



WORKING PAPER NUMBER 2018-03

Critical Rulings on International Criminal Justice

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September 2018

On September 6 and during the coming months, a number of important decisions are being handed down by three atrocity crimes tribunals. Each ruling will have enormous significance for both international law and global politics.

From the perspective of American foreign policy, all eyes will be on the decision of the Pre-Trial Chamber of the International Criminal Court (ICC) in The Hague determining whether the ICC Prosecutor, Fatou Bensouda, can start to formally investigate the U.S. Armed Forces and the Central Intelligence Agency (CIA) for war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violation in Afghanistan and at CIA “black sites” in Poland, Lithuania, and Romania primarily during the years 2003 and 2004. Under the rules of the ICC, the Prosecutor already completed her “preliminary examination” of the Afghanistan allegations, which predominantly focus on the alleged crimes of the Taliban in Afghanistan since May 1, 2003, when that country became a State Party of the “Rome Statute,” the treaty that governs the ICC. So the ICC has jurisdiction over atrocity crimes (genocide, war crimes, crimes against humanity) committed on the territory of Afghanistan since that date.

The ICC Prosecutor filed a request before the Pre-Trial Chamber last November seeking its judicial authorization to commence an investigation into the situation pertaining to Afghanistan. The request mostly pertains to the much larger body of crimes attributed to the Taliban, but it also focuses on a number of interrogations and detention practices by U.S. Armed Forces and the CIA in Afghanistan and at the three black sites of individuals who were detained there for Afghan-related conduct. The Prosecutor provides considerable detail in her request to the Pre-Trial Chamber about the alleged war crimes of American personnel. She

claims that Washington has not extended sufficient cooperation to her office or demonstrated investigations and prosecutions under U.S. law to satisfy her that justice has been rendered domestically with respect to the allegations of war crimes.

One might wonder how the United States, which is not a party to the Rome Statute, could be ensnared in the Court's jurisdiction for atrocity crimes. Washington no doubt will seek to exclude the United States from the reach of the Prosecutor, if not as a matter of law then as a matter of sheer power politics.

The view may prevail in the current U.S. administration that officials of a non-party State (like the United States) cannot be held responsible before the Court under these circumstances and within the framework of an international treaty regime unless that country explicitly consents, or the Security Council refers the situation to the Court for investigation. That view would be unlikely to derail the ICC from finding jurisdiction for crimes committed on the territory of one of its States Parties. Territorial jurisdiction for crimes, whoever commits them on the territory of the country, has a very solid basis in international law.

So Washington should not be surprised if the Pre-Trial Chamber grants the Prosecutor's request to authorize formal investigation of the United States for alleged war crimes in Afghanistan, Poland, Lithuania, and Romania. Of course, it may prove true that the current administration is far less inclined than even its predecessor to voluntarily cooperate with the ICC. The National Security Adviser, John Bolton, has long opposed the ICC and particularly any American engagement with it.

If a formal investigation is authorized, then U.S. officials still will need to decide the extent to which they will work with the Prosecutor to determine lines of evidence and accountability. The United States can limit if not eliminate the Prosecutor's investigation by exercising complementarity, namely demonstrating that Washington is, in good faith, pursuing justice in its own investigative bodies and courts (including military courts).

Of course, since the United States is not a member of the ICC, there would be no American obligation to surrender any U.S. official indicted by the Court on the Afghanistan situation. But any such individual would be severely limited in his or her travels globally as all of Europe and Latin America, much of Africa, and some countries in Asia are member States of the ICC. Each of those governments would be obligated to detain and transfer the indicted fugitive to The Hague.

I recommend the greatest possible cooperation with the Prosecutor's office immediately by relevant U.S. authorities at the Justice, Defense, and State Departments, the CIA, and the National Security Council on past, present, and future complementarity measures in Washington regarding this situation of alleged crimes. Assuming progress is made in those discussions, the Pre-Trial Chamber should be informed expeditiously. Otherwise, the die may be cast as to U.S. liability before the ICC for actions taken years ago in Afghanistan and at the black sites, whatever Washington might argue from the sidelines in its own defense in the aftermath of the

Court's determination. This is one treaty the United States cannot withdraw from in retaliation, as Washington never ratified it.

The other matter under review by the Prosecutor concerns Palestine, a State Party of the ICC. If the Prosecutor shifts into a full-fledged investigation of Israel and its military operations in Gaza during the 51-day conflict of mid-2014 and its settlement policies in the West Bank and East Jerusalem, then expect sharp reactions by both the Trump Administration and by Congress. The Prosecutor may need considerable time to examine information about suspect actions of alleged Israeli and Palestinian perpetrators. She received Palestine's official State Party referral (focusing on the settlements policy) only on May 15. Nonetheless, Palestinian pressure on her to investigate more quickly, particularly after the recent killings of demonstrators at the Gaza-Israel border, will only mount.

Perhaps the most intriguing and innovative issue, on which the Pre-Trial Chamber just ruled, is the Prosecutor's motion to find jurisdiction over the Rohingya situation of the last year that originated in Myanmar and has become a colossal refugee burden in Bangladesh. The one-year anniversary of the launch of the aggressive ethnic cleansing campaign against the Rohingya occurred on August 25.

While Myanmar is not a State Party to the Rome Statute, Bangladesh has been party to the ICC since March 23, 2010. The ethnic cleansing of the Rohingya on Myanmar territory, particularly Rakhine State, where the Muslim minority has lived for centuries, is regarded as a widespread and systematic state-organized assault on the Rohingya people that encompasses a wide range of crimes against humanity and war crimes. On August 27, the U.N. Independent International Fact-Finding Mission on Myanmar issued its report in Geneva confirming both those sets of atrocity crimes and concluding that "there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State."

A primary weapon in the ethnic cleansing of the Rohingya from their land and settlements in Myanmar is deportation onto Bangladesh territory. The crime against humanity of deportation or forcible transfer of population is defined in the Rome Statute as meaning "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." The only way to successfully commit the crime against humanity of deportation is to have a start point—the territory on which the individual resides (Myanmar)—and an end point—the foreign territory onto which the individual is compelled to flee and somehow survive (Bangladesh).

The Pre-Trial Chamber decided that the crime against humanity of deportation reached Bangladesh territory, and that other crimes against humanity, such as ethnic cleansing (the crime of persecution) and "other inhumane acts...intentionally causing great suffering or serious injury to body or to mental or physical health" and found to have occurred in Bangladesh as part and parcel of the expulsion of the Rohingya from Myanmar would invoke ICC jurisdiction.

The simple fact that Bangladesh is a member country of the ICC is the game changer that government and military authorities in Myanmar may not have grasped as they plotted the massive assault. That fact alone opens up a whole new legal calculus that can point directly to accountability for the leading perpetrators of these atrocity crimes.

Even though Myanmar military officers and government officials remain on Myanmar territory, they are now potential targets of investigation and even prosecution by the Prosecutor of the ICC if custody of them can ultimately be achieved.

Syrian officials, including President Bashar al-Assad, will be freshly open to ICC scrutiny now that the Pre-Trial Chamber has ruled. The Syrian Government's assault on its own civilians since 2011 led to massive waves of deportations and the refugee crisis on the European continent in recent years. The destinations of the refugees included Jordan and Greece, both States Parties of the ICC, and continental Europe where all European Union countries are part of the ICC. Thus, the extended reach of the criminal conduct of the Syrian regime through deportation to the territories of many States Parties of the ICC can now be considered a triggering ICC jurisdiction over one of the worst, and continuing, atrocities of our times: Syria.

The long campaign to achieve a Security Council referral of the Syrian situation to the ICC will still be worth pursuing, as it would grant the ICC jurisdiction over Syrian territory where the most atrocious crimes, including chemical weapons attacks, were committed. But in the meantime, ICC jurisdiction over the deportation of Syrians onto the territories of States Parties of the ICC should suffice to target leading perpetrators with the investigative powers of the Court.

The Pre-Trial Chamber's ruling also could prove relevant to the military operations of the United States and its NATO allies as they confront threats globally, not only in the future but also acts undertaken since July 1, 2002, in countries where the ICC has gained jurisdiction because they have ratified the Rome Statute. There are currently 123 States Parties to the ICC. Western-orchestrated military actions, including anti-terrorism strikes, that occur or might occur on the territory of non-party States (consider military operations in Iraq, Syria, Turkey, North Korea, Pakistan, Israel, most of the Middle East, Egypt, Libya, Sudan, South Sudan, or Ethiopia) and that happen to "bleed" over the border to the territory of any ICC State Party as an act of criminal character could be subject to the ICC Prosecutor's scrutiny.

U.S. immigration, including Immigration and Customs Enforcement, and border patrol actions against immigrants (who often are seeking asylum under international law) along America's southern border could be seen, depending on the character of any such act in the future, as reaching the territory of a State Party to the Rome Statute: Mexico or other countries in Latin America. Deportation, which has entailed intentionally separating families and then deporting some family members, arguably could trigger a crime against humanity inquiry. Further, the universe of actions relating to cyberwarfare, which reaches foreign territory in nanoseconds, invites unorthodox jurisdictional calculations of similar character.

Beyond rulings from the ICC's Pre-Trial Chamber, two judgments are expected by the end of 2018, one from the Yugoslav war crimes tribunal (now known as the U.N. Mechanism for International Criminal Tribunals (MICT)) and the second from the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The former president of the Bosnian Serbs during the Balkans conflict of 1991-1995, Radovan Karadžić, was convicted by the Trial Chamber of the Yugoslav tribunal on March 24, 2016, on 10 of 11 counts of atrocity crimes, including many crimes against humanity and war crimes. That massive judgment was appealed by both Karadžić and by the Prosecutor, Serge Brammertz, who appealed to the MICT the sole acquittal, the genocide charge in Count 1. That part of the original indictment charged Karadžić with orchestrating genocide during 1992 when the Bosnian Serb forces ethnically cleansed large swaths of Bosnia and Herzegovina of its Muslim population and of a good number of Bosnian Croats. (The genocide of the Muslim population of Srebrenica in July 1995 was a separate charge for which Karadžić was convicted in the 2016 verdict.)

In a rather novel but powerful argument, Brammertz argues that genocide was used as a tool during the 1992 ethnic cleansing. While Karadžić indeed was convicted of crimes against humanity and war crimes underpinning ethnic cleansing for what happened in Bosnia during 1992, Brammertz believes that the Bosnian Serb forces committed the crime of genocide to destroy in whole or in substantial part the Bosnian Muslim and Bosnian Croat populations in key municipalities being ethnically cleansed during that year, and that Karadžić bears responsibility for that tactic. For the sake of international criminal law and the victims of 1992 who strongly believe they survived a genocidal rampage that others did not, Brammertz seeks a ruling that under such circumstances the crimes included genocide and that the lines of intentional responsibility point to Karadžić during 1992.

The MICT Appeals Chamber will deliver its judgment by the end of the year. If the judges convict Karadžić for genocide during the 1992 ethnic cleansing campaign, not only will the historical record of the war be dramatically revised, but political repercussions in the region could be significant. Serbia and the Serb sector of Bosnia, namely Republika Srpska, have been fostering a culture of denial of war-time atrocity crimes for years. They both likely will kick into high gear to deny the genocide judgment and claim anti-Serb bias by the MICT and its Western backers, including the United States. That prospect, of course, should not deter any judge from the exercise of judicial duties.

Finally, the Trial Chamber of the ECCC, which is a special Cambodian court created and operated under an international treaty with the United Nations, is anticipated by November to deliver its judgment of the guilt or innocence of Khieu Samphan and Nuon Chea for atrocity crimes allegedly committed against Cambodians from 1975 to 1979 during the Pol Pot regime. They were senior leaders and worked closely with Pol Pot as at least an estimated 1.7 million Cambodians perished under the regime's oppressive rule. Both men already have been convicted of atrocity crimes committed in the early stages of the regime when cities were evacuated of their civilian populations, who were forcibly marched into the countryside to work on agricultural projects.

The forthcoming judgment, which could be viewed as the ECCC's "Nuremberg" ruling given its overall significance and the seniority of the surviving defendants, encompasses not only massive crimes against humanity and war crimes during the Pol Pot regime, but also genocide charges pertaining to the assaults on the Muslim Cham and Vietnamese minorities in Cambodia during those turbulent years. The crime of forced marriages, which were widely committed during the Pol Pot regime, also will be adjudicated.

The ECCC judgment has been long in coming on the charges against these two defendants; survivors, many of whom participated as "civil parties" in the trial proceedings, have awaited this verdict. When the judgment is finally delivered, the international community will bear witness to much more about the Pol Pot regime and that brutal chapter in Cambodia's history as weighed on the scales of voluminous trial evidence and the rigorous examination of prosecutors, defense counsel, civil parties, and the Cambodian and international judges of the Trial Chamber.

These forthcoming decisions and verdicts will build upon the dynamic character of international criminal justice that has evolved during the last quarter century.