elements of the crime — and thus the "conduct in question"—would have occurred in a State Party to the Rome Statute.

4.37. In contrast, if we interpret the term 'conduct' in Article 12(2)(a) as including the result of the action, which took place in Palestine, a State Party to the Rome Statute, the crime could have been

understood to have "occurred" in Palestine and the ICC would be entitled to conduct an investigation on the topic following its territorial jurisdiction. It must be noted that the alleged criminal act was intended to produce its main effects in Palestinian territory, and the State of Palestine is a country with a "*real and substantial link*" to the case.

4.38. It should be clarified, at this point, that this submission does not intend to justify an application of the 'effects doctrine', which would over-expand the territorial jurisdiction of the Court to territories where no part of the "conduct" took place. The relevant reference in this proposal is not the effects of a particular crime, but the result of the criminal action that directly emerges from it. This is particularly visible in 'conduct crimes' that punish 'attacks' where a particular population of a State Party has become the target of such attack. Even if the Rome Statute punishes the mere act of attacking—thus not requiring such attack to be successful—, when such attack has its direct and deliberate results in the territory of a State party, it is our position that the "crime" should be considered to also have occurred in the territory of a State Party, and consequently, the ICC should have jurisdiction to investigate and prosecute it, regardless of whether the criminal actions or coercive acts took place outside the national borders.

4.39. In this vein, reference is made to the definition of objective jurisdiction given by Hyde, who emphasized the direct link between the result and the criminal action to exercise jurisdiction:

> "*The setting in motion outside of a State of a force which produces as* ***direct consequences*** *an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain*"[44].

4.40. The intention or purpose to produce those results could also be relevant to differentiate the objective territoriality principle and the effects theory. In this respect, in *Strassheim v. Dailey*, the U.S. Supreme Court stated:

[44] 1 C. Hyde, International Law 422 (2nd ed. 1945) in Bassiouni, M.C. (1988): "Legal Responses to International Terrorism: U.S. Procedural Aspects", *Martinus Nijhoff Publishers,* p. 159.

> "*Acts done outside a jurisdiction, but* ***intended to*** *produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power*"[45].

4.41. This nexus between the action and the result has already been examined by the jurisprudence of international courts, for example, in order to determine the participation of victims. In this context, the ICC requires a nexus between the harm and the crimes alleged or charged, as it exposed in its Decision on Victims' Participation in the case of the *Prosecutor v. Thomas Lubanga Dyilo*:

> "*it is necessary that the harm was suffered* ***as a result of a crime*** *committed in the territory of a State Party or by a national of a State Party*"[46].

4.42. For all the reasons stated above, we would respectfully invite the ICC to adopt the objective territoriality principle, expand the interpretation proposed by the OTP and define the term "conduct", for 12(2)(a) purposes, as including not only the actions and situations determined by the elements of the crime, but also the result of such actions, regardless of its characterization as a separate element.

4.43. As previously mentioned, this interpretation would be consistent with domestic practice and with an international trend—mentioned by the OTP in its submission—"*moving away from formalistic analyses of where particular legal elements of a crime took place, and instead looking more broadly at the nature, causes, and* ***consequences*** *of the crime on its facts to determine if exercising jurisdiction is appropriate*" (emphasis added), with the OTP mentioning the cases of Canada, England and Wales, and Germany, as well as China, Argentina, Iran and Italy providing their courts with jurisdiction to prosecute crimes whose result occurs in their national territories.

4.44. Moreover, the European Court of Human Rights (hereinafter, ECtHR) has even concluded that the concept of jurisdiction extends to the "effects" of the violations of human rights committed

[45] U.S. Supreme Court, Strassheim v. Daily, 221 U.S. 280, 15th May 1911

[46] International Criminal Court, Decision on Victims' Participation, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 18th January 2008.

by State authorities on the territory of another State. In *Loizidou v. Turkey*, the ECtHR established that:

> "*it stressed that under its established caselaw the concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities* ***which produce effects outside their own territory***"[47] (emphasis added)

4.45. Finally, this interpretation would also be consistent with general criminal law theory, and the wording of the Rome Statute. It must be noted that Article 12(2)(a) provides the ICC with jurisdiction over crimes if they are committed in "*the State on the territory of which the conduct in question occurred or, if the* ***crime*** *was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft*" (emphasis added), thus suggesting that under Article 12, the terms conduct and crime—as exposed by the OTP in its submission— are synonymous and interchangeable. As Curfmann recently explained: "*affording different meanings to these terms would create the strange result of permitting objective territorial jurisdiction over sea-and air-based crimes, but not over those carried out on land*".[48] And if one attends to general criminal law theory, criminal offences are comprised by different elements, including an offender, a victim, an act or omission, a legal prohibition, a time and place of commission, and **a consequence**, which means that the result or consequence would be an inherent element of every crime—irrespective of whether it is legally required to criminally punish a particular action. Aa a matter of fact, according to Levitt, "*the function of the criminal law, inter alia, is to shield society from* ***harmful consequences*** *of human activities*" (emphasis added).[49]

5. Capability of Bangladesh to Prosecute

5.1. It is respectfully submitted that the authorities of the People's Republic of Bangladesh neither possess the will nor the ability to prosecute international crimes arising out of the deportation of

[47] European Court of Human Rights, Case of Loizidou v. Turkey, Application no. 15318/89, 18th December 1996, par. 52.

[48] Curfman, G. (2018): "ICC Jurisdiction and the Rohingya Crisis in Myanmar", *Just Security,* 9 January 2018, available at: https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/.

[49] Levitt, A. (1926): "Jurisdiction over Crimes", *Journal of Criminal Law and Criminology,* vol. 16, issue 3.

the Rohingya people exercising territorial jurisdiction, or any other crime under the principle of universal jurisdiction.

5.2. It has been mooted that it may be considered appropriate for relevant offences to be prosecuted domestically in Bangladesh.

5.3. This would appear to be on the basis that Bangladesh developed its own domestic tribunal in 2010, the Bangladesh International Crimes Tribunal (ICT) with a view to prosecuting those individuals alleged to have committed relevant offences during the 1971 War of Independence.

5.4. The assumption therefore, is that there is already an established mechanism experienced and adept at seeking to prosecute War Crimes and Crimes Against Humanity.

5.5. Further, on the face of the matter, to look to Bangladesh to prosecute relevant offences, would appear to be in accordance with the ICC's principle of complementarity.

5.6. It is not known, at the time of writing, whether the Government of Bangladesh, in its written submissions to the Pre-Trial Chamber, supports the position of the ICC Prosecutor, seeks to investigate and prosecute the matters domestically or disputes that there is jurisdiction outside of Myanmar. The following is submitted on the basis that should the Pre-Trial Chamber consider the question of jurisdiction by reference to the principle of complementarity, it should approach the question with the utmost caution.

5.7. In considering this matter, it is essential that the political situation in Bangladesh and the ICT is clearly understood.

5.8. In 2009, the Awami League Government made the electoral promise to establish a domestic court to provide justice for the crimes committed during the 1971 War of Liberation. After winning the election, the Government effectively promoted the creation of the International Crimes Tribunal: a first tribunal ICT-1 was established in 2010; and a second, ICT-2, in 2012. It is important to recall that the legal framework for the ICT was first passed in 1973 whereupon the ICT was established as a military court with limited due process guarantees.

5.9. Despite the pressing need to provide justice for the crimes committed during the Liberation War and the hopes placed on the potential of the ICT to serve as a tool of meaningful accountability, the trials being conducted before this tribunal have been, and still are, deeply flawed, and fall far below international standards of due process. A litany of grave violations of human and procedural rights has characterized the ICT in both its legal framework and practice. The Government of Bangladesh has used the courts, law enforcement and state security forces as tools of oppression. This very real concern must be borne in mind before any decision is made as to jurisdiction.

5.10. The following sets out some of the more serious concerns as to procedural safeguards.

5.11. First, charges brought against accused were neither clear nor specific, and defendants were deprived of both their right to appoint counsel of their own choosing and of sufficient time to prepare a defence. Moreover, the prosecution had no duty to disclose exculpatory material, while the defence were precluded from presenting important evidence and calling essential witnesses. Communication between the accused and the defence was limited and there were instances of witness perjury and falsification of evidence. Furthermore, witnesses and lawyers suffered grave threats, intimidation and even physical assaults.

5.12. The most basic principles of international criminal law have been consistently and severely violated during the trials: the burden of proof was transferred from the prosecution to the defence, presumption of evidence was non-existent, double jeopardy was repeatedly infringed, and the retroactivity of the tribunal's statute was not sufficiently analysed, which impeded a correct definition of the crimes. Moreover, a number of trials were conducted in absentia and the amnesties and processes that took place during the 1970s were completely disregarded.

5.13. Further, the Government encouraged legal and constitutional reforms that not only deprived defendants from some of their most basic human rights, but also forced the ICT to revise prior judgments in order to impose the death penalty. These reforms breached fundamental principles of international human rights law and showed a blatant disregard for the concept of human dignity.

5.14. In general, it is possible to argue that the proceedings before the ICT have been driven by politics, not by justice. The trials have been conducted by judges that received instructions and pressures from the Government and third-party actors, as the 'Skypegate' scandal showed. Consequently, there can be no suggestion of the principle of judicial impartiality being upheld. It is particularly worrying that despite this lack of impartiality and independence, defence lawyers were precluded from challenging the composition of the tribunal, its jurisdiction or any interlocutory decision it reached.

5.15. The Government has held a significant degree of control over the judicial process and has sought to use the ICT as a political tool, limiting the jurisdiction of the court to the crimes committed by just one side of the conflict and encouraging the prosecution of members of the political opposition. It is accepted, that in terms of the situation in Myanmar and Bangladesh, political manipulation is not necessarily an issue that will be directly relevant, however, as is considered later in this section, issues of credibility and legitimacy are. It is further clear that the Government of Bangladesh needs to maintain dialogue with the Government of Myanmar for the purpose of future repatriation and therefore its interest in holding perpetrators to account may be tainted by such political considerations.

5.16. Given the unfairness of the proceedings and the gravity of the due process violations, the verdicts of the ICT could be considered contrary to the standards set out in the International Covenant for Civil and Political Rights (hereinafter ICCPR) and in the Rome Statute. The death penalties imposed may, therefore, amount to summary or arbitrary executions, as expressed by the UN Special Rapporteur on Summary or Extra-Judicial Executions.

5.17. It is highlighted that there is no objection to domestic trials in principle, however, in order for this to be happen, the process put in place must be appropriate and credible, the mechanics of that in place at present in Bangladesh is neither of these, and has been quite rightly condemned.

Fundamental principles of fair trial

5.18. The right to a fair trial is a fundamental human right. It is recognized by article 10 and 11 of the Universal Declaration of Human Rights (hereinafter UDHR) and article 14, 15 and 26 of the

ICCPR. Bangladesh is a state party to the ICCPR and has been since 2000. Article 2.1 ICCPR demands that the rights contained within the covenant must be ensured to all individuals within the Bangladeshi territory and jurisdiction "without distinction of any kind".

5.19. Human Rights and Fair Trial Standards have been adapted to domestic regulations through national constitutions. The Bangladesh Constitution is no exception to this rule. It includes fair trial guarantees and a clear commitment to human rights in its Articles 11, 26.2 and 27 so, given its dual domestic and international compromise, Bangladesh were expected to initiate a process of investigation, justice and accountability for the crimes committed during 1971 consistent with international standards of due process and the minimum guarantees of a fair trial.

First and Fifteenth Constitutional Amendments

5.20. The first constitutional amendment added Article 47.A to the Constitution of Bangladesh. This article deprived those suspected of having committed war crimes, crimes against humanity and genocide from some of their most basic constitutional rights and fundamental freedoms, including the right to enjoy the protection of the law, the prohibition of retrospective prosecutions, the right to a speedy and public trial, and the right to appeal to the Supreme Court in case of violation of these rights.

5.21. This discriminatory measure was in breach of Article 26 of the ICCPR, as it targeted a particular group. Moreover, by imposing these severe restrictions prior to conviction, the amendment disfigured the principle of equality of arms and the presumption innocence contained within article 14.2 of the ICCPR, further, the provision of 47.A seems to contradict article 14.3.c of the ICCPR, which recognize everyone's rights "to be tried without undue delay".

ICT legal framework

5.22. The legal framework of the ICT is comprised of the International Crimes (Tribunals) Act of 1973, (IC(T)A), the Rules of Procedure (hereinafter RoP), and the Constitution of Bangladesh, the latter limiting the rights of the accused and the potential allegations from the Defence, as explained in the previous section. Given that the ICT is a special tribunal, established by a *lex specialisis,* outside

the judicial system of Bangladesh, the rest of the domestic criminal regulations did not apply to the trials.

5.23. The IC(T)A was a modern and advanced statute in 1973. International experts from the International Commission of Jurists had contributed to the drafting of the IC(T)A in 1973, and the statute succeeded in upgrading the substantive law from Nuremberg and Tokyo trials. Yet, the IC(T)A was considered completely out-dated by the start of the proceedings in 2009, as it did not reflect any of the improvements and developments from either the Rome Statute or from the work of the *ad hoc* tribunals created to investigate and prosecute international crimes committed in the conflicts of Rwanda and Yugoslavia. The 1973 legislation did not deal with modern rules of evidence, nor did it ensure that defendants were properly represented or had their modern day fair trial rights upheld.

5.24. The United States Ambassador-at-Large for War Crimes Issues, Stephen J. Rapp wrote an extensive analysis of the ICT legislation and listed several proposals to adapt the regulation to international standards of fairness and due process. Although some of his proposals for regulatory improvement were accepted by the Bangladesh Government and partially incorporated into the ICT regulation, the amendments finally implemented were insufficient and provided a mere theoretical protection that proved to be ineffective in the practice of the tribunal.

The First Arrests and The First Trials

5.25. Following the establishment of the tribunal, its judges issued the first arrest warrants: between June 2010 and June 2012, nine people were arrested. They remained detained for a prolonged period without being charged with a crime under the 1973 Act, and as a result filed a communication with the Working Group of Arbitrary Detention (hereinafter, WGAD).

5.26. After an exhaustive examination of the facts, the WGAD concluded in Opinions No. 66/2011[50] and No. 66/2012[51] that these long pre-trial detentions were arbitrary and contrary to Article 9 of

[50] UN Working Group of Arbitrary Detention (2011): "Motiur Rahman Nizami et al. v. Bangladesh", Opinions adopted by the Working Group on Arbitrary Detention at its sixty-second session, 16–25 November 2011, No. 66/2011 (Bangladesh), UN Doc A/HRC/WGAD/2011/66, 22nd June 2012, available at: http://www1.umn.edu/humanrts/wgad/66-2011.html, last accessed: 18th September 2015.

[51] UN Working Group of Arbitrary Detention (2013): "Azharul Islam et al. v. Bangladesh", Opinions Adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14-23 November 2012. No. 66/2012 (Bangladesh), UN Doc A/HRC/WGAD/2012/66, 16th January 2013,

the ICCPR. The opinions stressed that presumption of innocence was a fundamental right of judicial processes and, consequently, detention prior to conviction should be an exception rather than a rule. Moreover, the WGAD did not find any ground to deny the accused bail.

5.27. In addition, the WGAD detected several violations of the defendants' rights during pre-trial detention. For example, the accused were not afforded privileged communication with a legal representative of his own choosing and further, defence counsel were not allowed to be present during interrogations that, allegedly, led to confessions. Defendants also faced impediments to access evidence and, after one year in pre-trial detention, they had not yet been formally informed of the charges.

5.28. The WGAD condemned these violations of due process rights and called upon the Government of Bangladesh to take the necessary steps to stop arbitrary detentions and adhere to the principles of the ICCPR. As a matter of fact, given the gravity of the violations and the allegations of torture and cruel and inhuman treatment, the WGAD decided to refer the situation to the Special Rapporteur on Torture. Article 14.3.d of the ICCPR, to which Bangladesh is a State Party, recognizes the defendant's right "to be tried in his presence".

Inadequacy of the legal framework, critique of the legislation

5.29. The whole legislative framework of the ICT received widespread criticism for failing to comply with recognized international standards of due process and human rights norms.

5.30. Aside from the deprivation of fundamental rights by the aforementioned amendments of the Constitution, the regulation of the IC(T)A undermined the position of the defendants and deprived them of basic procedural protections.

5.31. The ICT followed special rules of procedure and evidence, and argued not to be bound by the domestic rules that regulate the ordinary criminal procedure. Indeed, Article 23 of the IC(T)A explicitly excluded the application of the provisions contained within the Criminal Procedure Code and the Evidence Act. Given the domestic nature of the tribunal there was absolutely no

available at: http://tmcadvisorygroup.com/wp-content/uploads/2013/01/UN-Working-Group-on-Arbitrary-Detetention-Bangladesh-662012.pdf, last accessed: 18th September 2015.

justification for departing from the established norms of due process and fair trial that were consistently applied in other criminal cases. This measure was unlawful and discriminatory, as the special rules applied by the ICT to regulate its trials provided less guarantees for the rights of the accused and fell far short of international standards. As a matter of fact, these special rules, according to the WGAD, were in breach of the ICCPR concerning disclosure and defence rights during the course of the investigation.

5.32. On numerous occasions, the information provided to the Defence as to the nature of the allegations was insufficient, and some of the information, including the investigative report and case diaries, was given to the Tribunal judges, but not to Defence Counsel. Indeed, the Prosecution was not required to serve unused or exculpatory material to the Defence.

5.33. Moreover, the deadline for the Prosecution to disclose its case to the Defence is only three weeks before the commencement of the trial, which leaves an extremely short period of time for the defendants to review the prosecution case and prepare the defence for crimes allegedly committed more than 40 years ago. In contrast, the Defence is obliged to disclose its entire case to both the Tribunal and Prosecution on the initiation of trial. It is clear that this regulation is contrary to article 14.3.b ICCPR, which guarantees "adequate time and facilities" for the preparation of the defence.

5.34. Indeed, one of the most blatant interferences of the Government of Bangladesh in the ICT activities took place with regards to the regulation of appeal in the IC(T)A. After the conviction of Abdul Quadar Mollah, the Assistant Secretary-General of Jamaat-e-Islami, to life imprisonment for crimes against humanity on 5th February 2013, several demonstrations were organized, with the support of the Government, to protest about the "lenient" sentence and demand the death penalty.

5.35. At the time of Mollah's conviction, the IC(T)A did not permit the prosecution to appeal a sentence in search for a more severe punishment, as a result the Government forced a rapid amendment of the IC(T)A. The amendment, approved on 14 February 2013, was exclusively designed to allow a prosecutorial appeal and the imposition of a death sentence in Mollah's particular case. Prime

Minister Sheikh Hasina stated the she would attempt to convince the ICT judges to listen to "*the sentiment of the people*"[52] when taking their decisions, and cabinet secretary Mr. Md Musharraf Hossain defended the amendment as a tool to fight against what he termed "*inadequacy of sentence*"[53]; statements that reflect an explicit intromission of the executive on the work of the ICT.

5.36. After the amendment, article 21.2 of the IC(T)A reads: "*the Government or the complainant or the informant, as the case may be, may appeal, as of right, to the Appellate Division of the Supreme Court of Bangladesh against an order of acquittal or an order of sentence*" (emphasis added). This permitted the prosecutor to appeal Mollah's sentence and he was finally sentenced to death and hanged in December 2013.

5.37. Geoffrey Robertson Q.C., first President of the UN War Crimes Court in Sierra Leone and jurist member of the UN's Internal Justice Council, described this legal reform as a 'lynch law' that proved the tribunal's dependence on popular pressure and politicization[54]. The modification indicated that the ICT had only limited possibilities to decide on the appropriate sentence, and retrospectively deprived a person convicted *"of a legitimate expectation that his sentence would not be increased"*[55]. This retrospective change with capital consequences confirmed the political nature of the tribunal and the enormous influence of the executive on the trials.

5.38. This disregard for international law, rules, and customs affected the definition of the crimes under the jurisdiction of the Tribunal. The Tribunal failed to provide a detailed definition of crimes against humanity in 1971 and did not accept the application of recognized definitions under customary international law.

5.39. Another of the most controversial issues of the regulation of the ICT was the regulation of interlocutory appeals: although the Rules of Procedure were modified to improve the fairness of the proceedings, the reform was insufficient as it allowed the very same judges to review its own

[52] Hossain, M. (2013): "A travesty of justice in Bangladesh", *Asia Times Online,* 20th September 2013, available at: http://www.atimes.com/atimes/South_Asia/SOU-03-200913.html, last accessed: 17th September 2015.

[53] Bangladesh Sangbad Sangsth (2013): "Cabinet okays proposal for ICT act amendment", 11th February 2013, available at: http://www.bssnews.net/newsDetails.php?cat=0&id=312516$date=2013-02-11&dateCurrent=2013-02-13, last accessed: 17th September 2015.

[54] Robertson, G. (2015): "Report on the International Crimes Tribunal of Bangladesh", *International Forum for Democracy and Human Rights,* available at: https://barhumanrights.org.uk/sites/default/files/documents/news/grqc_bangladesh_final.pdf, last accessed: 18th September 2015, p. 71.

[55] *Ibid.*

decisions. Therefore, challenges to the decisions of the tribunal cannot be subjected to an impartial review and decision. It is worth mentioning that the same judges lead the different stages of the proceedings: from the pre-trial stages—including bail, legal representation, disclosure and evidence—to the verdict, they control the development of the main trial and even review their own decisions.

5.40. This lack of impartiality of the tribunal was further confirmed by article 6.8 of the IC(T)A, which prohibited challenging "*neither the constitution of a Tribunal nor the appointment of its Chairman or members*". This prohibition curtailed the guarantee of an independent and impartial tribunal as recognized by article 10 UDHR and article 14.1 ICCPR and deprived article 6.2A of the IC(T)A—which obliges to ensure an independent and fair trial—of substantive content.

5.41. Indeed, preventing the ability to question the impartiality of the tribunal members had direct implications in the conduct of the trials. The Chairman of the first ICT Tribunal, Justice Md Nizamul Huq, participated in the Peoples' Inquiry Commission that judged the events occurred in 1971 and the crimes regulated by the IC(T)A. Thus, several experts brought his partiality into question. Although the Defence counsel of Delowar Hussain Sayedee applied for the recusal of the Chairman, the two remaining judges that decided on the issue ruled that there was no recusal provision in the IC(T)A, and thus, pretended that the tribunal had no power of recusal. The judges left the decision to the "good conscience of the Chairman"[56], who finally decided to remain in his position despite his clear and public preconceptions on the responsibility of the accused. Adding to the legal scandal, the ICT defined this recusal application as "outrageous" and "contemptuous", threatening to initiate judicial proceedings for contempt of court charges[57]. This decision has arguably negatively affected the integrity of the tribunal, its legitimacy and the required level of impartiality.

[56] Watch on Bangladesh War Crimes Tribunal (2011): "A Joint Press Release on Tribunal Chairman's Recusal", 21st November 2011, available at: https://ictbdwatch.wordpress.com/2011/11/21/a-joint-press-release-on-tribunal-chairmans-recusal/, last accessed: 17th September 2015.

[57] bdnews24.com (2011): "ICT chair rejects 'preposterous' petition", 28th November 2011, available at: http://bdnews24.com/bangladesh/war-crimes-trials/2011/11/28/ict-chair-rejects-preposterous-petition, last accessed: 17th September 2015.

5.42. Although this episode created serious concerns, it was only one of a series of judicial scandals that ruined the perceived independence and impartiality of the ICT.

5.43. First, Prosecutor Mr. Zead-Al-Malum had a clear opinion on the responsibility and the guilt of the accused, as expressed at his paper "Trial of the 1971 War Crimes in Bangladesh under the International War Crimes (Tribunal) Act, 1973" and at his presentations at both, the XVII Congress of the International Association of Democratic Lawyers[58] and the European Parliament in the South East Asia Committee.

5.44. Another prosecutor, Ms. Tureen Afroz, now removed for unrelated matters, also campaigned publicly for the conviction and punishment of the persons she had prosecuted, making statements that presumed the guilt of the accused[59]. These statements are acceptable from political activists, but not from the prosecutor of a case that could entail the death penalty, as clearly such statements compromise the integrity of the process, and contravene the principle of 'impartial prosecution'.

5.45. The appointment of Justice Md Nizamul Huq and of prosecutors Mr. Zead-Al-Malum and Ms. Afroz questioned the level of commitment that the ICT had to the fundamental principle of the presumption of innocence, a principle further curtailed by several statements coming from Bangladeshi authorities. Members of the government described the accused, and certain defendants and the political parties to which they were members, as "war criminals"[60]; and a justice of the High Court Division of the Supreme Court of Bangladesh stated in court tha there was a reasonable distinction between the rights of ordinary citizens and the rights of war criminals.[61]

---

[58] See International Association of Democratic Lawyers (2009): "List interventions in Commissions at 17th IADL congress", available at: http://www.iadllaw.org/en/node/364, last accessed: 17th September 2015.

[59] Afroz, T. (2014): "No political concession at war crimes trial", 3rd June 2014, available at: http://www.thedailystar.net/no-political-concession-at-war-crimes-trial-26831, last accessed: 17th September 2015.

[60] bdnews24.com (2014): "PM to Khaleda: Leave the side of war criminals", 3rd November 2014, available at: http://bdnews24.com/bangladesh/2014/11/03/pm-to-khaleda-leave-the-side-of-war-criminals, last accessed: 17th September 2015; The Daily Star (2014): "Anti-govt movement aims to protect war criminals: PM", 15th December 2015, available at: http://www.thedailystar.net/anti-govt-movement-aims-to-protect-war-criminals-pm-55485, last accessed: 17th September 2015.

[61] Al-Ghamdi, A. (2012): "Diplomacy and international law", 3rd October 2012, available at: http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20121003138329, last accessed: 17th September 2015.

5.46. Moreover, the independence and impartiality of the tribunal was not only threatened by the participation of judicial and prosecutorial experts with strong preconceptions on the final verdict of the trials; but even more importantly, by the Government influence on the Court.

5.47. This influence was firstly manifested by the changing composition of the Tribunal, as judges have been constantly transferred and replaced in the proceedings of the ICT. For example, Justice ATM Fazle Kabir was transferred from the first Tribunal (ICT-1) to the second tribunal (ICT-2) without any apparent reason that could justify this transfer. Some international voices considered the transfer as an inappropriate and unlawful intervention from the Government of Bangladesh seeking to influence the outcome of a certain trial[62].

5.48. Justice ATM Fazle Kabir was hearing evidence on the case against Mr. Sayedee when he was transferred. The newly appointed judge for ICT-1 appeared in the final stages on the process, so he could not familiarize himself with the evidence already presented in the trial and was not in a convenient position to issue a verdict on the particular case. Indeed, article 6.6 of the IC(T)A clearly states that: "*a Tribunal shall not, merely by reason of any change in its membership or the absence of any member thereof from any sitting, be bound to recall and re-hear any witness who has already given any evidence and may act on the evidence already given or produced before it*". Therefore, the transfer had intolerable consequences for the fairness of the proceedings, above all, given the legal impossibility to challenge the composition of the tribunal. It constituted a clear violation of due process rights and of international standards of justice. It is very illustrative that by the end of the proceedings, none of the judges in Mr. Sayedee's case had been present during the whole trial.

5.49. Nonetheless, the most clear example of the blatant intervention of the Bangladeshi executive in the trial came with the so-called "Skypegate" scandal: *The Economist* published[63] the content of more than 17 hours of recorded telephone conversations and over 230 emails between the Chairman of the ICT-1, Justice Md Nizamul Huq—the same judge whose impartiality was

[62] International Criminal Law Bureau (2012): "The Moving Judge and the Replacement Judge – Bangladesh International Crimes Tribunal and Interference by the Government with the Legal Process", 23rd April 2012, available at: http://www.internationallawbureau.com/index.php/the-moving-judge-and-the-replacement-judge-bangladesh-international-crimes-tribunal-and-interference-by-the-government-with-the-legal-process/, last accessed: 17th September 2015.

[63] The Economist (2012): "The trial of the birth of a nation", 15th December 2012, available at: http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, last accessed: 17th September 2015.

compromised by his participation in the Peoples' Inquiry Commission—and Dr. Ahmed Ziauddin, the director of the Bangladesh Centre for Genocide Studies in Brussels.

5.50. These conversations evinced the deep pressure that the Government of Bangladesh was placing on the ICT judges to force summary trials and secure convictions at the expense of international standards and with the complete disregard of due process and fundamental rights. The conversations showed evidence of judicial and prosecutorial misconduct; of collusion between prosecutors, judges, government officials and third parties; and importantly, of the immense influence of the Government to remove and appoint ICT judges.

5.51. Justice Md Nizamul Huq held a constant communication with Dr. Ahmed Ziauddin, who provided the judge with drafts of important court documents—including a rejection to a recusal application and the final draft of the indictment—and urged him to undertake certain judicial decisions. In some emails, the judge even seemed to be waiting for orders from Mr. Ziauddin and gave his arguments primacy over his own.

5.52. What is clear is that Mr. Ziauddin's role surpassed all the limits expected from an ordinary advisor to the court: first, his advice, far from being limited to his area of expertise, expanded to every aspect of the trial; second, his collaboration was unofficial and unknown to certain parties of the proceedings; and third, from the conversations it is inferred that he was cooperating with the prosecution as well, which presented a serious conflict of interest. Therefore, his intervention constituted an unlawful and inappropriate external influence on the trial, evincing the existence of high-level political interference on the process.

5.53. Ahmed Ziauddin's influence was so large that he even suggested the dismissal of a judge after Justice Md Nizamul Huq expressed concerns over the commitment of this judge to international standards: "*I am a bit afraid about Shahinur [Shahinur Islam, a tribunal judge]. Because he is too inclined to the international standard. It...was in my mind—and prosecutors also complained to me—that he brought the references of foreign tribunals in every order*"[64]. This conversation was explicit confirmation that the ICT's

[64] *Ibid.*

neglect for international human rights and criminal standards was a politically-motivated, wilful and purposeful decision aimed at ensuring convictions and executions.

5.54. In addition, Justice Md Nizamul Huq shared important information about the trial with Dr. Ahmed Ziauddin, undermining the independence of the whole process. Judges are normally expected to abstain from discussing certain details of their cases in order to ensure impartiality and avoid external influences that could prejudice the trial. However, in this case, "*Mr Ziauddin was involved in aspects of the trial that go beyond what would be permitted to a court adviser or anyone else*"[65].

5.55. According to The Economist, the material it disclosed suggested three things:

> *"that Mr Ziauddin had an influence over how the prosecution framed its case and how the court framed its indictment; that Mr Ziauddin told the judge in his December 2011 e-mail about how prosecutors might develop their case; and that after the prosecutors laid their charges, the judge accepted guidance about the formal accusations from Mr Ziauddin directly*".

5.56. Moreover, from the documents attached in the written communications between these actors, it was possible to infer that the tribunal was preparing a guilty verdict even before it had finished hearing the evidence or the witnesses' testimony presented by the defence. Therefore, these conversations and documents invite us to question whether the verdicts of the ICT are predetermined.

International Crimes Tribunal in practice

5.57. If the legal framework of the ICT was already in contravention of the international rules of due process, its practical application definitively negated every attempt to achieve justice. The trials before the ICT have been conducted in a deeply flawed manner, completely depriving the institution of legitimacy and thus depriving Bangladeshi society of anything other than revenge and victor's justice.

[65] *Ibid.*

5.58. The ICT observed very low standards of evidence. On several occasions death sentences were based on insufficient or unsatisfactory evidence that failed to meet the standards set in either international law or comparative domestic law. Indeed, given the exclusion of domestic rules of criminal procedure, the only provision that regulated evidence in the ICT was article 19 of the IC(T)A.

5.59. This article states that the court would follow a "*non-technical procedure*" and that it may admit any evidence, "*including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value*". This provision seemed to establish very low requirements of evidence, which eased the case of the prosecution.

5.60. In this line, the ICT expeditiously admitted evidence of 40-years-old crimes, disproportionally took judicial notice of relevant facts—including facts that were part of the definition of the crime, as the existence of a policy or plan to commit genocide—, and secured convictions on hearsay evidence without establishing the necessary cautions or guarantees to secure its credibility.

5.61. According to Geoffrey Robertson QC, "*the result is that convictions can be based on guilt by association: findings of genocide or war crimes are made on the basis of newspaper reports or local gossip that a defendant was associating with an army battalion committing war crimes, without any direct evidence that he was actually participating in them*"[66].

5.62. Amnesty International criticized the ICT's grave shortcomings on evidence standards, as "statements from prosecution witnesses shown by the defence to have been false were still used as evidence in court" and "affidavits by defence witnesses that the accused was too far from the site of the offence to be involved were not admitted"[67].

5.63. The low evidential standard of the ICT was severely criticized by the Chief Justice of the Supreme Court of Bangladesh, who in Mir Quasem Ali's appeal held that the prosecution had been

[66] Robertson, G. (2015): "Report on the International Crimes Tribunal of Bangladesh", *International Forum for Democracy and Human Rights,* available at: https://barhumanrights.org.uk/sites/default/files/documents/news/grqc_bangladesh_final.pdf, last accessed: 18th September 2015.

[67] Amnesty International (2016): "Amnesty International Report 2015/16: Bangladesh", available at: https://www.amnesty.org/en/countries/asia-and-the-pacific/bangladesh/report-bangladesh/, last accessed: 9th March 2016.

"incompetent" in its functions and failed in its duty to prove the case. He declared to be ashamed when reading "the prosecution evidences" and complained that despite the great number of facilities and resources at the Prosecution's disposal, the evidence presented was scarce and superfluous to justify a conviction. The evidence often being based upon unfounded assumptions, documentary submissions not directly related to the accused, or insufficient witnesses' testimonies. It is notable that the Chief Justice was threatened with being removed from office as a result, and has since been removed from office, arbitrarily, for issuing a constitutional ruling critical of the Government. He was forced to flee the jurisdiction.

5.64. In practice, and despite the compulsory nature of rule 50 of the RoP, the ICT has required the prosecution of the ICT to prove that his case was reliable or probable[68] while the defendant needs to prove his alibi with *absolute certainty*[69]. This reversion of the onus of evidence, explicitly recognized in Rule 51 of the RoP for the case of alibi, obliged the accused to prove 40-years-old facts to prove his innocence, posed an insurmountable difficulty on the Defence and wilfully ignored the fundamental principle of presumption of innocence, guaranteed in Article 14.2 of the ICCPR.

5.65. For example, in the trial against Mir Quasem Ali, the ICT held that "*the plea of alibi has to be proven with absolute certainty so as to completely exclude the possibility of the presence of the accused*" elsewhere (emphasis added). This requirement goes far beyond what is ordinarily required in international criminal law, which places the burden of proof on the prosecution, who must demonstrate the guilt of the accused, and not the converse position as appears to have been adopted by the ICT.

5.66. Third, several defence witnesses reported threats and intimidation and some of them were too afraid to appear in Court due to future reprisals. Indeed, Shukharanjan Bali, one of the witnesses in the trial of Maulana Delwar Hossain Sayedee, was abducted on 5 December 2012 outside the gates of the Tribunal, on the morning he was due to give testimony that exculpated Mr. Sayedee for the assassination of Bali's brother[70]. He was also going to testify that the Investigative Agency

[68] Supreme Court of Bangladesh, "Prosecutor v Abdul Quader Molla", Criminal Appeal n. 24-25 of 2013, 17th September 2013, p.202-203.

[69] ICT-2, "Prosecutor v Mir Quasem Ali", Case No 3 of 2013, 2nd November 2014, par. 695-698.

[70] Bergman, D. (2012): "Abduction of defense witness outside tribunal", *Bangladesh War Crimes Tribunal*, 10th November 2012, available at: http://bangladeshwarcrimes.blogspot.com.es/2012/11/abduction-of-defense-witness-outside.html, last accessed: 18th September 2015.

and Prosecution were providing false statements[71]. All indications pointed to the fact that the Bangladesh law enforcement agencies organized and executed the kidnapping. Bali remained in custody for several weeks, suffered torture and was then forced across the border into India[72].

5.67. The ICT, which lacks a proper system of witness protection, did not initiate sufficient investigations into the threats and pressures that the defence witnesses were allegedly experiencing[73]. Nevertheless, defence witnesses are not the only actors intimidated: judges[74], prosecution witnesses[75] and lawyers[76] were also pressured and targeted.

5.68. The ICT often fails to specify the particular conduct justifying the imposition of the sentence. For example, in Mr. Mir Quasem Ali's sentence, the ICT mentioned in different parts of the text, that he had "planned and instigated", "abetted and facilitated", and finally that he was "complicit" of the same crime. Consequently, we cannot legally determine the particular role of the accused in the crime, and therefore, his degree of criminal responsibility. It is difficult there to ascertain that the sentence passed was one proportional with the evidence; a further reason upon which it suggested that regardless of the legitimacy of the conviction, the sentence imposed in this case cannot be justified given the lack of certainty as far as the level of involvement is concerned.

5.69. The Chief Justice of Bangladesh, in Mir Quasem Ali's appeal before the Supreme Court, loudly confirmed the political character of the ICT trials[77]. In a heated and unprecedented discussion with the Attorney General , the Chief Justice declared to be feeling "really ashamed", shocked and frustrated about conduct of the prosecution in the proceedings before the ICT. During this discussion, the Chief Justice held that the trials "are being used for political interests" and added,

---

[71] *Ibid.*

[72] Human Rights Watch (2013): "India: Protect Bangladesh War Crimes Trial Witness". 16th May 2013, available at: http://www.hrw.org/news/2013/05/16/india-protect-bangladesh-war-crimes-trial-witness, last accessed: 18th September 2015.

[73] *Ibid.* and Human Rights Watch (2013): "Bangladesh: Azam Trial Concerns", 16th August 2013, available at: https://www.hrw.org/news/2013/08/16/bangladesh-azam-trial-concerns, last accessed: 18th September 2015.

[74] As reflected in the conversations published by The Economist.

[75] Human Rights Watch (2013): "Bangladesh: Investigate Killing of Witness", 23rd December 2013, available at: https://www.hrw.org/news/2013/12/23/bangladesh-investigate-killing-witness, last accessed: 18th September 2015.

[76] bdnews24.com (2013): "Mujaheed's counsel 'beaten'", 26th May 2013, available at: http://bdnews24.com/bangladesh/2013/05/26/mujaheeds-counsel-beaten, last accessed: 18th September 2015.

[77] Free Mir Quasem Ali (2016): "Bangladesh Chief Justice Lambast "incompetent prosecution" of Mir Quasem Ali/Appeal Hearing Proceedings 23.02.2016", 23rd February 2016, available at: https://mirquasemali.wordpress.com/2016/02/23/chief-justice-lambast-incompetent-prosecution-of-mir-quasem-ali-appeal-hearing-proceedings-23-02-2016/, last accessed: 8th March 2016.

the Prosecution manipulate the "sentiments" in the press and television and pushes the ICT trials into the background, thus prioritizing the publicity of the trials over the evidence, and the appearance of justice over the reality of it. The Chief Justice even declared that it hurt the Supreme Court "to hear this kind of appeals" and made reference to the Sayedee's case to complain about the impunity of certain prosecutors that had been signalled by the Supreme Court in previous proceedings.

5.70. Responding to these criticisms, the Minister for Food stated "…*I think there should be a rehearing of Mir Quasem's appeal without the chief justice*", so finally, despite having acknowledged serious deficiencies and injustices in his case, the Supreme Court upheld the death penalty for Mir Quasem Ali.

5.71. This point, quite aside from any other, highlights that there is political influence over the trials. It is unconscionable that the Chief Justice having been so vocal about the deficiencies in the Prosecution case would dismiss the appeal, unless there was another factor at play.

5.72. Moreover, there are two on-going trials, five completed investigations, and in August 2015, the coordinator of the investigation agency told Bangladesh media that 30 cases more were at the pre-trial stage and that the agency had received 600 complaints[78].

5.73. Apart from the aforementioned trials in absentia, certain cases judged by the ICT stand out for the seriousness of the human rights violations committed during trial.

5.74. One such case is the aforementioned trial of Abdul Quader Mollah, Assistant Secretary General of Jamaat-e-Islami, who was first sentenced to life imprisonment by the ICT but, after a rapid modification of the IC(T)A promoted by the Government, was condemned to death on appeal for five counts of crimes against humanity.

5.75. Despite the unanimous calls from the international community —including from John Kerry, Ban Ki Moon, William Hague and Navi Pillay—to commute the sentence, Mollah was hanged on 12 December 2013, on the eve before the Victory Day celebrations. The date reflects the symbolism

[78] The Daily Star (2015): "Govt plan not welcome", 17th August 2015, available at: http://www.thedailystar.net/backpage/govt-plan-not-welcome-128119, last accessed: 25th September 2015.

of his death, a death that the Government of Bangladesh urged and used for political and electoral purposes. His punishment, after a judicial process with such irregularities and disregard for due process safeguards, amounted to an instance of summary execution.

5.76. Another case dominated by procedural unfairness and judicial deficiencies was that of Maulana Delwar Hossain Sayedee who, on 28th February 2013, was found guilty of eight counts of crimes against humanity and sentenced to death. Yet, on 17th September 2014, the Supreme Court reduced his sentence to life imprisonment on appeal. The case is currently under review by the Supreme Court.

5.77. Mr. Sayedee was a Member of Parliament and the vice-president of Jamaat-e-Islami. His trial was tainted by disproportionate and arbitrary restrictions on the defence to produce evidence before the court and to cross-examine prosecution witnesses. Moreover, the conviction was based on weak, limited and unconvincing evidence.

5.78. Indeed, the tribunal failed to take into consideration fundamental exculpatory documents provided by the Defence, such as the certified copy of the initial charge sheet, or the certified copy of the initial complaint lodged by the widow of Ibrahim Kutti—who was allegedly assassinated by Mr. Sayedee—. Both documents demonstrated that Mr. Sayedee was not mentioned in the initial investigations of the crime and that Ms. Momtaz Begum, Ibrahim Kutti's widow, had testified, in a period of time contemporaneous to the commission of the crime, that Pakistani troops were responsible for the abduction and murder of her husband. Despite the fundamental importance of her testimony and its potential exculpatory nature, Ms. Momtaz Begum was prevented from being called as a defence witness, and the ICT refused to look into the record of the case filed by her.

5.79. In addition, due to changes in the composition of the court, none of the judges that imposed the death penalty had heard the complete evidence and testimonies of the case, and Shukharanjan Bali, the defence witness allegedly abducted by law enforcement agencies, was a witness supporting Sayedee's position. Therefore, the case was characterized by prosecutorial and judicial

misconduct, a blatant disregard for international standards of justice and due process, and a lack of substance.

5.80. The same type of severe procedural deficiency and scandal took place during the trial of Muhammed Kamaruzzaman, senior assistant Secretary General of Jamaat-e-Islami. All of the charges presented against him were based on either hearsay or circumstantial evidence: witnesses could identify him in the scene of a massacre in a village, but his degree of responsibility could not be established. His guilt was assumed, mainly, from the allegation that he held a position as an Al Badr leader. Moreover, his application to recuse two judges due to their clear partiality was, once again, rejected. Kamaruzzaman was sentenced to death on two counts and executed on 11th April 2015.

5.81. Professor Ghulam Azam, co-founder of Jamaat-e-Islami and its leader during the conflict, was sentenced to capital punishment in July 2013, although his sentence was commuted to 90 years imprisonment due to his advanced age. He died in custody in October 2014.

5.82. The death penalty was imposed even if the case absolutely lacked evidence that could serve as the basis of the charges or the conviction. Paradoxically, the judges of the trial admitted that the evidence was insufficient[79], and yet, he was convicted on all counts. The verdict relied, mainly, on Prof. Ghulam Azam's affiliation with the political party Jamaat-e-Islami during the conflict and, according to Human Rights Watch, "*the prosecution neither alleged nor offered any evidence showing Azam personally committed or ordered violence*"[80].

5.83. In addition, this case continued the ICT's established practice of placing disproportional limitations on the Defence—the tribunal only heard the testimony of one defence witness in this case—and Human Rights Watch reported witnesses disappearances and interference: "*members of the prosecution and government security agents intimidated defense witnesses, including by threatening their arrest should they cooperate with the defense*"[81].

[79] Human Rights Watch (2013): "Bangladesh: Azam trial concerns", 16th August 2013, available at: https://www.hrw.org/news/2013/08/16/bangladesh-azam-trial-concerns, last accessed: 18th September 2015.

[80] *Ibid.*

[81] *Ibid.*

5.84. These are just some examples of the procedural misconduct and the deep flaws that tainted the processes before the ICT, but the rest of the trials, including those of Nizami, Mr Ali Ahsan Mohammad Mujahid, Mr Salauddin Quader Chowdhury or Abdul Alim were also characterized by arbitrariness, blatant violations of due process rights and judicial misconduct.

International view of the ICT - support or condemnation

5.85. The first reactions to the announcement of the forthcoming trials were generally positive. Given the obsolescence of the International Crimes (Tribunal) Act, numerous international personalities offered their collaboration and support to the Government's initiative. International experts assisted the tribunal and gave valuable recommendations to improve the fairness of the process. As mentioned above, Stephen J. Rapp, US War Crimes Ambassador drafted some proposals for legislative amendments that received popular applause. The UN and several international NGOs congratulated the Bangladeshi government for the creation of the Tribunal, a 'brave' measure to fight against impunity on which they placed great expectations. The UN offered technical assistance to the Government of Bangladesh[82]; Human Rights Watch called the trials "an important and long overdue step to achieve justice for victims"[83], and European Union's resolutions expressed support for the trials.

5.86. However, this international support and praise was short lived. Soon it became evident that both the legal framework and the practice of the tribunal were deficient and that the trials would prioritize politics over legality, vengeance over justice and retribution over judicial independence.

5.87. The Government of Bangladesh rejected the financial and technical support offered by the United Nations and several NGOs, consequently, numerous institutions withdrew their previous offers of collaboration. This refusal of external support indicated that the Bangladeshi executive prioritized the ability to impose the death penalty over the tribunal's compliance with international standards of fairness and due process. Indeed, the majority of the legal and technical

[82] Wlosowicz, J. (2014): "International Support for Bangladesh War Crimes Tribunal", *EP Today,* 8th February 2014, available at: http://eptoday.com/international-support-bangladesh-war-crimes-tribunal/, last accessed: 18th September 2015.

[83] Human Rights Watch (2011): "Bangladesh: Unique Opportunity for Justice for 1971 Atrocities", 19th May 2011, available at: https://www.hrw.org/news/2011/05/19/bangladesh-unique-opportunity-justice-1971-atrocities, last accessed: 18th September 2015.

recommendations from the International community were largely ignored. The ICT judicial process, once perceived as a victory over impunity, was suddenly regarded with scepticism by the international community.

5.88. The injustices of the process and the grave breaches of due process rights during the trials quickly turned this scepticism into open condemnation. Instances of trials in absentia, of governmental interference with the trials, of partiality of the judges and of threats to witnesses made the tribunal lose its international legitimacy.

5.89. Several international organizations, such as the International Bar Association[84], Human Rights Watch[85] and Amnesty International[86], criticized the shortcomings of the ICT. The fact that the Tribunal exclusively prosecuted perpetrators from one side of the conflict and that it systematically targeted members of the political opposition invited the belief that the process, far from being guided by the principles of individual criminal responsibility and reliable evidence, was a political show trial designed to support the historical rhetoric of the Awami League, suppress and demonize an Islamist political party and execute political opponents.

5.90. Indeed, Chatham House defined the ICT as "*deeply flawed and a ploy by the prime minister to rid herself of political rivals*"[87]. It added that the executions did not deliver justice to the victims, instead it "*inflamed violence while violating international standards for a fair trial*"[88].

5.91. International experts and Members of the British Parliament wrote a letter to the British Foreign Secretary, William Hague, calling for immediate action on the ICT. The letter expressed serious concerns about the misconduct of prosecutors and judges and about the stability of the country. It added that the process had been hijacked by the Government and placed into the political arena

[84] Kozlovski, M.: "Bangladesh's way: Dhaka's controversial International Crimes Tribunal", *International Bar Association*, available at: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=AA9E9993-62BA-4E44-A177-DF51CA884C19, last accessed: 18th September 2015.

[85] Human Rights Watch (2013): "Bangladesh: Halt Execution of War Crimes Accused", 8th December 2013, available at: https://www.hrw.org/news/2013/12/08/bangladesh-halt-execution-war-crimes-accused, last accessed: 18th September 2015.

[86] Amnesty International (2014): "Bangladesh: Death penalty will not bring justice for crimes during independence war", 29th October 2014, available at: https://www.amnesty.org/en/latest/news/2014/10/bangladesh-death-penalty-will-not-bring-justice-crimes-during-independence-war/, last accessed: 18th September 2015.

[87] Lata Hogg, C. (2013): "Bangladesh Pays for a Lack of Justice", *Chatham House,* 31st December 2013, available at: https://www.chathamhouse.org/media/comment/view/196505, last accessed: 18th September 2015.

[88] *Ibid.*

and that the court had "*not adhered to the most fundamental of legal principles*"[89]. Signatories included Lord Carlile QC, sponsor of the letter and Vice-Chair of UK Parliament's All Party Parliamentary Group on Genocide and Crimes Against Humanity, Sir Desmond De Silva QC, the United Nations Chief Prosecutor in Sierra Leone, Sir Geoffrey Nice QC, Prosecutor of Slobodan Milosevic at International Tribunal for the former Yugoslavia, Kirsty Brimelow QC, International Human Rights lawyer, Chair of Bar Human Rights Committee of England and Wales, Karim Khan QC, legal adviser to the UN Criminal Tribunals for Former Yugoslavia and Rwanda, and Sir Henry Brooke, former Vice-President, Court of Appeal of England and Wales.

5.92. Lord Avebury and the Lord Carlile of Berriew QC sent an additional letter to the High Commissioner for Human Rights, requesting a joint delegation from the Commissioner's office to visit Bangladesh as a matter of urgency "*with the objectives of assessing the procedures of the Tribunal and seeking access to those concerned, including the defendants in their place of incarceration*"[90].

5.93. Amnesty International opposed the governmentally promoted amendment to allow the prosecution to appeal Mr. Mollah's life imprisonment sentence[91]; Human Rights Watch joined in this respect: "*a government supposedly guided by the rule of law cannot simply pass retroactive laws to overrule court decisions when it doesn't like […] Convictions of those responsible for the 1971 atrocities is important for the country, but not at the expense of the principles that make Bangladesh a democracy*"—said Brad Adams, the Asia Director of the organization[92].

5.94. United Nations institutions also expressed their condemnation of the trials. Several UN Special Rapporteurs and the UN Working Group on Arbitrary Detention criticized the flawed work of the ICT and described the process as arbitrary and a breach of international law. The Office for the High Commissioner of Human Rights issued a press release expressing its concern about the

[89] Letter to the Rt. Hon. William Hague MP, 18th October 2013, available at: http://tmcadvisorygroup.com/wp-content/uploads/2013/10/Letter-to-the-Rt-Hon-William-Hague-MP-181013.pdf, last accessed: 18th September 2015.

[90] Letter to the UN High Commissioner of Human Rights, 7th June 2013, available at: http://progressbangladesh.com/lord-avebury-carlile-letter-to-un-high-commissioner-for-human-rights-re-international-crimes-tribunal-ict/, last accessed: 18th September 2015.

[91] Amnesty International (2013): "Bangladesh: Protect against reprisals after Islamist leader's execution", 12th December 2013, available at: https://www.amnesty.org/en/latest/news/2013/12/bangladesh-protect-against-reprisals-after-islamist-leader-s-execution/, last accessed: 18th September 2015.

[92] Human Rights Watch (2013): "Bangladesh: Post-Trial Amendments Taint War Crimes Process", 14th February 2013, available at: http://www.hrw.org/node/248833, last accessed: 18th September 2015.

conduct of the International Crimes Tribunal and urging the ICT "*not to proceed with the death penalty in cases before the Tribunal, particularly given concerns about the fairness of the trials*"[93].

5.95. Gabriela Knaul, the Special Rapporteur on the Independence of Judges and Lawyers, and Mr. Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, stated their concerns about the apparent partiality of judges and prosecution services of the Tribunal, as well as their lack of independence from the executive[94]. They added "*witnesses and lawyers for the defence have also complained about an atmosphere of hostility, intimidation and harassment. Due process requires at a minimum that defendants are able to speak freely with their counsel, have adequate time to conduct their defence, and the ability to call witnesses to speak on their behalf. The principle of equality of arms should be respected at all stages of the proceedings*."

5.96. The International Centre for Transitional Justice[95], No Peace Without Justice[96], Members of the United States Congress, Members of the British Government, the Bar Human Rights Committee of England and Wales[97] and the Centre for Justice and Accountability[98] all criticized the practice and regulation of the ICT and raised serious concerns as to procedural and substantive flaws in the conduct of the trials.

5.97. The European Union joined the general criticisms of the Tribunal. The European Parliament resolution of 18 September 2014 highlighted the human rights and due process violations of the tribunal, criticized the lack of compliance with international standards and emphasized "*the*

[93] OHCHR (2013): "Pillay alarmed at sentencing of 152 paramilitary personnel to death in Bangladesh", 6th November 2013, available at: , last accessed: 18th September 2015.

[94] OHCHR (2013): "Bangladesh: Justice for the past requires fair trials, warn UN experts", 7th February 2013, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12972&LangID=E, last accessed: 18th September 2015.

[95] International Center for Transitional Justice (2013): "ICTJ concerned by Retroactive Sentencing in Bangladesh Genocide Trial", 19th September 2013, available at: https://www.ictj.org/news/ictj-concerned-retroactive-sentencing-bangladesh-genocide-trial, last accessed: 18th September 2015.

[96] No Peace Without Justice (2014): "Bangladesh International Crimes Tribunal: unfair trials and death penalty will not bring justice", 6th November 2014, available at: http://www.npwj.org/ICC/Bangladesh-International-Crimes-Tribunal-unfair-trials-and-death-penalty-will-not-bring-justic-0, last accessed: 18th September 2015.

[97] Bar Human Rights Committee of England and Wales (2012): "BHRC statement on the International Criminal Tribunal in Bangladesh", 16th November 2012, available at: https://www.barhumanrights.org.uk/bhrc-statement-international-criminal-tribunal-bangladesh-ict, last accessed: 18th September 2015.

[98] Centre for Justice and Accountability (2014): "Center for Justice and Accountability (CJA) expresses grave concern over Kamaruzzman verdict", *Talukder Shaheb blog*, 11th November 2014, available at: http://www.talukdershaheb.com/2014/11/13/center-for-justice-and-accountability-cja-expresses-grave-concern-over-kamaruzzman-verdict/, last accessed: 18th September 2015.

importance of an independent, impartial and accessible judicial system to enhance respect for the rule of law and for the fundamental rights of the population, and of reforming the International Crimes Tribunal"[99].

Violations of the rule of law by the ICT

Equality before the courts and tribunals

5.98. Article 14.1 commences by proclaiming that "*all persons shall be equal before the courts and tribunals*". According to the Human Rights Committee, "*procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26 […] to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that 'all persons shall be equal before the courts and tribunals', but may also amount to discrimination*".

5.99. In accordance with this criterion, it would be possible to argue that the deprivation of certain constitutional guarantees of due process, including the right to an expeditious trial, to those citizens accused of international crimes under the IC(T)A, constitutes a breach of Article 14.1 of the ICCPR.

Right to a fair hearing:

5.100. Article 14.1 of the ICCPR recognizes the right of everyone in the determination of any criminal charge against him, "*to be entitled to a fair and public hearing*".

5.101. This provision is the basis of Article 14, establishing the general right to a fair trial and guaranteeing access to a tribunal.

5.102. In interpretation of this article, the Human Rights Committee noted that the trial of civilians in special courts, such as the ICT, "may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned". Consequently, the Committee required the taking of "all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14". With this comment, the Committee

[99] European Parliament (2014): "European Parliament resolution of 18 September 2014 on human rights violations in Bangladesh", 2014/2834(RSP), 18th September 2014, available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2014-0024&language=EN, last accessed: 18th September 2015.

voiced its suspicions, based on abundant case law, that special courts do not usually comply with international standards of justice.

5.103. Moreover, it is important to mention, having regard to the regulation of interlocutory appeals in the ICT and preventing any challenge to the composition of the Court, that Article 14 provides protection against those situations in which "an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto". It is arguable that an impediment in seeking to challenge a court's decision that has a direct implication on the rights of the defendant could potentially constitute a breach of the right to access justice in terms of Article 14.1 of the ICCPR.

Right to a competent, independent and impartial tribunal

5.104. Article 14.1 of the ICCPR guarantees the right of a hearing by a competent, independent and impartial tribunal established by law. Similar provisions can be found at all the relevant conventions of human rights protection, which distinguish between the concepts of competence, independence and impartiality.

5.105. For the Human Rights Committee, independence refers to "*the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature*" (emphasis added).

5.106. As exposed in previous chapters, there are credible indications that the processes before the ICT have been inherently influenced by the Bangladeshi government. The Skypegate scandal uncovered the pressures that the ICT judges were under from the Government to both expedite the trials and reach a guilty verdict. At the same time, the rapid reform introduced by the executive after Mollah's sentence to life imprisonment is also a relevant factor indicative of governmental intervention in the proceedings. The Chief Justice of the Supreme Court further confirmed the political nature of the trials during Mir Quasem Ali's appeal; in removing the right to challenge

the composition of the court, the defendants have been prevented from seeking to take action that may be seen to counterbalance this lack of independence.

5.107. Moreover, the intervention of the Executive in the transfer of judges between tribunals could also be indicative of the ICT's lack of independence. As a matter of fact, the fact that no judge heard the complete process against Mr. Sayedee could be perceived to be contrary to the requirements of fair trial under Article 14 of the ICCPR.

5.108. In this respect, the processes before the ICT that the Lawyers Committee for Human Rights clarified that the impartiality of the judges could be *prima facie* called into question "*when a judge has taken part in the proceedings in some prior capacity, or when s/he is related to the parties, or when s/he has a personal stake in the proceedings. It is also open to suspicion when the judge has an evidently preformed opinion that could weigh in on the decision-making or when there are other reasons giving rise to concern about his/her impartiality*"[100] (emphasis added).

5.109. Moreover, in respect to impartiality, the Human Rights Committee added that the fairness of proceedings "*entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects*".

Right to have adequate time and facilities for the preparation of his defence:

5.110. Article 14.3 of the ICCPR lists a series of rights for the accused in criminal proceedings that function as a minimum guarantee in criminal trials. Article 14.3.b particularly recognizes the right "*to have adequate time and facilities for the preparation of the defence*".

5.111. The Human Rights Committee clarified that this is an important element of the guarantee of a fair trial, and "*an application of the principle of equality of arms*". Its jurisprudence states that when there

[100] Lawyers Committee for Human Rights (2000): "What is a fair trial? A Basic Guide to Legal Standards and Practice", available at: https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf, last accessed: 9th March 2016

was no adequate time for the preparation of the defence, it is assumed that the defendant "*was not effectively represented on trial*"[101].

5.112. There is no pre-determined timeframe that could serve as statistical reference to assess whether the ICT defence was granted adequate time to prepare its case, as the time limits set internationally depend on the nature of the proceedings and on the particular characteristics of the case.

5.113. However, according to the Lawyers Committee for Human Rights some factors must be taken into account when determining the preparation time, such as "*the complexity of a case, the defendant's access to evidence*" or "*the time limits provided for in domestic law for certain actions in the proceedings*" (emphasis added)[102].

5.114. A valid reference to judge whether the ICT complies with international standards in terms of 'adequate time' is the practice of the International Criminal Court, as it is the most modern international institution dealing with individual responsibility for international crimes.

5.115. In May 2015, the Trial Chamber I, in the case of Laurent Gbagbo and Charles Blé Goudé, determined that, in light of the complexity of the case and the large volume of material disclosed, the trial would not commence until November 2015, so the presentation of evidence would only start in January 2016[103]. Taking into account that the disclosure of the material held by the Prosecution was due for 30th June 2015, the Trial Chamber gave the defence five months to prepare its case.

5.116. The mere three weeks given by the ICT pale beside these ICC standards. The cases before the ICT are inherently complex, dealing with international crimes occurred 40 years ago, and could result in the imposition of a death penalty. Therefore, a period of three weeks does not seem to

[101] Human Rights Committee (1998): "Communication No. 594/1992, Phillip v. Trinidad and Tobago", U.N. Doc. CCPR/C/64/D/594/1992, 3rd December 1998, available at: https://www1.umn.edu/humanrts/undocs/session64/view594.htm, last accessed: 9th March 2016, par. 7.2.

[102] Lawyers Committee for Human Rights (2000): "What is a fair trial? A Basic Guide to Legal Standards and Practice", available at: https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf, last accessed: 9th March 2016

[103] ICC (2015): "Prosecutor v. Laurent Gbagbo and Charles Blé Goudé", Trial Chamber I, 7th May 2015, Doc. No. ICC-02/11-01/15, available at: https://www.icc-cpi.int/iccdocs/doc/doc1966575.pdf, last accessed: 9th March 2016.

be enough to prepare an adequate defence, and therefore, it does not comply with international standards of justice.

5.117. It is important to highlight that the ICTY Appeals Chamber in Tadic established that the principle of equality of arms means that "*the Prosecution and the Defence must be equal before the Trial Chamber*"[104]. This provision is of particular importance in evaluating the processes before the ICT, as the time provided to the prosecution in the ICT to conduct its investigations and prepare the proceedings is disproportionally higher than the one time given to the defence to prepare the case.

5.118. With regards to the 'adequate facilities' guaranteed under Article 14 of the ICCPR, the Human Rights Committee clarifies that the concept of adequate facilities comprised access to documents and other evidence, including "*all materials that the prosecution plans to offer in court against the accused or that are exculpatory*". Immediately after, the Committee added that "*exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary)*".

5.119. In contrast, the practice of the ICT shows that the Defence were often prevented from accessing important files held by the prosecutor, had limited access to the documentation and were not handed exculpatory evidence. As a matter of fact, the WGAD denounced that access to information by the defendants and their lawyers was impeded and restricted.

Right to communicate with counsel of his own choosing:

5.120. In the same article, Article 14.3.b, the ICCPR also guarantees the right to communicate with counsel of his own choosing.

5.121. In general terms, defendants in the ICT had insufficient communication with their lawyers, and some of them were deprived of their right to have privileged communications with their representatives. More importantly, as acknowledged by the WGAD, defence counsel have not been present during relevant interrogations.

[104] ICTY (1999): "Prosecutor v Duško Tadić", Appeals Chamber, Judgment, ICTY-94-1-A, 15th July 1999, para 52.

Right to equality of arms

5.122. Article 14.3.e of the ICCPR recognizes the right to "*examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*". This has traditionally been interpreted as the principle of equality of arms between the defence and the prosecution, which is "*the single most important criterion in evaluating the fairness of a trial*".

5.123. Several defendants before the ICT have seen how their rights to cross-examine witnesses and present witnesses in their defence were unduly limited.

5.124. The ICT has justified the restrictions imposed on the Defence when seeking to present witnesses, citing the obligation to reach a judgement 'without undue delay', which allegedly obliges a limit the number of witnesses admitted. However, the limitation on the number of witnesses cannot be arbitrary: the most relevant and essential witnesses for the defence must be heard, and the number of witnesses admitted to the defence must not be disproportionally inferior to the number of prosecution witnesses. Otherwise, such limitation would become unfair, and in breach of the right to equality of arms.

5.125. It is acknowledged that this section is detailed, and discusses issue that are not, at a glance, relevant to the issue of jurisdiction that the Pre-Trial Chamber has been asked to consider.

5.126. It is however relevant when considered in the context of Bangladesh potentially seeking to prosecute those responsible for crimes committed against the Rohingya.

5.127. As much as accountability must be pursued, and those responsible for Crimes Against Humanity held to account for their actions, it is essential that those accused are tried before a fair and competent tribunal otherwise any verdict or punishment will be forever tainted.

5.128. It cannot be argued that the ICT is either fair, or competent, and thus it cannot it all conscience, be considered an appropriate route to accountability to the hundreds of thousands of Rohingya victims.

5.129. The second issue that ought to be born in mind, is the manner in which any potential domestic trials may be manipulated to meet the rhetoric of the Government of Bangladesh.

5.130. The Bangladesh ICT has no legitimacy internationally as has been outlined the above, however, this legitimacy is craved by the Government.

5.131. To allow Bangladesh to prosecute matters domestically would by inference, confer upon the ICT, that legitimacy it so craves, as it would suggest that the international community had confidence in its ability to try such matters, and for verdicts in accordance with the evidence to be reached.

5.132. By extension therefore, it would render the judgments the ICT has rendered previously, judgments that have been universally condemned internationally, as legitimate; again, this would be entirely inappropriate.

5.133. It is therefore respectfully submitted, that although the principle of complementarity is appropriate, and one that ought to be supported, it would be entirely inappropriate for Bangladesh to be considered as an appropriate forum within which offences can be considered.

6. Issues Specific to the Border Region

6.1. It is anticipated that of the potential objections to be raised to jurisdiction being conferred upon the OTP to investigate the situation, a likely limb, is that regardless of whether the actions of the Myanmar Government and those under its control constitute an offence for the purposes of the Rome Statute, and relevant actions for the purposes of jurisdiction, stopped at the border with Bangladesh.

6.2. In these specific circumstances however, this likely position is rejected, the position of these submissions being that the relevant actions have continued on the border and across it into Bangladesh; accordingly, the anticipated argument in opposition must fail.

6.3. In its 'Mission Report'[105], the Office of the High Commissioner for Human Rights (OHCHR) rapid response mission to Cox's Bazar, reported on that which is occurring in Myanmar, but importantly, also draws reference to incidents that 'cross' the border into Bangladesh, and therefore can be characterised as being committed in Bangladesh as well as in Myanmar.

6.4. A 12-year old girl from Buthidaung township seeking to escape the violence reported "…*I thought we were safe the moment we reached the border but then [the Myanmar army] came from all directions and started shooting at us – many people ran into the nearby jungle but some old people died in front of my eyes*".[106]

6.5. Further, an 11-year-old boy with a gunshot wound reported he "…*belonged to a group of 25 people attempting to cross the border. Myanmar military started to shoot at us and 8 people for injured.*"[107]

6.6. The above is clear evidence of the actions, and therefore the offences having a 'cross-border' element.

6.7. Numerous accounts referring to ongoing attacks within the border area, a 34-year old woman from Buthidaung in describing how she found her sister's children abandoned at the border recalled "…*for eight days we were hiding in the jungle – when we came to the border I found my sister's [12-year old] daughter. She was shot three times, once in the back and twice in her leg. My sister's [4-year-old] son had a gun injury on the right side of this leg*".[108]

6.8. There is a clear intention on the part of the Myanmar military, and therefore the Government of Myanmar to cause devastating injury and loss of life amongst the Rohingya population within the border region.

6.9. In the OHCHR report quoted, the recent use of landmines is discussed noting that at least *"11 Rohingya victims had suffered severe injuries including missing limbs following mine incidents*".[109]

---

[105] https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf

[106] *Ibid* at page 8

[107] *Ibid* at page 9

[108] *Ibid*

[109] *Ibid* at page 10

6.10. It is of further significance however that evidence was received by the 'team' that:

> "*…until 23 August 2017, the Myanmar and Bangladesh border guards conducted joint patrols along the international border between Bangladesh and Myanmar and that it was therefore highly unlikely that mines were planted before 23 August due to the likelihood of real danger for army personnel of both sides that they would step onto such an explosive device.*
>
> *On the basis of the information received, the Team believe that the mines were deliberately planted by the Myanmar security forces after 23 August 2017 along the border in an attempt to prevent the Rohingya refugees from returning to Myanmar. Information received by the Team referred to the use of landmines and to incidents of people stepping on mines whilst fleeing, or attempting to return to Myanmar to check on other missing family members from 25 August onwards…The Cox's Bazar District Hospital and other medical facilities confirmed the treatment of mine injuries*".[110]

6.11. A further argument to consider is that the Myanmar Military, and by extension, the Government were, and are, fully aware of the situation that existed, and would further develop in the border region once the hundreds of thousands of refugees sought to cross.

6.12. In the article '*Myanmar's Annihilation of the Rohingya*'[111], the position is advanced that "*The camps should be understood as an important and planned part of the Myanmar state's genocidal finale*".[112]

6.13. Reference is drawn to Genocide academic Daniel Feierstein who describes the strategies of physical destruction "*…as including overcrowding, malnutrition, epidemics, lack of health care, torture, and sporadic killings*".[113]

6.14. The article goes on to note:

---

[110] *Ibid* at page 10

[111] http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf

[112] *Ibid* at page 67

[113] *Ibid*

> *"Having held between 120,000 and 140,000 Rohingya in camps, prison villages, and Sittwe's Aung Minglar ghetto in central Rakhine state since 2012, the Myanmar authorities are acutely aware of the dangerous consequences of camp life on the physical and psychological health and well-being of its inhabitant.*
>
> *The conditions that awaited the Rohingya in Bangladesh were entirely foreseeable. By driving the Rohingya into these camps, the Myanmar state deliberately inflicted on the Rohingya conditions of life calculated to bring about their destruction, overcrowding, disease, malnutrition, death and injury from floods and mudslides, trampling by elephants, human trafficking, malnutrition and lack of healthcare in the world's most densely-populated settlement of refugees".*[114]

6.15. The position advanced therefore, is that despite the Rohingya refugees being geographically outside of Myanmar, and therefore geographically outside of the State's reach, it is this State that continues to inflict harm by the very nature of the camps and the speed of the displacement, and therefore exodus:

> "*The potential and reality of epidemics and other mortal dangers, and the incapacity of a country as poor as Bangladesh to respond adequately to a refugee crisis of this vast scale, ensures that the future of the Rohingya, as a Myanmar people is effectively destroyed".*[115]

6.16. The aforementioned report concludes that "*From October 2016 onwards the Myanmar state planned and prepared the final stages of genocide*" and that "*The genocide of Rohingya continues inside Myanmar and in the camps in Bangladesh…Those languishing in the vast, under-resourced camps in Bangladesh are at risk of annihilation through disease, malnutrition, mudslides and other dangers".*[116]

---

[114] *Ibid*

[115] *Ibid* - see also footnote 210 also at page 67 - An August 2017 UN report revealed a sudden and significant deterioration in the humanitarian situation in the already underdeveloped district of Cox's Bazaar, including: 'an alarming level of malnutrition in the camps, high levels of psycho-social stress due to low birth spacing, large family sizes and cramped living conditions; poor sanitation and hygiene practices; inadequate access to safe drinking water.' See, United Nations Central Emergency Response Fund (UNCERF) 'Resident / Humanitarian Coordinator Report on the Use of CERF Funds: Bangladesh Rapid Response Displacement 2016', 26 November 2017, p.4: http://www.unocha.org/cerf/sites/default/files/CERF/HCRCReports/16-RR-BDG-23507-_BANGLADESH_RCHC. REPORT.pdf. Accessed 9 April 2018.

[116] *Ibid* at page 83.

6.17. In 2016, Amnesty, in its report *' "We are at Breaking Point" Rohingya: Persecuted in Myanmar, Neglected in Bangladesh"*[117], detailed instances of 'unlawful pushbacks', whereupon refugees are forced back across the border[118].

6.18. It is notable that in response to the crisis, Asaduzzaman Khan, Bangladesh Home Minister, on 23 November 2016 stated "*Rohingya infiltration is an uncomfortable issue for Bangladesh. We don't want illegal Rohingya immigration*".[119]

6.19. According to the Border Guard Bangladesh (BGB), at least 2,320 Rohingya were pushed back into Myanmar during November, and at least another further 2,400 people during the first week of December.[120]

6.20. It is accepted that the position on the border has become more accommodating towards the Rohingya refugees, however, the attitude of the Government of Bangladesh is something to be taken into account, just as the Myanmar Government will have taken it into account when adopting the most recent strategy against the Rohingya.

6.21. Further, the Government of Bangladesh, at least throughout October and November of 2016 "*refused to provide aid to newly arrived refugees in order to avoid creating a pull factor*".[121]

6.22. Again, it is accepted that the current position has changed given the exodus, and the Government of Bangladesh is more willing to provide aid to the hundreds of thousands of refugees, however, the previous position is still of relevance as it demonstrates the acknowledged position in Bangladesh towards refugees, a position that the Government of Myanmar would have been aware of, and therefore the offences of which they are accused can be demonstrated as although commencing in Myanmar, continued into Bangladesh.

---

[117] https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF

[118] *Ibid* at page 41

[119] Haroon Habib, "Bangladesh shuts border to Rohingya refugees", *The Hindu*, 23 November 2016, available at http://www.thehindu.com/news/international/Bangladesh-shuts-border-to-Rohingya-refugees/article16683927.ece

[120] *bdnews24.com*, "Bangladesh strengthens border patrol to stop intrusion of Rohingyas fleeing Myanmar", 19 November 2016, available at http://bdnews24.com/bangladesh/2016/11/17/bangladesh-strengthens-border-patrol-to-stop-incursion-of-rohingyas-fleeing-myanmar

[121] https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF at page 42

7. Wider Implications of the Decision

7.1. As much as the question under consideration by the Pre-Trial Chamber is one that is specific to the situation in Myanmar and Bangladesh, any decision on the issue will have far reaching consequences, not only to situations that may arise in the future, but also specific to current situations, specifically for the purposes of this submission, that in Syria.

7.2. As a consequence, it is essential that an appropriate decision is reached, both for the immediate victims in the current situation, but also victims of other relevant situations that *will* be affected by the decision of the Pre-Trial Chamber in this matter.

7.3. All efforts to seek accountability for that which has, and continues to occur in Syria, have thus far failed. They have failed by virtue of the fact that Syria is not a State Party to the Rome Statute, and therefore other than self-referral, the only way in which jurisdiction will be conferred on the ICC and therefore the OTP to investigate, will be by way of a UN Security Council (UNSC) resolution referring the matter.

7.4. All previous efforts through the UNSC have failed given that Russia, supported by China, permanent members of the UNSC, has consistently exercised its 'Right of Veto' against any relevant resolution geared towards accountability in Syria.

7.5. As a consequence of its now active involvement in the conflict, it is unlikely in the extreme that Russia, and by extension China, will change its position.

7.6. Alternative routes to accountability must therefore be actively pursued.

7.7. In considering the situations likely to be affected by the decision in this matter, we would seek to draw attention to the Syrian conflict.

7.8. It is universally accepted that as a direct consequence of the actions of the Assad regime, millions of innocent Syrian civilians have fled for their lives, a significant proportion of those, leaving Syria entirely.

7.9. It is estimated that 1.3 million Syrians currently live in Jordan[122], having fled as a result of the war engulfing the country.

7.10. They have fled as a direct result of the conflict, and by far the majority, have fled as a direct result of being subjected to targeted attacks by the Assad regime and those that have provided it with military support.

7.11. It is respectfully submitted that the situation concerning Syria and Jordan, is akin to that involving Myanmar and Bangladesh which is currently under consideration.

7.12. The OTP in her initial submissions to the Chamber notes that the Rohingya "*lawfully present in Myanmar, have been intentionally deported across the international border into Bangladesh*".[123]

7.13. The OTP goes to suggest that "…*attacks directed against the civilian population were well-organised, coordinated and systematic, and intended to drive the Rohingya population out of Myanmar*".[124]

7.14. It is respectfully submitted that a parallel can be drawn between this situation and that in Syria, in that the use of 'barrel bombs'[125], the targeting of hospitals and civilian infrastructure[126], and the use of chemical weapons[127], to use just three examples, have been used directly to target civilians, with the intention of driving those civilians out of the relevant area.

7.15. A credible submission can therefore be made, that the resulting exodus of civilians out of Syria is akin to forcible deportation in that they have been subjected to "*forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law*".[128]

---

[122] https://www.theguardian.com/world/2017/dec/13/can-jordan-get-a-million-syrians-into-work

[123] https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF at paragraph 2

[124] *Ibid* at paragraph 10.

[125] https://www.amnesty.org.uk/circle-hell-barrel-bombs-aleppo-syria

[126] https://www.amnesty.org/en/press-releases/2016/03/syrian-and-russian-forces-targeting-hospitals-as-a-strategy-of-war/

[127] https://www.hrw.org/news/2018/04/04/syria-year-chemical-weapons-attacks-persist

[128] https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf at Article 7(1)(d)

7.16. Further, subject to the decision of the Pre-Trial Chamber in respect of this matter, there is potential for there to be jurisdiction in respect of other War Crimes/Crimes Against Humanity that have been committed in Syria, by virtue of the fact that victims are now resident in Jordan, and resident purely because of that which they have been subjected to.

7.17. It is not the purpose of this submission to provide in-depth analysis as to what crimes may have been committed in Syria, and further, the legal basis for seeking to prosecute such matters extra-territorially; as per the leave application previously submitted however, it is relevant for the potential positive consequences of the any decision concerning the Myanmar situation to be highlighted, as it is the position of this submission, that such consequences ought to be taken into account.

8. Closed Hearings

8.1. In its order of 11 May 2018[129] in which a 'Status Conference' was listed, the Pre-Trial Chamber I ordered "…*the Chamber convenes a status conference on 20 June 2018, to be held in closed session, only in the presence of the Prosecutor*" (emphasis added).[130]

8.2. We would respectfully raise an objection to the fact that the Conference is to be heard in a closed session, and therefore, raise an objection to this element of the order, on the basis that there appears to be no reasoning as to why the Conference ought to be held behind closed doors.

8.3. Article 64 of the Rome Statute "*Functions and Powers of the Trial Chamber*"[131] notes at section 7, that:

[129] https://www.icc-cpi.int/CourtRecords/CR2018_02522.PDF

[130] *Ibid* at paragraph 4

[131] https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf at page 43

"The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence."

8.4. Article 68 "*Protection of the victims and witnesses and their participation in the proceedings*"[132], details appropriate protections for witnesses and/or victims, who may seek to give evidence, but, there are issues of "…*safety, physical and psychological well-being, dignity and privacy*"[133] of those victims and witnesses.

8.5. The article goes on to consider other relevant circumstances in which steps can be taken by the Chamber to ensure the safety and security of relevant participants.

8.6. It does not appear that the Status Conference scheduled has any relevant characteristics that would give rise to a session having to be designated a 'closed session'.

8.7. It is not anticipated that any witnesses will be called to give evidence, nor is it anticipated that any issues will be raised that could potential impinge upon the security of safety of any potential witnesses or victims.

8.8. It is difficult to see therefore why this matter being held in a closed session; further, such a session would, with respect, appear to contradict the principles of transparency and public justice.

8.9. It is therefore respectfully submitted that these proceedings, and any subsequent hearings in which the issue is considered, is done so by way of public hearing, unless there is a demonstrable basis, as per that outlined above, for the matter being held by way of closed session.

9. Conclusion

9.1. It is not in dispute that there is in excess of 700,000 Rohingya refugees now resident in Bangladesh; all of which have fled as a direct result of their treatment at the hands of the Myanmar military, and therefore the Government.

---

[132] *Ibid* at page 47

[133] Article 68(1), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

9.2. Further, it is not in dispute that Bangladesh is a State Party to the Rome Statute, and therefore, if it can be shown that crimes have been committed within the territory of Bangladesh, the OTP potentially has a mandate to investigate, and bring prosecutions should there be an evidential basis to do so.

9.3. The issues for the purpose of this submission have been identified as being fourfold:

a) Does the ICC have jurisdiction over offences that originated in Myanmar but concluded in Bangladesh;

b) Whether Bangladesh is capable of prosecuting individuals for relevant offences should it decide to do so;

c) Issues specific to the border region; and

d) The wider implications of a positive decision of the Pre-Trial Chamber.

9.4. The position of this submission, is that the ICC does have jurisdiction over relevant offences, on the basis that the 'offending' continues in Bangladesh.

9.5. As per the position advanced at part 6 of this submission the situation in Bangladesh, and the situation that the Rohingya would find themselves in, was already known to the Myanmar Government, given the conditions that it had already imposed on the Rohingya domestically, and further, knowing the position that had been previously adopted by the Government of Bangladesh towards refugees.

9.6. It is argued therefore that this formed an essential element of a 'formal plan' for the complete removal of the Rohingya from Myanmar.

9.7. The conclusion insofar as this issue is concerned, is that the 'forcible deportation', as much as it originated insofar as an offence is concerned, in Myanmar, the 'offending' did not end in Myanmar, but in Bangladesh, accordingly, jurisdiction is conferred on the ICC and therefore the OTP.

9.8. In submitting that the ICC has jurisdiction over the matter, it must be concluded that the ICC is the most appropriate forum for such matters to be dealt with, particularly when we take into the lack of capacity and ability that Bangladesh currently displays insofar as the prosecution of such crimes is concerned. Further, it is not conducive to the development of international law, for Bangladesh to be allowed to legitimise that which it has done so appallingly previously.

9.9. In considering appropriate accountability mechanisms, it must be borne in mind that there is no alternative domestic, regional, or international accountability mechanism before which the alleged offences of forced deportation, genocide, and other offences can be investigated by, and brought before.

9.10. The final conclusion to draw, is that the decision of the Pre-Trial Chamber in this matter will have far reaching consequences, not just for 'potential' future situations, but for those that we see immediately, namely Syria.

9.11. It is of course inappropriate to second guess the decision of the Chamber, but it must be borne in my mind that the decision can either close or open a door to accountability in terms of those offences committed in Syria since the beginning of the conflict, particularly those committed by the regime forces.

9.12. The importance of the question being considered by the Chamber therefore cannot be underestimated.

9.13. All of these issues ought to be given due consideration by the Chamber, as all, it is submitted, are directly relevant to the question that is being asked of it.

Mr. Toby Cadman,

Guernica 37 International Justice Chambers

Dated this 18 June 2018

At London, United Kingdom

Ms. Almudena Bernabeu

Guernica 37 International Justice Chambers

Dated this 18 June 2018

At London, United Kingdom

Mr. Carl Buckley

Guernica 37 International Justice Chambers

Dated this 18 June 2018

At London, United Kingdom