
Briefing Note

**Article 15 Communication to the Prosecutor of the International Criminal Court in Relation to
the Forced Deportation of Syrian Civilians to Jordan**

1. Introduction

- 1.1. The Guernica Centre for International Justice (GCIJ) is a non-profit legal group registered in the United States and the United Kingdom. Our international team of lawyers specialize in International Criminal Law and strategic transnational litigation to obtain accountability for international crimes and human rights violations. The GCIJ seeks to contribute to national processes of accountability by designing legal strategies in partnership with key actors in countries experiencing transitional processes after conflict or post-conflict situations.
- 1.2. On 1 March 2019, The GCIJ filed a confidential Article 15 Communication with the Office of the Prosecutor (OTP) at the International Criminal Court (ICC), requesting that a Preliminary Examination be opened into the situation in Syria.
- 1.3. The submission was made public on 4 March 2019 although the contents remain strictly confidential.
- 1.4. The submission follows several months of investigations and analysis of information and evidence and a series of confidential meetings with Syrian victims associations, international human rights groups such as Human Rights Watch and Amnesty International and international organisations including the UN Office of the High Commission for Human Rights (UN OHCHR), UN High Commission for Refugees (UN HCR), UN International Independent Commission of Inquiry (COI), UN International, Impartial and Independent Mechanism (IIIM)
- 1.5. This submission has been intentionally limited to the issue of jurisdiction.

- 1.6. A full factual and evidential analysis of the situation is in the process of being drafted and submitted in due course. However, the primary issue currently is one of jurisdiction.
- 1.7. It is noted that there have been numerous communications filed in the past concerning the Situation in Syria and all such attempts have failed on the basis that the ICC does not have jurisdiction over the numerous allegations arising out of the conflict, on account of the fact that Syria is not a State Party to the Rome Statute, and therefore has not accepted the jurisdiction of the Court.
- 1.8. There have also been several attempts at the UN Security Council to refer the ‘situation’ to the ICC. These attempts have failed on the basis that Russia and China have repeatedly exercised the use, as a permanent member, of veto to any such attempts. The result is that the justice has evaded the millions of victims of the Syrian conflict. A conflict which is still raging and a conflict in which more than half the pre-war population have been killed, imprisoned and tortured, or forced to flee their homes. That statistic is a sobering reminder that this is unquestionably the worst humanitarian crisis since the Second World War.
- 1.9. There are two important questions that have been raised at this preliminary stage that require consideration. First, why has a non-profit legal group initiated this process rather than a State Party. Second, why has it taken eight years to several hundred thousand civilian casualties to realise that the ICC has jurisdiction.
- 1.10. The first question is simple. GCIJ took this initiative due to the inaction of State Parties and there is nothing in the Rome Statute of the ICC that prohibits a non-profit from initiating such a process. In fact, GCIJ, and its partner organisation Guernica 37 International Justice Chambers

in London, have now filed legal submissions with the ICC Prosecutor on Bangladesh, Palestine, Egypt, Libya, Myanmar, Venezuela and now Syria.

- 1.11. It is clear that in the absence of traditional international criminal jurisdiction, the resulting vacuum of accountability has led non-profit legal groups to fill the void. However, that doesn't mean that States should not support and strengthen such initiatives now; they should and there is nothing preventing them from doing so.
- 1.12. Secondly, why has the ICC not taken this initiative in the past 8 years of conflict. That is of course an interesting point of debate, but questioning why it has taken so long will not bring justice any closer to the victims. The fact is it is now being pursued and that is important. It is clear that Myanmar was the testing ground. The Prosecutor was under huge pressure to look into the acts of ethnic cleansing that had seen several hundred thousand Rohingya forced from their homes into neighbouring Bangladesh. The campaign of ethnic cleansing had all the hallmarks of genocide. Rightly or wrongly, Genocide is still seen as the crime of crimes. It matters not, seemingly, that war crimes and crimes against humanity are equally grave crimes, Genocide and ethnic cleansing still carries a particular stigma.
- 1.13. In Myanmar the crimes amount to Genocide. In Syria, with the exception of the Yazidi, it is war crimes and crimes against humanity. It was therefore, arguably, a highly calculated and well thought out move by the ICC Prosecutor to test the water with the Rohingya. Now the precedent has been set.
- 1.14. The question may be raised as to whether the ruling on the Rohingya is limited to cases of ethnic cleansing and Genocide. The answer is simple. No, it is not. The decision on Myanmar refers to

the Crime of Forced Deportation, Persecution and Other Inhuman Acts as Crimes against Humanity.

- 1.15. The GCIJ filing is therefore different than those that have been filed before, and as much as there may be some scepticism regarding its chances of success because of that which has gone before, the case as argued must be considered, primarily because of clarification of ‘jurisdiction’ that occurred in the Myanmar decision on the Rohingya.
- 1.16. The position maintained by GCIJ is that the filing is legally sound, and rather than it being speculative to generate attention, it is one that ought to lead to a preliminary examination being opened.
- 1.17. This briefing note will summarise the position regarding jurisdiction, recent developments in ICC Jurisprudence, and why the GCIJ filing has a more than significant chance of success.

2. Jurisdiction of the International Criminal Court (ICC)

- 2.1. At its most simplistic, the ICC Prosecutor can commence a preliminary examination, or inquiry, into a situation in one of three circumstances.
 - a) Where the offences alleged have been committed within the territory of a State Party to the Rome Statute;
 - b) Where a non-State Party refers itself and therefore a situation, to the ICC, and therefore explicitly grants jurisdiction; and
 - c) Where the UN Security Council (UNSC) pass a resolution referring a situation to the ICC.

- 2.2. Syria is not a State Party to the Rome Statute, nor, given it is responsible for the commission of War Crimes and Crimes Against Humanity, is it likely to refer itself to the ICC.
- 2.3. The only previous option therefore, has been as per (c), namely a referral from the UNSC.
- 2.4. Each and every time a resolution has been tabled, it has been vetoed by Russia and China, permanent members of the UNSC. Again, this is largely unsurprising given Russia's position as a staunch ally of Syria and having direct involvement in the conflict and associated allegations of criminality. China has consistently sided with Russia despite the fact that it is not an active participant in the hostilities but is stridently anti-interventionalist since the situation in Libya was referred to the ICC.
- 2.5. The position has become frustrated and thought to be hopeless.

3. Developments in ICC Jurisprudence

- 3.1. In 2018, following the crisis in Myanmar involving the Rohingya, the Prosecutor sought a ruling of the ICC Pre-Trial Chamber, asking whether jurisdiction could be exercised for the Crime of Forced Deportation of the Rohingya from Myanmar into neighbouring Bangladesh.
- 3.2. The argument was essentially twofold. In the first instance, that although Myanmar was not a State Party to the Rome Statute, Bangladesh was, and secondly, the nature of the crime of forced deportation itself was that the offence is essentially committed within the territory of two states, by virtue of people moving from one to the other.

- 3.3. The Pre-Trial Chamber agreed, and confirmed that, subject to the relevant substantive elements of the crime being satisfied, the Prosecutor did have the mandate to investigate.
- 3.4. In short therefore, where it can be demonstrated that an offence although originating in one State, finishes in a second state, that second state being a State Party to the Rome Statute, the ICC can (and should) exercise jurisdiction.

4. Guernica Filing

- 4.1. In the first instance, it is of note that GCIJ helped inform the decision of the Pre-Trial Chamber in the Myanmar decision, as our group was one of a small number of legal groups who were granted leave to submit an *Amicus Curiae* brief on the subject of jurisdiction.
- 4.2. Further, we were the only group to draw explicit reference within that *Amicus* filing, to the fact that should the Pre-Trial Chamber rule in favour of the Prosecutor's submission on jurisdiction the wider implications of such a ruling to the Situation in Syria open were clearly evident.
- 4.3. Immediately following the Pre-Trial Chamber's ruling on jurisdiction on Myanmar, we announced that we would file a similar request to the ICC Prosecutor regarding the Forced Deportation of more than a million Syrians into neighbouring Jordan; a State Party.
- 4.4. In this most recent filing on Syria, GCIJ has applied the Myanmar decision and argued that the position is exactly the same.

- 4.5. As noted, Syria is not a State Party to the Rome Statute, however, the State of Jordan is and more than a million Syrian civilians have poured into Jordan, fleeing for their lives.
- 4.6. Given the treatment of those civilians in Syria, imprisonment, torture, murder by the tens of thousands, and the widespread or systematic indiscriminate targeting of civilians, schools, hospitals, and otherwise protected groups, civilians in their droves have been forced to leave.
- 4.7. Accordingly, they have been forcibly deported through the actions of the State which can only be described as a state policy.
- 4.8. It is established law that when dealing with forcible deportation it is not necessary that there is an actual order for individuals to leave, nor is it necessary that an individual is ‘marched across the border at gunpoint’. Forced deportation, for the purposes of international law, is contextual, hence the argument in the Syrian context.
- 4.9. The submission goes on to raise the offence of ‘Persecution’, and in doing so, draws attention to the fact that there is as much a risk posed to Syrian refugees in Jordan returning to Syria as there was when those civilians sought to escape.
- 4.10. There is credible evidence to demonstrate that should civilians return, they are at risk of being conscripted into the Syrian Army and being immediately transported to the front line of the conflict.
- 4.11. Further, the risk posed extends to arbitrary arrest, detention, and the endemic practice of torture and murder that we have seen in Syrian prisons and places of detention over the past eight years.

- 4.12. The argument therefore, is that these refugees will be persecuted by the Syrian regime purely on the basis that they left Syria, and therefore, have in the eyes of the Regime, shown themselves to be disloyal.
- 4.13. It is argued in our submission that this amounts to persecution, and as is the case with Deportation, that persecution continues whilst they reside in Jordan. Accordingly, it is in accordance with the ‘Myanmar decision’.
- 4.14. Having established that relevant crimes have been committed, and that they have been committed in the context of two states, the originating state not being a State Party, the receiving State being a State Party, the situation is precisely the same as that within the Myanmar decision.
- 4.15. Accordingly, it is the position of the GCIJ submission that there is no basis upon which to assert that the ICC does *not* have jurisdiction, although that jurisdiction is limited to an extent.
- 4.16. It is not suggested that the GCIJ filing and any subsequent decision will open the entire conflict to investigation, as it will not, there are a number of offences that will remain outside of the scope of any examination and eventual investigation, such as the use of Chemical Weapons, the use of ‘Barrel Bombs’ and other indiscriminate use of non-precise weaponry. Further, offences of Torture or Murder, as a War Crime, or Crime Against Humanity, will remain outside of scope as an individual offence, although evidence of such crimes are set out in detail in the submission and will be taken into account in establishing those other offences that are within scope.
- 4.17. What is important however, is that subject to the ICC Prosecutor agreeing with the arguments espoused within the GCIJ filing, there is now a clear route to accountability for at least some victims of the conflict.

5. Next Steps

- 5.1. It is noted that GCIJ filed the first filing to the ICC Prosecutor earlier this month. It is encouraging to see that already within a matter of days a second filing was made by another legal group Stoke White LLP, that focuses on the testimony of twenty-eight Syrian victims in Jordan. This complementary approach is to be applauded and it is likely that additional filings will follow.
- 5.2. Members of GCIJ have been working on Syrian related accountability initiatives for the last decade; our work preceding the outbreak of hostilities in 2011. We have worked with Syrian groups documenting war crimes for many years. We have also developed important relationships with groups such the UN Office of the High Commission for Human Rights, UN High Commission for Refugees, UN Commission of Inquiry, UN International Impartial and Independent Mechanism, Commission on International Justice and Accountability, Human Rights Watch, Amnesty International who will now need to ensure that the Prosecutor is provided with the information and evidence to make an appropriate decision. Our group has taken statements from victims in Jordan and will continue to do so.
- 5.3. Whilst this initial submission is under review, GCIJ is now in the process of drafting its subsequent filings, namely those that seek to provide an evidential basis for the opening of an investigation, having already established the jurisdictional basis.
- 5.4. In drafting these next submissions, direct testimony from witnesses will continue to be collated, along with that evidence that is already within the public domain or held by some of the groups mentioned above.

- 5.5. It is recognised that this is a watershed moment and rather than being concerned with what has not been done in the past and viewing the process through a sceptical and overly cynical lens, it is time to get behind it and give the ICC Prosecutor the support, including financial support, her office so desperately needs to take this important matter forward.
- 5.6. The ICC was created as the first permanent international criminal court to specifically address the kind of atrocities that the Syrian people have been forced to endure for eight years. As we approach the ninth year of the conflict it is important to recognise the preventative element of an international criminal investigation.
- 5.7. It will be a long process, but that process starts can now start.