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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou

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

Public Document

**Amicus Curiae Observations by the International Commission of Jurists
(pursuant to Rule 103 of the Rules)**

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

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Introduction

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the “Rules”) and the Decision of 29 May 2018 by Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “ICC” or “Court”),¹ the International Commission of Jurists (“ICJ”) hereby submits its *amicus curiae* observations in relation to the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (the “Request”).²

2. In summary, the ICJ submits that:

1. *The crossing of an international border is a fundamental constitutive element for the crime of deportation. This position is supported by customary international law, international human rights law and is reflected in the domestic laws of Bangladesh; and*
2. *The Court has territorial jurisdiction over the crime of deportation. This position is supported by international principles of territoriality, which are also reflected in the domestic laws of Bangladesh.*

3. Interpretation of the Rome Statute in this manner is consistent with the object and purpose of the Statute to end impunity for the most serious crimes that are of concern to the international community. Reliance upon principles of international law, the laws of Bangladesh and human rights law is also relevant pursuant to the provisions of Article 21 of the Rome Statute.

¹ ICC-RoC46(3)-01/18-7.

² ICC-RoC46(3)-01/18-1. Following the filing of the Request, the Chamber invited the competent authorities of Bangladesh to submit written observations. See ICC-RoC46(3)-01/18-3. The Chamber also granted leave to submit *amicus curiae* observations to the Canadian Partnership for International Justice and jointly to Naripokkho, the Women’s Initiatives for Gender Justice, Ms. Sara Hossain and the European Center for Constitutional and Human Rights. See ICC-RoC46(3)-01/18-8 and ICC-RoC46(3)-01/18-15, respectively. Pursuant to Article 19(3) or, in the alternative, Article 68(3) of the Rome Statute, Global Rights Compliance also filed submissions in relation to the Request. See ICC-RoC46(3)-01/18-9 (“Global Rights Compliance Submissions”). In addition to the Request, the ICJ had an opportunity to review these latter submissions. The ICJ has not been formally notified of whether the authorities of Bangladesh have submitted any observations before the Chamber.

1. The crossing of an international border is a fundamental constitutive element of the crime of deportation

4. In the first section of these observations, the ICJ focuses on the identification of the crossing of an international border as an essential constitutive element of the crime against humanity of deportation. This characteristic of the crime of deportation makes it distinct from the separate crime of forcible transfer, which contains no such constitutive element. The ICJ first briefly reviews the leading applicable law and the relevant jurisprudence from other international criminal courts and tribunals. It subsequently provides an analysis of deportation from a human rights perspective. The ICJ then concludes its observations with a review of the applicable domestic laws of Bangladesh relating to the crime of deportation.

1.1 Deportation in international criminal law and in international humanitarian law

5. Deportation has long been recognized as a crime under customary international law, both as a crime against humanity and a war crime.³

6. Article 7(d) of the Rome Statute provides that deportation, together with forcible transfer, are underlying offences of crimes against humanity. However, prior to the adoption of the Rome Statute deportation had already been identified as a crime against humanity in other authoritative legal instruments. Deportation was recognized as a crime under international law in the aftermath of the Second World War and identified as such in Article 6(c) of the Charter of the International Military Tribunal (Nuremberg Charter, annexed to the 1945 London Agreement); Article 5(c) of the Charter of the International Military Tribunal for the Far East; Article II(1)(c) of the (Allied) Control Council Law No. 10; Principle VI(c) of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal; and in Article 2(11) of the 1954 Draft Code of Offences against the Peace and Security of Mankind and Article 18(g) of the 1996 International Law

³ See, in general: J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge, 2005), Rule 129 and relevant national and international sources referred therein. The customary status of deportation has also been recognized in the jurisprudence of the ICTY. See, for instance, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgment, 17 March 2009 (“*Krajišnik Appeal Judgment*”), para. 223.

Commission Draft Code of Crimes against the Peace and Security of Mankind (“1996 ILC Draft Code”). Subsequently, deportation was listed as an underlying offence of crime against humanity in Article 5(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”); and in Article 5 of the Law on the Extraordinary Chambers in the Courts of Cambodia (“ECCC”); and in the codes of several other courts and tribunals.⁴

7. With the exception of the Rome Statute, none of the instruments referred to above provide a definition of deportation. However, the courts and tribunals that have adjudicated cases pursuant to these instruments have, in their jurisprudence, provided a significant contribution to clarifying the crime of deportation. They have been instrumental in setting out the scope and parameters of the constitutive elements of deportation, which contributed to the elaboration of the definition contained in the Rome Statute as well as its relationship with other crimes under international law.

8. In addition to being a crime against humanity, deportation is also a crime under international humanitarian law. Deportation, for instance, was included as a war crime in Article 6(b) of the Nuremberg Charter; Article II (1)(b) of Control Council Law No 10; effectively in Articles 49 and 147 of Geneva Convention IV and Article 85(4)(a) of Additional Protocol I; Article 20 of the 1996 ILC Draft Code; and in Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.⁵ While these *amicus* observations focus on the crime of deportation as a crime against humanity, recourse to the definition of deportation as a war crime is also instructive and, accordingly, is taken into account.⁶

⁴ The crime of deportation is also encompassed in the Statute of several other international or mixed tribunals. See Article 3(d) of the Statute of the International Criminal Tribunal for Rwanda; Article 2 of the Statute of the Special Court for Sierra Leone; Section 5(1)(d) of Regulation 2001/15 of the United Nations Transitional Administration in East Timor on the Special Panels for Serious Crimes; and Article 13(1)(d) of the Law on the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (“Kosovo Specialist Chambers”).

⁵ See also Article 6 of the Law on the ECCC; and Articles 14(1)(a)(vii) and 14(1)(b)(viii) of the Law on the Kosovo Specialist Chambers.

⁶ As stated by the ICTY Trial Chamber in the *Krnojelac* Judgment, apart for its *chapeaux* requirements, the content of the underlying offence of deportation “does not differ whether perpetrated as a war crime or as a crime against humanity”. See *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15

1.1.1 The constitutive elements of deportation

9. Article 7(1)(d) of the Rome Statute provides for both deportation and forcible transfer as specific underlying offences of crimes against humanity. The ICJ supports the Prosecutor's position that deportation and forcible transfer remain two separate and distinct offences and are recognized as such under the Rome Statute.⁷

10. In the first instance, the ordinary meaning to be given to the terms of Article 7(1)(d) suggests that deportation and forced transfer are to be treated as distinct offences.⁸ Otherwise, there would have been no need to identify deportation as an offence at all, as it would simply be one species of a forced transfer. If, on the other hand, the drafters had meant only to include a reference to deportation for the sake of clarity, they would likely have used a more accurate formulation such as "forced transfer, including deportation". Since an entirely disjunctive formulation is used, the plain language suggests that "forced transfer" and "deportation" are separate offences.

11. In addition, there is no indication in the *travaux préparatoires* that the drafters of the Rome Statute intended to depart from customary international law and the established jurisprudence distinguishing between deportation and forced transfer and instead to join these into a single, new crime with identical elements.⁹

March 2002 ("*Krnojelac* Trial Judgment"), para. 473. See also *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 ("*Stakić* Appeal Judgment"), para. 289.

⁷ Request, paras 15-27. See also Global Rights Compliance Submissions, paras 36-46.

⁸ As a treaty, the Rome Statute should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. See Vienna Convention on the Laws of Treaties, 23 May 1969, Article 31.

⁹ Forcible transfer was first given express recognition in Article 18(g) of the ILC 1996 Draft Code, which in turn informed the Rome Statute. The commentary to the 1996 ILC Draft Code, however, distinguishes between deportation and forced transfer on the basis of their geographical reach. See below, at Fn. 26. The ICJ has not been able to identify any jurisprudence supporting a possible novel approach by the Rome Statute in the codification of the crime of deportation and forcible transfer. Scholarly commentary also supports the distinction between these crimes in the Rome Statute. See, for instance, C.K. Hall, *Crimes against humanity – para. 1(d)*, in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, 1999), p. 136: "Unfortunately, the Statute does not expressly distinguish between deportation and transfer. However, given the common distinction between deportation as forcing persons to cross a national frontier and transfer as forcing them to move from one part of the country to another without crossing a national frontier, and given the basic presumption that no words in a treaty should be seen as surplus, it is likely that the common distinction was intended". The distinction between deportation and forcible transfer within the meaning of the Rome Statutes is implicitly confirmed in the jurisprudence of the ICC, which

12. Although not specifically listed as such in the Statutes of the ICTY and the Law establishing the ECCC, forcible transfer, often referred to also as forced transfer, was deemed by these tribunals as falling within the residual category of ‘Other Inhumane Acts’ within the respective provisions on crimes against humanity.¹⁰

13. The Rome Statute as well as the jurisprudence of this Court and of the ICTY show that, with the significant exception of the requirement of the crossing of an international border as opposed to the displacement taking place within national territory, the other elements of deportation are identical to those of forcible transfer. While the two crimes are legally distinct, therefore, an initial analysis of the constitutive elements of deportation will also take into account jurisprudence relevant to forcible transfer, where the elements overlap.¹¹

14. According to Article 7(2)(d) of the Statute, “Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or

included instances where warrants of arrests have been issued only for forcible transfer in relation to internal displacements. See, for instance, *Prosecutor v. Harun and Abd-Al-Rahman*, Case No. ICC-02/05-01/07-2-Corr, Warrant of Arrest for *Ahmad Harun*, 27 April 2007 (Count 9).

¹⁰ *Stakić* Appeal Judgment, para. 317; *Krajišnik* Appeal Judgment, para. 331; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, 1 December 2004, (“*Brđanin* Trial Judgment”), paras. 449-455; *Co-Prosecutors v. Chea and Samphan*, Case No. ECCC/002/19-9-2007/ECCC/TC, Judgment, 7 August 2014 (“*ECCC Case 002/01* Trial Judgment”), para. 455. It can be argued that the jurisprudence of these courts contributed to progressively define forcible transfer as an autonomous offence under international criminal law. The Law on recently established Kosovo Specialist Chambers also does not provide for the autonomous crime of forcible transfer.

¹¹ The ensuing initial analysis of the common, constitutive elements of deportation and forced transfer aims to provide context to the act of displacement in light of its relevance to other areas of these observations, particularly the analysis of deportation from a human rights perspective, as well as the assessment of the continuing nature of this crime and its relevance in relation to the interpretation of Article 12(2)(a). The ICJ acknowledges that the terms used to refer to these offences are not always univocal, particularly in national legislation which might stem from their inherent similarities. Deportation and forcible transfer, for instance, are often discussed jointly as “forcible displacements” or “forcible removals”. See also ICC Elements of Crimes, at Fn. 13. The joint referencing of these two offences in a footnote of the Elements of Crimes, however, cannot be construed as conflating deportation and forcible transfer into the same crime. As already argued, this is reinforced by the continuing references to both terms in the Rome Statute. Should the Statute intend to identify these as a single offence, presumably it would not have resorted to refer to both deportation and forcible transfer.

other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.¹²

15. Therefore, to establish both deportation and forcible transfer, there must be a forced displacement of individuals carried out by expulsion or other forms of coercion. The displacement might include physical force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or the act of taking advantage of a coercive environment. The forced character of the displacement is determined by the absence of genuine choice by the victim as to his or her displacement. The displacement, therefore, has to be involuntary, where the individuals being displaced had no real opportunity to choose whether or not to depart the territory. While individuals may consent to, or even request, their removal, any consent or request to be displaced must be given voluntarily and as a result of the individual’s free will, assessed in light of the circumstances of the particular case.¹³

16. Critical to the question under consideration in the instant case is that the *mens rea* required for deportation is the intent to forcibly displace the population “across a

¹² See also *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (“*Ruto Confirmation of Charges Decision*”), para. 243. This common definition of deportation and forcible transfer is also reflected in the jurisprudence of the ICTY. See, for instance, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, 27 September 2006 (“*Krajišnik Trial Judgment*”), para. 723; *Prosecutor v. Gotovina, Čermak and Markač*, Case No. IT-06-90-T, Judgment, 15 April 2011 (“*Gotovina Trial Judgment*”), para. 1738; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Judgment, 30 May 2013, (“*Stanišić and Simatović Trial Judgment*”), para. 992.

¹³ On the forced or coercive character of the displacement, see, for instance, *Krajišnik Appeal Judgment*, para. 319; *Stakić Appeal Judgment*, paras 279, 281-282; *Krnojelac Appeal Judgment*, paras 229, 233; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005 (“*Blagojević and Jokić Trial Judgment*”), para. 596; *Brđanin Trial Judgment*, para. 543; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016 (“*Karadžić Trial Judgment*”), para. 489. For instance, fleeing in order to escape persecution or targeted violence is not a genuine choice. A lack of genuine choice may also be inferred from looting or burning property belonging to the targeted population. These crimes must be calculated to terrify the population to leave the area. See also Report of the International Commission of Inquiry on the Central African Republic, UN Doc S/2014/928 (2014) (“*CAR Report*”), paras 440-441. Similarly, displacements carried out pursuant to an agreement among political or military leaders, or under the auspices of the ICRC or another neutral organization, does not necessarily make it voluntary. See *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (“*Tolimir Trial Judgment*”), para. 796; *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, 10 June 2010 (“*Popović Trial Judgment*”), para. 897; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003 (“*Naletilić and Martinović Trial Judgment*”), para. 523; *Stakić Appeal Judgment*, para. 286.

de jure or *de facto* border". There is no requirement, however, that a perpetrator has intended the displacement to be on a permanent basis.¹⁴

17. Not all displacements are unlawful. Forced removals are permitted on certain grounds, such as the evacuation of a civilian population for its security or for imperative military reasons. If an act of forced removal is carried out on such bases, that act will not necessarily constitute the crime of deportation or forcible transfer. Under the universally recognized principle of *non-refoulement*,¹⁵ however, removals are unlawful when exposing individuals to the risk of persecution on identified grounds under international refugee law, as well where there is a real risk of serious human rights violations under international human rights law.¹⁶ It is also unlawful to use evacuation measures based on imperative military reasons as a pretext to remove the civilian population to seize control over a desired territory, for example. Forced removals for humanitarian reasons are not justified where the humanitarian crisis that caused the displacement is itself the result of the perpetrator's own unlawful activity.¹⁷

18. Forced displacements undertaken in the interest of civilian security or military necessity, however, must conform to the principle of proportionality. They must be appropriate to achieve their protective function; be the least intrusive instrument that might achieve the desired result; and they must be proportionate to the interest to be protected. For a transfer to be considered proportionate, evacuees must be transferred back to their homes as soon as hostilities in the area in question have ceased. Additionally, those responsible for the transfer shall ensure, to the greatest

¹⁴ *Stakić* Appeal Judgment, paras 278, 307; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007 ("*Brđanin* Appeal Judgment"), para. 206. Accordingly, the *mens rea* for forcible transfer "is the intent to forcibly displace the population within a national border". See *Karadžić* Trial Judgment, para. 493. Previous jurisprudence from the ICTY required that the perpetrator intended the displacement to be permanent. See *Naletilić and Martinović* Trial Judgment, para. 520; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 ("*Stakić* Trial Judgment"), para. 687.

¹⁵ See United Nations Convention relating to the Status of refugees, 1951, Article 33(1).

¹⁶ See also para. 39 below.

¹⁷ *Karadžić* Trial Judgment, para. 492; *Stakić* Appeal Judgment, paras 284-285. See also *Popović* Trial Judgment, paras. 901-902; *Blagojević and Jokić* Trial Judgment, para. 597. See also Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, Article 19; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 ("*Geneva Convention IV*"), Article 49; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 17.

practicable extent, that proper accommodation is provided, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.¹⁸

1.1.2 The crossing of an international border and deportation

19. Despite the commonality of the constitutive elements discussed above, deportation and forcible transfer, are not coterminous in international criminal law. Deportation and forcible transfer are and remain legally distinct crimes. While they share common elements relevant to the acts of displacement, the fundamental distinction between deportation and forcible transfer lies in their geographical reach. For deportation, the displacement must be across a *de jure* border between two States or, in certain circumstances, a *de facto* border.¹⁹ For forcible transfer, the removal takes place within national boundaries.²⁰

20. This distinction, as underscored by the Prosecutor and by Global Rights Compliance in their submissions,²¹ is reflected in the Rome Statute and, specifically, the Elements of Crimes, which identify the crossing of a border “to another State” as an element of the offence.²²

¹⁸ ECCC Case 002/01 Trial Judgment, para. 450. See also Geneva Convention IV, Article 49; *Gotovina* Trial Judgment, para. 1740; *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment, 29 May 2013 (“*Prlić* Trial Judgment”), para. 52; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (“*Krstić* Trial Judgment”), para. 524.

¹⁹ *Stakić* Appeal Judgement, paras 278, 300; *Prlić* Trial Judgement, paras. 55-56; *Popović* Trial Judgment, para. 895. For the purposes of these *amicus curies* observations, the ICJ makes no observations in relation to the crossing of a *de facto* border, or more specifically in relation to occupied territories, as this consideration is not immediately relevant to the instant case.

²⁰ *Stakić* Appeal Judgement, para. 317. The distinction between the elements of deportation and forcible transfer is further acknowledged and reiterated in several other judgments of the ICTY. See *Krajišnik* Trial Judgment, para. 723; *Krajišnik* Appeal Judgment, para. 304; *Tolimir* Trial Judgment, para. 793; *Popović* Trial Judgment, para. 892; *Gotovina* Trial Judgment, para. 1738; *Stanišić and Simatović* Trial Judgement, para. 992; *Karadzic* Trial Judgment, para. 488. Accordingly, this distinction between deportation and forcible transfer is also reflected in their *mens rea*. See, for instance, *Karadzic* Trial Judgment, para. 493.

²¹ Request, para. 19; Global Rights Compliance Submissions, para. 38-39.

²² ICC Elements of Crimes, Article 7(1)(d), Element 1. See also the identical language in relation to the corresponding war crime. Article 8(2)(a)(vii), Element 1. If the crossing of a border was not an element of the crime under the Rome Statute, the Elements of Crimes could have opted to refer only to transfer “to another location”. Thus, even if deportation and forcible transfer were to be identified as a single offence, as posited in the *Ruto* Confirmation of Charges Decision, the crossing of a border would remain an element of any such offence.

21. The crossing of a border as an element of deportation is rooted in customary international law. In the *Stakić* Case, in particular, the Appeals Chamber of the ICTY engaged in a lengthy survey of international law and authorities in support of its conclusion that deportation requires the crossing of a border.²³ In addition to the jurisprudence of the ICTY, this review included the IMT (Nuremberg) Judgment as well as a number of trials conducted under Control Council Law No. 10, which considered the issue of deportation as a crime against humanity, including the mass deportation of Jews from or to German territory.²⁴ The crossing of a border is also contemplated within the meaning of Article 49 of 1949 Geneva Convention IV and Article 85 of Additional Protocol I,²⁵ as well as in Article 18(g) of the ILC 1996 Draft Code, which are referred to above.²⁶ Finally, the *Stakić* Appeals Chamber also relied upon the 2005 study of the International Committee of the Red Cross on customary international law, particularly Rule 129, as confirming that deportation requires displacement across a border.²⁷

²³ *Stakić* Appeal Judgement, paras. 288-300. See also *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal Decision, 16 June 2004, paras 47-70.

²⁴ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946 (London: His Majesty's Stationary Office, 1946) (Reprinted Buffalo, New York: William S. Hein & Co., Inc., 2001), Vol I (1947), pp. 227, 244, 297, 319 and 329. See also Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946 – April 1949 (Reprinted Buffalo, New York: William S. Hein & Co., Inc., 1997): *Milch* Judgment, Concurring Opinion of Judge Phillips, Vol. II, p. 865; *Krupp* Judgment, Vol. IX, Part II, pp. 1432-1433. For additional references to World War II-related jurisprudence, see *Krnjelac* Trial Judgment, para. 474 and Fn. 1429.

²⁵ Article 49 of Geneva Convention IV, first paragraph provides: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."; Article 49, fourth paragraph, provides: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs." See also Article 17 of Additional Protocol II.

²⁶ The commentary of the ILC 1996 Draft Code, Article 18(g), provides that "Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State." See Report of the International Law Commission on the work of its forty-eighth session, UN Doc A/51/10 (1996), p. 49, para. 13. See also Report of the International Law Commission on the work of its forty-third session, UN Doc A/46/10 (1991), p. 104.

²⁷ J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge, 2005), Rule 129.

1.1.3 Deportation as an underlying act of the crime of genocide and the crime against humanity of persecution

22. As similarly argued by Global Rights Compliance in their submissions,²⁸ in addition to being a specific offence, deportation can be relevant as an underlying act of genocide, as well as of the crime against humanity of persecution.²⁹

23. The ICTY has consistently held that while forcible removals may not in themselves be acts of genocide they could be taken as indicia of an additional means to ensure the destruction of a targeted group, which is an element of genocide.³⁰ When the process of forcibly removing a population causes its physical or biological destruction, deportation also qualifies as a genocidal act.³¹

24. Evidence of deportation may also be relevant to the element of genocidal intent. For example, forced displacements could be indicative to demonstrate the

²⁸ Global Rights Compliance Submissions, paras 99-117. The ICJ supports the arguments raised by Global Rights Compliance and, without repeating these arguments, it supplements them with the following observations.

²⁹ Deportation, as well as forcible transfer, is also of particular significance in relation to the so-called policy of "Ethnic Cleansing". Although no formal or autonomous legal definition of ethnic cleansing as an international crime exist, it is commonly referred to as practice consisting of "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area". See *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment of 26 February 2007 ("ICJ 2007 Genocide Judgment"), para. 190; *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on Confirmation of Charges, 4 March 2009 ("*Al Bashir* Confirmation of Charges Decision"), paras 143-145. See also Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, 27 May 1994, paras 129-130. Ethnic cleansing is also recognized in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at paras 23-24, and 28.

³⁰ *Stakić* Trial Judgment, para. 519; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 ("*Krstić* Appeal Judgment"), para. 31. See also CAR Report, paras. 452-454.

³¹ As held by the Appeals Chamber in the *Tolimir* Case: "A forcible transfer operation may still "ensure the physical destruction" of the protected group by causing serious mental harm or leading to conditions of life calculated to bring about the group's physical destruction, even if the group members are not transferred to places of execution. In past cases before the Tribunal, various trial chambers have recognised that forced displacement may – depending on the circumstances of the case – inflict serious mental harm, by causing grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof." *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2005 ("*Tolimir* Appeal Judgment"), para. 209. See also *Blagojević and Jokić* Trial Judgment, paras 646, 665; *Krstić* Trial Judgment, paras 513, 518; *Krajišnik* Trial Judgment, para. 862.

existence of genocidal intent when accompanied by or occurring in parallel with other contextual elements such as mass killings or other destructive conducts.³²

25. Persecution is defined by Article 7(2)(g) of the Rome Statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". According to Article 7(1)(h) of the Rome Statute, to qualify as an offence under the Statute, persecution must be committed "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any acts referred to in this paragraph or any crime within the jurisdiction of the Court".

26. In practice, persecution may encompass different forms. An act, or omission, enumerated in the other underlying offences of crimes against humanity, as well as other relevant offences whether included in the statutes of international tribunals or not, may constitute the *actus reus* of persecution, when committed on discriminatory grounds.³³ Not every denial or infringement of a fundamental human right, however, is sufficiently serious to qualify as a crime against humanity.³⁴ Underlying offences of crimes against humanity, however, are by definition considered to be serious enough to amount to persecution. This is particularly significant in relation to the Rome Statute, where the conduct constituting persecution must have been committed in connection with any other crime within the jurisdiction of the Court.³⁵ When

³² *Blagojević and Jokić* Trial Judgment, para. 123; ICJ 2007 Genocide Judgment, para. 190; *Krstić* Appeal Judgment, para. 33; *Al Bashir* Confirmation of Charges Decision, para. 30. See also CAR Report, paras 458-459.

³³ *Krnojelac* Appeal Judgment, para. 219; *Brđanin* Appeal Judgment, para. 296; *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, 28 February 2005 ("*Kvočka* Appeal Judgment"), para. 323; *Popović* Trial Judgment, para. 966.

³⁴ See also *Blagojević and Jokić* Trial Judgment, para. 580; *Brđanin* Trial Judgment, para. 995.

³⁵ Situation in the Republic of Burundi, Case No. ICC-01/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, 25 October 2017 ("*Burundi* Authorization Decision"), paras 130-131.

committed with the requisite discriminatory intent, acts of deportation may, therefore, also constitute underlying acts of persecution.³⁶

1.2 Deportation under international human rights law

27. Applicable human rights law contained in treaties and customary international law supports the argument that deportation and forcible transfer, while implicating many of the same rights, are distinct crimes. The Prosecutor argues in her Request that this distinction “is necessary to give effect to the different values protected by the two crimes”.³⁷ In this subsection, the ICJ wishes to indicate additional international human rights law to support the Prosecutor’s argument that “while both safeguard the right of individuals to ‘live in their communities and homes’, deportation *also* protects a further set of important rights: the right of the individuals to live in the particular State in which they were lawfully present—which means living within a particular culture, society, language, set of values, and legal protections”.

1.2.1 Rights engaged by deportation and forcible transfer

28. While international humanitarian law and international criminal law establish detailed rules applicable to both deportation and forcible transfer in the context of an armed conflict or of an attack against the civilian population, respectively, international human rights law establishes standards applicable to deportation and forcible transfer in peacetime. As described below in paras. 29-39, acts that amount to deportation or forcible transfer under international criminal law, would entail the violation of a range of civil and political rights, as well as, economic, social, and cultural rights.

29. Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights (“ICCPR”) establish that anyone lawfully within a territory of a State has the right to move freely within that State, to

³⁶ *Ruto* Confirmation of Charges Decision, paras 271-272, 277; *Krnojelac* Appeal Judgment, paras 219-222; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 153; *Karadžić* Trial Judgment, para. 516.

³⁷ Request, para. 17; See also Global Rights Compliance Submissions, para. 46.

leave that State, and for nationals, to re-enter that State.³⁸ Freedom of movement and has been described as an “essential condition for the free development of the person”.³⁹ The Human Rights Committee, the supervisory authority for the ICCPR, has made clear that protections afforded by Article 12 in so far as they concern deportation or forcible transfer are absolute. In other words, they cannot be derogated from even under situations of public emergency:

As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity. The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.⁴⁰

30. Further, acts that amount to deportation or forcible transfer can impact a range of additional and inter-related rights including, but not limited to: the right to respect for private and family life,⁴¹ freedom of religion or belief,⁴² the right to an adequate

³⁸ Article 12 of the International Covenant on Civil and Political Rights (“ICCPR”), 16 December 1966; Article 13 of the Universal Declaration of Human Rights (“UDHR”), 10 December 1948; Freedom of movement is additionally recognized in each of the regional human rights systems. Article 12 of the African Charter on Human and Peoples’ Rights (“ACHPR”), 27 June 1981; Articles 22(5) and 22(1) of the American Convention on Human Rights (“ACHR”) 22 January 1969.

³⁹ *Tide Mendez et al. v. Dominican Republic*, Case No. 12.271, Rep. No. 64/12, IACtHR, 29 March 2012, para. 385.

⁴⁰ UN Human Rights Committee, *General Comment No. 29, States of Emergency*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para. 13(d).

⁴¹ Articles 17 and 23 of the ICCPR; Article 9 of the Convention on the Rights of the Child (“CRC”), Article 8 of the European Convention on Human Rights (“ECHR”), Article 11 of the ACHR; Article 18 of the ACHPR, and Articles 21 and 33 Arab Charter on Human Rights (“ArCHR”); See also *Rubin Byaruhanga v. Denmark*, UN Human Rights Committee, Communication No. 1222/2003, UN Doc CCPR/C/82/1222/2003 (2004), paras. 11.7-12; *Madafferi and Madafferi v. Australia*, UN Human Rights Committee, Communication No. 1011/2001, UN Doc CCPR/C/81/1011/2001 (2004), para. 9.8; For further analysis of practice of international and regional human rights bodies in relation to migrants, see also ICJ, “*Migration and International Human Rights Law – A Practitioners Guide*,” 2014, (“ICJ Practitioners’ Guide No. 6”), available at <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>, pp. 142-145.

⁴² Article 18 of the ICCPR; Article 9 of the ECHR; Article 12 of the ACHR; Article 8 of the ACHPR; Article 30 of the ArCHR; See also *Nolan and K. v. Russia*, ECtHR, Appl. No. 2512/04, Judgment of 12 February 2009, paras. 62, 78; *Omkarananda and the Divine Light Zentrum v. Switzerland*, ECommHR, Appl. no. 8118/77, Admissibility Decision of 19 March 1981, para. 5.; See also *Good v. Republic of Botswana*, ACommHPR, Communication No. 313/05, 47th Ordinary Session, May 2010, paras. 196-200.

standard of living,⁴³ the right to health,⁴⁴ the right to social security,⁴⁵ and the right to education.⁴⁶ Both the UN Special Rapporteur on the human rights of migrants and the UN Representative of the Secretary-General on human rights of internally displaced persons have emphasized and evaluated these human rights effects at length.⁴⁷

1.2.2 Additional rights engaged by deportation

31. Despite the commonalities, it is also recognized that deportation, also referred to as expulsion,⁴⁸ may carry additional consequences for expelled individuals who are not considered nationals in the receiving State. As noted in the ICJ practitioner's guide on migration and international human rights law:

⁴³ Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." Other rights, whose respect and realization are necessary to the attainment of an adequate standard of living, such as the right to water and sanitation, the right to food, and the right to adequate housing, are also protected for by Article 11. See Committee on Economic, Social and Cultural Rights (CESCR): *General comment No. 15, The right to water*, UN Doc. E/C.12/2002/11 (2003), para. 10; *General Comment No. 14, The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), para. 43.

⁴⁴ Article 12 of the ICESCR; Article 25.1 of the UDHR; See also CESCR, *General Comment No. 14, The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), para. 34 (stating that migrants asylum seekers alike are entitled to an adequate standard of physical and mental health); see also ICJ Practitioners' Guide No. 6, pp. 247-352.

⁴⁵ Article 9 of the ICESCR; CESCR, *General Comment No. 19, the right to social security*, UN Doc. E/C.12/GC/19 (2008), para. 59.

⁴⁶ Article 13 of the ICESCR; ICJ Practitioners' Guide No. 6, pp. 257- 261.

⁴⁷ See, for instance Report of the UN Special Rapporteur on the rights of migrants, Gabriela Rodríguez Pizarro, UN Doc. E/CN.4/2000/82 (2000); Report of the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin, UN Doc. A/HRC/4/38 (2007).

⁴⁸ See, for example, W. Kalin, *Aliens, Expulsion and Deportation* in Max Planck Encyclopedia of Public International Law (October 2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e745>: "In many legal traditions and international legal instruments, "deportation" and "expulsion" are considered either interchangeable concepts or there is a tendency to call "expulsion the legal order to leave the territory of a State, and deportation the actual implementation of such order in cases where the person covered does not follow it voluntarily." A third view should additionally be noted. In certain other legal traditions, (francophone Europe, for example) there is a procedural distinction between deportation and expulsion, in light of the historical significance attached to the practice of "deportation" in WWII. In these countries, "deportation" denotes the power of a State to expel an alien forcibly to any country chosen by the deporting State, closely resembling its definition under the laws of war; while "expulsion" denotes that an alien may be expelled from the territory of the expelling State, which should seek the agreement of the person to be expelled in determining the destination, which should in all cases be the State of which that person is a national. See: Maurice Kamto, UN Special Rapporteur of the International Law Commission, Second report on the expulsion of aliens, 20 July 2006, UN Doc. A/CN.4/573, ("ILC Second Report"), para. 157.

When people cross their country's border, they might not know it yet, but the world no longer sees them as it did before. They have a special label or status now: they are migrants. And because of this, they will often find themselves in an inferior position to those around them, who hold the passport of the country in which they live. Whatever the circumstances in which they travel, those who become migrants typically move in a new, unfamiliar, and less secure world. Whether they have entered with an authorisation or they are undocumented, migrants will generally find their rights diminished in comparison with the citizens of their country of residence.⁴⁹

32. In some limited instances, non-nationals do not have guarantees of political rights contained in Article 25 of the ICCPR, which recognize and protect the right to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service.⁵⁰

33. While in principle, non-nationals must be guaranteed enjoyment of the same rights as nationals, beyond those very small number of political rights identified in Article 25 of the ICCPR,⁵¹ many countries typically do not ensure the equal protection of rights as a matter of domestic law and practice. In General Comment 15, pertaining to Article 25 of the ICCPR, the Human Rights Committee noted that many State "constitutions are drafted in terms of citizens only when granting relevant rights", and "in certain cases... there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens".⁵²

34. In this regard, there is a tendency to treat non-nationals primarily as subjects of immigration or refugee law over which States typically enjoy wide discretion. As a result, non-nationals are generally restricted in practice in their right to enter any State, take up residence, move freely, exit and re-enter, work within the receiving

⁴⁹ ICJ Practitioners' Guide No. 6, p. 35; See also Report of the UN Special Rapporteur on the rights of migrants, Gabriela Rodríguez Pizarro, UN Doc. E/CN.4/2002/94 (2002), para. 17.

⁵⁰ Article 25 of the ICCPR; *General Comment No. 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para. 1.

⁵¹ As the Human Rights Committee has made clear in respect of the ICCPR: "The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens." *General Comment No. 15, The Position of Aliens under the Covenant*, 11 April 1986, para. 2.

⁵² *General Comment No. 15, The Position of Aliens under the Covenant*, 11 April 1986, para. 2.

State, participate in political life, or access State benefits.⁵³ In addition, “people finding themselves in this situation, while having nominal entitlement to their human rights, effectively lack, because of their fear of being identified and deported, any opportunity to vindicate those rights, or to access the remedies which should protect them”.⁵⁴

35. As a result, acts that would amount to deportation as a war crime or an underlying act of crimes against humanity may carry an adverse human rights effect that is distinct from acts that constitute forcible transfer within a country, particularly if they effectively result in the deprivation of nationality and statelessness.⁵⁵

1.2.3 Additional State obligations specific to deportation

36. In addition to the human rights engaged by acts that constitute deportation outlined in section 1.2.1-1.2.2 above, there are additional State obligations that are specific to deportation, also referred to as expulsion in the relevant human rights treaties.

37. First, a State may not expel its own nationals.⁵⁶ This principle is rooted in the domestic law of many States, the ICCPR, and each of the regional human rights treaties.⁵⁷ This principle has been found to extend to certain non-nationals that maintain links to a particular State akin to nationals. For example, in *Stewart v. Canada*, the Human Rights Committee, found that Article 13 of the ICCPR applies to nationals in addition to former nationals who have been stripped of their nationality

⁵³ International refugee law, and the accompanying legal instruments arose in reflection of the vulnerable position of those who are displaced across a border owing to a well-founded fear of persecution. See e.g. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, September 2011.

⁵⁴ ICJ Practitioners’ Guide No. 6, p. 35.

⁵⁵ See Report of the UN Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc. A/HRC/25/28 (2013), para. 23.

⁵⁶ Maurice Kamto, UN Special Rapporteur of the International Law Commission, Third report on the Expulsion of Aliens, 19 April 2007, UN Doc. A/CN.4/581, p. 22 (“ILC Third Report”).

⁵⁷ Article 22, para. 5 of the ACHR states: “no one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it.” The same explicit prohibition is found in the European human rights system in Protocol No. 4 to the Convention for the Protection on Human Rights and Fundamental Freedoms: “no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.” This right has been found implicit in ICCPR Article 12, para. 4 stating: “no one shall be arbitrarily deprived of the right to enter his own country.” Finally, it can also be found in Article 12, paragraph 2 of the ACHPR.

in violation of international law, as well as “other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”.⁵⁸ The Human Rights Committee reaffirmed this conclusion in General Comment 27, which sets out in general terms the scope of State’s obligations under ICCPR Article 12.⁵⁹

38. Further, “collective expulsion is prohibited in an absolute way by all major human rights treaties and this prohibition is considered to have assumed the status of customary international law therefore binding all States, regardless of their being party to a treaty expressing such prohibition”.⁶⁰ Treaty prohibitions of collective expulsions can be found in Article 4 of Protocol 4 to the ECHR, Article 12(5) of the ACHPR,⁶¹ Article 22(9) of the ACHR,⁶² and Article 26(2) of the Arab Charter on Human Rights. While there is no express ICCPR provision that prohibits collective expulsions, the Human Rights Committee has been clear that “laws or decisions providing for collective or mass expulsions”⁶³ would entail a violation of Article 13 of the ICCPR.

39. Lastly, any expulsion of either a national or non-national is subject to limitations of *non-refoulement* under international human rights law and international

⁵⁸ *Stewart v. Canada*, UN Human Rights Committee Communication No. 538/1993, UN Doc CCPR/C/58/538/1993 (1996), paras 12.3-12.4. This is enshrined in the law of a number of States and recognized by international law scholars. Beligum, *Annuaire de legislation etrangere*, vol. 27 (1898), pp. 514-515; Netherlands; Jitta, *Le droit d’expulsion des etrangers dans la legislation des Pays-Bas*, p. 69; Brazil, Darras, *Revue de droit international prive et de droit penal international*, p. 855; Austria, Supreme Court, ILR, vol. 71, 8 October 1968, pp. 235-238.

⁵⁹ UN Human Rights Committee, *General Comment No. 27, Freedom of Movement*, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), paras. 19-20.

⁶⁰ ICJ Practitioner’s Manual No. 6, p. 163. The ILC Special Rapporteur on the expulsion of aliens found that the prohibition of collective expulsion had assumed the status of a general principle of international law; see ILC Third Report, para. 115.

⁶¹ See, for instance, *Federation internationale des Ligues des droits de l’homme v. Angola*, ACHPR Communication No. 159/96, 11 November 1997; *Recontre africaine pour la defense de droits de l’homme v. Zambia*, ACHPR Communication No. 71/92, 21-31 October 1996.

⁶² The Inter-American Court of Human Rights has affirmed that acts constituting the mass deportation can violate a broad range of human rights in addition to the Article 22(9), such as: the right to juridical personality, humane treatment, personal liberty, fair trial, protection of the family, rights of the child, right to a nationality, equality and non-discrimination, and juridical protection, as well as the right to freedom of movement. See, for instance, *Tide Mendez et al. v. Dominican Republic*, Case No. 12.271, Rep. No. 64/12, Decision of 29 March 2012 Merits, IACtHR (2012).

⁶³ UN Human Rights Committee, *General Comment No. 15, The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/Rev.9 (1986), para. 10.

refugee law. The principle of *non-refoulement* is a fundamental principle of international law and prohibits States from transferring anyone to a country where he or she faces a real risk of persecution or serious violations of human rights. Under international human rights law, the principle of *non-refoulement*, expressly provided for in the Convention Against Torture,⁶⁴ has been found by international courts and other authorities to apply to risks of violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment; of violations of the right to life; and of flagrant denial of justice and of the right to liberty.⁶⁵

1.2.4 Deportation under international human rights law and the object and purpose of the ICC

40. Based on the above analysis, the ICJ is in agreement with the OTP's submission that the Court should find that recognition of the distinction between deportation and forcible transfer is necessary to give effect to the different values and human rights protected by the two crimes.⁶⁶ As argued above, the distinction is clearly reflected in international human rights law and the development of international criminal law.⁶⁷ Given the gravity that attaches to deportation as a crime against humanity and the prevalence of impunity in many cases where international crimes have allegedly been committed around the world, it is submitted that the Court should ensure that any gaps in protection are filled, wherever necessary and supported by the law. The ICJ submits that the Court's explicit recognition of the distinction between deportation and forcible transfer, as supported by international law, would be consistent with the object and purpose of the Rome Statute as it would have the effect of providing increased protection of victims of gross human rights violations amounting to international crimes.

⁶⁴ Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁶⁵ See, for instance, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 12; *Saadi v. Italy*, ECtHR, Appl. No. 37201/06, Judgement of 28 February 2008, para. 127; *Chahal v. the United Kingdom*, ECtHR, Appl. No. 70/1995/576/662, Judgement of 15 November 1996, para. 79.

⁶⁶ Request, para. 17; See also, Global Rights Compliance Submissions, para. 46.

⁶⁷ See the analysis in Section 1.1 above.

1.3 The crime of deportation under the domestic laws of Bangladesh

41. Bangladesh ratified the Rome Statute on 23 March 2010 and, consequently, became the first country in South Asia to become a State Party to the Rome Statute. However, the domestic laws of Bangladesh, to a certain extent, already made criminal under law and provided for the prosecution and trial of genocide, crimes against humanity and war crimes under international law, pursuant to the International Crimes (Tribunal) Act enacted in 1973.⁶⁸

42. The Act provides for the power to create a tribunal try and punish any individual or group of individuals or organizations, or any member of any armed, defense or auxiliary forces irrespective of their nationality, who commits or has committed, in the territory of Bangladesh, whether before or after commencement of the Act, crimes against peace, genocide, war crimes, including violations of humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, and crimes against humanity, including the offence of deportation.⁶⁹

43. The International Crimes Tribunal Act remained essentially dormant until 2010, after which two tribunals were established under the Act and remain currently in operation. These International Crimes Tribunals are domestic tribunals operating within the judicial system of Bangladesh. The ICJ is conscious of the shortcomings of the International Crimes Tribunal Act in relation to international standards of due process, and shares the criticisms which accompanied the operation of the two tribunals established under the Act, including with regards the imposition of the death penalty and in relation to fair trial rights.⁷⁰ The ICJ, however, considers that

⁶⁸ International Crimes (Tribunals) Act, 1973, (Act No. XIX of 1973), 20 July 1973, as amended by the International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009), by the International Crimes (Tribunals) (Second Amendment) Act, 2012 (Act No. XLIII of 2012), and by the International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013) (with effect from 14 July 2009) (“International Crimes Tribunal Act”). The International Crimes Act is available at <http://bdlaws.minlaw.gov.bd/>.

⁶⁹ International Crimes Tribunal Act, Section 3.

⁷⁰ See ICJ, “*Bangladesh International Crimes Tribunal Should Pursue Justice, not Vengeance*”, Press Release, 28 February 2013, available at <https://www.icj.org/bangladesh-international-crimes-tribunal-should-pursue-justice-not-vengeance/>. See also, for instance, P. Menon, “*International Crimes Tribunal in Bangladesh*”, Max Planck Institute Luxembourg for International, MPILux Working Paper 11 (2017),

reference to the International Crimes Tribunal Act, and to the relevant jurisprudence of its two International Crimes Tribunals, is pertinent in identifying the relevant domestic jurisdiction under the laws of Bangladesh to try the crime against humanity of deportation.⁷¹

44. While their temporal jurisdiction under the International Crimes Act is open ended, in practice, the jurisprudence of the International Crimes Tribunals is limited to crimes committed during the war of independence leading to the creation of Bangladesh. Nevertheless, this jurisprudence is also relevant to identify the definition and the constitutive elements of the crime of deportation as a crime against humanity under the Act and as part of the jurisdiction of these Tribunals. Notably, in a number of judgments issued by the International Crimes Tribunals, these have adopted the same definition of deportation identified by the jurisprudence of the ICTY, including the distinction between deportation and forcible transfer as determined by the requirement of the crossing of an international border for the crime of deportation, as well as its relation with the crime against humanity of persecution, as discussed already above.⁷²

45. This review of the domestic laws of Bangladesh, a State party to the Rome Statute, reveals how deportation is already punishable within the judicial system of Bangladesh. It will be taken into account when discussing the interpretation of Article 12(2)(a) of the Rome Statute, particularly in connection with the provisions of Article 21(1)(c) of the Statute, in the following section of these amicus curiae observations.

available at: www.mpi.lu; S. Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment", *Journal of Genocide Research* (2015) Vol. 17, No. 2, pp. 211–220.

⁷¹ See also Rome Statute, Article 21(3), providing for the Court's consideration of the national laws of States that would normally exercise jurisdiction over the crime.

⁷² See, for instance, *Prosecutor v. Alim*, ICT-BD [ICT-2] Case No. 01 of 2012, Judgment, 9 October 2013, paras 210-215; *Prosecutor v. Sardar and Mollah*, ICT-BD [ICT-1] Case No. 06 of 2015, Judgment, 5 December 2016, paras 469-470, 479-480, 579, 868-887, 889; *Prosecutor v. Haque and Rahman*, ICT-BD [ICT-1] Case No. 04 of 2014, Judgment, 2 February 2016, paras 306-308; *Prosecutor v. Engineer*, ICT-BD [ICT-1] Case No. 01 of 2014, Judgment, 23 February 2015, para. 268. These judgments are available at <http://www.ict-bd.org/ict1/judgments.php> and <http://www.ict-bd.org/ict2/judgments.php>, respectively. They refer to, in particular, the following ICTY judgments: *Blagojević and Jokić* Trial Judgment, paras 595, 601; *Krstić* Trial Judgment, para. 529; *Stakić* Appeal Judgment, paras 277-279, 300; *Brdanin* Trial Judgment, para. 544; *Karadzic* Trial Judgment, paras 488-489, 493; *Krnojelac* Trial Judgment, para. 475.

2. The Court has territorial jurisdiction over the crime of deportation pursuant to Article 12(2)(a) of the Rome Statute

46. In this section, the ICJ will focus on the interpretation of the territorial jurisdiction of the Court under Article 12(2)(a) of the Rome Statute in light of recognized principles of territorial jurisdiction. For the purposes of the present submissions and the Rome Statute, the ICJ will not address the question as to any extra-territorial or universal jurisdiction that might obtain under general international law.⁷³ Pursuant to Article 21 of the Statute, this section will apply Article 12(2)(a) to the crime of deportation, also taking into consideration the laws of Bangladesh and the applicable international human rights law.

2.1 Principles of territorial jurisdiction

47. Under the principles of territorial jurisdiction, a State may regulate conduct that takes place on its territory and that affects the State's vital interests, including commercial, security, political independence, governmental functions, the protection and promotion of human rights, and the combat of serious crimes under international law crimes.⁷⁴ Aside from the permissive exercise of jurisdiction and in respect of certain subject matter, the exercise of jurisdiction – whether for prescriptive, enforcement or adjudicatory purposes - by the State may be mandatory according to the terms of specific treaty provisions or customary international law. Such jurisdiction obtains for instance in respect of human rights protection under international human rights law, which also may require the exercise of criminal law jurisdiction for certain human rights violations amounting to crimes under law.

48. While States have taken varying approaches to determining the scope of territorial jurisdiction for purposes of criminal adjudication, the exercise of

⁷³ The question of extraterritoriality would be relevant in respect of the putative competency of Bangladesh and other States to assert jurisdiction over deportation and other crimes provided for in the Rome Statute.

⁷⁴ M. Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishers, 2011), p. 28. See also, European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction 26-27* (Council of Europe, 1990).

jurisdiction when only part of a crime has been committed on the territory is firmly established in customary international law.⁷⁵

49. This conclusion is supported by two longstanding principles within jurisdictional theory: subjective territorial jurisdiction and objective territorial jurisdiction. Each espouses the idea that a State may exercise jurisdiction over a crime when at least one element of the crime has taken place on the territory of the State. Given the increasingly interconnected world and the evolving nature of cross-border crime, domestic incorporation of these principles has evolved to include the commission of the crime “in whole or in part”, a formulation that has been given broad interpretation domestically.⁷⁶

2.1.1 Subjective territoriality

50. Subjective territoriality establishes that jurisdiction may be exercised on the territory where a crime commenced.⁷⁷ For example, if a rocket was fired from the territory of one State into the territory of another State and resulted in the disproportionate loss of civilian life, the State where the rocket was launched from may exercise jurisdiction on the basis of subjective territoriality. This proposition is uncontroversial, irrespective of the fact the primary consequences of the conduct may have been felt in the second State.⁷⁸

2.1.2 Objective territoriality

51. Objective territoriality establishes that jurisdiction may be exercised on the territory where a crime has been consummated or completed. In the previous

⁷⁵ This rule is also established in treaty law. See Request, paras 34-42. For a review and analysis of legislation and state practice, see A. Cassese et al, *Cassese’s International Criminal Law*, 3rd Ed. (Oxford: OUP, 2013), pp. 275-27; R. O’Keefe, *International Criminal Law* (Oxford: OUP, 2015), p. 10; D. Guilfoyle, *International Criminal Law* (Oxford: OUP, 2016), p. 32; M.N. Shaw, *International Law*, 7th Ed. (Cambridge: CUP, 2013), pp. 475-476.

⁷⁶ C. Ryngaert, *Jurisdiction in International Law*, 2 ed. (Oxford: OUP, 2015), p. 78.

⁷⁷ Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention), *Supp. to the American Journal of International Law*, Vol. 29, 1935, p. 484. See also C.L. Blakesley, “Extraterritorial Jurisdiction,” in M.C. Bassiouni (ed.), *Volume II: International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008).

⁷⁸ See, for instance, C.L. Blakesley, “Extraterritorial Jurisdiction,” in M.C. Bassiouni (ed.), *Volume II: International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008), p. 100-104.

example, the State where disproportionate loss of civilian life occurred has jurisdiction over the crime under the objective territoriality principle. Like subjective territorial jurisdiction, objective territorial jurisdiction is said to be incorporated by most, if not all, States and considered a well-established principle in international law.⁷⁹ Indeed, the principle has been observed by jurists dating as far back as 1622.⁸⁰

52. Notably, this approach was endorsed by the Permanent Court of International Justice in the *Lotus* case. In *Lotus*, the Court found that Turkey could exercise jurisdiction over a French national because the consequence of the event in question, namely, the death of the victim, had occurred on Turkish territory.⁸¹ The Court observed that this accorded with general principles under international law and noted that if it were to take the opposite approach, States would be unable to exercise jurisdiction over what would amount to a cross-border crime, as that crime would be rendered non-existent in the eyes of the law, irrespective of the effects the conduct had on domestic interests.⁸²

⁷⁹ United Nations, Report of the International Law Commission, Fifty-eighth session, (1 May-9 June and 3 July- 11 August 2006), General Assembly, Official Records Sixty-first session, Supplement No. 10 (A/61/10) para. 12, p. 521; M. Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishers, 2011), p. 40; C.L. Blakesley, "Extraterritorial Jurisdiction," in M.C. Bassiouni (ed.), *Volume II: International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008), p. 105; C. Ryngaert, *Jurisdiction in International Law*, 2 ed. (Oxford: OUP, 2015), p. 208; M. Hirst, *Jurisdiction and the Ambit of Criminal Law* (Oxford: OUP, 2003) p. 113; J.H. Currie, *Public International Law*, 2 ed. (May 2008).

⁸⁰ See C. Ryngaert, *Jurisdiction in International Law*, 2 ed. (Oxford: OUP, 2015), p. 78; M. Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishers, 2011), p. 37.

⁸¹ See Permanent Court of International Justice, Case of S.S. "Lotus", France v. Turkey, Judgment, 7 September 1927, P.C.I.J. (ser. A) No. 10 ("*Lotus* Case"), para. 65: "If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent."

⁸² See *Lotus* Case, para. 86: "These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole."

2.1.3 The doctrine of ubiquity

53. As established by the subjective and objective territoriality principles set out above, States may exercise jurisdiction over a crime when it has either commenced or is completed on the territory of the State.

54. However, States have largely adopted a hybrid view of territorial jurisdiction in what is now called the doctrine of ubiquity. It is commonly accepted that the occurrence of any element of a crime, as defined by domestic law, on a State's territory sufficient to trigger territorial jurisdiction.⁸³

55. This approach has been adopted in recognition that the acts and omissions which underlie the constituent elements of a crime may be apportioned across jurisdictions and are not easily dividable along the lines of where the crime commences and where it is completed.⁸⁴

56. This is commonly understood to mean that jurisdiction may be exercised if any part of the crime was committed on a State's territory.⁸⁵ What is considered "a part" of a crime is a matter of domestic interpretation and States have taken a number of different approaches. For example, the United States takes the approach that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such [offense] was begun, continued, or completed".⁸⁶ England and Wales, on the other hand, exercises jurisdiction where "a substantial

⁸³ See, for instance, Request paragraph 40. See in particular the laws of the Islamic Republic of Iran, Islamic Penal Code, 2013 (unofficial English translation by the Iran Human Rights Documentation Centre, 2014), Book I, Ch. 2, Article 4; Italy, Codice Penale e di Procedura Penale e Leggi Complementari, 46th Ed. (Piacenza: La Tribuna, 2017), Article 6(2); Japan, Judgment of the Supreme Court of Judicature, 16 June 1911, Law Reports, Vol. 17, p. 1202 (available in Japanese); Republic of Korea, Criminal Act, Article 2 (translation into English); See also Certain Criminal Proceedings in France, 2003, ICJ Rep. pleadings, 4; U.S. Model Penal Code 2008, section 1.03, available at: <http://www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf>; Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention), Supp. to the American Journal of International Law, Vol. 29, 1935, p. 495; C. Ryngaert, Jurisdiction in International Law, 2 ed. (Oxford: OUP, 2015), p. 188.

⁸⁴ Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention), Supp. to the American Journal of International Law, Vol. 29, 1935, p. 484.

⁸⁵ See, for instance, Certain Criminal Proceedings in France, 2003, ICJ Rep. Pleadings, 4, para. 11; C. Ryngaert, Jurisdiction in International Law, 2 ed. (Oxford: OUP, 2015), p. 78.

⁸⁶ 18 U.S.C. section 3237(a), section 119.

measure” of the crime occurred within the territory. As evidenced by the Prosecutor, other States fall at different points in between these views.⁸⁷

2.1.4 Territorial jurisdiction and protection

57. It should be emphasized that underlying the exercise of territorial jurisdiction is the protection of State interests, including the protection of human rights of all persons “under its jurisdiction”, and combating impunity for serious crimes under international law.⁸⁸ In light of the growing complexity of cross-border crime, States have found it necessary to exercise jurisdiction in this way to protect those interests and treaty law applicable to cross-border crime has evolved in recognition of the realities that States face.⁸⁹

58. Accordingly, and even leaving aside crimes where principles of extraterritorial jurisdiction may apply, while it is universally accepted that States may exercise jurisdiction over crimes committed wholly within their territory, it can also be said that the majority of - if not all - States exercise jurisdiction over crimes which are committed *in part* within their territory.⁹⁰

59. As will be shown below, this approach not only resonates with the domestic laws of Bangladesh, it also has implications for the manner in which territorial jurisdiction under the Rome Statute should be interpreted.

⁸⁷ Request, para. 40.

⁸⁸ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 2, 4; Articles 2(1) and 2(3) of the ICCPR, together with UN Human Rights Committee *General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18; Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN. Doc. A/Res/60/147 (2006).

⁸⁹ See Request, fn. 71. See also, Council Framework Decision 2004/757/JHA (25 October 2004), Article 8 (laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking); Comprehensive study of the problem of cybercrime and responses to it by Member States, the international community and the private sector, UNODC/CCPCJ/EG.4/2013/2 (23 January 2013), para. 27 (available at: [https://www.unodc.org/documents/organized-crime/UNODC CCPCJ EG.4 2013/UNODC CCPCJ EG4 2013 2 E.pdf](https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/UNODC_CCPCJ_EG4_2013_2_E.pdf)). See also M. Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishers, 2011).

⁹⁰ See, for instance, C. Ryngaert, *Jurisdiction in International Law*, 2 ed. (Oxford: OUP, 2015), p. 480.

2.2 Territoriality under the laws of Bangladesh

60. The International Crimes Tribunal Act, the Code of Criminal Procedure and the Penal Code, link the exercise of criminal jurisdiction by domestic courts with the requirement that a crime be ‘committed’. The following subsection reviews the applicable provisions of the International Crimes Tribunal Act as well as of the Code of Criminal Procedure and the Penal Code of Bangladesh with a view to determining the meaning of the reference to the commission of a crime for the exercise of territorial jurisdiction within the laws of Bangladesh.

2.2.1 Territoriality under the International Crimes Act

61. Under Section 3 of the International Crimes Tribunal Act, the International Crimes Tribunals established under the Act have jurisdiction over crimes against peace, genocide, war crimes and crimes against humanity, including deportation, when “committed” in the territory of Bangladesh.⁹¹

62. The commission of an offence relevant to the subject matter of the International Crimes Tribunal Act within the territory of Bangladesh is, therefore, a necessary precondition for the exercise of jurisdiction by the International Crimes Tribunals established under the Act.⁹²

63. The International Crimes Tribunal Act does not provide a definition of the reference to ‘commission’ of a crime under the Act. This is, indeed, unnecessary given its uncontroversial meaning. A further reading of the Act confirms this. Commission is foreseen not only in relation to the traditional form of direct liability of a perpetrator of the offence, which includes instances where a plurality of perpetrators is involved⁹³ but also to other forms of liability or modes of contribution contemplated within the Act, such as attempt, aiding and abetting, conspiracy and complicity.⁹⁴ Similarly, the commission of an offence is also relevant in connection with the responsibility attaching to commanders or superiors, not only when they

⁹¹ International Crimes Tribunal Act, Section 3(1).

⁹² Several other sections of the Act also refer to the commission of the offence as relevant to the jurisdiction of the tribunals established under the Act. See also International Crimes Tribunal Act, Section 3(2)(a) and (c); Section 9(1); and Section 15(1).

⁹³ International Crimes Tribunal Act, Section 4(1).

⁹⁴ International Crimes Tribunal Act, Section 3(g) and (h).

order or otherwise participate in the commission of the crimes, but also in relation to these commanders or superiors own vicarious responsibility for the actions or omissions of those under their command or subordination.⁹⁵

2.2.2 Territoriality under the Code of Criminal Procedure and the Penal Code of Bangladesh

64. In addition to the International Crimes Tribunal Act, a review of the Code of Criminal Procedure and the Penal Code of Bangladesh is also helpful to define the contours of the meaning of commission of an offence within the judicial system of Bangladesh.⁹⁶

65. The Code of Criminal Procedure and the Penal Code define an offence as “any act or omission” punishable by law.⁹⁷ Generally throughout these Codes, the commission of an offence is described as the necessary precondition for the exercise of jurisdiction by the courts of Bangladesh, including the identification of the relevant local or national courts which shall exercise such jurisdiction, in relation to the offences criminalized by the Penal Code.

66. Part VI, Chapter XV of the Code of Criminal Procedure is relevant to the jurisdiction of the criminal courts of Bangladesh in relation to investigations and trials. Not surprisingly, every offence shall ordinarily be inquired and tried by a Court within the local limits of whose jurisdiction it was committed.⁹⁸ Other provisions in this Chapter, however, are instructive in providing further insight into the commission of a crime and how the territorial jurisdiction of national courts is assessed or exercised.

67. Section 179 of this Code, notably, provides that when a person is accused of the commission of any offence, “such offence may be inquired into or tried by a

⁹⁵ International Crimes Tribunal Act, Section 4(2).

⁹⁶ Code of Criminal Procedure, 1898 (Act No. V of 1898), 22 March 1898, as subsequently amended (“Code of Criminal Procedure”). Penal Code (Act No. XLV of 1860), 6 October 1860, as subsequently amended (“Penal Code”). Both the Code of Criminal Procedure and the Penal Code are available at <http://bdlaws.minlaw.gov.bd>. The specific provisions of the Code of Criminal Procedure are not applicable to the International Crimes Tribunal Act and to the International Crimes Tribunals. See International Crimes Tribunal Act, Section 23. Reference to the Code, however, provides some important insight on the principle of territoriality as applicable in Bangladesh.

⁹⁷ Code of Criminal Procedure, Section 4(1)(o); Penal Code, Section 32.

⁹⁸ Code of Criminal Procedure, Section 177.

Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued". This provision, therefore, contemplates within the commission of a crime both the conduct and consequences arising from the relevant acts, or omissions, of the perpetrator, also distinguishing among these as both relevant to determine the *fora* where such offence shall be tried.⁹⁹ This is confirmed by the relevant provisions of the Penal Code. Section 37 of this Code provides that: "Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence". Other provisions in Chapter XV of the Code of Criminal Procedure extend the possibility to try multiple offences or different modes of liability connected in the criminal conduct in any of the locations where each of these might have been committed.¹⁰⁰

68. The Code of Criminal Procedure also addresses the determination of the territorial jurisdiction of local court in relation to offences committed, in whole or in part, in several locations, or in relation to continuing offences, which is particularly instructive in relation to the elements of the crime of deportation, given its nature of transnational and continuing offence.¹⁰¹ Under Section 182 of the Code: "When it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas", the local courts of any such areas will have jurisdiction.¹⁰² This reading of Chapter XV of the Code,

⁹⁹ Code of Criminal Procedure, Section 179 and illustrations therein.

¹⁰⁰ Code of Criminal Procedure, Section 180 and illustrations therein. See also Sections 180(3)(Theft) and (4)(Kidnapping). See also Penal Code, Sections 34-35 and 37 on the liability of multiple perpetrators. Section 37, in particular indicates that the commission of an act or acts, as part of an offence committed by multiple perpetrators and requiring multiple acts, equals to the commission of the offence, proper.

¹⁰¹ The transnational and continuing nature of the crime of deportation is already discussed by the Prosecutor and Global Rights Compliance in their submissions, hence it will not be repeated here. See Request, para. 49; Global Rights Compliance Submissions, paras 37, 43-44, 49 and 81-87.

¹⁰² Code of Criminal Procedure, Section 182. See also Section 183. See also Sections 235-239 in relation to multiple acts which could give rise to difference offences, or be joined in a single offence.

accordingly, shows how principles of territoriality within the local courts of Bangladesh correspond to the doctrine of ubiquity, as discussed above. This approach with regards to the exercise of jurisdiction at the national level is also reflected at the international level. Indeed, Bangladesh has acceded to or ratified several international treaties requiring the criminalization of offences, particularly those of a transnational nature, including when only committed in part on the territory of a State party.¹⁰³

69. Finally, the Code of Criminal Procedure also provides for instances of extraterritorial jurisdiction in relation to certain offences committed outside the territory of Bangladesh.¹⁰⁴

2.3 Territorial jurisdiction under the Rome Statute

70. In the following subsection of these *amicus* observations, the ICJ will discuss the relevant provisions of Article 12(2)(a) of the Rome Statute in relation to the territorial jurisdiction of the Court. It will assess the meaning of the reference to “conduct” in this Article, particularly in connection with the provisions of Article 21 on the applicable law before the Court. Finally, it will apply this review to the crime

¹⁰³ Bangladesh is a party to the United Nations Convention against Transnational Organized Crime. Bangladesh has also acceded or ratified the following international treaties: the United Nations Convention against Corruption; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the International Convention Against the Taking of Hostages; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; the International Convention for the Suppression of Acts of Nuclear Terrorism; the United Nations Convention on the Law of the Sea; and the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation. These treaties are also relied upon by the Prosecutor. See Request, paras. 37-38.

¹⁰⁴ Section 44(2) of the Code of Criminal Procedure contains a general provision relating to extraterritorial jurisdiction concerning offences under the laws of Bangladesh, when committed abroad: “For the purposes of this section the term “offence” includes any act committed at any place out of Bangladesh which would constitute an offence if committed in Bangladesh.” See also Section 54(1). This provision is also contained in the Penal Code. See Penal Code, Section 3. Liability for offences committed by nationals of Bangladesh outside the territory of Bangladesh is also contemplated. See Code of Criminal Procedure, Section 188. See also Penal Code, Section 4. The Penal Code expands on this jurisdiction, in relation to offences abetted by nationals of Bangladesh and committed in a foreign country. See Penal Code, Section 108A. As mentioned, however, issues of extraterritorial jurisdiction are not germane to the scope of these *amicus* observations.

of deportation, taking also into account general principles of territoriality, the laws of Bangladesh and a human right perspective.

2.3.1 The “conduct in question” under Article 12(2)(a) of the Rome Statute

71. The territorial parameters of the Court’s jurisdiction are defined in Article 12(2)(a) of the Rome Statute. Pursuant to Article 12(2)(a), the Court has jurisdiction, in cases of a State party referral or further to the initiation of an investigation by the Prosecutor pursuant to Article 13(a) or (c) of the Statute, respectively, in relation to a 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.

72. The provisions of Article 12(2)(a), do not expressly clarify the precise relationship or connection between a crime and the territory of a State Party required for the Court to have jurisdiction, particularly with regards to the requirement that a “conduct”, as opposed to the commission of a crime, occurred within the territory of the relevant State.

2.3.2 Interpretation of Article 12(2)(a) pursuant to Article 21 of the Rome Statute

73. The Court has an inherent power to define its jurisdiction under the Rome Statute.¹⁰⁵ In clarifying the scope of jurisdiction under Article 12(2)(a), the Court may look to Article 21 of the Rome Statute for guidance in facilitating its assessment of the meaning of Article 12(2)(a). Article 21 provides for a set of sources, in hierarchical ranking, to be relied upon when interpreting and applying the Statute. Under the provisions of Article 21(1)(a)-(c), in particular, the Court should, first of all, rely upon its main instruments, namely the Statute, the Elements of Crimes and its Rules of

¹⁰⁵ Rome Statute, Article 19(1). See also *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 23: “notwithstanding the language of article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived by the well- recognized principle of “la compétence de la compétence”. See also para. 24. Situation in Dem. Rep. Congo, Case No. ICC-04-01-169, Judgment on the Prosecutor’s Appeal against the decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, paras 51-52.

Procedure and Evidence; secondly or on applicable treaties or principles and rules of international law; and, finally on general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.

74. In respect of the Statute itself, a review of the academic analysis of the *travaux préparatoires* for Article 12(2)(a) of the Rome Statute underscores a lack of uniformity in the interpretation of the origins of this Article, revealing a debate on whether the reference to “conduct” adopted at the Rome Conference is the result of a compromise, or of an oversight, or is instead purely intentional.¹⁰⁶ Among the predominant views, is that “conduct” was used in the absence of an agreement on the meaning of ‘omission’ as part to the reference to the traditional notion of “acts or omissions”.¹⁰⁷

75. A general review of the Rome Statute is also not immediately helpful. None of the other provisions of the Statute suggest a precise or unequivocal definition of what “conduct” means. While some provisions appear to consider “conduct” as a constituent of a crime,¹⁰⁸ others appear to conflate the two terms into the same notion.¹⁰⁹

76. Notably, the jurisprudence of the Court also adds to this uncertainty, favouring a broader notion of crime from the language contained in Article

¹⁰⁶ M. Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishing, 2011), pp. 55-77; H.P. Kaul and C. Kreß, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises", in O. Bekou and R. Cryer (eds.), *The International Criminal Court* (Ashgate Publishing, 2004), pp. 152-156; H.P. Kaul, "Preconditions to the Exercise of Jurisdiction", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, 2002), pp. 593-605.

¹⁰⁷ See, for instance, M. Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishing, 2011), pp. 109-110, citing among others sources the Report of the Working Group on General Principles of Law, Official Records, U.N. Doc. A/CONF.183/C.1/WGPP/L.4, p. 255, which noted the relevant draft article 28 containing the reference to acts and omissions as ‘deleted’ and explained in footnote 60 that “[s]ome delegations were of the view that the deletion of article 28 required further consideration and reserved their right to reopen the issue at an appropriate time”.

¹⁰⁸ See, for instance, Article 20(1): “Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.”; See also Article 78(2); Article 90(1); and Article 101(1).

¹⁰⁹ See, for instance, Article 22(1): “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”; See also Article 31(1)(b) and (d); Article 32(2); Article 90(7); and Article 93(10)(a).

12(a)(2).¹¹⁰ In discussing the ambit of the Court's territorial jurisdiction, several Chambers appear to simply equate the notion of "conduct" under Article 12(a)(2) to the commission of a crime.¹¹¹

77. Most significantly, as noted by the Prosecutor and Global Rights Compliance in their submissions, it is the Court's own Elements of Crimes that provides an instructive distinction between conduct, consequences and circumstances as ingredients of the crimes under the Rome Statute.¹¹²

78. Finally, as discussed above, general principles of territoriality at the international level, deriving from both treaty law and customary international law, establish that for territorial jurisdiction to be exercised is sufficient that a crime is committed at least in part in a State's own territory.

79. As a result of this analysis, two main contrasting perspectives can be identified in relation to Article 12(2)(a) of the Rome Statute. From a more strict view, the words "conduct in question" may be understood as 'conduct' alone, meaning that the Court may interpret Article 12(2)(a) to the effect that it has jurisdiction only when any part of the prohibited conduct occurs within the territory of a State party. From an alternative, broader view, instead, "conduct" may be construed as 'crime,'

¹¹⁰ Recourse to principles and rules of law as interpreted by the Court in its previous decisions is contemplated in Article 21(2) of the Statute. Given the hierarchical structure of Article 21, consideration of the provisions preceding Article 21(2) shall, however, take precedence over the jurisprudence of the Court.

¹¹¹ See, most recently, Burundi Authorization Decision, para. 194: "Lastly, with regard to the geographical scope of the authorized investigation, the Chamber underscores the fact that some crimes, as exemplified in this decision, were allegedly committed outside of Burundi by Burundian nationals pursuant to or in furtherance of the State policy described in Part IV of the present decision. Therefore, the Prosecutor may extend her investigation to all crimes within the jurisdiction of the Court committed on the territory of Burundi (article 12(2)(a) of the Statute) or committed outside Burundi by nationals of Burundi (article 12(2)(b) of the Statute) if the legal requirements of the contextual elements of crimes against humanity are fulfilled." See also Situation in Dem. Rep. Congo, Case No. ICC-01/04, Decision on the Application for Participation in the Proceedings of VPRS- 1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, 17 January 2006, para. 85; Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 178;

¹¹² Request, paras 46; Global Rights Compliance Submissions, para. 52. See Elements of Crimes, General Introduction, paras 2 and 7. See, however, para. 9, indicating that a "particular conduct may constitute one or more crimes". While referring primarily to the mental elements of the crimes, Article 30 of the Rome Statute also appears to support indirectly this distinction, specifying that the *actus reus* of an offence contemplated in the Rome Statute is to be construed as comprising conduct, consequences and circumstances.

which entails that the Court will have jurisdiction under Article 12(2)(a) when any part of the prohibited conduct and/or its consequences occur in the territory of a State party.

80. In her Request, the Prosecutor puts forward several possible interpretations of Article 12(2)(a).¹¹³ For the outlined reasons below, however, which are provided in the alternative, the ICJ considers that the identification of a broader view in relation to the meaning of the word “conduct” pursuant to the provisions of Article 21(1)(a) and (b) is immaterial, particularly with regards to the Court’s jurisdiction in relation to the crime of deportation.¹¹⁴

2.3.3 Application of Article 12(2)(a) to the crime of deportation

81. Regardless of any lack of clarity that may obtain regarding the meaning of the “conduct in question” under Article 12(2)(a) of the Rome Statute, the application of a restrictive meaning of these words as separating ‘conduct’ from its ‘consequences’ will, nevertheless, be sufficient to establish the Court’s territorial jurisdiction over the crime against humanity of deportation.

82. This position is supported by Article 21(1)(a) and (b) of the Rome Statute. As discussed in these *amicus* observations,¹¹⁵ the Statute and the Elements of Crime, as well as the customary status of the crime of deportation, identify the crossing of a border as a constitutive element of this crime, which sets it apart from the offence of forcible transfer. While both of these offences lead to the consequence of the displacement of individuals,¹¹⁶ the particular nature of deportation as a transnational and continuing offence, as described by the Prosecutor and Global Rights

¹¹³ See, for instance Request, paras 44-47.

¹¹⁴ The ICJ supports the view that, pursuant to internationally recognised principles of territoriality, the occurrence of only an element of the offence in the territory of a State party, whether relevant to the conduct or its consequences, will suffice to establish the Court jurisdiction under Article 12(2)(a). See also, generally, Request, paras. 28-47. The ensuing discussion, therefore, will focus on whether the constitutive elements of deportation constitute part of the relevant criminal conduct.

¹¹⁵ See above, paras 19-21.

¹¹⁶ The *Ruto* Confirmation of Charges Decision also confirms that deportation, as well as forcible transfer is an open-conduct crime, resulting in the displacement of individuals. See *Ruto* Confirmation of Charges Decision, paras 244-245. While the same decision defines deportation and forcible transfer as “two labels”, however, this definition is unsupported, it does not take precedence over other considerations under Article 21(1) of the Statute and, therefore, should be disregarded. See para. 268.

Compliance, identifies the element of the crossing of border, particularly when the displacement of individuals across such border is continuing, as an integral, independent and significant part of the relevant conduct attaching to deportation as a crime under international law.¹¹⁷

83. It follows that, under the principle of objective territoriality and the doctrine of ubiquity, as discussed above, the occurrence of one of the elements of deportation, namely in this instance the crossing of a border into a State party of the Rome Statute, will satisfy the conditions laid out in Article 12(2)(a) of the Statute and establish the Court's jurisdiction in relation to this crimes.¹¹⁸

2.3.4 Relevance of the provisions of Article 21(1)(c) and 21(3)

84. Should the Court, however, determine that Article 21(1)(a) and (b) of the Statute are not sufficient to resolve the question of the application of Article 12(2)(a) to the element of crossing of a border in relation to the crime of deportation, the ICJ submits that recourse could be made to the provisions of Article 21(1)(c) of the Statute. According to these provisions, the Court may apply general principles of law derived from national laws of legal systems of the world including, as appropriate, "the national laws of States that would normally exercise jurisdiction over the crime".¹¹⁹ The ICJ considers that, given that the mass displacement of a significant number of individuals has occurred into its territory, Bangladesh could exercise jurisdiction in relation to the relevant facts within the meaning of Article 21(1)(c).

85. With regards to the crime of deportation, as discussed above in these *amicus* observations, the national laws of Bangladesh not only provide for a definition of the constitutive elements of deportation but, through reliance on the established jurisprudence of the ICTY, also identify this definition in line with the current

¹¹⁷ Request, para. 49; Global Rights Compliance Submissions, paras. 37, 43-44, 49 and 81-87.

¹¹⁸ Similarly, in the abstract, if all of the elements of deportation relating to the criminal conduct, minus the crossing of an international border, where to occur within the territory of a State party to the Rome Statute, but the displacement where to occur across a border with a non-State party, the Court will retain its jurisdiction over the crime of deportation pursuant to Article 12 (2)(a).

¹¹⁹ Article 21(1)(c) refers to "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

internationally recognized customary status of the crime.¹²⁰ The ICJ considers that this definition corresponds to the definition of deportation under the Rome Statute and the Elements of Crimes and is not, therefore, inconsistent with the Statute.

86. Furthermore, these *amicus* observations also show how, within the judicial system of Bangladesh, territorial jurisdiction adheres to internationally recognized standards, encompassing the location of any of the consequences of an offence, in addition to any part of the conduct of the same offence, as determinative.¹²¹ While territoriality within the laws of Bangladesh might, as such, be broader than the ambit identified by a restrictive interpretation of Article 12(2)(a) of the Statute, this distinction remains immaterial to the crime of deportation, in light of its nature as both transnational and continuing offence, and, consequently, the element of crossing of a border being a part of its conduct, as contemplated by the national laws of Bangladesh.

87. In addition to Article 21(1)(c) of the Statute, the ICJ also draws the Court's attention to the more general provisions of Article 21(3), which provides that application and interpretation of the law under Article 21 must be consistent with internationally recognized human rights.¹²² This extends to jurisdictional issues.¹²³ Accordingly, these *amicus* observations also focused on providing a human rights perspective in relation to the elements of deportation.¹²⁴ Human rights law supports the distinction between deportation and forcible transfer, as crimes under international law, on the basis of the different rights protected by each offence, wherein deportation violates specific rights in light of the displacement of the victims

¹²⁰ See above, paras 41-44.

¹²¹ See above, paras 61-68.

¹²² See also *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 OA 4, Judgment on the Appeal of Lubanga against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006 ("*Lubanga* Jurisdiction Decision"), para. 36; "[a]rticle 21 (3) makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognised human rights norms."

¹²³ *Lubanga* Jurisdiction Decision, para. 37: "Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. Human rights underpin the Statute; every aspect of it, including the exercise of jurisdiction by the Court."

¹²⁴ See above, paras 27-40.

into the territory of another country. The ICJ submits that the Court, therefore, take into account this human rights perspective in its evaluation of Article 12(2)(a) and well as its appreciation of the constitutive elements of deportation.¹²⁵

Conclusions

88. In her Request, the Prosecutor raises a set of discrete legal issues relating to the interpretation of the Rome Statute, its subject matter jurisdiction for the crime against humanity of deportation and the territorial confines of the Court's jurisdiction. With a view to assisting the Court in the proper determination of the matters before it, these *amicus curiae* observations have addressed some of these issues with reference to international law and comparative law, including the laws of Bangladesh. They have shown that the crime against humanity of deportation is distinct from that of forcible transfer. This distinction is consistent with the overall object and purpose of the Rome Statute and reflects the specific needs for protection, including human rights protections, of individual victims of deportation.

89. Given the specific nature of the crime of deportation and general principles of law concerning territoriality, the Court has territorial jurisdiction under Article 12(2)(a) of the Rome Statute when persons are deported from the territory of a State which is not a party to the Statute directly into the territory of a State which is a party to the Statute. The provisions of the Statute, however, should not be interpreted and applied in a vacuum. The preamble of the Rome Statute reflects the commitment of its States parties towards accountability for the most serious crimes of concern to the international community as a whole and their determination to put an end to impunity for the perpetrators of these crimes. These are not a mere cosmetic statements. They are an integral part of the Rome Statute and are the very foundations upon which the Court has been created. In applying the Rome Statute, the Court should stand ready to respond to an ever changing and evolving society

¹²⁵ As discussed above, the jurisprudence of the ICTY has also incorporated a human rights perspective in its assessment of the crime of deportation, particularly in its evaluation of the element of the crossing of a border as distinguishing between deportation and forcible transfer. See subsections 1.1 and 1.2 above.

which, in turn, also affects the nature of the crimes falling within the jurisdiction of the Court.

90. Ending impunity for violations of international law, including human rights and international humanitarian law, promotes accountability, respect for international law and justice for the victims, including their right to the truth and to effective remedies and reparation, preserves historical records of the violations and deters the commission of such crimes in the future. It is the responsibility of States and of the international community as a whole to protect all persons from such crimes and promote fair and equitable justice in our society.¹²⁶



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on behalf of
International Commission of Jurists

Dated this 18th day of June 2018
At Geneva, Switzerland

¹²⁶ UN Commission on Human Rights *Resolution 2005/81*, UN Doc E/CN.4/RES/2005/81 (2005); UN Economic and Social Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1 (2005); Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights, Vienna, 25 June 1993, para. 91

