

THE INTERNATIONAL CRIMINAL COURT'S DECISION ON THE
ROHINGYA CRISIS: THE NEED FOR A CRITICAL REDEFINITION OF
TRANS-BORDER JURISDICTION TO ADDRESS HUMAN RIGHTS

TABLE OF CONTENTS

INTRODUCTION	177
I. THE ROHINGYA CRISIS AND THE ICC'S RESPONSE.....	180
<i>A. Rohingya Crisis</i>	180
<i>B. ICC's Response</i>	182
1. <i>Chief Prosecutor's Request</i>	183
2. <i>Pre-Trial Chamber I Decision</i>	184
II. THE DECISION'S COMPATIBILITY WITH INTERNATIONAL LAW AND STATE SOVEREIGNTY	188
<i>A. Compatibility with National Law and State Sovereignty</i>	189
<i>B. Compatibility with International Law</i>	191
III. THE SCOPE OF THE COURT'S DECISION.....	192
IV. APPLYING THE ICC'S REASONING TO OTHER SCENARIOS	194
<i>A. Israeli-Palestinian Conflict</i>	194
<i>B. Syrian Conflict</i>	198
V. THE COURT'S ALTERNATE CHOICES	202
CONCLUSION	204

INTRODUCTION

“I prefer not to say I'm Rohingya,' he said, 'because it is very dangerous here.’”¹ These are the words of Kamal, a Rohingya Muslim man, who had to smuggle himself while relocating within his own

1. Timothy McLaughlin, *'I Had No Options': The Rohingya Man Who Smuggled Himself*, ATLANTIC (Feb. 5, 2019), <https://www.theatlantic.com/international/archive/2019/02/rohingya-man-smuggled-himself-myanmar/581806/>.

178 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

country to escape the violence sweeping Rakhine State in Myanmar.² Kamal's family once owned a successful business in Sittwe, the capital of Rakhine State.³ However, his family's wealth could not deter the ensuing violence.⁴ The Rohingya were attacked indiscriminately, regardless of whether rich or poor.⁵ At the peak of their detestation for the Rohingya minority, Buddhist mobs destroyed the homes in Kamal's village.⁶ Although Kamal escaped from his village, he is far from safe. To survive, Kamal must hide his Rohingya ethnicity and must "live[] in a cramped apartment with his aunt, uncle, and cousins; [additionally, Kamal] finds his day job at a company importing electronics unmotivating."⁷ This may not seem like the most horrible life, but Kamal's escape and survival were only possible through bribes and lies.⁸ However, Kamal's story differs from the reality for most Rohingya who do not have the means to escape the violence.

The Rohingya reside in Rakhine State, one of the poorest states in Myanmar.⁹ Therefore, unlike Kamal, most Rohingya cannot escape through bribes and lies.¹⁰ Consequently, "slaughter, rape and village burnings" forced many Rohingya to exercise their only option—fleeing the country.¹¹ For example, in 2014, before many Rohingya left for the bordering country of Bangladesh, the Myanmar government's violence and evictions drove many Rohingya to seek shelter in "a wasteland of camps" on their country's western border.¹² These camps have been

2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Jason Motlagh, *The Survivors of the Rohingya Genocide*, ROLLING STONE (Aug. 9, 2018), <https://www.rollingstone.com/politics/politics-features/rohingya-genocide-myanmar-701354/>.

10. *See id.*; McLaughlin, *supra* note 1.

11. *See* Hannah Beech, *First Rohingya Are to Be Returned to Myanmar Killing Grounds*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/world/asia/rohingya-myanmar-repatriation.html>.

12. Jason Motlagh, *Myanmar: Burma's Rohingya Left to Die in Concentration Camps*, TIME (June 17, 2014), <http://time.com/2888864/rohingya-myanmar-burma-camps-sittwe/>.

described as “concentration camps,” nothing like the refugee camps they were meant to be.¹³ Many fled the country because of the conditions in these camps. As of early 2019, over 700,000 Rohingya have fled Myanmar.¹⁴ In early 2017, an estimated one million Rohingya lived in Myanmar,¹⁵ meaning nearly three-quarters of the Rohingya have fled. Yet, the international community has failed to respond to this humanitarian crisis.¹⁶

The Rohingya prosecution in Myanmar demonstrates the flaws of modern international efforts to thwart human rights violations and the need for comprehensive solutions to overcome moral and political ideological differences.

Accordingly, this Comment addresses the International Criminal Court's (ICC) recent decision acknowledging that the court may exercise jurisdiction over the Rohingya crisis, allowing the Chief Prosecutor to proceed with a preliminary investigation into the Rohingya people's deportation from Myanmar. Part I of this Comment summarizes the Rohingya crisis and highlights the court's reasoning in deciding to assert jurisdiction over the crime. Part II applies the court's main reasoning regarding trans-border jurisdiction to our modern understanding of state sovereignty and international law to showcase their compatibility. Part III, however, considers how specific sections of the court's argument—the possibility of expanding a future investigation's scope—are incompatible with current international law. To further illustrate the potential impact of the court's new precedent, Part IV applies the court's reasoning to ongoing conflicts in Palestine and Syria. Part V outlines the ICC's alternatives to asserting jurisdiction, which would not have required the ICC to interpret its own

13. *See, e.g., id.*

14. *Rohingya Refugee Crisis*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFF., <https://www.unocha.org/rohingya-refugee-crisis> (last visited Nov. 20, 2019).

15. Eleanor Albert & Andrew Chatzky, *What Forces Are Fueling Myanmar's Rohingya Crisis?*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/rohingya-crisis> (last updated Dec. 5, 2018).

16. *See Genocide Against the Burmese Rohingya: Hearing Before the Comm. of Foreign Affairs*, 115th Cong. 84 (2018) [hereinafter *Hearing*] (statement of Rep. Gerald E. Connolly) (“[O]ur failure to hold accountable those responsible for these heinous atrocities gives a green light to human rights abusers not just in Burma, but around the world. As Elie Wiesel said[,] ‘[H]uman suffering anywhere concerns men and women everywhere.’”).

jurisdictional power. This Comment concludes that although the ICC's decision to allow a preliminary investigation into the Rohingya people's deportation is a groundbreaking assertion of authority from an international body, it is necessary for redefining trans-border jurisdiction to comprehensively address human rights violations.

I. THE ROHINGYA CRISIS AND THE ICC'S RESPONSE

A. *Rohingya Crisis*

One of the most recent human rights violations is the mass forced deportation of the Rohingya people from Myanmar.¹⁷ The Rohingya people are a stateless Indo-Aryan ethnic group who primarily resided in Myanmar's Rakhine State, near the southern border of Bangladesh.¹⁸ The group is comprised of a Muslim majority and a Hindu minority.¹⁹ The Rohingya are considered a stateless group and, thus, have been "marooned on an international border, unwanted by either side [Myanmar and Bangladesh], weary, traumatized, . . . their very origins in dispute."²⁰

However, the minority Rohingya population's clash with the Buddhist majority, which is supported by the historically pro-Buddhist-government in Myanmar, is not a new occurrence.²¹ The two groups' confrontation began during World War II; the Rohingya Muslims

17. Eli Meixler, *ICC to Examine Myanmar's Deportation of Rohingya Muslims*, TIME (Sept. 19, 2018), <http://time.com/5400224/myanmar-rohingya-deportations-icc-preliminary-examination/>.

18. Albert & Chatzky, *supra* note 15; Shakeeb Asrar, *Rohingya Crisis Explained in Maps*, AL JAZEERA (Oct. 28, 2017), <https://www.aljazeera.com/indepth/interactive/2017/09/rohingya-crisis-explained-maps-170910140906580.html>.

19. Susan Glazebrook, *Special Issue Editor: Professor Campbell Mclachlan QC: The Refugee Convention in the 21st Century*, 49 Victoria U. of Wellington L. Rev. [VUWLR] 479 n.13 (2018) (N.Z.).

20. Jeffrey Gettleman, *Fate of Stateless Rohingya Muslims Is in Antagonistic Hands*, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/world/asia/rohingya-myanmar-bangladesh-stateless.html>.

21. Krishnadev Calamur, *The Misunderstood Roots of Burma's Rohingya Crisis*, ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/>; INT'L CRISIS GRP., BUDDHISM AND STATE POWER IN MYANMAR (2017), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/290-buddhism-and-state-power-myanmar>.

supported the British forces, while the Buddhist majority allied itself with the Japanese, which caused constant conflict between the two groups.²² Since then, the Rohingya have been under systematic attacks involving “oppression, periodic mass expulsions[,] and denials of their identity.”²³ These attacks also arise from a predominant view that Myanmar government officials share: the Rohingya people are illegal immigrants who arrived from the bordering state of Bangladesh.²⁴ This is a prevalent view despite evidence that Rohingya have been present in Myanmar since 1799.²⁵

This view of the Rohingya has led to recent brutal attacks on the group, which have prompted some international condemnation. In August 2017, the military cracked down on the Rohingya population, leading many of them to flee their homes.²⁶ During this particular crackdown, the militants burned Rohingya villages, one after the other, intending to remove the Rohingya from the land.²⁷ As of early 2019, such unprecedented attacks have led over 700,000 Rohingya to flee Myanmar into the neighboring country of Bangladesh.²⁸ The United Nations (U.N.) classified these ongoing attacks on the Rohingya as “hallmarks of genocide.”²⁹

The Myanmar government's general response has been to deny any wrongful intent and the occurrence of any alleged events.³⁰ For

22. Jaayita Sarkar, *How WWII Shaped the Crisis in Myanmar*, WASH. POST (Mar. 10, 2019, 3:00 AM), <https://www.washingtonpost.com/outlook/2019/03/10/how-wwii-shaped-crisis-myanmar/>.

23. Nicholas Kristof, *Myanmar's Appalling Apartheid*, N.Y. TIMES (May 28, 2014), <https://www.nytimes.com/2014/05/29/opinion/kristof-myanmars-appalling-apartheid.html>.

24. *See id.*

25. *Id.*

26. Reuters, ‘Hallmarks of Genocide’: ICC Prosecutor Seeks Justice for Rohingya, GUARDIAN (Apr. 10, 2018, 6:14 AM), <https://www.theguardian.com/world/2018/apr/10/rohingya-crisis-icc-prosecutor-seeks-power-to-investigate-crimes-against-humanity>.

27. Gettleman, *supra* note 20.

28. John Quinley III, *The Rohingya Diaspora Is Crucial to Achieving Justice*, TIME (Feb. 14, 2019), <http://time.com/5529321/rohingya-myanmar-genocide-fortify-rights-diaspora/>.

29. Reuters, *supra* note 26.

30. *See, e.g.*, Hannah Beech & Saw Nang, *Myanmar Rejects U.N. Findings: ‘No Ethnic Cleansing or Genocide in Our Country’*, N.Y. TIMES (Mar. 14, 2018),

182 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50

example, the Myanmar government's response to the claim that its military burned down Rohingya villages was that "the Rohingya burned down their own villages."³¹ Additionally, the government downplayed the bulldozing of villages, stating that it was trying to facilitate the Rohingya's return to Myanmar by making the land suitable for rebuilding.³² However, the government has acknowledged and excused the occurrence of some crackdowns, claiming they were a response to "threats from . . . Rohingya insurgents who carried out fatal raids on Myanmar security posts on Aug[ust] 25[, 2017]."³³

International efforts to stop these human rights violations have mainly been limited to world leaders' talks and speeches, without any formal initiatives to hold the perpetrators accountable. Thus, there is merit to the U.N.'s belief that the international community has "buried its head in the sand"³⁴ by failing to address Myanmar's crimes.

B. ICC's Response

The International Criminal Court's decision to open an investigation into Myanmar's crimes is potentially the most effective effort taken to secure justice and accountability for the Rohingya people.

On July 1, 2002, the Rome Statute entered into force, establishing the ICC.³⁵ The ICC aims to "participat[e] in a global fight to end impunity, . . . to hold those responsible accountable for their crimes [through international criminal justice,] and to help prevent these crimes from happening again."³⁶ Although other international justice systems exist, such as the International Court of Justice (the judicial branch of the United Nations), their interdependence with the United

<https://www.nytimes.com/2018/03/14/world/asia/un-myanmar-rohingya-genocide.html>.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.* (Adama Dieng, the United Nations special advisor on the prevention of genocide, asserted this claim).

35. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

36. *About*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Nov. 21, 2019).

2019] THE ICC'S DECISION ON THE ROHINGYA CRISIS 183

Nations predisposes them to bureaucratic gridlock. Accordingly, the ICC was created to be the first truly permanent, impartial, and independent international criminal court.³⁷ The United Nations created the court to address the shortcomings of modern international efforts, such as the “selective justice” of ad hoc tribunals and prevalence of uncooperative national authorities.³⁸

As of 2019, 122 countries are State Parties to the Rome Statute, having both ratified and signed the original law.³⁹ By signing and ratifying the Rome Statute, these State Parties agreed to support the ICC's efforts and goals. However, the ICC members failed to refer Myanmar's crimes to the court, which illustrated their apathy regarding the Rohingya crisis. Through their inaction, the members forced the court to interpret and expand its jurisdictional authority.

1. Chief Prosecutor's Request

The ICC is not the only international body that has failed to take effective formal action to resolve the humanitarian crisis in Myanmar. For example, the International Court of Justice has repeatedly failed to get referrals from members to litigate pressing disputes; however, even

37. See *The ICC Will Continue Its Independent and Impartial Work, Undeterred*, INT'L CRIM. CT. (Sept. 12, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1406>; see also Simone Halink, *All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment to the United Nations in the Armed Activities Case*, 40 N.Y.U. J. Int'l L. & Pol. 14, 37 (2008) (“An additional complication is that the parties to the Court are sovereign states that, when presenting evidence, focus on the political impact of their case just as much as on its judicial impact.”).

38. *Rome Statute of the International Criminal Court - Overview*, UNITED NATIONS, <http://legal.un.org/icc/general/overview.htm> (last visited Nov. 21, 2019). Selective justice refers to the idea that although there may be many wrongdoers, the court only seeks prosecution for a select few, which some parties have used to argue the court is discriminating against them. Peter Tatchell, *Selective Justice*, GUARDIAN (Jan. 5, 2007, 6:10 AM), <https://www.theguardian.com/commentisfree/2007/jan/05/selectivejustice>.

39. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states_parties/pages/thestatespartiestotheromestatute.aspx (last visited Nov. 21, 2019).

184 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

in those few cases that are litigated and binding, member states simply veto the decision, hindering any potential resolution.⁴⁰

The ICC's Chief Prosecutor, Fatou Bensouda, sought to redeem previous unsuccessful efforts and further the ICC's goal to end impunity. Thus, Bensouda began a new process to hold the Myanmar government responsible for its crimes against the Rohingya people. Specifically, on April 9, 2018, the Chief Prosecutor asked the ICC's Pre-Trial Chamber I to assess whether the ICC had jurisdiction to investigate the crimes against humanity—particularly deportation—occurring in Myanmar against the Rohingya minority.⁴¹

2. Pre-Trial Chamber I Decision

The Prosecutor's request posed a difficult question for the court because the ICC, like many other international courts, has limited jurisdiction.⁴² The ICC's jurisdiction is limited to addressing genocide,

40. SEC. COUNCIL REPORT, MONTHLY FORECAST: OVERVIEW 1-2 (2017), https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2017_01_forecast.pdf (discussing the United Nations Security Council's historical deficiency in utilizing the International Court of Justice and the notable historical example where "[t]he US vetoed a draft resolution calling for full compliance with the ICJ judgment" regarding the *Military and Paramilitary Activities in and against Nicaragua Case*). *But see Gambia Brings Genocide Case Against Myanmar: International Court of Justice to Address Atrocities Against Rohingya*, HUM. RTS. WATCH (Nov. 11, 2019, 5:21 AM), <https://www.hrw.org/news/2019/11/11/gambia-brings-genocide-case-against-myanmar#> (on November 11, 2019, after the writing of this article, Gambia filed a case against Myanmar regarding the Rohingya crisis with the International Court of Justice).

41. Application Under Regulation 46(3), Case No. ICC-RoC46(3)-01-18, Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ¶ 1 (Apr. 9, 2018), <https://www.legal-tools.org/doc/4af756/pdf/> [hereinafter Prosecutor's Request]. The Pre-Trial Chamber consists of a panel of judges who make pre-trial determinations, such as whether an arrest warrant should be issued or whether there is sufficient evidence to proceed with a trial. *Pre-Trial*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/Pre-Trial.aspx> (last visited Nov. 26, 2019).

42. Terrence Chapman & Stephen Chaudoin, *People Like the International Criminal Court – As Long As It Targets Other Problems in Other Countries*, WASH. POST (Jan. 20, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/20/people-like-the-international-criminal-court-as-long-as-it-targets-other-problems-in-other-countries/>.

aggression, war crimes, and crimes against humanity.⁴³ In the Rohingya case, the Chief Prosecutor alleged the Myanmar government was responsible for forcible deportation, which is specifically identified as a crime against humanity under Article 7 of the Rome Statute.⁴⁴

However, the court faced several challenges in determining whether it could assert jurisdiction over the Rohingya conflict. The court's greatest challenge lay in satisfying one of the preconditions necessary to assert jurisdiction. Specifically, to conclude that it has jurisdiction over a crime, the court must demonstrate any of the following: (1) the crime occurred inside a State Party's territory, (2) a State Party national committed the crime,⁴⁵ or (3) the United Nations Security Council (UNSC) referred the crime to the Chief Prosecutor.⁴⁶ Here, the court encountered a problem because the UNSC had not referred the deportation to the ICC.⁴⁷ Moreover, a State Party national had not committed the crime⁴⁸ because Myanmar is not a State Party to the Rome Statute.⁴⁹ Additionally, Myanmar's non-Party status prevented the court from justifying its jurisdiction based on a strict territoriality basis.⁵⁰ As a result, the court's only option to justify its

43. Rome Statute, *supra* note 35, art. 5.

44. *Id.* art. 7(1)(d).

45. *Id.* art. 12(2). A State Party is a country that has both signed and ratified the Rome Statute, meaning it has accepted the jurisdiction and legal obligations of the ICC. See *State Parties to the ICC*, ABA-ICC PROJECT, <https://www.aba-icc.org/about-the-icc/states-parties-to-the-icc/> (last visited Nov. 21, 2019).

46. Rome Statute, *supra* note 35, art. 13(b). See Geoff Curfman, *ICC Jurisdiction and the Rohingya Crisis in Myanmar*, JUST SECURITY (Jan. 9, 2018), <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/> (discussing the possible bases for the ICC's exercise of jurisdiction over the Rohingya crisis).

47. Curfman, *supra* note 46.

48. *Id.*

49. Antoni Slodkowski, *Myanmar to ICC: Rohingya Jurisdiction Request 'Should Be Dismissed'*, REUTERS (Aug. 9, 2018, 6:14 AM), <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-to-icc-rohingya-jurisdiction-request-should-be-dismissed-idUSKBN1KU1NG> (The office of government leader Aung San Suu Kyi pointed to Myanmar's lack of state party status as a key reason Myanmar was not responding to the ICC Prosecutor's request for jurisdiction.).

50. Curfman, *supra* note 46. Territoriality simply refers to one of the preconditions to assert jurisdiction, which is that the court has jurisdiction over the crime because the crime occurred inside the territory/borders of a State Party. Am.

jurisdiction was to find that the crime of deportation somehow occurred inside a State Party's territory.

Once the court establishes jurisdiction, it must still meet separate conditions to exercise that authority to investigate the crime. The court may only exercise jurisdiction under the following limited circumstances: (1) a State Party refers the crime to the court, (2) the UNSC refers the crime to the court, or (3) the Pre-Trial Chamber approves the Prosecutor's request for an investigation.⁵¹ In this case, the Chief Prosecutor requested that the Pre-Trial Chamber I decide whether the court has jurisdiction to investigate the crime of deportation against the Rohingya—the first step in proceeding with a request to open a formal investigation.

After nearly five months of consideration, the Pre-Trial Chamber reached a decision on September 6, 2018.⁵² The Pre-Trial Chamber concluded the ICC may exercise jurisdiction over the Rohingya crisis in Myanmar and authorized the Chief Prosecutor to consider examining the alleged crimes, mainly deportation.⁵³

In its decision, the Pre-Trial Chamber articulated “that the requirement of displacement across a border constitutes a specific element of the crime of deportation under article 7(1)(d) of the Statute.”⁵⁴ Furthermore, the court noted that decisions regarding territoriality have been uncontroversial thus far because all elements of

Soc'y Int'l L., *Jurisdictional, Preliminary, and Procedural Concerns*, in BENCHBOOK ON INTERNATIONAL LAW § II.A (Diane Marie Amann ed., 2014), <https://www.asil.org/sites/default/files/benchbook/jurisdiction.pdf> (discussing the different bases for asserting jurisdiction). In this Comment, strict territoriality means the conduct of the alleged crime occurred completely inside the territory.

51. Rome Statute, *supra* note 35, art. 13, 14, 15(3)-(5).

52. Press Release, Int'l Criminal Court, ICC Pre-Trial Chamber I Rules That the Court May Exercise Jurisdiction over the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh (Sept. 6, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>.

53. See Request Under Regulation 46(3) of the Regulations of the Court, Case No. ICC-RoC46(3)-01-18, Decision on the “Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute,” ¶¶ 72-73, 78-88 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF [hereinafter The Decision]. It is important to note that the Pre-Trial Chamber I conditioned the exercise of jurisdiction on “the allegations [being] established to the required threshold.” *Id.* ¶ 78.

54. *Id.* ¶ 60.

the crime are usually committed inside a State Party's territory.⁵⁵ However, the court clarified that under Article 12(2)(a) of the Rome Statute, only one element of the crime needs to occur inside a State Party's territory, although the Statute does not expressly state that proposition.⁵⁶ Thus, this modified territoriality argument under Article 12(2)(a) generated controversy regarding the ICC's decision to exercise jurisdiction over the Rohingya crisis.

Considering this modification, the court noted that the crime of deportation against the Rohingya was not complete until the group was displaced across the border into Bangladesh.⁵⁷ This meant that part of the crime, the crossing of a border, occurred inside Bangladesh—a country that had signed and ratified the Rome Statute.⁵⁸ Therefore, part of the crime of deportation could qualify as having occurred within a State Party's territory. Consequently, the court determined it could meet one of the preconditions for asserting jurisdiction under Article 12 of the Rome Statute, and all that remained was for the Pre-Trial Chamber to authorize the court's exercise of jurisdiction by approving the Chief Prosecutor's investigation.⁵⁹ Based on the Chief Prosecutor's arguments and its own findings, the Pre-Trial Chamber approved a preliminary investigation into the crime of deportation committed against the Rohingya people of Myanmar in accordance with the proper procedures and international principles.⁶⁰

In addition to extending its territorial jurisdiction, the court noted it might potentially expand the investigation's scope depending on the Chief Prosecutor's findings from the preliminary investigation.⁶¹ The

55. *Id.* ¶ 63.

56. *Id.* ¶¶ 64-65. *See* Rome Statute, *supra* note 35, art. 12(2)(a). The Court came to this determination based on a "contextual interpretation" of the article. The Decision, *supra* note 53, ¶ 65.

57. The Decision, *supra* note 53, ¶ 73.

58. *Statement of ICC Prosecutor, Fatou Bensouda, on Opening a Preliminary Examination Concerning the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh*, INT'L CRIM. CT. (Sept. 18, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya> [hereinafter *Statement of the Prosecutor*].

59. The Decision, *supra* note 53, ¶¶ 73, 79.

60. *Id.* ¶¶ 80-88.

61. *Id.* ¶¶ 74-79. *See Statement of the Prosecutor, supra* note 58 ("My Office will further consider whether other crimes under article 7 of the Rome Statute may be

188 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50

main rationale for allowing potential expansion was that “coercive acts” might have resulted in the Rohingya’s deportation from Myanmar.⁶²

The court, anticipating that its decision would spark controversy, noted that a similar expansive territorial jurisdiction approach has been widely accepted by many international and national systems.⁶³ Importantly, the court identified other treaties Myanmar is a party to that follow a jurisdictional approach similar to the one the ICC accepted in this case.⁶⁴ Therefore, the court concluded its decision conformed to international legal norms. Although the court’s arguments and conclusion are not baseless or false, they merit further discussion.

II. THE DECISION’S COMPATIBILITY WITH INTERNATIONAL LAW AND STATE SOVEREIGNTY

The ICC’s decision on the Rohingya crisis represented the court’s liberal construction of its jurisdictional power because no part of Article 12(2)(a) of the Rome Statute specifies that *only one element* of the crime(s) needs to occur inside a State Party’s territory.⁶⁵ However, the court reached this interpretation due to the “context of the relevant rules of international law and in the light of the object and purpose of the [Rome] Statute.”⁶⁶ The court cited various sources to reconcile its decision with international law,⁶⁷ including national sources that demonstrate how numerous countries exercise a similar trans-border jurisdiction.⁶⁸ The court also cited international sources, like the Permanent Court of International Justice.⁶⁹

applicable to the situation at hand, such as the crimes of persecution and other inhumane acts.”).

62. The Decision, *supra* note 53, ¶¶ 61, 74-79. See *Statement of the Prosecutor*, *supra* note 58 (“[T]he preliminary examination may take into account a number of alleged coercive acts having resulted in the forced displacement of the Rohingya people, including deprivation of fundamental rights, killing, sexual violence, enforced disappearance, destruction, and looting.”).

63. The Decision, *supra* note 53, ¶¶ 63, 66-68.

64. *Id.* ¶ 67, 67 n.111.

65. See Rome Statute, *supra* note 35, art. 12(2)(a).

66. The Decision, *supra* note 53, ¶ 72.

67. See *id.* ¶¶ 65-71 nn.106-118.

68. *Id.* ¶¶ 67-68 nn.112-115.

69. *Id.* ¶ 66 n.107.

A. Compatibility with National Law and State Sovereignty

In reaching a decision, the court confronted the principle that “any tangible human rights enforcement mechanism must come from states’ own domestic legal system.”⁷⁰ Although the court generally shows respect for state sovereignty by acting only when national authorities fail to address a situation,⁷¹ when “a state ignores—or itself carries out—human rights abuses, the principle of state sovereignty comes into conflict with any possibility for resolution.”⁷² Such conflict was manifest in the Rohingya crisis because Myanmar’s legal system failed to address the Rohingya’s plea for peace.⁷³ To overcome this conflict and justify its assertion of jurisdiction, the court cited several national sources.⁷⁴ In its decision, the court respected this principle of deference to national authorities by citing specific countries’ laws that resemble the court’s jurisdictional argument.

For example, the court’s decision is compatible with Australia’s Criminal Code Act because the code states that “a person does not commit the offence unless: (a) the conduct constituting the alleged offence occurs: (i) wholly *or partly* in Australia.”⁷⁵ Additionally, the Czech Republic’s Criminal Code uses similar language, stating that it is irrelevant whether the act was intended to occur wholly or partly

70. Holly Brooke, *State Sovereignty and Human Rights – Irreconcilable Tensions*, MEDIUM (June 7, 2017), <https://medium.com/@hollybrooke/state-sovereignty-and-human-rights-irreconcilable-tensions-462d356ae063> (explaining what it means to respect state sovereignty). See The Decision, *supra* note 53, ¶¶ 63-72.

71. *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Nov. 22, 2019) (“[The ICC] prosecutes cases only when States do not [because they] are unwilling or unable to do so genuinely.”).

72. Brooke, *supra* note 70.

73. See generally Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar’s Rohingya*, 23 PAC. RIM L. & POL’Y J. 683 (2014). “The lack of legal protection for non-citizens, together with the implementation of local policies and a dysfunctional judicial system, deemed to have failed even minimalist models of the rule of law, govern the lives of the Rohingya in North Rakhine State, rendering everyday activities illegal and thus allowing free-reign for extortion, abuse, impunity, and wide-spread human rights abuses.” *Id.* at 709.

74. The Decision, *supra* note 53, ¶¶ 67-68 nn.112-115.

75. *Id.* ¶ 66 n.109 (emphasis added) (quoting *Criminal Code Act 1995* (Cth) s 14.1, para. 2(a) (Austl.)).

190 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

abroad.⁷⁶ Furthermore, Georgia's Criminal Code expresses that "[a] crime shall be considered to have been committed in the territory of Georgia if it began, continued and terminated or ended in the territory of Georgia."⁷⁷ The court cited such sources to show that its decision would not violate the principle of state sovereignty because nations, like those noted above, have criminal systems that follow a similar jurisdictional approach. Citing these sources also showed that the single element argument was not a new approach, as many criminal systems only require that part of a crime be committed inside their territory. This indicates the court's arguments had some basis rooted in the laws of various nations.

Although the court's citation to nations' laws was persuasive at best, the court also directly cited Myanmar's laws to strengthen its justification. The court noted Myanmar's Penal Code, which articulates the following:

[a]ny person liable, by any law in force in the Union of Burma [now known as Myanmar], to be tried for an offence committed beyond the limits of the Union of Burma, shall be [dealt] with according to the provisions of this Code for any act committed beyond the Union of Burma in the same manner as if such act had been committed within the Union of Burma.⁷⁸

Essentially, Myanmar's laws allow it to exercise jurisdiction over crimes that only partially occurred within its territory and sometimes over crimes committed completely outside of its borders. But, the court went further and cited Bangladesh's law, the State Party involved in this action, and demonstrated that Bangladesh's Penal Code contains similar language.⁷⁹ Therefore, the court believed its underlying rationale was justified because both countries involved in the dispute

76. *Id.* (quoting Trestní zákon, Zákon č. [Criminal Code], 40/2009 Sb. (Czech)).

77. *Id.* ¶ 66 n.108 (quoting article (4)(2) of the Georgia Criminal Code).

78. *Id.* ¶ 67. Myanmar was formerly known as Burma. *Who, What, Why: Should It Be Burma or Myanmar?*, BBC NEWS MAG. (Dec. 2, 2011), <https://www.bbc.com/news/magazine-16000467>.

79. The Decision, *supra* note 53, ¶ 68 ("Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Bangladesh."). *See id.* ¶ 68 nn.113-15.

have codified laws that allow them to encroach upon another nation's sovereignty to investigate extra-territorial crimes.

B. Compatibility with International Law

Although some of the court's cited international treaties do not expressly support its proposition,⁸⁰ there are existing laws and principles that support its position. For example, the *Case of the S.S. "Lotus" (Lotus)*, decided by the Permanent Court of International Justice in 1927, includes a supporting principle.⁸¹ In *Lotus*, a French ship collided with a Turkish ship on the high seas; Turkish forces then arrested the captain of the Turkish ship and a Lieutenant (Demos) from the French ship.⁸² Protesting the arrest, the Lieutenant argued Turkey lacked jurisdiction to initiate criminal proceedings against him.⁸³ Consequently, the French and Turkish authorities agreed to ask the Permanent Court of International Justice to resolve the dispute.⁸⁴ In *Lotus*, the court concluded Turkey had jurisdiction because in international criminal law the concept of territoriality is "not an absolute principle."⁸⁵ *Lotus's* "impact as a source of foundational principles in various areas of international law has been lasting."⁸⁶ By citing to *Lotus*, the ICC Pre-Trial Chamber suggests it is adopting this established principle. Although *Lotus's* status in international law is

80. Unlike the cited national sources, the international sources cited by the Court are ambiguous at best as to the partial territoriality reasoning that the Court concluded was valid. For example, most of its citations to treaties that Myanmar is a party to only deal with extradition of a party national and not the occurrence of the crime inside a territory. *See id.* ¶ 67 n.111.

81. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 20 (Sept. 7) (holding that territoriality in criminal law "is not an absolute principle of international law"); The Decision, *supra* note 53, ¶ 66 n.107.

82. Hugh Handeyside, Note, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71, 73 (2007).

83. *Id.*

84. *Id.* at 73-74 ("(1) Has Turkey . . . acted in conflict with the principles of international law - and if so, what principles - by instituting . . . criminal proceedings in pursuance of Turkish law against M. Demos . . .?") (quoting *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 5).

85. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 20.

86. Handeyside, *supra* note 82, at 71.

192 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

notable, it is unclear whether citing to only one case is sufficiently persuasive.

Moreover, the ICC also referred to international treaties that Myanmar is a party to that adopt a similar trans-border jurisdiction argument. These cited treaties include the following: the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁸⁷ These treaties require Myanmar “to take measures to establish its jurisdiction . . . in cases where the alleged offender is present in its territory, irrespective of the location of the commission of the alleged offence or the nationality of the alleged offender.”⁸⁸ Thus, the court highlights that Myanmar denies the court’s jurisdiction, yet allows a similar jurisdictional enforcement under the noted treaties.

III. THE SCOPE OF THE COURT’S DECISION

Although the court’s reasoning regarding trans-border jurisdiction is compatible with international law and principles of state sovereignty, the second part of the court’s decision regarding the possible expansion of the investigative scope is questionable. The court tried to broaden its decision’s scope by stating it could also exercise jurisdiction over crimes that might have led to the crime of deportation.⁸⁹ These crimes involve both “coercive acts” and other crimes under Article 7 of the Rome Statute,⁹⁰ which are crimes that may not possess the same trans-border element as the crime of forcible deportation. However, this is

87. The Decision, *supra* note 53, ¶ 67 n.111.

88. *Id.* ¶ 67.

89. *Id.* ¶¶ 60-61, 74-78.

90. Rome Statute, *supra* note 35, art. 7(2)(d); The Decision, *supra* note 53, ¶ 61 (explaining other coercive acts may include “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting”); *id.* ¶¶ 74-78 (referring to the crime of persecution and other inhumane acts as the other crimes under Article 7 of the Rome Statute). See *Statement of the Prosecutor*, *supra* note 58 (stating the possibility of examining several alleged coercive acts and other crimes under Article 7 of the Rome Statute).

controversial because the underlying rationale of the ICC's decision only justifies jurisdiction over trans-border crimes.⁹¹

Essentially, trans-border crimes, such as deportation, could serve as a Trojan Horse,⁹² allowing the court to investigate a non-State Party for crimes beyond those that international law expressly allows it to exercise jurisdiction over. Unlike in its deportation analysis, the court does not cite any international law sources to justify its Trojan Horse argument.⁹³ Unlike how the court cited national codes to justify its expansive territorial jurisdiction approach, here, the court did not defer to the principle of state sovereignty, failing to cite any national sources that supported its argument.⁹⁴

In its conclusion, the court attempted to limit the application of its decision and reasoning by stating that at least one element of the crime must occur within a State Party's territory to justify an investigation. The court noted that it may also have jurisdiction over the crime of persecution, which is a crime against humanity, because "an element or part of this crime (i.e. the cross-border transfer) takes place on the territory of a State Party."⁹⁵ Additionally, the court addressed another potential crime—"other inhumane acts"—that it could have investigated under Article 7 of the Rome Statute.⁹⁶ However, the court did not explain why it discussed potential jurisdiction for these crimes

91. See The Decision, *supra* note 53, ¶¶ 57-72. In this comment, trans-border crimes refers to crimes where at least one element of the crime involves the crossing of a border, as in the case of deportation. The Decision, *supra* note 53, ¶ 60.

92. In this comment, the Trojan Horse analogy is meant to illustrate how the court, through its groundbreaking decision, may have an unintended and consequential impact beyond investigating the crime of deportation. Though not deceptive as the classic Trojan Horse of Greek canon, the ICC's interpretation of its jurisdictional power goes far beyond what meets the eye. Editors of Encyclopaedia Britannica, *Trojan Horse*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Trojan-horse> (last visited Nov. 30, 2019) (explaining the Trojan Horse mythology).

93. See The Decision, *supra* note 53, ¶¶ 65-77 nn.106-23. The court does not explain why it has the legal authority to investigate other crimes if its jurisdictional grounds are solely based on the trans-border nature of the alleged crime: deportation. See also *id.* ¶¶ 65-77.

94. See *id.* ¶ 66 nn.108-09.

95. *Id.* ¶ 76.

96. *Id.* ¶ 77 (quoting Rome Statute, *supra* note 35, art. 7(1)(k)).

194 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50

when the Chief Prosecutor did not allege them.⁹⁷ The absence of an explanation is significant because the court believed the crimes share a similar element: the crossing of a border.⁹⁸ It is possible that the Chief Prosecutor and the court decided to sideline these crimes because they do not provoke the same impactful image as deportation—the image of over 700,000 Rohingya crossing the border into another country. Ultimately, it was this mass deportation and not the other crimes that provoked the need for a humanitarian response, which likely influenced the court’s focus.

IV. APPLYING THE ICC’S REASONING TO OTHER SCENARIOS

Although the ICC’s decision may not seem groundbreaking in light of precedent like *Lotus*, the decision’s effects are far-reaching. For example, two current situations, the Israeli-Palestinian conflict and the Syrian conflict, demonstrate the extensive potential reach of the ICC’s decision. Both situations are similar because other international community efforts have failed to effectively address them. Moreover, both conflicts share four key characteristics that are central to the ICC’s reasoning in its decision regarding the Rohingya crisis. These shared characteristics include the following: (1) the affected party is a State Party to the Rome Statute or has accepted the ICC’s jurisdiction, (2) the crime(s) committed are crime(s) that the ICC has jurisdiction over, (3) at least one element of the crime(s) being committed within a State Party’s territory is being committed by a non-State Party, and (4) the crime contains a trans-border element or has a trans-border effect.

A. Israeli-Palestinian Conflict

The ICC’s decision regarding the Rohingya crisis may impact the Israeli-Palestinian conflict. The ICC has attempted to address the conflict before, but it was unsuccessful. In April 2015, Palestine became a State Party to the Rome Statute, giving the ICC jurisdiction

97. See *id.* ¶¶ 74-79; Prosecutor’s Request, *supra* note 41.

98. The Decision, *supra* note 53, ¶ 78.

2019] THE ICC'S DECISION ON THE ROHINGYA CRISIS 195

to investigate “crimes committed in the territory since June 13, 2014.”⁹⁹ On the other hand, Israel has not ratified the Rome Statute.¹⁰⁰

In 2015, the ICC began a preliminary investigation into the “situation in Palestine.”¹⁰¹ However, preliminary investigations typically take years unless a State Party requests a formal investigation through referral.¹⁰² In 2015, Palestine did not request such an investigation, and thus no real progress was made.¹⁰³ There was no referral, in part, because international donors pressured the Palestinian National Authority (PA), the interim self-government of the Gaza strip, to refrain from pursuing an investigation.¹⁰⁴ In 2015, Israel withheld tax revenues that it typically collects for PA to pressure Palestine to not open an investigation and in retaliation for Palestine becoming a State Party to the Rome Statute.¹⁰⁵ Additionally, since joining the ICC, both Israel and the United States have consistently threatened and pressured Palestine not to make any formal requests to the ICC¹⁰⁶; thus, at the time, it was highly improbable that Palestine would refer the situation to the ICC.¹⁰⁷

However, in 2018, Palestine resisted these pressures and referred Israel's crimes to the ICC.¹⁰⁸ Among the issues Palestine wanted the court to investigate were land disputes and attacks on unarmed protestors.¹⁰⁹ Israel responded to Palestine's request by arguing the ICC lacked jurisdiction over the Israeli-Palestinian conflict for two

99. Zena Tahhan, *Palestine Submits ICC Referral to Open Probe into 'Israel crimes'*, AL JAZEERA (May 22, 2018), <https://www.aljazeera.com/news/2018/05/palestine-submits-icc-referral-open-probe-israel-crimes-180522101121093.html>.

100. *Id.*

101. *Preliminary Examination: Palestine*, INT'L CRIM. CT., <https://www.icc-cpi.int/palestine> (last visited Nov. 30, 2019).

102. Tahhan, *supra* note 99.

103. *Id.*

104. *Id.*; Jennifer Williams, *Israeli Officials Fear a Looming Disaster: The Collapse of the Palestinian Authority*, VOX (Jan. 4, 2016, 8:00 AM), <https://www.vox.com/2016/1/4/10690270/collapse-palestinian-authority> (defining what the Palestinian National Authority is).

105. Tahhan, *supra* note 99.

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.*

196 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

reasons: (1) Palestine is not a recognized state, and (2) Israel has never accepted the ICC's jurisdiction because it has never signed and ratified the Rome Statute.¹¹⁰ In response, the ICC issued a warning to Israel stating "that extensive destruction of property without military necessity and population transfers in an occupied territory constitute war crimes under the Rome Statute."¹¹¹ Again, Israel argued the ICC lacked jurisdiction to investigate the situation and further noted that Israel's legal system conducts its own war crime investigations.¹¹² Thus, Israel contended that its own legal system makes it sovereign and shields it from ICC criminal investigations.

On the other hand, the ICC's position is that the court will not investigate or prosecute individuals unless national authorities cannot or will not take action to address the alleged crimes.¹¹³ Here, the court's willingness to investigate Israel's crimes indicates that Israel's legal system is not properly addressing the issues Palestine is raising. However, as of 2019, despite Palestine's referral and the Chief Prosecutor's warning, the ICC has not opened any formal investigations against Israel.¹¹⁴

However, with the court's recent decision regarding the Rohingya crisis, the ICC may have new precedent to open a formal investigation into Israel's war crimes in the disputed area of Gaza. A formal investigation is possible because the Israeli-Palestinian conflict shares similar conditions with the Rohingya crisis that were key in justifying the decision.

First, Palestine, the affected party, is a State Party to the Rome Statute, which means the ICC would have jurisdiction to investigate

110. *Id.*

111. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Situation in Palestine*, INT'L CRIM. CT. (Oct. 17, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=181017-otp-stat-palestine>.

112. *Id.*

113. *How the Court Works*, *supra* note 71.

114. *See* Oliver Holmes, *Palestinian Minister Delivers Israel 'War Crimes' Referral to ICC*, GUARDIAN (May 22, 2018, 10:37 AM), <https://www.theguardian.com/world/2018/may/22/palestinian-minister-israel-war-crimes-icc-referral>; *see also* *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Dec. 1, 2019) (the Israeli-Palestinian conflict is not currently listed among the twelve situations under investigation).

crimes under any of the following conditions: (1) the crimes occurred inside Palestine's territory, (2) the crimes are committed by Palestinian nationals, or (3) the crimes are referred to the court by the UNSC. However, like Myanmar, Israel, the accused party, is also a non-State Party because it has neither signed or ratified the Rome Statute nor accepted the ICC's limited jurisdiction.

Second, the ICC's Chief Prosecutor classified Israel's actions as war crimes. Palestine also classified Israel's actions as war crimes when it requested that the ICC open an investigation.¹¹⁵ Therefore, Israel's alleged crimes fall under the court's jurisdiction because Article 5 of the Rome Statute identifies war crimes as one of the categories of crimes under the ICC's investigative prerogative.¹¹⁶

Third, the specific war crime that either Palestine or the Chief Prosecutor may allege is the willful killing of Palestinians. Under Article 8(2)(a)(i) of the Rome Statute, willful killing constitutes a war crime and may fall under the ICC's jurisdiction.¹¹⁷ This crime occurs inside the Gaza territory, which is recognized as part of the Palestinian National Authority.¹¹⁸ One specific instance of Israel's alleged willful killing occurred on March 30, 2018, when Israel killed over 100 Palestinian protestors in the Gaza Strip.¹¹⁹

A critical question in determining if this new court precedent applies to the Israeli-Palestinian conflict is whether this crime has some trans-border element or effect. In the March 30th incident, the Israeli soldiers who shot the protestors were on the Israeli side of the Gaza-Israel border and did not cross the border into the Gaza territory.¹²⁰ However, the deaths occurred inside the Gaza Strip, Palestine, a State Party's territory.¹²¹ Therefore, the crime of willful killing committed by Israeli soldiers had an effect across the border, in Palestine.

115. Holmes, *supra* note 114.

116. Rome Statute, *supra* note 35, art. 5(c).

117. *Id.* art. 8(2)(a)(i).

118. *Palestinian Territories Profile*, BBC NEWS (Apr. 8, 2019), <https://www.bbc.com/news/world-middle-east-14630174>.

119. Tahhan, *supra* note 99.

120. See David M. Halbfinger, Isabel Kershner & Declan Walsh, *Israel Kills Dozens at Gaza Border as U.S. Embassy Opens in Jerusalem*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/world/middleeast/gaza-protests-palestinians-us-embassy.html>.

121. See *id.*

198 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

Palestine may not be able to convince the court to open an investigation based on this incident alone; however, the Chief Prosecutor may be driven to request the Pre-Trial Chamber to authorize an investigation based on the escalating number of serious crimes Israel is committing in Palestine.¹²²

Another potential crime Israel is committing against Palestinians is deportation, which has a trans-border element. Since the court has established precedent granting it jurisdiction over crimes with a trans-border element, Israel's crime of deportation could bolster the court's argument for exercising jurisdiction. The allegation is that "[s]ince the establishment of Israel in 1948, deportation has been used to expel Palestinians from their land, both individually and en masse";¹²³ this would form the core of the case against Israel.

Israel is likely to reject this broader jurisdictional argument. However, the court's new precedent would likely support exercising broader jurisdiction to investigate Israel's crimes, including war crimes such as willful killing and deportation. Nonetheless, the ICC may choose not to initiate an investigation because the magnitude of the people affected is low compared to the Rohingya crisis.¹²⁴

B. Syrian Conflict

The Syrian conflict more closely resembles the Rohingya crisis. Due to the similarities, the Syrian conflict may fall under the ICC's jurisdiction. The Syrian conflict has been shaped by "poor governance, violence, and resulting waves of displacement [in the Middle East]."¹²⁵ The Syrian conflict encompasses a wide variety of disputes, including

122. *Israel: Apparent War Crimes in Gaza*, HUM. RTS. WATCH (June 13, 2018, 12:00 AM), <https://www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza>. See Marlise Simons & Alan Cowell, *Palestinians Ask I.C.C. to Open Full Inquiry into Israel*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/world/middleeast/palestinians-israel-gaza.html>.

123. Bahea Namoor, *Palestinians Displaced by Force*, AL JAZEERA: PALESTINE REMIX, <https://interactive.aljazeera.com/aje/palestineremix/deportees.html#/21> (last visited Dec. 1, 2019).

124. *Compare Israel and Palestine: Events of 2018*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine> (last visited Dec. 1, 2019), with *Rohingya Refugee Crisis*, *supra* note 14.

125. ELIZABETH FERRIS & KEMAL KIRIŞCI, *THE CONSEQUENCES OF CHAOS: SYRIA'S HUMANITARIAN CRISIS AND THE FAILURE TO PROTECT 5* (2016).

2019] THE ICC'S DECISION ON THE ROHINGYA CRISIS 199

a civil war, which the Syrian government legitimizes as a fight against terrorism.¹²⁶ The Syrian conflict is attributable to “deep-seated political and economic factors endemic to the region and [to] specific actions taken by the Bashar al-Assad regime and various insurgent groups.”¹²⁷

Since the conflict began in 2011,¹²⁸ the court has not been able to address the situation, partly because the UN's procedures affected the court's ability to tackle the conflict.

Throughout the conflict, evidence of the regime's indiscriminate approach to prosecuting the war has led to multiple attempts to build a case for war crimes. Evidence includes the use of chemical weapons, the detention and execution of many without trial, and the use of torture. There had previously been an attempt to refer the government to the ICC back in 2014, when more than 60 countries backed a UN Security Council resolution. However, it was vetoed by Russia and China, the former remaining a staunch ally of the Assad regime.¹²⁹

Since the international community's failed attempts to provide justice for Syria, American and European courts have led the discussion of such atrocious crimes, in which Syrian lawyers and human rights activists succeeded.¹³⁰ Moreover, a recent filing by human rights lawyers may lead to further successes in this movement to obtain justice. The lawyers brought two lawsuits against Syria on behalf of

126. Daniel Corstange & Erin A. York, *Sectarian Framing in the Syrian Civil War*, 62 AM. J. POL. SCI. 441, 454 (2018).

127. FERRIS & KIRIŞCI, *supra* note 125, at 109.

128. *Id.* at 7.

129. Edwin Wood, *Syrian Refugees Seek Justice Against Assad Government in ICC*, THE ORG. FOR WORLD PEACE (Mar. 27, 2019), <http://theowp.org/syrian-refugees-seek-justice-against-assad-government-in-icc/>.

130. Maryam Saleh, *Syrian Refugees Use Precedent Set in Rohingya Case to Try to Bring Government Officials Before the International Criminal Court*, INTERCEPT (Mar. 16, 2019, 4:57 AM), <https://theintercept.com/2019/03/16/syria-conflict-international-criminal-court/> (“The biggest success so far has been in Germany, where authorities last month arrested a former high-ranking Syrian intelligence officer and two others who are accused of crimes against humanity for torturing detainees in Syrian prisons. Other cases remain pending in France, Sweden, and Spain. (Cadman and al-Bunni[, two lawyers,] have been involved with some of these cases.)”).

200 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

Syrian refugees in Jordan.¹³¹ Unsurprisingly, the lawyers rely on the recent precedent regarding the Rohingya crisis to urge the ICC to investigate alleged crimes committed by Syria.¹³² In their Article 15 communications with the ICC, the two groups of lawyers alleged Syria's violation of international law.¹³³ However, Article 15 communications are not enough to open an investigation against a government until "the prosecutor . . . compile[s] that information and decide[s] whether to take it to a judge and move forward with a preliminary investigation."¹³⁴

Perhaps the ICC could be a key arbiter for the Syrian people because regional organizations do not possess the tools necessary to adjudicate the dispute, and the UN may also prove ineffective.¹³⁵ Therefore, with the ICC's recent Rohingya decision, the court may have jurisdiction to bring Bashar al-Assad's regime and insurgent groups to justice. Unlike the Israeli-Palestinian conflict, the Syrian conflict shares more characteristics with the Rohingya crisis, primarily the magnitude of people it has affected; this makes it a stronger case for the court to assert its jurisdiction over.

As noted above, there are three preconditions for the court to assert jurisdiction. First, one of the affected parties must be a Rome Statute signatory. In the Syrian conflict, one of the affected countries is

131. *Syria War: Lawyers Submit First War Crimes Cases Against Assad*, BBC NEWS (Mar. 7, 2019), <https://www.bbc.com/news/world-middle-east-47483714> [hereinafter *Syria War*].

132. *Id.*

133. Saleh, *supra* note 130. Article 15 communications are the means by which "any individual, group, or organization can send information on alleged or potential ICC crimes to the Office of the Prosecutor (OTP) of the ICC." *How to File a Communication to the ICC-Prosecutor*, COALITION FOR THE INT'L CRIM. CT., <http://coalitionfortheicc.org/how-file-communication-icc-prosecutor> (last visited Dec. 1, 2019).

134. Saleh, *supra* note 130 (quoting Heidi Nichols Haddad, author of "The Hidden Hands of Justice: NGOs, Human Rights, and International Courts").

135. FERRIS & KIRIŞCI, *supra* note 125, at 112. *See generally* Shelby Black, *Universal Jurisdiction and Syria: A Treaty Based Expansion of Universal Jurisdiction as a Solution to Impunity*, 21 INT'L TRADE & BUS. L. REV. 177 (2018) (discussing the U.N.'s political differences and deadlock as a likely impediment to addressing the Syrian conflict).

Jordan,¹³⁶ which is a State Party to the Rome Statute.¹³⁷ On the other hand, the aggressor, Syria, has not accepted the ICC's jurisdiction by either ratifying the Rome Statute or accepting its limited jurisdiction.¹³⁸

Second, the crime(s) committed must be crime(s) that the ICC has jurisdiction over. Here, one of the crimes alleged is deportation, which as discussed above is a crime under the ICC's jurisdiction as expressly stated in Article 7(1)(d) of the Rome Statute.¹³⁹ Since 2011, the Syrian conflict has driven more than 5.6 million Syrians to flee their country into the neighboring countries of "Lebanon, Turkey, Jordan and beyond."¹⁴⁰ Jordan, in particular, has taken in over 655,000 Syrian refugees.¹⁴¹

Third, at least one element of the crime(s) must be committed within a State Party's territory. Applying the court's trans-border element analysis, Syrians crossing Syria's southern border into Jordan means that part of the crime of deportation occurred inside a State Party's territory: Jordan. Therefore, the ICC may be able to exert jurisdiction over Syria's war crime of deportation. The ICC may have a stronger argument to investigate the Syrian conflict than it had for the Rohingya crisis because of the greater magnitude of people affected by the conflict. In the Rohingya crisis, the Myanmar government forced over 700,000 Rohingya to flee, whereas Bashar al-Assad's regime has forced over five million Syrian's to flee Syria.¹⁴² Syrians have alleged the Assad regime committed other crimes, such as "the use of chemical weapons, indiscriminate bombings of civilian centers, and torture."¹⁴³ However, these other crimes fall under the court's Trojan Horse argument, which is incompatible with international law and principles of state sovereignty because these other crimes do not share a trans-border element.

136. *Syria War*, *supra* note 131.

137. *Jordan*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en_menus/asp/states/parties/asian states/Pages/jordan.aspx](https://asp.icc-cpi.int/en_menus/asp/states/parties/asian%20states/Pages/jordan.aspx) (last visited Dec. 1, 2019).

138. Black, *supra* note 135, at 184. *See The States Parties to the Rome Statute*, *supra* note 39 (Syria is not listed as a State Party).

139. Rome Statute, *supra* note 35, art. 7(1)(d).

140. *Syria Emergency*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/syria-emergency.html> (last updated Apr. 19, 2019).

141. *Id.*

142. Saleh, *supra* note 130.

143. *Id.*

202 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

Fourth, the crime must contain a trans-border element or have a trans-border effect. The Syrian crisis has affected Jordan in several ways. Most notably, Jordan's acceptance of a sizeable number of Syrian refugees "put dramatic strains on Jordan's financial and limited natural resources, including water."¹⁴⁴ The large displacement of Syrians into Jordan could place Jordan in economic jeopardy. Specifically, "hosting refugees who make up more than 10 percent of the population in a relatively small and resource-poor country . . . runs the risk of transforming Jordan from a 'middle income' to a 'low income' country."¹⁴⁵

As of 2019, the Syrian conflict likely presents a stronger case for the ICC to exercise its jurisdiction over than the Rohingya crisis. It is puzzling that the court failed to address the Syrian conflict before the Rohingya crisis given the stronger evidence and magnitude of the crimes. If the ICC does not take any concrete action, "the prospect of a post-Assad state—or a period of transitional justice—is difficult to imagine."¹⁴⁶

Given the length of investigations and lack of referrals, it may take some time to appreciate the potential far-reaching effect of the court's precedent in its Rohingya decision on other humanitarian crises. Both the Syrian and Israeli-Palestinian conflict can no longer go unaddressed without formal judicial proceedings. Traditional reprimands like sanctions and moral outrage have failed to effectively resolve the conflicts. Therefore, the ICC's new precedent should signal to the international community that it must end political gridlock and intervene to end humanitarian crises. However, if the international community fails to provide comprehensive solutions to address human rights, the ICC would still be the best forum for ensuring that human rights do not go unaddressed.

V. THE COURT'S ALTERNATE CHOICES

The court's decision regarding the Rohingya people is a necessary precedent to tackle human rights violations. However, the court reached its decision by broadly interpreting its jurisdictional reach

144. FERRIS & KIRIŞCI, *supra* note 125, at 50.

145. *Id.*

146. Saleh, *supra* note 130.

under the Rome Statute, which may not have been the best approach but was the most feasible option. The court had at least two other choices to address its lack of express jurisdiction that would likely not have been as controversial.

First, the court could have proposed an amendment to the Rome Statute. Article 121 of the Rome Statute allows any State Party to propose an amendment.¹⁴⁷ Adopting an amendment requires a two-thirds majority vote.¹⁴⁸ By pursuing the amendment process, the court could have avoided interpreting its own jurisdictional authority. Instead, the court chose to justify its position by citing national and international laws that support its argument. An amendment to Article 12(2)(a) of the Rome Statute could have expressly clarified that only one element of a crime must occur inside a State Party's territory for the court to have jurisdiction over the claim. This amendment would not have been problematic because the court gave ample evidence of national authorities using express language in their own laws to justify exercising similar trans-border jurisdiction.

As of 2019, the language of Article 12(2)(a) states that the court can assert jurisdiction to investigate crimes over "[t]he State on the territory of which the conduct in question occurred."¹⁴⁹ A new amendment to Article 12 could have stated the court has jurisdiction over "[t]he State on the territory of which the *entirety or part* of the conduct in question occurred." However, the court would have needed to obtain the two-thirds majority vote required to adopt an amendment. Although it is an obstacle, obtaining a two-thirds majority vote is more plausible within the ICC than within another body like the U.N., where approximately eighty percent of resolutions are adopted through consensus.¹⁵⁰

However, if adopting an amendment was improbable, the court had a second option to strengthen its argument for trans-border jurisdiction. Instead of acting independently, the court could have asked the State Parties for a referral regarding the Rohingya crisis. If Bangladesh, the

147. Rome Statute, *supra* note 35, art. 121(1).

148. *Id.* art. 121(3).

149. *Id.* art. 12(2)(a).

150. *How Decisions Are Made at the UN*, UNITED NATIONS, <https://outreach.un.org/mun/content/how-decisions-are-made-un> (last visited Dec. 1, 2019) (consensus means "all of the Member States agree to adopt a resolution without taking a vote").

204 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 50]

affected State Party, had made a referral, the court would have had a stronger argument for asserting jurisdiction. One of the greatest drawbacks of the Rohingya crisis not being referred to the court is that the ICC could only address a fraction of the crimes alleged against Myanmar because of its ruling's limited scope,¹⁵¹ specifically its focus on the need for a trans-border element. A referral would have allowed the ICC to open a formal investigation. Without a formal investigation, the court had to resort to opening a preliminary investigation, which may take years to conclude, "increas[ing] the chances that critical evidence will deteriorate or be lost entirely, reducing the possibility of effective prosecution."¹⁵² Pursuing these alternatives for future investigations could give the court the individual support of State Parties and the credibility needed to fully prosecute crimes.

These procedural alternatives are limited short-term solutions to bolster the ICC's assertion of jurisdiction; however, to effectively address human rights violations, the international community must recognize that international judicial bodies, like the ICC, need broader jurisdictional authority.

CONCLUSION

Although there have been talks between Myanmar and Bangladesh, there is "no current guarantee of public safety."¹⁵³ As a result, "only 11 percent of recently surveyed Rohingya refugees expressed a desire to return" to Myanmar.¹⁵⁴ Myanmar claims that it would welcome back the refugees, but the reality is that the Rohingya people face a greater danger than the crime of deportation currently being investigated by the ICC—the Myanmar government's annihilation of the Rohingya

151. *Myanmar: Why an IIIM and Security Council Referral Are Needed Despite the ICC Ruling Relating to Bangladesh*, INT'L COMMISSION OF JURISTS (Sept. 13, 2018), <https://www.icj.org/myanmar-why-an-iiim-and-security-council-referral-are-needed-despite-the-icc-ruling-relating-to-bangladesh/>.

152. *Id.*

153. Shane McCarthy, *Rohingya crisis: Why Policy Solutions Are Tricky and What to Do About It*, GEO. PUB. POL'Y REV. (Jan. 7, 2019), <http://gppreview.com/2019/01/07/rohingya-crisis-policy-solutions-tricky/>.

154. *Id.*

population through ethnic cleansing and genocide.¹⁵⁵ As a court of last resort,¹⁵⁶ the ICC is currently the Rohingya's only hope for justice.

However, to make real progress in resolving humanitarian crises, the international community must take formal action. In this regard, on September 16, 2018, the United States House of Representatives Committee on Foreign Affairs held a hearing to discuss the Genocide Against the Burmese Rohingya.¹⁵⁷ In the hearing, some speakers showed support for the ICC's efforts while others were more skeptical.¹⁵⁸ For example, some speakers stated that "the ICC is not going to answer [the Rohingya crisis] but it's going to put more world pressure [on Myanmar]. It's sort of collective. It's why we need . . . Congress[,] . . . the U.N.[,] . . . [and] the ICC."¹⁵⁹ However, some believe that even these efforts may be unsuccessful because the President has "trashed the ICC,"¹⁶⁰ thus destroying the possibility of international collaborative efforts. To best address these humanitarian crises, any derogatory views regarding the ICC must be put aside. World leaders must recognize that the problem is not the ICC but the ineffective assistance of the international community, which has made the ICC the last resort for individuals whose human rights have been violated.

*Carlos E. Gomez**

155. Curfman, *supra* note 46.

156. *International Criminal Court*, HUM. RTS. WATCH, <https://www.hrw.org/topic/justicia-internacional/international-criminal-court> (last visited Dec. 1, 2019).

157. Hearing, *supra* note 16.

158. *See, e.g., id.* at 42-43 (statement of Rep. Christopher H. Smith).

159. *Id.* at 44 (statement of Greta Van Susteren).

160. *See id.* at 3 (statement of Rep. Eliot L. Engel).

* J.D. Candidate, California Western School of Law, 2020; B.A., University of California San Diego, 2017. First and foremost, I would like to thank my family for their unwavering love and support. I would also like to thank the *California Western International Law Journal* for this incredible opportunity. I would especially like to thank the Executive Editor, Emily Ferman, whose advice, attention to detail, and dedication transformed my article into something I am proud of. I would also like to thank Rojina Hariparsa for her invaluable insight on how to improve my writing. Lastly, I would like to thank Professor Aceves for guiding my research process and helping me narrow my research on this critical humanitarian crisis that needs international attention and support.