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THE INTERNATIONAL CRIMINAL COURT AS A VERITABLE TOOL FOR THE PROTECTION OF THE RIGHTS OF ETHNIC MINORITIES: EXAMINING THE ICC'S DECISIONS REGARDING THE PEOPLE OF ROHINGYA

Ikechukwu P. Ugwu
Faculty of Law and Administration
University of Silesia in Katowice, Poland
e-mail: ikechukwu.ugwu@us.edu.pl

ABSTRACT

Notwithstanding obstacles to the power and jurisdiction of the ICC, the judges' posture is that the court is ever ready to protect ethnic minorities against any form of violations. Regarding the situation of the Rohingya people in Myanmar, the Pre-Trial Chamber 1 and III of the ICC held that the ICC could exercise jurisdiction over Myanmar, a non-party State to the Rome Statute, for the deportation of the Rohingya people to Bangladesh. With these decisions, international observers hope for accountability for those responsible for the crimes committed against the Rohingya people. It examines the applicable law and history of discrimination of the Rohingya people using the descriptive method and then examines the jurisprudence behind these rulings using the analytical method. Finally, this article suggests that the Rome Statute should be consistently interpreted by the ICC judges to advance the Rome Statute's intention, especially when ethnic minority groups are involved.

Keywords: International Criminal Court, International Court of Justice, Jurisdiction, Human Rights, Rohingya People.

A. Introduction

Over the years, there have been agitations by ethnic minorities worldwide to protect their rights against violations by different actors like States,[1] multinational corporations,[2] or even other citizens in their various countries.[3] The ethnic minorities face various acts of violations, including the

1 Jernej Letnar Černič, "State Obligations Concerning Indigenous Peoples' Rights to their Ancestral Lands: Lex Imperfecta?", *American University International Law Review* 28 (2013): 1129, 1130. See also Zaka Firma Aditya and Sholahuddin Al-Fatih, "State Liability for Violation of Constitutional Rights Against Indigenous People in Freedom of Religion and Belief", *Brawijaya Law Journal* 4 (2017):29, 29 where the authors recognise that the government of Indonesia are perceived as the main perpetrator of the violation of rights of indigenous peoples.

2 Maxi Lyons, "A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress", *Denver Journal of International Law and Policy* 32 (2004): 701, 701; Emilio C Viano, "The Curse and Theft of Natural Riches: Environmental Crimes and Violations of Indigenous Rights Throughout History Facilitated by Legal and Financial Systems", *International Annals of Criminology* 52 (2014): 93; Sascha Dov Bachmann and Ikechukwu P. Ugwu, "Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?", *Oil and Gas, Natural Resources, and Energy Journal* 6 (2021): 547.

3 See Aileen Moreton-Robinson, "Citizenship, Exclusion and the Denial of Indigenous Sovereign Rights",

forceful takeover of their ancestral lands, denial of the right to a healthy environment due to pollution emanating from mining their natural resources, displacement and deportation, genocide. However, in 2018, there was a decision[4] by the Pre-Trial Chamber I (the PTC I) of the International Criminal Court (the ICC) that the ICC has jurisdiction over the deportation of the Rohingya people, an ethnic minority in Myanmar, from Myanmar to Bangladesh. This decision has again stirred up some of the controversies surrounding the ICC, to wit, the ICC's jurisdiction over States that are not parties to the Rome Statute of the International Criminal Court (the Rome Statute)[5], the effectiveness of the ICC in protecting some of the identified human rights abuses, and most importantly, the ICC as a veritable tool to protecting the rights of ethnic minority groups.

Again, in 2019, the Pre-Trial Chamber III (The PTC III) gave the prosecutor authorization to carry out a full investigation into the situation in Myanmar.[6] These issues are even more important seeing that The Gambia has gone ahead to institute an action against Myanmar at the International Court of Justice (ICJ),[7] and a court in Argentine has accepted a petition to try Myanmar officials under the universal jurisdiction principle in an apparent conviction that the rights of the Rohingya people must be established and protected. Therefore, this article gives a historical background to the Rohingya people's situation, the jurisdiction of the ICC, its legislative history, and the mischief it was set to remedy. The article also reviews the majority decision and the dissenting view of Judge Marc-Perrin de Brichambaut [8] of the PTC I, a summary of the ruling of the PTC III authorizing a full investigation into the crises, and finally, some of the factors that oppose the ICC regarding the protection of the rights of ethnic minority groups. Again, countries are beginning to stand up for the rights of the Rohingya people, like the Gambian case at the ICJ and the Rohingya case in Argentina under the universal jurisdiction, and this is an indication that the world is ready to hold the Myanmar leadership accountable for decades of their persecution of the Rohingya people.

From these decisions, a question that

ABC, 30 May 2017, https://www.abc.net.au/religion/citizenship-exclusion-and-the-denial-of-indigenous-sovereign-rig/10095738 (accessed 28 January 2021). Here, the writer, a professor of Indigenous Studies, pointed out "that the majority of white Australians voted in favour of a referendum that did not give Indigenous people citizenship rights" in the 1967 referendum organised by the Australian government.

4 The International Criminal Court, *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* 6 September 2018, ICC Pre-Trial Chamber 1-RoC46 (3)-01/18 (herein referred to as the Majority Decision.

5 United Nations General Assembly, *Rome Statute of the International Criminal Court* 17 July 1998, 2187, UNTS 90.

6 The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 14 November 2019, ICC Pre-Trial Chambers III ICC 01/19 27 (hereinafter referred to as the PTC III Decision).

7 The International Court of Justice, *Application Instituting Proceedings and Request for additional Measures (Republic of The Gambia v Republic of the Union of Myanmar)* 11 November 2019, Press Release 2019/47.

8 The International Criminal Court, *Partially Dissenting Opinion of Judge Marc Perrin De-Brichambaut*, ICC-RoC46(3)-01/18/1, 6 September 2018 (herein referred to as the Dissenting Decision).

this article would answer is whether the ICC is creating a new norm of customary international law where the court can exercise jurisdiction over States that are not party to the Rome Statute? Put differently, is the jurisdiction of the ICC and the Rome Statute now part of customary international law so that States that are not parties to the Rome Statute would be bound by its provisions, especially when ethnic minority groups are involved?

B. Research Method

This article is on two decisions by the Pre-Trial Chamber of the ICC regarding the situation in Myanmar where the members of the Rohingya ethnic minority group were displaced and deported to Bangladesh. First, using the descriptive research method, this article tells the history of the Rohingya people, why they were deported from Myanmar to Bangladesh, and their difficulties in obtaining justice. Again, using the same method, this article traces the history of the ICC and the various resolutions adopted at the Rome Conference in 1998 that finally culminated into the Rome Statute. Second, the analytical research method is employed to look at the Pre-Trial Chamber I and III decisions critically. The merits of the majority decisions in PTC I are analyzed to discover if the judges followed the Rome Statute's intention. The provisions of the Rome Statute are analyzed side-by-side with the decisions of the PTC I and III. Also, the analytical method enables us to discover that the core crimes provided in the Rome Statute and the jurisdiction of the ICC, even though the jurisdiction has been objected to by a small percentage of States, are gradually becoming part of customary international law.

Primary and secondary data sources are used in this article. For instance, international legal instruments, previous decisions of the ICC and other international courts, and national laws serve as the primary source of data. Opinions in textbooks and journal articles of recognized scholars on the ICC and minority groups are the secondary data sources.

C. Discussions

1. Historical Background and the Situation of the Rohingya People

The Rohingya people, an ethnic minority group in Myanmar, were stripped of their citizenship for failing to establish that their forefathers inhabited Burma before 1823,[9] making them one of the seven stateless populations of the world.[10] The stance of Myanmar, a non-party State to the Rome Statute, is that the Rohingya people are nationals of Bangladesh, but because of the British partitioning, they found themselves in Myanmar.[11] Myanmar's stance is despite evidence that shows that the Rohingya

9 See Burma Citizenship Law [], MMR-130, 15 October 1982.

10 Syed Mahmood et. al., 'The Rohingya people of Myanmar: health, human rights, and identity' *The-Lancet* 389 (2017): 1841.

11 The Economist, "Myanmar's Rohingyas: No help, please, we're Buddhists", The Economist, 20 October 2012, https://www.economist.com/asia/2012/10/20/no-help-please-were-buddhists (accessed 13 April 2019).

people have been in Myanmar since 1799.[12] The Myanmar government has gone ahead to classify them as "illegal immigrants from Bangladesh".[13] Being stateless implied that they would not be allowed to work at the civil service jobs, they were denied state education, and their freedom of movement was restricted.[14] Their situation is only comparable to the apartheid regime in South Africa,[15] the Rohingya people were in 2013 described as the most persecuted group of people in the world by the United Nations.[16]

The immediate cause for which the ICC Prosecutor initiated a case was killing the Rohingya people in August 2017 as a response by Myanmar's military to an attack on a police post.[17] Because of the "clearance-operation" launched by the military, many of the Rohingya people fled the country to Bangladesh. Many people were killed while fleeing. Within weeks, among the one million Rohingya people in Myanmar, around 700,000 were already taking refuge in Bangladesh.[18] From August to November 2017, reporters alleged that the Burmese Military (Myanmar was officially known as Burma) had killed, raped, detained arbitrarily, and committed arson against the Rohingyas.[19] Landmines were laid by the military, which killed many when they attempted crossing the border between Myanmar and Bangladesh.[20] In an attempt to conceal evidence of international crimes, especially crimes against humanity, Myanmar's authorities allegedly bulldozed graves of murdered Rohingya people.[21]

It has been recognized that the long persecution and prosecution of the Rohingya in Myanmar reveals the shortcomings of current international attempts to thwart abuses of human rights and the need for systemic solutions to address gaps in moral and political ideology.[22] Nevertheless, the

12 Nicholas Kristof, "Myanmar's Appalling Apartheid", New York Times, 28 May 2014, https://www.nytimes.com/2014/05/29/opinion/kristof-myanmars-appallingapartheid.html (accessed 28 January 2021).

13 Mikael Gravers, *Exploring Ethnic Diversity in Burma* (Copenhagen: NIAS Press, 2007) x.

14 Human Rights Watch, "Burma/Bangladesh Burmese Refugees in Bangladesh: Still no Durable Solution", *Human Rights Watch*, 12, No 3 (C) (2000), https://www.hrw.org/reports/2000/burma/index.htm (accessed 19 May 2020).

15 Azeem Ibrahim, "War of Words: What's in the Name "Rohingya"?" *Yale Global Online* (2020) https://yaleglobal.yale.edu/content/war-words-whats-name-rohingya (accessed 16 May, 2020).

16 Lennart Hofman, "Meet the most persecuted people in the world", The Correspondent, 25 February 2016, https://thecorrespondent.com/4087/meet-the-most-persecuted-people-in-the-world/293299468-71e6cf33 (accessed 19 May 2020).

17 Rajika Shah, "Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis", *Loyola of Los Angeles International and Comparative Law Review* 41 (2018): 181.

18 *ibid*, 182.

19 *ibid*.

20 See Zeid Ra'ad Al Hussein, "High Commissioner for Human Rights, U.N. Human Rights Council", (Opening Statement before 36th Session 11 September 2017), cited in Shah (n 17).

21 Shah (n 17) 182; Stephanie Nebehay and Simon Lewis, "Acts of genocide" suspected against Rohingya in Myanmar – UN", Reuters, 7 March 2018 https://www.reuters.com/article/us-myanmar-rohingya-rights/acts-of-genocide-suspected-against-rohingya-in-myanmar-u-n-idUSKCN1GJ163 (accessed 19 May 2020).

22 Carlos E Gomez, "The International Criminal Court's Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights" *California Western International Law Journal* 50 (2020):177, 179.

ICC Prosecutor seized this opportunity to test the ICC's continued relevance by filing a Request on 9 April 2018 titled "Request for a Ruling on Jurisdiction under Article 19(3) of the Statute."[23] On 6 September 2018, in what could be described as judicial activism by the ICC judges, the PTC I delivered its decision accepting jurisdiction over the deportation of the Rohingyas.[24] Again, in July 2019, the PTC II confirmed the PTC I's ruling that the ICC can exercise jurisdiction over Myanmar, a non-party to the Rome Statute, and consequently authorized the ICC Prosecutor to initiate investigations into the situation of the Rohingya people in Myanmar. To further show that the world is not oblivious of the happenings in Myanmar, the ICJ, in January 2020, gave provisional measures by ordering the authorities in the country to stop killing and carrying out other discriminatory acts against the Rohingya people. This article is based on the PTC I and III decisions while referring to the ICJ's provisional measures rulings. However, before analyzing these decisions, we would first look at the jurisdiction, the legislative history, and the mischief the ICC was set to remedy.

2. Jurisdiction, Legislative history, and the mischief prior to the ICC.

The ICC's substantive jurisdiction is restricted to the most severe offenses of concern to the international community. These crimes are war crimes, the crime of aggression, crimes against humanity, and genocide.[25] They are the so-called core crimes, and they constitute a violation of "*jus cogens*[26] norms of international law, giving rise to so-called erga omnes (State) responsibility to either prosecute or extradite."[27] The debate on the ICC's territorial jurisdiction was heated, unlike its substantive jurisdiction during the Rome Conference of 1998 (the Rome Conference).[28] Many representatives of States at the Rome Conference, it should be remembered, had proposed that the ICC be given universal jurisdiction over the four core crimes so that it can prosecute any international crime regardless of whether it was committed on the territory of or by a citizen of a State Party.[29] States like India, China, and the USA that opposed the idea of the conferment of universal jurisdiction on the ICC feared for their sovereignty, and they envisaged a possibility of them being unable to protect their citizens; they instead favored a "weak and more symbolic court"

23 The International Criminal Court, *Prosecution's Request for a Ruling on Jurisdiction under Article* 19(3) of the Statute, ICC RoC46(3)-01/18-1, 9 April 2018.
24 The Majority Decision (n 4) para 73.
25 The Rome Statute (n 5) art 5.
26 John F Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" *Harvard Human Rights Journal* 12 (1999): 1, 6, 9.
27 Sascha Dominik Dov Bachmann and Eda Luke Nwibo, "Pull and Push – Implementing the Complementarity Principle of the Rome Statute of the ICC within the African Union: Opportunities and Challenges" *Brooklyn Journal of International Law* 2 (2018): 457, 462.
28 Kevin Jon-Heller, "The Rome Statute in Comparative Perspective" in Kevin Jon Heller and Markus Dirk Dubber, (eds), *The Handbook of Comparative Criminal Law* (California: Stanford University Press 2010) 593.
29 *ibid*; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (England: 3rd ed, Oxford Press 2014) 20.

that should only be activated by the United Nations Security Council when there is a crisis.[30]

Generally, for the ICC to have jurisdiction over persons and territories, one of the following preconditions must be present, 1) the core crimes have been committed by a citizen of a State Party to the Rome Statute, regardless of where they committed the crime;[31] and for States not being parties to the Statute 2) if such a State accepts ICC jurisdiction on an *ad-hoc* basis;[32] and 3) where the United Nations Security Council (the Security Council) refers a matter to the ICC[33] under Chapter VII of the United Nations Charter.[34] Referral by the Security Council would mean that in the case of a non-party State, the jurisdiction of the ICC will remain dormant until triggered by a referral.[35] In other words, the ICC jurisdiction remains inactive until a state party makes a referral or the Security Council and/or the ICC Prosecutor makes an initiation in line with article 15.[36] The initiation must be concerning crimes committed 'within the jurisdiction of the Court.'[37] As seen already, the territorial jurisdiction is limited to state parties or States not being a party by special agreement.[38]

Before the Rome Statute, sources of international criminal law were fragmented, starting from the Versailles Treaty, the establishment of the Nuremberg and Tokyo Tribunals, the constitution of the International Criminal Tribunal for the former Yugoslavia, the making of the International Criminal Tribunal for Rwanda, and finally the Rome Conference of 1998 that gave birth to the Rome Statute. It was an attempt at bringing together all these sources, together with existing customary international law, to have one codified source of international criminal law.[39] During the Rome Conference, States like Germany and South Korea failed to convince the United Nations General Assembly on the need to confer universal jurisdiction on the ICC, i.e. power to exercise jurisdiction over any state whether or not such state has ratified the Rome Statute.[40] A writer had argued elsewhere that the enthusiasm that greeted the Rome Statute's ratification would have been affected if they had succeeded.[41]

30 *ibid*, 19 – 20.
31 The Rome Statute (n 5) art 12(2)(b).
32 *ibid*, art 12(3).
33 *ibid* art 13(b).
34 UN, *Charter of the United Nations*, 24-October-1945, 1 UNTS XVI.
35 Sascha and Luke (n 27) 480.
36 The Rome Statute (n 5) art 13.
37 ibid, art 15(1).
38 ibid, art 4(2).
39 ibid, Preamble, para 9; Carsten Stahn and Larissa Herik "Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?" in Larissa Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (The Netherlands: vol 1, Koninklijke Brill nv., 2012) 22.
40 Cedric Ryngaert "The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?" *New Criminal Law Review: An International and Interdisciplinary Journal* 12 (2009): 498, 500.
41 William Schabas, *An Introduction to the International Criminal Court* (England: 5th edn, Cambridge-Press

The mischief/defect the Rome Statute remedied was, therefore, the lack of a single source of international criminal law for the prosecution of persons who commit crimes that 'deeply shock the conscience of humanity,'[42] 'reveal the vanity of man and wickedness of the human heart'[43] and 'threaten the peace and security of the world'.[44] The remedy is more so seeing that the 'horrors of the Second World War'[45] did not prevent a repeat of such heinous crimes. Because of the reason for the establishment of the ICC, we will argue later that the legislative history of the Rome Statute should not have more weight and indeed should not be preferred over the mischief rule whenever the Rome Statute is to be interpreted and applied. This preference is because relying on the legislative history, rather than the defect for which the Rome Statute was set to correct, would still lead to the international community's inability to prosecute acts that "deeply shock the conscience of humanity".

3. The Majority and Dissenting Decisions of the Pre-Trial Chamber I

The preceding part looked at the ICC jurisdiction and how, during the Rome Conference, the participants rejected the idea of universal jurisdiction for the ICC. We shall now consider the PTC I's majority decision to discover whether the court followed sound international jurisprudence or not.

The ICC Prosecutor's request was for the ICC to determine if it can exercise its jurisdiction over the forcible deportation, a constitutive element of the crime against humanity,[46] against the Rohingya people. The majority decision by Judges Peter Kovacs and Reine Adélaïde Sophie Alapini-Gansou is that the ICC has jurisdiction over the expulsion from Myanmar to Bangladesh of members of the Rohingya people[47] despite Myanmar not being a state party to the Rome Statute. Judge Marc Perrin de Brichambaut dissented on the ground that a Request to rule on jurisdiction is premature at this stage until the Prosecutor must have done 'preliminary investigation and subsequently seeking authorization to commence an investigation according to article 15 (3)'.[48]

a. Areas of Novelty

1). Article 19(3) of the Rome Statute – Compétence-de-la-Compétence

The power of courts to rule on their jurisdiction is referred to as ***Kompetenz-Kompetenz*** or the *Compétence-de-la-*

2017) 66.

42 Marion Beckerink, "Justice Jackson Delivers Opening Statement at Nuremberg November 21, 1945", Robert H Jackson Centre, 8 January 2016 https://www.roberthjackson.org/article/justice-jackson-delivers-opening-statement-at-nuremberg-november-21-1945/ (accessed 15 April 2020).

43 Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction* (Enugu: Catholic Institute for Development Justice and Peace, 1999) 35 cited in Sascha and Luke (n 27) 461.

44 Sascha and Luke (n 27) 461.

45 Kofi Annan, "Address to the International Bar Association in New York", (UN-Press-Release SG/SM/6257, 12 June 1997) https://www.un.org/press/en/1997/19970612.sgsm6257.html (accessed 15 April 2020).

46 The Rome Statute (n 5) art 7 (1) (d).

47 The Majority Decision (n 4) para 73.

48 The Dissenting Decision (n 8) para 40.

Compétence principle.[49] Relying on the ICJ's judgment in *Liechtenstein v Guatemala*, the PTC I ruled on this concept thus: "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."[50] The ICC has exercised this power[51] concerning article 19(3) of the Rome Statute. Article 19(1) provides that the Court shall satisfy itself that it has jurisdiction in any *case* brought before it and, in any case, where the jurisdiction of the court is in question, the Prosecutor may seek the Court to determine whether it has jurisdiction or not.[52] It is a court's inherent power.[53]

There is a controversy as to what stage a court can determine whether it has jurisdiction, whether this power arises after the Court is seised of an issue or whether the Court can go into determining its jurisdiction without having a case before it.[54] In his dissent, Judge Marc Perrin de Brichambaut thought that raising and relying on this doctrine at the pre-preliminary stage would amount to the ICC 'exceeding and transgressing its mandate'[55] because there was no "proper case or dispute" before the court. He held that giving "a contextual interpretation of Article 19(3)" of the Rome Statute would reveal that the "scope of the application suggests that this article [19] applies only once a case has been defined by a warrant of arrest or a summons to appear according to article 58 of the [Rome] Statute."[56] Judge Marc Perrin de Brichambaut's opinion should not be preferred because even article 119 (1) of the Rome Statute provides that "[a]ny *dispute* concerning the judicial functions of the Court shall be settled by the decision of the Court". Although article 119 is headed 'Final Clauses', we agree with the majority view that article 119(1) also includes questions "related to the [ICC's] jurisdiction.[57] Judge Marc Perrin de Brichambaut's argument that

49 International Court of Justice, *Nottebohm case (Liechtenstein v Guatemala)* (Preliminary Objections) (Judgment) 18-November-1953, [1953] ICJ Rep111, 119.

50 *ibid*; The Majority Decision (n 4) para 30.

51 *Prosecutor v Jean-Pierre Bemba Gombo* (Pre-Trial Chamber III Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-14-tENG (10-June-2008) [11]; Pre-Trial Chamber II, *Situation in Uganda, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission* Filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, paras 22-23.

52 The Rome Statute (n 5) art 19 (3).

53 *Prosecutor v Duško Tadić,* (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) [18-19].

54 See Ibrahim Shihata, *The Power of The International Court to Determine its own Jurisdiction: Competence de la Competence* (Leiden: Martinus Nijhoff 1965) cited in Boisson Laurence, 'The Principle of Compétence-de-la-Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals' in Arsanjani, Cogan and S Weissner, *Looking to the Future: Essays in Honor of W Michael-Reisman*, (Leiden: Martinus Nijhoff, 2010): 1027, 1039; *Northern Cameroons* (Cameroon v UK), Preliminary Objections, [1963] ICJ 15, 102 (separate opinion of Judge Fitzmaurice).

55 The Dissenting Decision (n 8) para 30.

56 *ibid*, para 10.

57 The Majority Decision (n 4) para 28; Roger S Clark, "Article 119: Settlement of disputes", in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd ed Kooperationswerke Beck - Hart – Nomos 2016) 2276.

since article 119 was not mentioned in the Request, it should not be relied upon by the PTC can be countered on the ground that whenever a court is interpreting a statute, the court must make a wholistic interpretation of that statute. All the articles of the statute must be read as a whole to find the intention of the draftsmen.[58]

Historically, article 119 elicited some commentaries. Since the International Law Commission has the practice of not drafting the final provisions of any article, it merely suggested that the ICC should have the power to "determine its own jurisdiction" and would have to deal with any issue that may arise with regards to the interpretation and application of the statute.[59]The final draft report of the Preparatory Committee contained Four Options in Article 108 on how disputes should be settled: Option 1) *disputes* should be settled by the decision of the Court; Option 2) *disputes* on the interpretation or application of the Statute which is not resolved through negotiations should be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute; Option 3) the decision of the Court shall settle *disputes* concerning the judicial functions of the Court; and Option 4) no provision on dispute settlement.[60] These Options capture the three opposing parties to the settlement of disputes by the Court at the Rome Conference. First, delegations that wanted the Court to handle all disputes relating to the functioning of its power.[61] Second, delegations that wanted the settlement of inter-state disputes to be under Article 33 of the UN Charter by allowing States to choose means of peaceful resolution.[62] and finally, those that wanted inter-state disputes to be referred to the ICJ.[63] Consequently, article 119 is a compromise to contain all the above Options and views.[64] While article 119(1) relates to the power of the ICC to settle *any dispute* concerning the *judicial functions* of the Court itself, article 119(2) is to the effect that where any dispute relating to the interpretation and application of any clause of the Statute between two or more States that has failed to be settled through negotiations within three months, shall be referred to the Assembly of States Parties. The Assembly of States Parties may seek

58 See the following English cases, *Attorney-General v Prince Ernest Augustus of Hanover* (1957) AC 436, 461, 473; *Maunsell v Olins* (1975) AC 373, 386; *Black-Clawson Ltd v Papierwerke AG* [1975] UKHL 2; (1975) AC 591, 613.

59 International Law Commission, *Yearbook of the International Law Commission,* Vol II, Part Two, A/CN.4/SER.A/1994/Add.l (Part 2) 1994): 70.

60 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Italy 15 June - 17 July 1998, A/CONF.183/2).

61 Roger S Clark, "Article 119" in Otto Triffterer and K Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (London: Hart Publishing, 1999) 1241.

62 *ibid*.

63 *ibid*, Timothy O'Neill, "Dispute Settlement under the Rome Statute of the International Criminal Court: Article 119 and the Possible Role of the International Court of Justice" *Chinese Journal of International Law* 5 (2006): 67, 69.

64 Mark Klamberg, *Commentary on the Law of the International Criminal Court* (Brussels: TorkelOpsahl Academic EPublisher, 2017) 739.

further settlement or refer the dispute to the ICJ.

Article 119(1) is of more importance to this article. According to Timothy O'Neill, there are two limitations to the ICC's competence regarding this provision – there must be a "dispute" and the dispute must relate to "the judicial function" of the ICC.[65] As the ICJ has held, a dispute exists "where there is a disagreement on the point of law or fact, a conflict of legal views or interest between *parties*"[66] and "it must be shown that the claim of one party is positively opposed by the other".[67] Although Myanmar vehemently refused to engage with the Court in any formal reply, perhaps because Myanmar has consistently made it known that they are not a party to the Rome Statute.[68] Their refusal to engage the Court should not be interpreted as no case or dispute or positive opposition between the ICC Prosecutor and the Republic of Myanmar. Rather the ICC Prosecutor's Request should be seen as merely asking the Court to rule on its jurisdiction. Again, an authorization request to commence an investigation under article 15 is based on a "reasonable basis". A reasonable basis is arrived at after the Prosecutor has determined 1) the seriousness of the allegation; 2) whether the ICC has material or territorial jurisdiction; 3) admissibility issues and the interest of justice to be served by commencing such trial.[69] So, the Prosecutor merely wanted to be sure that the ICC has jurisdiction before seeking authorization.

2) International Legal Personality (ILP) of the ICC

In what could be judicial activism, the PTC I established the ICC as having an international legal personality, even though the argument for it was not advance by the ICC Prosecutor.[70] By doing so, the PTC I successfully navigated through the complex request of the ICC Prosecutor. The ICC's international legal personality would mean that the ICC has been "clothed it with the competence" required to enable it [to] perform its functions effectively.[71] The reasoning that the ICC has been conferred the status of international legal personality, and by implication, jurisdiction over all countries because 'over 120 States have ratified the […] Statute',[72] has a far-reaching effect in international criminal law. In justifying its decision, the PTC 1 has this to say:

"…it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international

65 O'Neill (n 63) 69.
66 *East Timor (Portugal v Australia)*, Judgment [1995] ICJ Rep at 90.
67 *South West Africa, (Ethiopia v South Africa, Liberia v South Africa)*, ICJ Reports (21 December 1962), 328.
68 Notice of the Public Statement Issued by the Government of Myanmar, ICC-RoC 46 (3)-01/18-36 (2018) para 1.
69 ICC, *Policy Paper on Preliminary Examinations*, ICC-OTP 2013, 1<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 17 April 2020.
70 The Majority Decision (n 4) paras 34 – 49.
71 International Court of Justice, *Reparation for Injuries Suffered in the Service of the UN* [1949] I.CJ. Rep. 174. (Reparations Case) [178].
72 *ibid*, para 48.

community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions".[73]

In 2001, before the Rome Statute entered into force, Scharf had opined that the ICC's universal jurisdiction does not give it the power to prosecute States not parties to the Rome Statute without referral by the Security Council.[74] It would seem that the conferment of international legal personality on the ICC does not mean that it has universal jurisdiction. If the ICC had such jurisdiction, then there would have been no need for countries to sign up to the Statute as its jurisdiction, in any case, would bind them. The provision that consents of a non-party State be obtained or that the Security Council should refer a case involving States not being parties to the ICC,[75] shows that the drafters of the Statute never intended it to have universal jurisdiction[76] as it would present some difficulties,[77] including States pulling out or refusing to ratify the Statute. This fact was also recognized by the PTC I when it decided to limit the Prosecutor's investigatory power to deportation only. In this way, an element of deportation, border crossing, happened on the territory of Bangladesh, a state party to the Rome Statute.

It is important to note that the initial thought regarding the obligation of States that are not parties to the Rome Statute is only to assist.[78] While recognizing the importance of the principle of *pacta tertiis nec nocent nec prosunt* – "a treaty does not create either obligations or rights for third parties without their consent"[79] – reiterated in article 34 of the Vienna Convention on the Law of Treaties,[80] the PTC I held that there are exceptions to it.[81] These exceptions include rules recognized by nations as customary international law rules[82] and peremptory norms of international law (*jus cogens*).[83] The PTC I brings the ICC into a relationship with the UN, whose Security

73 The Majority Decision (n 4) paras 48.
74 Michael Scharf, "The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position" *Scholarly Commons* 64 (2001): 67, 76.
75 The Rome Statute (n 5) art 13.
76 David Scheffer, "International Criminal Court: The Challenge of Jurisdiction" (address at the Annual Meeting of the American Society of International Law, 26 March 1999) http://www.iccnow.org/documents/DavidSchefferAddressOnICC.pdf (accessed 17 April 2020).
77 Madeline Morris, "The Jurisdiction of the International Criminal Court over Nationals of Non-Party States" *ILSA Journal of International and Comparative Law* 6 (2000): 363, 365.
78 The Rome Statute (n 5) art 87 (5); Gennady M. Danilenko, "The Statute of the International Criminal Court and Third States" *Michigan Journal of International Law* 21 (2000): 445, 447.
79 *ibid*, art 34.
80 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155, UNTS, 331.
81 The Majority Decision (n 4) para 36.
82 Vienna Convention (n 80) art 38.
83 The Majority Decision (n 4) para 36.

Council can refer a case against a non-party State to the Rome Statute.[84] This means that the "objective legal personality of the UN assists the ICC to act accordingly."[85]The consequence of this decision is that the Rome Statute regarding its relationship with third parties, that is, States not being parties to it, is no longer that of *res inter alios acta,*[86] but those States are bound to cooperate.[87]

3) Elements of Deportation

To expand its jurisdiction to protect the rights of ethnic minority groups, the PTC I held that since an element of deportation, that is crossing the border, occurred in a State-Party's territory, the ICC has jurisdiction.[88] The PTC I held that "the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, *inter alia*, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is on the territory of a State Party".[89] The PTC I arrived at this after analyzing article 12(2)(a), which provides that where conduct has taken place in a state-party, the ICC will be vested with jurisdiction because there is no contemplation regarding the destination of those deported. Whether those deported were taken to a no man's land provided an element of it, that is, the crossing of a border, took place in a state party to the Rome Statute, the ICC would exercise its jurisdiction.

The PTC I decision also confirmed that article 7(1)(d) of the Rome Statute contemplates two distinct offenses, as confirmed by the Elements of Crimes[90] - "deportation and forcible transfer" because of the use of "or" in article 7 (1)(d). The said article provides that "crime against humanity means… [d]eportation or forcible transfer of population".[91] Therefore, in this reasoning, a "forceful transfer" entails the displacement of a group within a state's borders. At the same time, deportation involves the displacement of persons lawfully residing in a country to another country.[92]

In support of this argument is article 12 (2)(a) that provides that the ICC may exercise its jurisdiction if "… [t]he State on the territory of which the conduct in question occurred" is a State party to the Rome Statute.[93] International law allows a state to exercise jurisdiction over a criminal act if an element of that crime occurred in its territory.[94] This decision is significant on two grounds:

84 *ibid*, para 43.
85 *ibid*.
86 Latin for "a thing done between others does not harm or benefit others".
87 *ibid*, para 43.
88 The Majority Decision (n 4) para 71-72.
89 *ibid*, para 71.
90 International Criminal Court, "Elements of crimes", https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (accessed 13 April 2020).
91 The Majority Decision (n 4) para 54.
92 *ibid*, para 55.
93 *ibid*, para 62.
94 Cedric Ryngaert, "Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law" *International Criminal Law Review* 9 (2009): 187, 187.

1) the broadens the ICC's jurisdiction over States that have refused to become parties to the Rome, and 2) the "reasoning could be applied to other crimes within the Court's jurisdiction, such as persecution and []other inhumane acts[] committed in connection with deportation, even though those crimes would not necessarily occur on the territory of more than one state."[95]

Gomez has argued that the PTC I's broad interpretation of the jurisdiction of the ICC "may not have been the best approach",[96] and he goes ahead to recommend that the PTC should have followed the alternative of "propos[ing] an amendment to the Rome Statute."[97] He argues that such amendment should be made to article 12(2)(a), which provides that the ICC can exercise jurisdiction to investigate crimes over "[t]he State on the territory of which the conduct in question occurred"[98] to now read that the ICC has jurisdiction over "[t]he State on the territory of which the entirety or part of the conduct in question occurred."[99]

Gomez's proposition would not have served the justice required by the Rohingya people because at the heart of international criminal law is the principle of *nullum crimen, nulla poena sine lege* with its core element rule of non-retroactivity,[100] and amending the Rome Statute after the events in Rohingya had taken place, would make the case to be caught up by the non-retroactivity principle. The Rome Statute even forbids the retroactive application of the Statute. In other words, [a] person shall not be criminally responsible under [the Rome Statute] unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the [ICC],"[101] and "[n]o person shall be criminally responsible under this Statute for conduct before the entry into force of the [Rome] Statute".[102]

95 Sarah Freuden, "Introductory Note to Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (Int'l Crim. Ct.)" *International Legal Materials* 58 (2019): 120, 121.

96 Gomez (n 22) 26 – 27.

97 *Ibid*, 27.

98 The Rome Statute (n 5) art 12(2)(a).

99 Gomez (n 22) 27.

100 Valentina Spiga, "Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga", *Journal of International Criminal Justice* 9 (2011): 5 – 23; Yudan Tan, "The Identification of Customary Rules in International Criminal Law", *Utrecht Journal of International and European Law* 34 (2018): 92, 110; Talita de Souza Dias, "The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem", *Journal of International Criminal Justice* 16 (2018): 65; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2010): 3, 8 – 9.

101 The Rome Statute (n 5) art 22(1).

102 ibid, art 24(1). Some authors have identified possibilities where the Rome Statute can be applied retroactively – 1) where there is a violation of customary international law (see Bruce Broomhall, "Article 22" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* – Observers' Notes, Article by Article (Leiden: 2nd edn, Beck/Hart 2008) 713, 720; The Prosecutor v Omar Al Bashir (Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I) ICC-02/05-01/09-139 (12 December 2011) (Al Bashir Malawi Cooperation Decision)), 2) where the Security Council referred a non-party State to the Rome Statute to the ICC (see Souza Dias (n 100) 66 – 67; art 13 (b) of the Rome Statute), and finally, 3) "where when a situation originates from an ad hoc declaration under Article 12(3), i.e. a declaration

The Prosecutor in 2019 initiated a series of processes for authorization to commence an investigation into the whole scenario. As a result, the authorization was granted to her in the decision of the Pre-Trial Chamber III.

4. The Pre-Trial Chamber III Decision

On the 4th of July 2019, the Prosecutor requested the Chamber for authorization to commence an investigation into the situation in Bangladesh/Myanmar from 9 October 2016 and continuing.[103] The Prosecutor must make this Request, accompanied by relevant materials, for the commencement of investigation into any situation if the Prosecutor concludes that there is a reasonable basis for an investigation.[104] After this request has been made, "[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, *without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case*."[105] At a closer look at the emphasized phrase, it would appear that even after the Pre-Trial Chamber has authorized the commencement of investigation and had determined its jurisdiction, the ICC is not precluded, during the trial, to revisit the issue of jurisdiction. In order words, the ICC can still conclude that it does not have the jurisdiction to entertain a case already investigated.

During the PTC III, the victims were represented, wherein their views and concerns were collected as per article 68 (3) of the Rome Statute. Three hundred thirty-nine representations in English were received (311 representations were submitted in written form, and 28 were put forward in video format).[106] These representations were either from families or those living in the same refugee camp, and multiple other representations from individuals were also made.[107] The victims' representation presented gory abuses of human rights perpetrated against the Rohingya, including indiscriminate shootings of villagers, especially targeting children, and some of them were thrown into water or fire to die.[108] Many women were gang-raped, and their sexual organs mutilated,[109] homes and schools belonging to the Rohingya people were burnt, and some of their valuables were taken away.[110] All of these, the victim representations claimed, were done

by which a state (party or not) grants the Court jurisdiction over a situation that took place when such state had not accepted the application of the Rome Statute" (see Souza Dias (n 100) 67.

103 *Request for authorisation of an investigation pursuant to article* 15, ICC-01/19-7 and 10 annexes (hereinafter referred to as the Investigation Request).

104 The Rome Statute (n 5) art 15 (3).

105 ibid, art 15 (4). Emphasis added.

106 The PTC III Decision (n 6) para 20.

107 ibid, para 22.

108 ibid, para 29.

109 ibid, para 31.

110 ibid, para 32.

because they were Rohingya and Muslims,[111] and these forced them to flee Myanmar to Bangladesh and other countries.[112]

Based on the victim representation, the PTC III determined that authorizing an investigation would be in the interest of justice and that the case passed the admissibility test. The PTC III also decided that the case falls within the jurisdiction of the ICC. While agreeing with the PTC I on ICC jurisdiction, it held that "[f]or the reasons given below, the Chamber agrees with the conclusion of Pre-Trial Chamber I that the Court may exercise jurisdiction over crimes when *part of the criminal conduct takes place on the territory of a State Party*."[113]

a. Types of jurisdictions

The PTC III decision was extensive in its discussion of jurisdiction and "conduct" that constitutes a crime. Four components of jurisdiction must be considered while determining whether a court has jurisdiction or not – jurisdiction *ratione materiae*, jurisdiction *ratione temporis*, jurisdiction *ratione loci*, and jurisdiction *ratione personae*. These components will be discussed below and how the PTC III justified them to arrive at the fact that the ICC has jurisdiction over Myanmar.

1) Jurisdiction *ratione materiae* and jurisdiction *ratione temporis*

Jurisdiction *ratione materiae* also known as subject matter jurisdiction, implies that a court has jurisdiction to adjudicate only on those cases "that raise those factual and legal questions which the constitutive instruments have defined and/or that one or more of the parties have agreed to refer to adjudication."[114] For the ICC, its jurisdiction *ratione materiae* is limited to those core crimes mentioned in article 5 of the Rome Statute. In the case of Myanmar, the atrocities committed against the Rohingya are covered under the Rome Statute as the victim representations indicated.[115]

An international court's jurisdiction may also be time-bound; that is to say, a court cannot adjudicate a case until the statute establishing the subject matter comes into force. It "denotes the effect of the passage of time on obligations or a tribunal's power to decide a dispute"[116] and that treaties should not be applied retroactively.[117] This is called jurisdiction *ratione temporis*. Article 11 (1) of the Rome Statute provides that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute", and for a state that becomes a party to the Rome Statute after

111 ibid, para 33.
112 ibid, para 28.
113 ibid, para 43. Emphasis added.
114 Yuval Shany, "Jurisdiction and Admissibility", in Cesare P R Romano, Karen J Alter, and Chrisanthi Avgerou (eds), *Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013): 788; Alexander Proelss, "The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunal" *Hitotsubashi Journal of Law and Politics* 46 (2018): 47, 48.
115 The PTC III Decision (n 6) paras 26 – 33.
116 Barton Legum, Obioma Ofoego, and Catherine Gilfedder, "Ratione Temporis or Temporal Scope" in Barton Legum (ed), *The Investment Treaty Arbitration Review* (London: 4th ed Law Business Research Ltd 2019): 26.
117 ibid, 27.

the entry into force of the Statute, the ICC can only exercise jurisdiction "with respect to crimes committed after the entry into force of this Statute for that State".[118] The Rome Statute came into force on 1st July 2002, and although the alleged crimes committed by Myanmar took place after the entry into force of the Statute, Myanmar is not yet a party to the Rome Statute. The PTC III interpreted the four elements of the *chapeau* to article 7 – "attack", "civilian population", "policy", and "widespread and systematic" – in the context of the Rohingya people.[119] It concluded that "there exists a reasonable basis to believe that… security forces and with some participation of local civilians, may have committed coercive acts that could qualify as the crimes against humanity of deportation [under] article 7(1)(d) of the Statute…."[120]

2) Jurisdiction *ratione personae*

Under jurisdiction *ratione personae,* a court is limited to try a specific type of persons. The ICC is to "have the power to exercise its jurisdiction over persons for the most serious crimes of international concern,"[121] and these persons must be nationals of a state party to the Rome Statute,[122] or a non-party State by special arrangement or declaration.[123] Organizations, States, multinational corporations, and other legal personalities are excluded from the ICC jurisdiction.[124] Michael Scharf, while arguing on the universal nature of the Article 5 crimes, stated that the universality of those crimes does not "imply that the ICC may exercise universal jurisdiction in the sense that it is empowered to prosecute non-party nationals without a referral by the Security Council or the consent of the state in which the crime was committed".[125] In extending its *ratione personae* jurisdiction, the PTC III authorized the ICC Prosecutor to "investigate alleged crimes … irrespective of the nationality of the perpetrators."[126] In other words, the ICC Prosecutor was authorized to investigate Myanmar officials who are most responsible for the crimes committed against the Rohingya people since an element of the crime of deportation took place in the borders of a state party to the Rome Statute.

It has been noted elsewhere that prosecutions at the ICC have all been based on territoriality rather than the accused person's nationality.[127] The ICC Prosecutor had investigated but dismissed the prospect of nationality-based cases instead of territorial claims in 2003. In his first report on communications submitted according

118 The Rome Statute (n 5) art 11 (2).
119 The PTC III (n 6) paras 63 – 91.
120 ibid, para 110.
121 The Rome Statute (n 5) art 1.
122 ibid, art 12 (2)(b).
123 ibid, art 12 (3).
124 Ibid, art 25 (2).
125 Scharf (n 74) 76.
126 The PTC III (n 6) para 125.
127 Felix E Eboibi, "Jurisdiction of The International Criminal Court: Analysis, Loopholes and Challenges" *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 3 (2012): 28, 34.

to Article 15 of the Rome Statute, the Prosecutor stated that several allegations of acts perpetrated by coalition forces' nationals during the 2003 invasion of Iraq had been made.[128] In his second report in February 2006, particularly in the statement on Iraq-related prosecutions, he pursued that in greater depth. There he indicated that inquiries had been made regarding United Kingdom nationals about the acts perpetrated on Iraq's territory, a non-state party.[129] He stated further that "in accordance with Article 12, acts on the territory of a non-party state fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction (Article 12(2)(b))."[130] Because Iraq and some of the coalition forces were not parties to the Rome Statute, the Prosecutor then concluded that the ICC "do[es] not have jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq."[131] Even though there were alleged connections with States parties, the Prosecutor opined that those connections were not enough to establish territorial jurisdiction.[132] The position of the ICC Prosecutor in 2006 appears to have been discarded by the PTC III decision because now, nationals of Myanmar (a non-State party) who committed crimes against the Rohingya people at the borders of Bangladesh (a State party) would be investigated.

3) Jurisdiction ratione loci

This is the most important in this ruling by the PTC III because of its interpretation of "conduct" and "crime" as used in article 12 (2) (a). Jurisdiction *ratione loci* is the power of a court to prosecute crimes committed within its locality or territory. The "territorial theory" represents the acceptance of the global community that a State does not exist without the right to regulate actions or events occurring within its territory.[133] As earlier indicated, this principle is embodied in article 12 (2) of the Rome Statute, and it states that:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) *The State on the territory of which the conduct in question occurred* or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

This method adopted in the Rome Statute

128 Office of the Prosecutor, *Communications Received by the Office of the Prosecutor of the ICC*, No.: pids.009.2003-EN (16 July 2003) 2; See also ibid, 34.

129 Office of the Prosecutor, "Thank you for your communication concerning the situation in Iraq 9 February 2006" https://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed 4 June 2020).

130 ibid.

131 ibid.

132 ibid.

133 Thomas Buergenthal and Sean D Murphy, *Public International Law in a Nutshell* (Minnesota: West Academic Publishing, 6th ed, 2007) 205.

ensures that the ICC would exercise its jurisdiction once one of the core crimes has been committed in a State Party's territory regardless of the offender's nationality.[134] Agreeing on the ICC's territorial jurisdiction during the Rome Conference was very contentious as territoriality primarily is the hallmark of a state's sovereignty and States do not find it easy to waive their sovereignty. One thing was common no matter the different proposals submitted by States during the Rome Conference: that to exercise jurisdiction in a state, the State's consent was paramount.[135]

The PTC III, in maintaining the decision arrived at by the PTC I that the ICC has jurisdiction over the situation in Myanmar, interpreted the word "conduct" as used in article 12 (2) (a) with regards to deportation. It defines it as "a form of behavior encompassing more than the notion of an act"[136] Although the drafters of the Rome Statute deliberately used the word "conduct" with regards to a state's territory and "crime" committed on vessel or craft, the PTC III concluded, "that the notions of 'conduct' and 'crime' in article 12(2)(a) of the Statute have the same functional meaning".[137]

In her Request, the Prosecutor alleged that the Crime of deportation was completed when the Rohingya fled their ancestral homes to Bangladesh due to the "clearance operation" initiated by the Myanmar military.[138] While agreeing with the Prosecutor, the PTC III concluded that the crossing of the border of Bangladesh was conducted that "clearly establishes a territorial link on the basis of the *actus reus* of [deportation]".[139] The PTC III rationalized this using the constructive and the constitutive territorial principles as bases to assume jurisdiction since the crime of deportation was completed in a state party and that a constitutive element of the crime, that is the crossing of a border, all happened in Bangladesh.[140] The objective territorial principle allows national courts to assume jurisdiction over activities that occurred outside their national borders but with impacts and effects on their territories. In other words, this principle allows a state to prosecute and punish crimes committed outside the State consummated within its territory.[141] Again, the authorization granted the ICC Prosecutor is so broad that it even covers "investigation to alleged crimes committed at least in part on the territory of other States Parties or States which would accept the jurisdiction of this Court in

134 Dominik Zimmerman, "Article 12: Preconditions to the Exercise of Jurisdiction" in William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: 2nd ed., Oxford University Press, 2016): 351-352

135 Elizabeth Wilmshurst, "Jurisdiction of the Court" in Roy S Lee (ed), *The International Criminal Court: The Making of the Statute: Issues, Negotiations, Results* (Alphen aan den Rijn: Kluwer Law International, 1999): 127-139.

136 The PTC III Decision (n 6) para 46.

137 ibid, para 48.

138 The PTC III Decision (n 6) para 53.

139 ibid, para 62.

140 ibid.

141 Hannah L. Buxbaum, "Territory, Territoriality, and the Resolution of Jurisdictional Conflict, and the Resolution of Jurisdictional Conflict", *The American Journal of Comparative Law* 57 (2009): 631, 638.

accordance with article 12(3) of the Statute, insofar as they are sufficiently linked to the situation as described in this decision."[142]

5. Other attempts for Justice

Apart from the ICC decisions, attempts have been made at the International Court of Justice and national levels. For instance, The Gambia's Minister of Justice and Attorney General filed a case against Myanmar at the International Court of Justice[143] for violating the Genocide Convention,[144] where the ICJ has, on the 23 January 2020, issued its decision on the provisional measures request,[145] by ordering Myanmar to immediately stop the killing of the Rohingya people, the destruction of their property, and other discriminatory acts.[146] Again, a court in Argentina has accepted the petition by the Burmese Rohingya Organization UK (BROUK), and has asked for more information on the Rohingya genocide. This move by the Argentinian court is based on the universal jurisdiction principle. According to the petition, genocide and crimes against humanity can be prosecuted in any country, notwithstanding where those offenses took place and the nationality of the offenders and victims.[147] Even though these cases would complement one another in bringing justice to the Rohingya people and sending a strong signal to Myanmar leadership that the whole world is determined to hold them accountable for the persecution of the Rohingya people,[148] a final decision by the ICC will be most effective.[149] ICC judgment would have more far-reaching effects, including holding persons accountable for the crimes committed, unlike the ICJ's decision that would merely establish Myanmar's responsibility.[150]The PTC decisions established the ICC's jurisdiction over Myanmar through the judges' ingenuity and desire for justice for the Rohingya people. This ingenuity is despite oppositions from different States and actors that try to

142 The PTC III Decision (n 6) para 124.

143 International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* 11 November 2019.

144 UN General Assembly, *Prevention and Punishment of the Crime of Genocide*, 9 December 1948, A/RES/260.

145 International Court of Justice, *Order, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* 23 January 2020.

146 ibid, paras 79 – 84.

147 Md. Kamruzzaman, "Argentinian court decision brings hope for Rohingya", AA, 2 June 2020 https://www.aa.com.tr/en/americas/argentinian-court-decision-brings-hope-for-rohingya/1861967#:~:text=A%20court%20in%20South%20American,and%20persecution%20against%20Rohingya%20community.&text=1%20has%20accepted%20its%20petition,information%20on%20the%20Rohingya%20genocide (accessed 3 February 2021); Arunav Kaul, "Argentina Is Taking a Unique Route to Try Myanmar's Leaders for Crimes on Rohingya", The Wire, 10 December 2020 https://thewire.in/rights/argentina-universal-jurisdiction-myanmar-rohingyas (accessed 3 February 2021).

148 Tun Khin, "Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide", OpinioJuris, 23 October 2020 http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/ (accessed 3 February 2021).

149 Gomez (n 22) 6.

150 Thomas Van Poecke, Marta Hermez, and Jonas Vernimmen, "The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya" EJIL: Talk, 21 November 2019, https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmars-alleged-genocide-against-rohingya/ (accessed 16 November 2020).

weaken the jurisdiction of the ICC.[151]

D. Conclusion

Despite some difficulties, justice for the Rohingya people is gradually obtained, firstly, by the creative interpretation of the Rome Statute by the PTC I and III, and secondly, by other countries taking innovative steps regarding the plight of the Rohingya people. The Majority Decision of the PTC I and the PTC III decision are a welcome development in international criminal law. They establish the fact that the jurisdiction of the ICC has been recognized by many nations who have signed and ratified the Rome Statute. While it is good to look at a law's legislative history while interpreting it, it is even better to consider the mischief that existed before the law. In the case of the Rome Statute, it codified the hitherto scattered sources of international criminal law and aimed at holding accountable those who commit acts that "deeply shock the conscience of humanity,"[152]"reveal the vanity of man and wickedness of the human heart,"[153] and "threaten the peace and security of the world".[154] In other words, the PTC decisions followed the spirit behind the Rome Statute as the ICC is the first permanent international criminal court charged with prosecuting those that threaten the peace and security of the world. Finally, these ICC decisions have reiterated that the core crimes under article 5 of the Rome Statute are customary international laws. With these decisions also, the trend is that the jurisdiction of the ICC, in the bid to protect all human beings from "the wickedness of the human heart", is being elevated to universal jurisdiction.

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151 For instance, the African Union alleges partiality against African leaders on the part of the ICC. See Sascha-Dominik Dov Bachmann and Naa A. Sowatey-Adjei, "The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice" *Washington International Law Journal* 29 (2020): 247; Benedict Chigara and Chidebe Nwankwo, "To be or not to be?" The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)" *NORDIC Journal of Human Rights* 33 (2015): 243, 243; Priya Pillai, "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability", *American Society of International Law* 22 (2018), https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court (accessed 17 November 2020). Again, three members of the Security Council – Russia, the USA, and China – are not members of the Rome Statute, and it is improbable that China and Russia will allow a referral by the Security Council. See Freuden (n 83) 121; Michelle Nichols, "U.N. Security Council mulls Myanmar action; Russia, China boycott talks", Reuters, 7 December 2018, https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ (accessed 4 February 2021).

152 Beckerink (n 42).

153 Ogbu (n 43).

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Curriculum Vitae of the author

Ikechukwu P. UGWU is a Doctoral Researcher at the University of Silesia in Katowice, Poland. He holds two master's degrees; LL.M Public International Law from Bournemouth University, UK, 2019 (Distinction); LL.M Intellectual Property Rights from the University of Nigeria, Nsukka. The British government awarded Ikechukwu the Commonwealth Shared Scholarship in conjunction with Bournemouth University for his LLM in Public International Law at Bournemouth University. He holds an LLB degree from the University of Nigeria, Nsukka, 2014. He is a qualified barrister and solicitor in Nigeria. Email: ikechukwu.ugwu@us.edu.pl. ORCID: 0000-0002-0271-9364.
Publications: Sascha Dov Bachmann and Ikechukwu P. Ugwu, "Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?", Oil and Gas, Natural Resources, and Energy Journal 6 (2021): 547; Ikechukwu Ugwu, Anna Stephanie Elizabeth Orchard, Argyro Karanasiou, "Driverless Vehicles and Liability" in Philip L. Frana and Michael J. Klein (eds), Encyclopedia of Artificial Intelligence: The Past, Present, and Future of AI (California: ABC-CLIO, 2021) 131; Ikechukwu P. Ugwu, "The Tragedy of the Commons: Indigenous Peoples' Rights as Catalyst for Environmental Protection", Bournemouth University (2019).