



**Challenges of the ICC's Ruling on Jurisdiction Based on the Mechanism of Article 19(3) of the Statute in The Myanmar Situation and its Justification in its Jurisprudence**

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**Abstract**

The function of the ICC prosecutor based on the mechanism of article 19(3) of the statute to the ICC's ruling on jurisdiction in the Myanmar situation is one of the unprecedented ICC jurisprudence. Achieving its goals requires overcoming the possible challenges and justifying them in the ICC jurisprudence. A critical study of the dimensions and samples of these challenges is one of the objectives and topics of this paper, which is considered in an analytical descriptive method and based on the provisions of the statute and ICC jurisprudence. The main question is what are the challenges due to the ruling on jurisdiction in the Myanmar situation and its justification on the ICC jurisprudence? The research findings show that the ruling on jurisdiction in the Myanmar situation upon preconditions necessities, distinct from admissibility, non-support of Myanmar membership in the ICC or UN Security Council's referrals.

**Key words:** International Criminal Court, Ruling on Jurisdiction, Republic of the Union of Myanmar, Prosecutor.

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## **Introduction**

The non-recognition of Rohingya Muslim citizenship under the Myanmar laws<sup>1</sup> has led to their deportation (through expulsion or other coercive acts) from the territory of that state (International Criminal Court, 2018: para. 72). International reports indicate that Myanmar's crime against humanity in Rakhine State have led to ethnic cleansing (Salimi and Shafiee, 2019: 42) and deportation of Rohingya people. Accordingly, Rohingya people from the territory of Myanmar to the territory of the neighboring state of Bangladesh has deported that is in jurisdiction of International Criminal Court (ICC or the Court). But Myanmar is not a party to the Rome Statute. If the crime against humanity in the Rohingya situation had ended in the territory of Myanmar, exercising the jurisdiction of Court would have required the UN Security Council's referral. The UN Security Council's referral of the non-member states' situation as Sudan and Libya to the Court is precedent. This approach creates credibility in the situation of non-member states of the ICC and in compensating for the vacuum of non-membership of states involved in the situation in jurisdiction of the ICC. Therefore, at first, it was thought that the jurisdiction of the Court in the Myanmar situation would continue to be established by the model of the Security Council referral. As some have argued, the prosecutor encouraged the Security Council to refer Myanmar situation to the Court (Rahmati and Sadeghi, 2019: 108). But that did not happen. In Myanmar situation, after the prosecutor has acted in accordance with Article 19(3) of the Statute, she submits to the Pre-Trial Chamber a request for authorization of an investigation in accordance with Article 15(3) of the Statute, and the chamber gave authorization of an investigation to the Prosecutor on 14 November 2019. This is because the Court's jurisdiction has been exercised in this situation through the membership of Bangladesh.

The prosecutor instead of resorting to the usual mechanisms in the Myanmar situation has preferred to request the ICC's pre-trial chamber for a ruling on jurisdiction under article 19(3) of the statute. While article 19(3) is not a mechanism for triggering ICC's jurisdiction, it is just related to the challenges to the jurisdiction of the Court or the admissibility of a case. This request has arisen for the first time in the Court jurisprudence. Article 19(3) of the statute explicitly states that the prosecutor may seek a ruling from the Court regarding a question of jurisdiction, even if it has not previously opened a preliminary examination or other routine proceedings and has initially resorted to this mechanism. But, some disagree with the

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<sup>1</sup> Myanmar Citizenship Law (1982).

prosecutor's resorting. Opponents argue that the prosecutor has resorted for a ruling on jurisdiction, despite having other common mechanisms provided in the statute. This was because the prosecutor was not sure of the possibility of success in prosecuting the Myanmar situation by the Court with the theory<sup>2</sup> of objective territorial jurisdiction (Vagias, 2018: 985). Therefore, before resorting to other routine mechanisms in the statute, the prosecutor has relied on the mechanism of article 19(3) of the statute to both shorten the proceeding and make the result reassuring for him. But this argument is not correct. Because first of all; the prosecutor could have resorted to other mechanisms to enter the Myanmar situation with objective territorial jurisdiction. The prosecutor did not resort to articles 13(c) and 15(3) of the statute, due to the impossibility of proposing an objective territorial jurisdiction theory. Relying on Bangladesh membership in the Court, the prosecutor could still seek the pre-trial chamber for authorisation to the opening of an investigation. Thus, there is no relationship between the theory of objective territorial jurisdiction and the need for the prosecutor to resort to the mechanism of article 19(3) of the statute. Secondly; the pre-trial chamber is not affected by inductions and approaches of the prosecutor. In response to the prosecutor's request for a ruling on jurisdiction, the pre-trial chamber indicates that the prosecutor's approach to the Myanmar situation has been accepted.

The prosecutor's reference to the mechanism of article 19(3) of the statute, instead of the mechanism of article 15(3) of the statute, faces serious challenges that need to be justified within the legal framework of the Court. Analyzing the dimensions of these possible challenges and justifying or criticizing them is one of the goals and topics of this article. The main question is what are the possible challenges due to the pre-trial chamber ruling on jurisdiction in the Myanmar situation and its justification on the ICC jurisprudence? Answering this question, first of all, requires assessing challenge of preconditions to the ruling on jurisdiction, next challenge of ruling on jurisdiction distinct from admissibility and then challenge of Myanmar's non-membership or the UN Security Council non-referral until their justification based on the jurisprudence and the provisions of the statute are provided and its comparative achievements are presented.

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<sup>2</sup> The theory of objective territorial jurisdiction is in contrast to the theory of subjective territorial jurisdiction which no case has yet been opened in the Court.

### **1) Challenge of Preconditions to the Ruling on Jurisdiction**

The Myanmar situation in the ICC is due to the prosecutor's chosen approach in this case, in order to be considered in the pre-trial chamber by establishing a connection between the provisions of articles 13(c) and 19(3) of the statute and a ruling on jurisdiction. But a ruling on jurisdiction of the Court is subject to the fulfillment of the preconditions provided for in article 12(2) of the statute; Two criteria of territorial jurisdiction (article 12(2)(a) of the statute) and personal jurisdiction (article 12(2)(b) of the statute) are mentioned and related to the responsibilities of the prosecutor in articles 13, 14 and 15 of the Statute. The prosecutor's authority on the opening of preliminary examination is provided in article 15 of the statute. However, on the one hand, the preliminary examination of the prosecutor in accordance with the provisions of article 13 of the statute is one of the cases on which the ICC also exercises jurisdiction, provided that its preconditions are observed in accordance with the provisions of article 12(2) of the statute. Accordingly, it is necessary to achieve one of the two criteria of territorial jurisdiction or personal jurisdiction along with other matters. However, personal jurisdiction is not relevant in the Myanmar situation, as the perpetrators are citizens of Myanmar which is not a party to Court's statute. Therefore, territorial jurisdiction in Myanmar is a criterion. Actus reus of a deportation consists of two components. The second part of it has been committed in the territory of the state member of the Court (Bangladesh) and has been included in the provisions of article 12(2)(a) of the statute (International Criminal Court, 2018, para. 74).

On the other hand, article 13(a) of the statute refers to the status of a crime to be referred by the member state of the Court in accordance with the conditions set forth in article 14 of the statute. This is the situation for Bangladesh, the neighboring state in Myanmar. While Bangladesh could have referred the Myanmar situation to the Court on the basis of membership in the Court and the commission of the second part of the crime against humanity, but Bangladesh did not use this mechanism. At the same time, Bangladesh is reluctant to exercise territorial jurisdiction. According to some, Bangladesh's criminal jurisdiction based on the principle of universal jurisdiction faces the challenge of lack of access to defendants and the principle of prohibition of non-extradition of nationals by the Myanmar (Musavi and Alavi, 2015: 35). But in the Myanmar situation, this has not been the main issue. The position of Bangladesh is that Myanmar has committed genocide, but Bangladesh wants a peaceful mechanism to overcome this situation (Bangladesh FM, 2017: 1). Therefore, the agreement on the return of Rohingya asylum seekers to the territory of Myanmar would be drawn up between the two states of Myanmar and Bangladesh in November 2107 (Mahmud, 2017: 1). A joint working group is formed based

on this, and as a result of their negotiations, it is agreed that all Rohingya asylum seekers will return to their homes territory within a two-year period. However, the settlement of the repatriation agreements and the establishment of its working group without the knowledge and consent of the Rohingya peoples and international human rights organizations, and Myanmar are reluctant to implement it. Therefore, there is no prospect of its satisfactory implementation by Myanmar. In fact, neither the Rohingya people are willing to return to Myanmar's territory, nor is Myanmar state giving them such authorisation.

Of course, the authorities of Myanmar supposedly impede members of the Rohingya people return to the territory of Myanmar under the terms of the repatriation agreements has nothing to do with the crime of Rohingya deportation from Myanmar to Bangladesh, but is another violation of article 7(1) of the statute. Under international human rights law, no one may be arbitrarily deprived of the right to enter one's own country<sup>3</sup>. Preventing the return of Rohingya people to the territory of the Myanmar amounts to a crime against humanity as torture is the intentional infliction of severe pain or suffering (article 7(2)(e) of the statute) and inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (article 7(1)(k) of the statute) (International Criminal Court, *Ibid*, para. 77). But before that, the deportation of Rohingya people should not lead to the passivity of the international community and the international criminal justice system. Crimes against Rohingya Muslims have led to a demand for international criminal justice for Myanmar's Muslim victims in the international community (Zakerhossein, 2020: 379). Therefore, in accordance with the provisions of article 15(1) of the Statute, later the prosecutor is responsible to seek authorisation to open preliminary examination from the pre-trial chamber if they are established to the required threshold, providing the reasonable basis and documents that provide a logical basis for the opening of the preliminary examination. As required by the complementary jurisdiction of the Court and same person, same conduct test from some perspective is necessary (Lentner, 2018: 93).

However, in connection with the crime of deporting Rohingya people under the crime against humanity, which the prosecutor has requested for the ruling on jurisdiction, it should be born in mind that the ruling on jurisdiction relies on two issues and nothing more. First, the crime is within the jurisdiction of the Court (*ratione materiae*). Second, the crime is within the jurisdiction (*ratione temporis*) and third, state party' territory (*ratione loci*) (International Criminal Court, 2019: paras. 42-52). Merely providing the necessary documentation in this regard will cause the pre-

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<sup>3</sup> Article 12(4) of the International Covenant on Civil and Political Rights (1966).

trial to rule on jurisdiction. However, the ruling on ICC's jurisdiction does not imply the prosecutor's success in proving the crime in the ICC's future proceedings in the Myanmar situation, provided that such allegations are established to the required threshold. This conclusion is without prejudice to subsequent findings on jurisdiction at a later stage of the proceedings (International Criminal Court, 2019, para. 73) This approach shows that the prosecutor could have applied for the preliminary examination with the objective territorial jurisdiction's test and membership of Bangladesh as the territorial state where the second part of the crime took place, but she did not. But if the prosecutor, instead of requesting a ruling on jurisdiction, applied for a preliminary examination, she would shoot them twice. First, the pre-trial chamber in order on the preliminary examination still had to satisfy its jurisdiction. Second, prevent the re-application of a preliminary examination order after the ruling on jurisdiction.

## **2) Challenge of Ruling on Jurisdiction Distinct from Admissibility**

The Court's jurisdiction differs from the admissibility of a case. The Court for satisfying itself that it has jurisdiction taken into account the provisions of articles 5, 11, 12 and 13 of the statute, the type of crime, its location and the nationality of the perpetrator or the Security Council referral from some view to establish jurisdiction over crimes recognized as customary international law (Lentner, 2018: 93). However, for the case to be admissible, the Court shall consider the provisions of article 17 of the statute and the requirements of its complementary jurisdiction. The situation may be under the jurisdiction of the ICC, but it may be determined later that the situation in the Court is not admissible. Assuming that jurisdiction is satisfied, the admissibility of a case means the fulfillment of the preconditions for exercising the complementary jurisdiction of the Court. First of all, if the jurisdiction of the court is not satisfied, it is not the turn of the admissibility of the situation in the Court. The priority of jurisdiction is on the territorial state. If the competent state has taken the necessary measures to prosecute the perpetrators of the crime, it is not the turn of the Court to exercise its jurisdiction and admissibility of the criminal situation. Therefore, the state claiming jurisdiction must prove that it has exercised jurisdiction before the court entered the situation and has initiated or completed prosecution or criminal proceedings against the perpetrators. One of the mechanisms in this regard is article 19(2) of the statute, which is also relevant to the Myanmar situation, although Myanmar does not claim it. However, reluctance to it leads to the formation of a practice in the ICC

that in other possible situations facing similar Myanmar situation is ignored. Therefore, it is important to examine its dimensions in the Myanmar situation so that the extent of deviation from the principles of fair trial in the ICC is clear.

The right to object to the Court's exercise of its jurisdiction results in the use of the mechanism set forth in Article 19(2) of the Statute for the state claiming jurisdiction in a criminal case in which the prosecutor had sought authorisation to the opening of a preliminary examination. The prosecutor seeks pre-trial chamber for the opening of a preliminary examination authorisation in accordance with article 15(3) of the statute and the state claiming jurisdiction object it immediately returning to article 19(2) of the statute, assuming that the request of the prosecutor is accepted by the pre-trial chamber. Assuming Myanmar's possible objection to the Court's jurisdiction, Myanmar's objection to the status according to article 19(2) of the statute in Myanmar situation is subject of serious ambiguity for a number of reasons. The first reason is that the necessary evidences are provided by the competent state while the prosecutor did not submit the contradictory evidences before the ICC's judges or objected state in accordance with the provisions of article 15 of the statute or the conditions set forth in Article 13 of the Statute. The second reason is that the case is being processed in the usual ways in accordance with the conditions set forth in articles 13 and 15 of the statute is a deterrent in many cases. If the prosecutor in a preliminary examination notices the jurisdiction of the competent state, she refuses to continue the investigation due to the possibility of failure in the admissibility stage of the case in the Court. Because the objection of the competent state in accordance with the mechanism of article 19 of the statute and after the preliminary examination of the prosecutor according to article 15 of the statute, still prevents the admissibility of that case in the Court. However, this hierarchy has been disrupted by the prosecutor's request for ruling on jurisdiction of the Court in the Myanmar situation. Provisions of article 19(2) of the statute are related to the objection to the jurisdiction of the Court or the admissibility of the case and are assigned to the post jurisdiction satisfied in the Court. The jurisdiction satisfies or the admissibility of the case depends on the realization of the preliminaries which depend on the observance of the provisions of articles 13, 14 or 15 of the statute. After fulfilling the conditions stipulated in articles 13 or 14 of the statute, the prosecutor shall apply to article 15 of the statute to open a preliminary examination and seek the authorisation of from the pre-trial chamber. The pre-trial chamber examines the prosecutor's request for the authorisation of the opening of a preliminary examination, relying on the provisions of article 19(1) of the statute to satisfy itself that it has jurisdiction in the case is considered

by the prosecutor. If the Court finds its jurisdiction, then the accused or the protesting state, relying on the provisions of article 19(2) of the statute, will rise to the challenge of the Court's jurisdiction and will try to reject it. As their success in rejecting the jurisdiction of the Court in this way means the removal of that situation from the Court and the realization of the consideration of that situation in the criminal courts of the competent state. However, this process depends on the prosecutor's relying on the mechanism of article 15 of the statute, which is missing in the Myanmar situation. In this regard, the prosecutor's approach to the provisions of article 19(3) of the statute is for the first time in the Myanmar situation, meaning the lack of a record of the Court's jurisdiction in the same situation. Because the prosecutor's relying for ruling on jurisdiction is not preceded by other cases or proceedings in the Myanmar situation. The prosecutor has placed the cornerstone of the case in the Myanmar situation with a request for ruling on jurisdiction, and she has relied on article 19(3) of the statute to seek it.

### **3) Challenge of the Myanmar's Non-Membership or the Security Council Non-Referral**

Some believe that the pre-trial chamber's approach to the ruling on jurisdiction in Myanmar is not legally debatable, but it is neither logical nor defensible from the point of view of the Court's policy (Guilfoyle, 2019: 3). The Court's exercise of jurisdiction in the territory of non-member states requires the support of the Security Council referral, which is missing in the Myanmar case. Therefore, this situation makes the non-member state not have the necessary cooperation to collect and provide criminal evidences for prosecuting and proofing the crimes committed in the territory of that state to the Court. Therefore, there is no prospect for the possible success of the Court in this case from their point of view (Guilfoyle, 2019: 7). The scope of this theory also includes the membership or non-membership of the state involved in the criminal situation in the Court. This means that membership of the state has a criminal status in the Court as a support for the performance of the Court in qualifying and investigating into that criminal status of the member state, which is excluded in connection with a non-member state. However, these theories are only theoretically acceptable, but not necessarily accordance with the facts of the Court in practice. The objective experience of the Court over the year's activity has shown that even the referral of the situation by the Security Council and the necessary support from this body cannot guarantee the success of the Court in prosecuting the perpetrators. The Sudan's Darfur situation is an objective example of this claim. Although the UN Security Council referred Sudan's Darfur situation, the Court had the least success in advancing his trial



(Salehi, 2018: 83) until the fall of Omar al-Bashir's government. There was no objection to the Sudan's non-membership in the Court, as evidenced by the referral of the Security Council to pursue Sudan's Darfur situation in the Court. But the Court still failed to prosecute.

The objection stemmed from the fact that the crime was committed by the highest Sudan official. There was no higher power in Sudan to hand over Omar al-Bashir in order to cooperate with the Security Council or the Court and prepare his trial. In this regard, there was no difference between the Sudan membership or non-membership in the Court or the referral or non-referral of the situation by the Security Council. If the Court had exercised its jurisdiction in another way in this case, it would still have faced the same situation that the Security Council had referred to the Court. If the Sudan state had also joined the Court, the situation would have been the same. The possible membership of Sudan state in the Court did not change the situation in favor of the Court, because assuming the membership of the Sudan state, there was still no higher power at the head of Sudan than Omar al-Bashir to hand him over to the Court. In addition, the obligation of other states to cooperate with the Court in the arrest of Omar al-Bashir and his surrender (Salehi, 2020: 804) did not lead to the benefit of the Court and its exercise of jurisdiction. There was no difference between Sudan's membership or non-membership and the Security Council's referral or non-referral in connection with the member and non-member states' failure to arrest Omar al-Bashir and his surrender in cooperation with the Court. These states were required to cooperate with the Court in accordance with the provisions of the Statute and the contents of Security Council Resolution No. 1593 (2005). Again, they did not cooperate with the Court in the arrest of Omar al-Bashir and his surrender, arguing that this cooperation leads to the violation of the components of customary international law in respecting the immunity of Omar al-Bashir until the end of his presidency. They believed that Omar al-Bashir's immunity until the end of his presidency was in the light of the teachings of customary international law was superior than the provisions of article 27 of the statute and the contents of the Security Council resolution referring the situation of Sudan to the Court.

The Sudan situation is an example of the failed performance of the Court, although it also had the support of the Security Council referral. Therefore, the aforementioned argument that membership in the Court or the Security Council referral to the Court guarantees its success is not necessarily true in all cases. Nevertheless, the referral or non-referral of the situation by the Security Council affects the proceedings of the Court in the case of a non-member state. The Security Council is the political pillar of the United Nations, while the Court is an independent entity. The protection of the political element from the performance of the judiciary strengthens the position of the Court in the international community and increases its legitimacy (Bartels, 2017: 143).

In other words, the performance of the Court in a criminal situation, regardless of membership or non-membership of that state in the ICC and Security Council referral or non-referral, creates the impression that the Court is ahead and replay responsibility of the Security Council. While the Security Council is responsible for maintaining the peace and security of the international community and the responsibility for the realization of criminal justice in the international community is on the Court. Therefore, if the Security Council does not consider it necessary to intervene in a situation that violates international peace and security, the Court should not investigate. But the same theory is flawed. Because first of all; there is no hierarchy between the two commitments. In other words, there is no priority and superiority of the Security Council's commitment to the commitment of the Court or vice versa. So that the passivity of the Security Council can be interpreted as the requirement of the Court not to react. Secondly; assuming that there is coordination between the Security Council and the Court so that the Court is limited to state membership or the Security Council referral of a non-member state, there is still no something in favor of the Security Council or the Court, or is not inferred the need to follow one another. Because the prosecutor is independent from the Court by a separate duty. The Court is bound by the principles of international criminal jurisdiction in accordance with the provisions of the statute and other documents in response to the prosecutor's requests. In such circumstances, the Court shall not be subject to the orders of the Security Council or otherwise, in order to refrain from examining or concluding from the prosecutor's requests for the ruling on jurisdiction or the opening of a preliminary examination. At the same time, of course, there are situations that do not violate international peace and security but require criminal prosecution.

### **Conclusion**

The ICC's criminal jurisdiction over the Myanmar situation has been specified in its statute, such as article 12, and exercising jurisdiction is based on article 13 of the statute. However, the ICC's other cases have not been raised from this point of view. The ICC jurisdiction exercise in the Myanmar situation is the subject of developing the ICC territorial jurisdiction's idea. Territorial jurisdiction in this model is based on the membership of one state in the ICC (Bangladesh) in relation to the criminal situation of another non-member state in the Court (Myanmar). Therefore, the membership of the Bangladesh state in the Court is sufficient to prosecute crimes attributed to citizens and in Myanmar territory. Even if it seems exercise of jurisdiction is incompetent in the affairs of the Myanmar and violates the sovereignty of that state that is not a member of the Court. But it is not, in fact. It is wrong to assume that the Court's jurisdiction over a

non-member state is fundamentally related to the Myanmar situation. The Court's jurisdiction over the Myanmar situation is due to the commission of a part of the crime in the territory of Bangladesh, which is a member of the Court. However, the main source of this crime is the citizens of the neighboring state and it started from the territory of that state, which is not a member of the Court. From this point of view, the effect of the Myanmar state's non-membership is negligible if the Court's criminal jurisdiction over the Myanmar situation is addressed. However, it is necessary to raise the challenges facing the prosecutor arising from the Court's criminal jurisdiction over the Rohingya and the need to justify them in jurisprudence and in accordance with the provisions of the statute. In this regard, ruling on jurisdiction in the Myanmar situation requires the observance of the preconditions, distinct from admissibility, without the support of the membership of the Myanmar state or the Security Council's referral.

The ruling on jurisdiction in the Myanmar situation is based on the membership of Bangladesh's territorial jurisdiction of the Court. Although the crime of expelling Rohingya people began in the territory of the origin, which is not a member of the Court, it has continued in the territory of the destination state, which is a member of the Court. Accordingly, the non-membership of Myanmar is not an issue that has committed a crime against its citizens, while the effects of the crime have spread to the territory of the neighboring state. The prosecutor's request for the ruling on jurisdiction does not depend on any other preconditions, although the processing of the ruling on jurisdiction requires the subject and geographical jurisdiction of the Court. However, it is clear that the success of a prosecutor in obtaining a ruling on jurisdiction does not mean that she is likely to succeed in the future. As the Court states, ruling on jurisdiction does not replace the preliminary investigation authorisation and does not prejudice the future decisions of the Court in this case. This approach does not mean that the Court will be able to deviate from the ruling on jurisdiction in the future, although it will make the ruling on jurisdiction of the prosecutor's office ineffective. But there is no escaping from this situation. However, if the prosecutor had resorted to the usual mechanisms and the opening of preliminary investigations instead of resorting to Article 19(3) of the statute, these conditions would have existed so that the case could not be later admissible. This is the case in all situations from start to finish. It is possible that a preliminary investigation will be ordered and the prosecutor will begin the investigation in that situation, but later the case will not be admissible in Court due to the reasons provided for in Article 17 of the Statute. This is also true of the ruling on jurisdiction and is not a cause for concern.

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