The ICC's territorial jurisdiction on the Myanmar situation: justly extending it to include the alleged crime of deportation?

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Acknowledgement

The idea for the topic of this thesis all started when I was studying in Canada for a semester abroad, starting in September of 2018. The ICC had just ruled on the question of jurisdiction over the alleged crime of deportation, and hence the news was filled with articles about the situation in Myanmar. I was dazzled to learn that Aung San Suu Kyi, Myanmar's leader, had received an honorary Canadian citizenship in 2007 (which she was stripped from later that year), for her campaign for democracy. Moreover, I was bewildered by the Nobel Peace Prize she had won in 1991, considering her current lack of action on the military actions against the Rohingya in her country, and her denial of reports of ethnic cleansing. International criminal law is the area of law that has always interested me the most. The international response to the decision of the Pre-Trial Chamber I of the ICC intrigued me. Program director of the Liberal Arts and Sciences major law dr. L. Yanev helped me further define the limits of my research. I would therefore like to thank him for his enthusiasm for my interest in the subject. Most importantly, I want to thank my supervisor mr. S.R.B. Walther for assisting me in the process of this thesis. I am grateful for her time, valuable feedback, and overall support. Lastly, I want to thank my friends, family and boyfriend for believing in me and supporting me these past months.

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List of abbreviations

ICC	International Criminal Court
ICJ	International Court of Justice
IDP	Internally Displace Person
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
UK	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
US	United States
VCLT	Vienna Convention on the Law of Treaties

Chapter 1 – Introduction

Since August 2018, more than 700.000 Rohingya people fled from Myanmar to the neighboring country Bangladesh.[1] Myanmar no longer recognizes the Rohingya as citizens of Myanmar, which leaves them stateless. On 6 September 2018, the Pre-Trial Chamber I of the International Criminal Court (ICC) ruled that the Court can exercise its jurisdiction over this alleged crime against humanity of deportation against the Rohingya people in Myanmar.[2] However, the Court's jurisdiction is based on consent. It has jurisdiction over States that signed the Rome Statute, and thus empowered the Court with certain rights. Myanmar is not a party to the Statute, whereas Bangladesh is. In making this decision, the Court extends its territorial jurisdiction to include crimes of which only one element took place on the territory of a Member State. Myanmar has refused to accept the Court's jurisdiction, based on the fact that the State did not consent to be bound by the Rome Statute, and it thus does not apply to the State.[3] The ICC argues that the Rome Statute can impose obligations on non-Member States, through a contextual reading of article 12(2)(a), which lays down the territorial jurisdiction of the Court.[4] The broadening of the jurisdiction imposes obligations on non-Member States, even though it is a general rule that no State is bound by a treaty it did not sign.[5]

There has previously been discussion on the jurisdiction of the Court in case of a cross-border crime when one of the States is not party to the Rome Statute.[6] However, this case where the ICC decided on its jurisdiction over the crime in Myanmar is the first ICC case with this problem. The crime, and thus the decision of the ICC, affects a great amount of people. It has an effect on the Rohingya people in Myanmar. Furthermore, the decision of the Court to extend its territorial jurisdiction means it has reach over a larger number of people. In this thesis, the decision the Court made regarding the jurisdiction over the alleged crime of deportation in a non-Member State will be evaluated in light of the sources of international law through analyzing relevant secondary data, the case of the Pre-Trial Chamber I, and existing legislation. The preparatory works of article 12 and the Rome Statute as a whole will provide the basis.

[1] Christina Fink, 'Myanmar in 2018: The Rohingya crisis continues' (2019) 59(1) Asian Survey 177.
[2] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018.
[3] ibid para 35.
[4] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018.
[5] United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS.
[6] Michail Vagias, 'The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC?' (2012) Intl. L. Rev. 43.

Chapter 2 will provide a legal framework of the sources of international criminal law that govern the Court. Chapter 3 functions as a background for the jurisdiction of the ICC. How does the Court obtain jurisdiction and in which cases? Chapter 4 will examine the situation in Myanmar, and lay down the arguments made by the Court in the case. In chapter 5, the main research will be provided. It will elaborate on whether the Court violated any laws under international criminal law, and whether the contextual interpretation of the Court is in line with the intention of the Member States. This will be done by thoroughly examining the preparatory works of the Rome Statute, with special focus on article 12(2)(a). This thesis will answer the question: is the decision made by the ICC to extend its territorial jurisdiction to the alleged crime of deportation of the Rohingya people in Myanmar just in light of the sources of international criminal law?

Chapter 2 – Sources of international criminal law

2.1 Introduction

When deciding on any ruling, the Court must always adhere to the sources of international criminal law. These are *jus cogens*, treaty law, customary law and general principles of law. Article 21 of the Rome Statute lays down these sources, and the hierarchy the Court adheres to, except for *jus cogens*. This is the highest, unwritten, source of law. In order to determine whether or not the decision made by the ICC regarding the Court's jurisdiction over the crime against humanity of deportation in Myanmar was just according to the sources of international criminal law, it must first be elaborated upon what these sources are and what they entail. The ICC has to base their reasoning on existing law in making a decision. The reasoning of the Pre-Trial Chamber I for the decision on jurisdiction thus should also be based on existing law. Before the question of whether this decision was just can be answered, it needs to be explained what this existing law looks like. What are the sources of international criminal law the Court needs to adhere to?

2.2 Sources of international criminal law

Most international laws are created by entering into treaty, by a legislator or by a court.[7] The way a law comes into being creates a distinction between different types of laws, like statute law, treaty law, and case law. These forms of laws come into existence in a different way and are applicable in different situations. Treaty law is for example only applicable to States that are party to the treaty. The ICC has laid down which sources of law it adheres to in article 21 of the Rome Statute.[8] This article explains the hierarchy of sources. These sources of law are important because in making a decision, the ICC has to base their reasoning on existing sources of law.

The sources of international criminal law are laid down in Article 38(1) of the Statute of the International Court of Justice (ICJ).[9] The article establishes a hierarchy of sources: the sources are mentioned in order of importance. The sources of international criminal law are treaty law, customary law, general principles of law, and, as a subsidiary means, judicial

[7] Jaap Hage, & Bram Akkermans (eds.), *Introduction to law* (Springer: Switzerland 2014) 24.
[8] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 21.
[9] International Court of Justice, *Statute of the International Court of Justice*, article 38.

decisions and scholarly writings. However, in the hierarchy of sources of international criminal law, there is one source that goes above all of the aforementioned, namely *jus cogens*.[10]

2.2.1 Jus cogens

Jus cogens is the status which rules can obtain in order to protect the higher interest of the international community.[11] No derogation is permitted from these peremptory norms.[12] The status of *jus cogens* imposes certain duties on all States.[13] Certain crimes such as genocide have a *jus cogens* status, which means that there is a duty to prosecute or extradite[14]; this crime cannot go unpunished. Treaties cannot conflict with *jus cogens* norms. If a treaty does conflict, the treaty is considered null and void.[15] This is laid down in article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[16] This Convention specifies peremptory norms of general international laws as "*a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*[17] A list of which crimes are considered to have *jus cogens* status is not included. The crimes that enjoy *jus cogens* status enjoy universal jurisdiction: any State can claim jurisdiction, regardless of place of the crime or nationality of the perpetrator or victim.[18] The duty that the *jus cogens* norm imposes on a State is that it is not merely a possibility to prosecute: it is an obligation. Crimes that generally enjoy *jus cogens* status in legal literature are aggression, genocide, crimes against humanity, war crimes, piracy, slavery and torture.[19]

2.2.2 Treaty law

Treaty law forms the basis for international criminal law. It is the highest source of international criminal law after *jus cogens*. Where statute law regulates internally in a State, treaty law deals with affairs that go beyond State borders. Treaties are formed through cooperation of states.[20] The starting point of a treaty is the sovereignty of a State. States give their consent to be bound

[10] M. Cherif Bassiouni (ed.), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd ed., Nijhoff: Leiden 2008) 11.
[11] Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law', 60 Am. J. Int'l L. 55 (1966) 58.
[12] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 44.
[13] M. Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1997) Law and Contemporary Problems, Vol. 95: No.4, 63.
[14] ibid 65.
[15] Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law', (1966) 60 Am. J. Int'l L. 57.
[16] United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS, art 53.
[17] ibid art 53.
[18] M. Cherif Bassiouni (n 106) 66.
[19] ibid 68.
[20] Jaap Hage, & Bram Akkermans (eds.), *Introduction to law* (Springer: Switzerland 2014) 31.

by a treaty; to give up a part of their sovereignty in cooperation.[21] International law has its basis in several treaties, such as the 1907 Hague regulations, the 1949 Geneva convention and the 1948 Genocide Convention.[22] The rules on treaties have been codified in the VCLT of 1969, which defines a treaty as an agreement between states, although international organizations such as the European Union can also enter into treaty.[23] The Rome Statute of the ICC is a treaty as well. It is a special treaty, for it establishes the existence of the Court. The Statute furthermore lays down the rights and duties of the Court. The Court can only exercise jurisdiction over States that have given their consent to be bound: the States that signed the treaty which established the Court. Myanmar refuses to accept the jurisdiction of the Court over the alleged crime of deportation based on the fact that it is not a signatory State of the Rome Statute. The State refers to article 34 of the VCLT, which reads that "*A treaty does not create either obligations or rights for a third State without its consent*."[24] This is called the *pacta tertiis nec nocent nec prosunt* principle (hereafter '*pacta tertiis* principle*'*).[25] The exceptions for this article have been controversial ever since the drafting of the VCLT by the International Law Commission (ILC).[26] However, there are exceptions to article 34.[27] The most simple exception is in case a State not party to a treaty accepts an obligation imposed on it by a treaty.[28] Another exception is laid down in article 38 of the VCLT, which reads that "*Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such*."[29] The Pre-Trial Chamber furthermore puts forth other exceptions such as "*peremptory norms of international law (jus cogens), collateral agreements, repetition of well-established custom, or reappearance/repetition of the State's commitments contracted elsewhere*".[30]

[21] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 28.
[22] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 8.
[23] United Nations, *Vienna Convention on the Law of Treaties (1969*), 1155 UNTS.
[24] ibid art 34.
[25] Zdzislaw W. Galcki, 'International Treaties and Third States' (1980) J. Ethiopian L. 105.
[26] United Nations, *Draft Articles on the Law of Treaties with commentaries*, in UN, yearbook of the international law commission 1966, volume II (New York: UN, 1967) 226.
[27] ICC, Decision on the *"Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*", ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 36.
[28] United Nations (n 26) 227.
[29] United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS, article 34.
[30] ICC, Decision on the "*Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*", ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, footnote 58.

2.2.3 Customary law

Customary law is one of the oldest sources of law.[31] Customary law is when practices "*acquire the force of law*"[32]. Two conditions have to be met in order to speak of customary law. The first requirement is that there must be a custom concerning a guideline for behavior. This custom must be effective: there must be general practice. This general practice can exist in multiple ways. A State can practice a custom by means of legislative acts.[33] There is no consensus about what is considered practice. It is for example debated whether speech counts as practice.[34] There is no specific limit to how many and which States must exercise a custom in order to be considered general practice. In the Paquete Habana case from 1900, the Supreme Court decided on a conflict between the United States (US) and Cuba.[35] During the Spanish-American war, the US seized the Paquete Habana, a Cuban ship seen as an enemy ship. The Court studied old decrees from England, France and the United States. It also found multiple bilateral treaties declaring that fishing vessels cannot be seized during times of war.[36] In this case, the Court did not separate the two conditions, but saw them as closely related. More importantly, the number of States the Court looked at for general practice is limited. However, the countries involved are the most important ones, in a case on maritime affairs. The second condition that has to be fulfilled is that the custom is accepted as law.[37] This is called the *opinio juris*. If a custom is not seen as legally binding, and a violation of the custom is not considered to be a reason for enforcement, the custom is not part of customary law.[38] Evidence of *opinio juris* is visible in State practice. For example, the enactment of a law is evidence of State practice, and is also evidence that the custom is accepted as legally binding. As mentioned before, the two conditions are closely related. General practice and *opinio juris* can both be found in legislation, treaties and court decisions, and can thus not always be seen as separate.[39]

2.2.4 General principles of law

"(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise

[31] Jaap Hage, & Bram Akkermans (eds.), *Introduction to law* (Springer: Switzerland 2014) 34.
[32] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 29.
[33] ibid 31.
[34] ibid.
[35] US Supreme Court, *The Paquete Habana*, 175 US 677 (1900)
[36] Klabbers (n 120) 32.
[37] Jaap Hage, & Bram Akkermans (eds.), *Introduction to law* (Springer: Switzerland 2014) 35.
[38] ibid.
[39] Klabbers (n 120) 33.

jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."[40]

The Rome Statute reads that the ICC only looks to general principles of law when both statute law and treaty law are not applicable.[41] General principles of law thus have a gap filling role.

2.2.4.1 What are general principles of law?

General principles of law have a subsidiary role. International organizations should only turn to general principles of law when there is no legal base in both statute law, treaty law, or customary law. [42] This is reflected in article 21 of the Rome Statute, which starts with the words "*failing that"*.[43] General principles of law gain three functions from this subsidiary role: filling legal gaps, interpreting legal rules, and reinforcing the legal reasoning of a previous decision.[44] Concrete answers to the question of what the general principles of law are exactly are lacking. There is no list of all the general principles, they are not a set of legal rules. Therefore, only those that are of importance in the ICC case will be discussed in the next chapter. General principles of law are used as a legal source in international tribunals such as the Permanent Court of International Justice (PCIJ) and the ICC.[45] General principles of law are a material source of international law: States and international organizations such as the ICC can lay down international legal rules that express the general principle.[46] General principles of law are derived from rules that exists in national legal systems.[47] Thus, national legal systems form a source of general principles of law.

2.2.4.2 How to determine general principles of law?

If general principles of law are not written down, the question is how to determine a general principle of law. It is up to the international courts and tribunals to decide whether a rule is seen as a general principle of law.[48] These institutions can do that by deriving them from the legal

[40] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 21.
[41] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 28.
[42] Neha Jain, 'Judicial lawmaking and general principles of law in international criminal law' (2016) 57 Harvard Intl. L. 112.
[43] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010*), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 21.
[44] Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (BRILL, 2018) 44.
[45] ibid 36.
[46] ibid 40.
[47] ibid 41.
[48] ibid 45.

rules of national legal systems. This is called the vertical move.[49] Since they are derived from these legal rules, the general principles of law are not rigid and permanent. International courts and tribunals can also verify that a legal principle is recognized by the generality of nations, and thus decide that legal principle to be a general principle of law. This is the horizontal move. The question is which and how many nations should recognize a principle in order to be seen as a general principle of law. The ICJ lays down the requirement of 'civilized nations' in article 38(1)(c) of the ICJ Statute.[50] This wording has been criticized, for some scholars believe nations to be civilized when these nations speak of a 'law'. A better way to determine which nations should recognize a principle is to speak of 'the community of nations'.[51] However, this term is vague. There is no mention of a specific number of nations that sets the limit. The Draft Statute of the ICC mentioned a list of States that should recognize a principle in order for it to be classified as a general principle of law in deciding the outcome of a case. This list includes the State on whose territory a crime was committed and the nationality of the perpetrator.[52] A test could thus be that the nations should be representative for a legal tradition, that could be based on geographic distribution.[53]

The manner of determining a general principle of law by deriving it from national laws makes general principles of law sometimes difficult to distinguish from customary law, since customary law is made by generalizing State practice, which is often visible in legislative acts.[54]

2.4 Conclusion

In any decision the Court makes, it has to adhere to the sources of international criminal law. These are laid down in article 21 of the Rome Statute, apart from *jus cogens* norms.[55] *Jus cogens* is the highest source of law and imposes universal jurisdiction on the most serious crimes, such as genocide. Any State can thus claim jurisdiction to a crime of genocide, without the need for a nexus to the crime in any way. The Rome Statute is a treaty, thus according to article 34 of the VCLT only applies to States who signed the treaty.[56] There are however exceptions to this

[49] ibid 48.
[50] United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: https://www.refworld.org/docid/3deb4b9c0.html article 38.
[51] Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (BRILL, 2018) 51.
[52] ibid 152.
[53] ibid 55.
[54] Bruno Simma, Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Aust. YBIL 82 (1988-1989).
[55] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 21.
[56] United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS, article 34.

pacta tertiis principle. When an obligation arising through a treaty is a rule of customary international law, it will not violate article 34 of the VCLT. Customary law is in its creation very similar to general principles of law, although general principles of law differ in that they have a subsidiary role. The Court should only make use of general principles in case treaty law and customary law do not suffice.[57] An international court such as the ICC can derive general principles of law from national legal rules. There is no clear test that determines which or how many nations should recognize a legal principle for the ICC to claim it as a general principle of law, however, it has been suggested that these nations should form a generality of nations representative for the relevant legal tradition.[58]

The Rome Statute is a treaty through which the ICC is established. It binds only its Member States. The Statute gives the Court the power to act over its Member States in cases laid down in the treaty. In the next chapter, it will be explained what jurisdiction is, and in what cases the Court can exercise it.

[57] Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (BRILL, 2018) 44.
[58] ibid 55.

Chapter 3 – Jurisdiction

3.1 Introduction

The Rome Statute through which the Court was established entails the power of the Court. It lays down in which cases the Court can exercise its jurisdiction. On September 6, 2018, the ICC decided that the Court has the power to exercise jurisdiction over the crime against humanity of deportation in Myanmar, even though Myanmar is not a Member State.[59] Myanmar, on the other hand, denies this jurisdiction for the very reason that they are not a Member State; they did not sign the Rome Statute.[60] The starting point of international law is that States are sovereign, and a legal entity such as the ICC can only exercise jurisdiction when a State allows them to.[61] Jurisdiction entails the power to exercise law.[62] It arises in domestic law as well as in international law. It refers to the competence of a State or another legal entity to make or enforce rules. There are five principles of jurisdiction, although not all are generally accepted. The ICC has jurisdiction over specific crimes in specific circumstances, that are laid down in the Rome Statute.[63] The Court only has this jurisdiction because their Member States granted the Court that power by signing the Rome Statute. What is jurisdiction, and in what cases can the ICC exercise it? This chapter will begin with an explanation of what jurisdiction in general is. This will be done by examining principles of international law. Next, the jurisdiction of the Court will be explained through evaluation of the Rome Statute.

3.2 Forms of jurisdiction

There are three ways in which jurisdiction may be exercised: legislative, adjudicative and executive. Legislative jurisdiction is the jurisdiction a State has to apply laws that impact legal interests. Adjudicative jurisdiction refers to the extend a State may try cases before its courts. Executive jurisdiction is the right to enforcement through police or military.[64]

3.3 Principles of jurisdiction

There are five traditional principles of jurisdiction.[65] None of these principles are laid down in international law. No State is obliged to accept all principles of jurisdiction. However, most

[59] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 44.
[60] ibid paras 16-17.
[61] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 99.
[62] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 49.
[63] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html articles 5 - 8.
[64] Cryer (n 62) 49.
[65] Jan Klabbers, *International Law* (2nd ed., Cambridge University Press, United Kingdom 2017) p. 99.

treaties include articles on jurisdiction in accordance with these principles. Some principles are uncontroversial, while others are not accepted by everyone.

3.3.1 Territoriality principle

The most traditional, and uncontroversial principle of jurisdiction is the territoriality principle. A State may claim jurisdiction over crimes which occurred on their territory.[66] A State is sovereign, and because of this sovereignty, it may exercise their jurisdiction over crimes that happen on its territory.[67] This also includes their airspace and territorial waters, therefore airplanes and ships are also seen as part of the territory of a State.[68] When two or more States are involved in a crime, territoriality can be divided into subjective and objective jurisdiction. A State can claim jurisdiction based on subjective territoriality when the crime originated on its territory, whereas it can claim objective territoriality when the effects of a crime can be felt on its territory.[69] This means that a crime has to start, continue, or finish on the territory of a State for this State to be able to claim jurisdiction. The decision made in the important Lotus case of 1927 was based on objective territoriality.[70] The S.S. Lotus was a French ship that collided with a Turkish ship on the high seas, which caused the death of eight Turkish people on board of the vessel. The PCIJ decided that Turkey did not act against international law by claiming jurisdiction over the French Lieutenant of the S.S. Lotus[71] when he was arrested two days after he stepped on Turkish territory.[72] The Court argued that this was the case because the effects of the collision were felt in Turkey. They thus adhered to the objective territoriality principle.

3.3.2 Nationality principle

The second principle of jurisdiction is called the nationality principle.[73] This principle is an uncontroversial one. States can claim jurisdiction when one of their nationals was the perpetrator of a crime. This jurisdiction can be claimed even when the crime was not committed on the territory of the state in question.[74] A crime committed in State A by a national of State B can be prosecuted in State B, based on this active nationality principle. In order to be a

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[66] Jaap Hage, & Bram Akkermans (eds.), *Introduction to Law* (Springer: Switzerland 2014) 254.
[67] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 52.
[68] ibid.
[69] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 100.
[70] ibid.
[71] George Wendell Berge, '*The Case of the S.S. Lotus'* (1928) 26 Mich. L. Rev. 361, 367.
[72] ibid 361.
[73] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 101.
[74] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 53.

national of a State, one must be recognized as such by the State. In the Notebohm case of 1953[75], one element for nationality jurisdiction was established. For an individual to be considered a national of a State by others, he must have a genuine link to the state he is a national of.[76] This can be by blood (the parents were of that nationality) or by soil (the individual was born on the territory of the State).

3.3.3 Passive personality principle

The passive personality principle refers to the jurisdiction a State can claim in case one of their nationals is the victim in a crime, regardless of the location or the nationality of the perpetrator of the crime.[77] This is a controversial principle, although it is increasingly accepted in cases of terrorism.[78] Some States do not accept this principle of jurisdiction, for it could seem as though a State were to view their own legal system as being better than that of another State.

3.3.4 Protective principle

The fourth principle of jurisdiction worth shortly mentioning is the protective principle, which entails that a State can claim jurisdiction over conduct that poses a threat to the State, even if this conduct occurs abroad.[79] This principle is widely accepted. It arises in cases such as counterfeiting money or preparing terrorist attacks.[80]

3.3.5 Universality principle

The most controversial principle of jurisdiction is the universality principle. Universal jurisdiction is the jurisdiction which States may exercise regardless of where, when, or by whom the crime was committed. It only applies to specific crimes.[81] These crimes are very serious by nature. Universal jurisdiction arose in response to piracy. Piracy is one of the crimes over which States can claim jurisdiction based on universality, because of the nature of this crime. Piracy occurs on the high seas, far away from any territory, and the nationalities of the perpetrators are usually diverse.[82] Universality gradually expanded into a jurisdiction over more crimes.[83] After the Second World War, the universality principle laid at the basis of claims of jurisdiction over

[75] ICJ, *Nottebohm Case (Liechtenstein v. Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955, available at: https://www.refworld.org/cases,ICJ,3ae6b7248.html.
[76] ibid 54.
[77] Jan Klabbers, International law (2nd ed., Cambridge University Press, United Kingdom 2017) 102.
[78] Jaap Hage, & Bram Akkermans (eds.), *Introduction to law* (Springer: Switzerland 2014) 254.
[79] Cryer (n 74) 56.
[80] Hage (n 78) 254.
[81] ibid 258.
[82] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 102.
[83] Kenneth C. Randall, 'Universal Jurisdiction under International Law' (1988) 66 Tex. L. Rev. 785, 789.

certain war crimes and crimes against humanity.[84] The Nuremberg Trials, for example, already introduced the idea that some crimes are too gruesome to be defended upon by immunity for high officials.[85] It was argued that these crimes were atrocious, and against all of humanity. Instead of acting out of their own interest, States can act out of the interest of the international community.[86] A famous case in which universal jurisdiction was exercised is the case of Adolf Eichmann. Eichmann was a German Lieutenant Colonel of the Waffen SS, and was responsible for deportation more than two million Jews to extermination camps.[87] In 1960, he was abducted from Argentina by the Israeli Secret Service, and brought to Tel Aviv for prosecution. The District Court of Jerusalem argued a claim to jurisdiction on the basis of universality, because of the graveness of the crimes committed by Eichmann. The Supreme Court of Israel affirmed this universal jurisdiction because of the universal character of the crimes.[88] The use of universal jurisdiction claims is, as said, controversial. Some States argue that there is (or should be) no such thing as universality, for it coincides with the sovereignty of States.[89] One of the most vocal States that hold this view is the United States. The US does not argue with the universal jurisdiction over the 'crime of all crimes' of genocide, but is however reluctant to accept universal jurisdiction over crimes against humanity and war crimes.[90] The US is of the opinion that the universality principle interferes with State sovereignty. A State should not be able to exercise jurisdiction over another State's nationals. The US fears politically motivated accusations, considering its significant role in peacekeeping missions worldwide.[91] In practice, universal jurisdiction is generally accepted as a customary law principle[92], however, it is not seen as obligatory.[93]

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[84] ibid.
[85] M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Va. J. Int'l L. 81, 84.
[86] ibid 96.
[87] John K. T. Chao, 'Individual Responsibility in International Law for Crimes Against Humanity: The Attorney-General of the Government of Israel v. Adolf Eichmann (1961), 24 Chinese (Taiwan)' (2006) Y.B. Int'l L. & Aff. 43, 46.
[88] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 60.
[89] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 601.
[90] Bartram S. Brown, 'The Evolving Concept of Universal Jurisdiction', 35 New Eng. L. Rev. 383 (2001) 385-386.
[91] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 601.
[92] ibid 591.
[93] Bartram S. Brown, 'The Evolving Concept of Universal Jurisdiction', 35 New Eng. L. Rev. 383 (2001) 396.

3.4 Jurisdiction of the ICC

The ICC is not a State; it does not have a territory, nor does it have a population. It is not a sovereign entity. States are sovereign, but can voluntarily give a legal entity like the ICC certain powers. They can grant the ICC permission to exercise jurisdiction in cases laid down in the Rome Statute. State have to sign and ratify this Statute in order to allow the ICC the right to exercise jurisdiction in certain cases.

The ICC can only exercise jurisdiction over four crimes: the crime of genocide, crimes against humanity, war crimes, and since 17 July 2018 also the crime of aggression.[94] These are considered to be the most serious crimes against all of humanity, generally referred to as 'core crimes'. These crimes are further defined in articles 6, 7, 8 & 8bis.[95] At the Rome Conference, it was concluded to not include drug trafficking and terrorism in the jurisdiction of the Court, for these are of a different character than the core crimes.[96] The Court can only exercise jurisdiction over crimes that occurred after the entry into force of the Statute, or after the date the Member State ratified the Statute.[97]

Laid down in article 13 are the three trigger mechanisms in which the ICC can obtain jurisdiction.[98] A crime can be referred to the Prosecutor by a Member State, it can be referred by the United Nations Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations (UN), or the Prosecutor can refer a situation to the Court. This power is conferred upon the Court by article 15.[99] This referral requires authorization of the Pre-Trial Chamber, for there must be a reasonable basis to proceed.[100] In case the crime is not referred to the Court by the UNSC, there are certain preconditions to the exercise of jurisdiction, which are laid down in article 12 of the Rome Statute.[101] The ICC only has jurisdiction over a crime if it occurred on the territory of a Member State, or if the perpetrator of the crime is a national

[94] Claus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 JICJ 1, 15.
[95] UN General Assembly, *Rome Statute of the International Criminal* Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html.
[96] Philippe Kirsch, Darryl Robinson, 'Reaching agreement at the Rome Conference' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 78.
[97] UN General Assembly (n 95) art 11.
[98] ibid.
[99] ibid article 15.
[100] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 164.
[101] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art 12.

of a Member State. This thesis will focus on the territoriality principle, which is laid down in article 12(2)(a). The article reads:

> *"2. 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; "*[102]

This means that the ICC can exercise jurisdiction over crimes that happened on territories of states that are party to the Rome Statute.

3.5 Conclusion

Jurisdiction is the power to exercise law.[103] There are five principles of jurisdiction.[104] The territoriality principle is the most accepted and uncontroversial principle of jurisdiction. Following the notion of sovereignty, it is generally accepted that a State has jurisdiction over crimes which happen on its territory.[105] The ICC has jurisdiction over four specific cases: the crime of genocide, war crimes, crimes against humanity, and crimes of aggression.[106] States are sovereign, thus, the ICC can only exercise this jurisdiction if a State has explicitly given them the power to do so by signing the Rome Statute and becoming a Member State. The jurisdiction of the Court is based on the territoriality and the nationality principles, laid down in article 12.[107] The ICC is a legal entity without a territory of its own. The territories over which the Court can exercise jurisdiction are the territories of Member States. However, the ICC has argued that they can exercise jurisdiction over a crime which occurred in a non-Member State. In the next chapter, the crime in question and the decision of the Court will be discussed.

[102] ibid.
[103] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 49.
[104] Jan Klabbers, *International law* (2nd ed., Cambridge University Press, United Kingdom 2017) 99.
[105] Cryer (n 103) 52.
[106] UN General Assembly (n 101) art 5.
[107] ibid art 12.

Chapter 4 – Myanmar & ICC decision

4.1 Introduction

The ICC was established when the Rome Statute entered into force in 2002.[108] At that time, 60 States signed and ratified the Statute, and thus became Member States. Myanmar was not one of those States, and did not become a State party later on. The Rome Statute is thus not legally binding upon Myanmar, as the ICC does not have jurisdiction over non-Member States. However, on September 6, 2018, the ICC decided that it does have jurisdiction over the crime against humanity of deportation in Myanmar.[109] The violence that erupted from a military action on August 25, 2017, forced over 700.000 Rohingya Muslims to flee to the neighboring country Bangladesh.[110] This chapter will provide what amounts to a crime of deportation. When does fleeing constitute a crime of deportation? In order to explain this, the current situation in Myanmar will be examined. Furthermore, this chapter will elaborate on the decision of the Court. How did the Court argue for a broad reading of article 12(2)(a)? The case will be thoroughly examined, and the arguments of the Court will be explained.

4.2 Situation in Myanmar

4.2.1 History

The Rohingya people are an ethnic and religious minority in Buddhist Myanmar: 87% of the population in Myanmar is Buddhist.[111] Their ancestry is contested: not all inhabitants believe that the Rohingya are native to Myanmar, but rather to Bengal. For this reason, some call the Rohingya "Bengalis" or "Bangladeshis" instead.[112] They argue that the Rohingya came from neighboring Bengal to Burma as laborers when the latter came under British colonial rule in 1826.[113]

Although violence against Rohingya has spiked recently, it is not new. There has been tension in Rakhine State, one of the Northern states of Myanmar, for centuries between the two main populations of that state: the Rohingya Muslims and the Rakhine Buddhists.[114] This can be traced back to Second World War, when the Rohingya Muslims remained loyal to the British

[108] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 50.
[109] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018.
[110] Christina Fink, *Myanmar in 2018: The Rohingya crisis continues* (2019) 59(1) Asian Survey 177.
[111] ibid 179.
[112] Syed S. Mahmood, Emily Wroe, Arlan Fuller, & Jennifer Leaning, *The Rohingya people of Myanmar: Health, human rights, and identity* (2017) 381(10081) The Lancet 1841.
[113] ibid.
[114] Christina Fink (n 110) 180.

rulers, while the Rakhine Buddhists aligned with the Burmese, and thus the Japanese. They were on opposite sides of the war.[115] The violent acts that occurred on both sides are the cause for unresolved trauma.[116] After the country gained independence from the British in 1948, some Rohingya received national registration cards.[117] Most of the trouble for the Rohingya began when the military took power in 1962.[118] The military took measures that led to the dehumanization of the Rohingya people, such as renaming the state Arakan to Rakhine State, and thus confirming the rights of the Rakhine in that state, ignoring all the Rohingya that live in that State. A Citizenship Law in 1982 stripped the Rohingya of their nationality. The law put the burden on ethnicities to prove that their ancestors originate from Myanmar. Unable to do so, they were no longer recognized as citizens to Myanmar, and lost all the rights that come with having a nationality. Instead, they were now 'illegal foreigners' in the country.[119]

4.2.2 Recent violence

More recent violence between Rohingya and Rakhine people broke out in June 2012, following the rape and murder of a Buddhist women by three Rohingya men in Rakhine State.[120] After a three month curfew, violence swiftly erupted again once it was lifted in October. After this major incident, it remained relatively calm until 2016. There were no outbursts of violence, although the period was one of tension, with no attempts at resolution of the conflict. Between October 2016 and February 2017, military actions with an attempt to get rid of militant Rohingya who had organized themselves in the ARSA were performed.[121] They were a response to a deadly attack launched by this Muslim militant group. A second military attack was launched in August 2017, in which 350 Rohingya villages were burned. This caused 700.000 Rohingya to flee to Bangladesh.

4.2.3 Rohingya forced to flee

Currently, there are approximately 850.000 Rohingya people living in refugee camps in Bangladesh.[122] Another 600,000 Rohingya remain in Myanmar, of which a third are housed in

[115] Anthony Ware, & Costas Laoutides, 'Myanmar's 'Rohingya'conflict: Misconceptions and complexity' (2019) 50(1) Asian Affairs 67.
[116] ibid 64.
[117] Syed S. Mahmood, Emily Wroe, Arlan Fuller, & Jennifer Leaning, 'The Rohingya people of Myanmar: Health, human rights, and identity' (2017) 381(10081) The Lancet 1842.
[118] ibid.
[119] ibid.
[120] Anthony Ware, & Costas Laoutides, 'Myanmar's 'Rohingya'conflict: Misconceptions and complexity' (2019) 50(1) Asian Affairs 64.
[121] ibid 65.
[122] Anthony Ware, & Costas Laoutides, 'Myanmar's 'Rohingya'conflict: Misconceptions and complexity' (2019) 50(1) Asian Affairs.

Internally Displaced Persons (IDP) camps which were established in 2012 after a surge of violence.[123] However, they are not allowed to go and come as they please: these IDP camps have become detention camps.[124] Residents of these IDP camps must have special identification cards on them at all times.[125] The stripping of their nationality has left the Rohingya people without the fundamental rights that come with having a nationality. There is no list of rights that a national of a State has, as this differs per State.[126] The stateless Rohingya are no longer entitled to the rights prescribed to citizens in the laws of Myanmar. In addition to losing their right to free movement from the IDP camps, the Rohingya have also been denied employment, access to education and food and medicine.[127] This is why the large amount of Rohingya fled from Myanmar to Bangladesh. Fleeing might seem like a voluntary action. How can the Pre-Trial Chamber 1 then argue for the alleged crime of deportation?

The crime of deportation is one of the crimes against humanity listed in the Rome Statute article 7.[128] A requirement for a crime against humanity is that the crime must be committed as part of a widespread or systematic attack directed at a civilian population.[129] The Nuremberg Charter put down the first list of crimes against humanity, which already included deportation.[130] The crime of deportation is one of the crimes against humanity the ICC has jurisdiction over, listed in article 7(1)(d).[131] Further elaboration in the elements of the crimes adopted by the ICC provides that it is a crime of deportation when one or more person is forcibly deported to another state or location, "*by expulsion or other coercive acts*"[132] from an area in which they were lawfully present.[133] The displacement must be forceful in order to constitute a crime of deportation.[134] "*Expulsion or other coercive acts*" is further defined in one of the footnotes of the elements of crimes, which specifies that the displacement does not need to be physical in

[123] ibid 63.
[124] Syed S. Mahmood, Emily Wroe, Arlan Fuller, & Jennifer Leaning, 'The Rohingya people of Myanmar: Health, human rights, and identity' (2017) 381(10081) The Lancet 1842.
[125] Amnesty International, *"All the civilians suffer": Conflict, displacement, and abuse in Northern Myanmar* (2017), retrieved from amnesty.org, 32.
[126] Laura van Waas, *Nationality Matters* (Intersentia, Antwerp 2008) 218.
[127] Amnesty International (n 125) 36.
[128] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art. 7(1)(d).
[129] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014).
[130] ibid 230.
[131] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html.
[132] *Elements of Crimes*, International Criminal Court (ICC), September 2002, art. 7(1)(d).
[133] *Elements of Crimes*, International Criminal Court (ICC), September 2002.
[134] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html Art. 7(2)d.

order to constitute deportation.[135] It can also be through acts or threats of violence and oppression.[136] The Trial Chamber of the ICTY decided in the case *Prosecutor v Krstic* that discrimination is not enough for departure to be forceful.[137] However, when a group of people fled in order to survive, these people had no *genuine choice*, and were thus forced to relocate.[138] In the case *Prosecutor v Ruto et al.*, the Pre-Trial Chamber II of the ICC decided that acts of "*looting, burning and destruction of property*" forced civilians to relocate, and thus amounted to deportation.[139] The destruction of homes is also included as a coercive act, as the Pre-Trial Chamber II decided in *Prosecutor v Muthaura.*[140] It can be concluded that the military attacks on the Rohingya people and the burning of their villages are coercive acts which forced the Rohingya to relocate in order to survive. These acts thus amount to deportation.

4.3 Pre-Trial Chamber I ruling

4.3.1 Request for a ruling on jurisdiction

On September 6, 2018, the Pre-Trial Chamber I of the ICC decided on the Prosecutor's request for a ruling on jurisdiction under article 19(3) of the Rome Statute, thus to see whether the ICC has the power to exercise jurisdiction over the crime in Myanmar.[141] The Court ruled in favor.

The Court is not concerned with the conflict in Myanmar itself: the ruling was purely on the question of jurisdiction. The core question the ICC ruled over was "*whether the Court may exercise jurisdiction under article 12(2)(a) over the alleged deportation of the Rohingya people from Myanmar to Bangladesh*".[142] The Court first establishes their power to rule over jurisdiction cases. The Court explains how it has jurisdiction to decide on cases on their own jurisdiction based on article 19(3), which is also in accordance with international law principles. article 19(3) reads that "*the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility*"[143]. The argument the Court makes is that it is an established principle of international law that "*any international tribunal has the power to determine the*

[135] *Elements of Crimes*, International Criminal Court (ICC), September 2002, footnote 12.
[136] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 248.
[137] *Prosecutor v Krstic*, ICTY, IT-98-33-T, 02 August 2001, para 528.
[138] ibid para 530.
[139] *Prosecutor v Ruto et al.*, ICC PT. Ch. II, ICC-01/09-01/11-373, 23 January 2012, para 277.
[140] *Prosecutor v Muthaura et al*., ICC PT. Ch. II, ICC-01/09-02/11-382-Red, 23 January 2012, para 244.
[141] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018.
[142] ibid para 27.
[143] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html.

extent of its own jurisdiction"[144]. In French, this principle is called *la compétence de la compétence.*[145] The Court provides several cases in which this principle of international law has been used. This goes back as far as 1953, when the ICJ recognized this as a principle of international law in the Notebohm case.[146] Multiple international tribunals have reaffirmed this principle, including Chambers of the ICC itself.[147]

The Court goes on to emphasize the international character of the Court.[148] It recalls the ICJ pronouncement that the UN holds objective international personality, which gives them competences in certain cases that can extend to non-Member States (in case of a threat to peace and security).[149]

The Pre-Trial Chamber I sees differences and similarities between the UN and the ICC. When the Court was established in 1998, 120 States voted in favor of the establishment of the Court. The UN had 185 Members at that point. The Court furthermore notices the intention of the drafters of the Rome Statute to connect the UNSC with the Court.[150] The UNSC can refer a situation to the ICC.[151] If a State is Member of the UN, it is duty bound to cooperate with the Court, even if it is not a Member of the ICC. In addition, the Court mentions that in some instances, the Statute may have an effect on non-Member States.[152] The Court gives three arguments. Firstly, general characteristics of the Statute, purposes and considerations of *erga omnes* character set forth in the preamble. Secondly, the application of provisions. Lastly, voluntary cooperation with the Court of non-Member States. The Court then concludes that the ICC, like the UN, compasses objective international personality, "*with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole*"[153]. To have objective international personality means that non-Member States cannot

[144] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, 12.
[145] Chittharanjan F. Amerasinghe, *International Arbitral Jurisdiction* (Nijhoff: Leiden 2011) 31.
[146] *Nottebohm Case (Liechtenstein v. Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955, available at: https://www.refworld.org/cases,ICJ,3ae6b7248.html.
[147] Chittharanjan F. Amerasinghe, *International Arbitral Jurisdiction* (Nijhoff: Leiden 2011) 31-32.
[148] *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 48.
[149] ibid para 37.
[150] ibid para 25.
[151] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art. 13(b).
[152] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, paras 44-47.
[153] ibid para 29.

doubt the ICC's competence as an international institution.[154] It confirms the Court's legal existence, even towards non-Member States. What the court emphasizes next is very important: this objective legal personality of the Court does not imply *erga omnes* jurisdiction.[155] The conditions for the jurisdiction are set out in the Rome Statute. The Court has jurisdiction over the crime of deportation under article 7(1)(d) of the Rome Statute: "*Deportation or forcible transfer of population*;"[156]. The deportation has to be forceful, but can be through coercive acts, rather than physical relocation.[157]

The most important part of the case is the Court's interpretation of article 12(2)(a) of the Statute. The finding of the Court is that the preconditions for the exercise of jurisdiction pursuant to article 12(2)(a) are fulfilled if at least one legal element of a crime or part of a crime that falls under the Court's jurisdiction is committed on the territory of a Member State. The Court has two main arguments for this contextual interpretation of the article in question. Firstly, in general the Court argues that territoriality *"is not an absolute principle of international law and by no means coincides with territorial sovereignty*".[158] Elaborately, the Court explains that a number of national jurisdictions contain legislation that mention that the exercise of criminal jurisdiction requires the commission of at least one legal element of the crime on the territory of a State.

The second main argument is that of the object and purpose of the Statute. The Court cites the VCLT, article 31(1): "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". The preamble of the Rome Statute reads that "*the most serious crimes of concern to the international community as a whole must not go unpunished*".[159] The Court writes that article 12(2)(a) is a compromise made by the States at the Rome Conference of 1998 that "*allows the Court to assert jurisdiction over the most serious crimes of concern to the international community as a whole on the basis of approaches to criminal jurisdiction that are*

[154] Gennady M. Danilenko, 'ICC Statute and Third States' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 1873.
[155] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 49.
[156] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html, art 7(1)(d).
[157] *Elements of Crimes*, International Criminal Court (ICC), September 2002.
[158] ICC (n 155).
[159] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html.

firmly anchored in international law and domestic legal systems"[160], meaning that the intention of the drafters was to extend the Court's jurisdiction to the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems. Thus, the Court concludes that a restrictive reading of article 12(2)(a) would not be in line with the object and purpose of the Statute. To add to this argumentation, the Court emphasizes the inherently transboundary nature of the crime of deportation.[161] The crime of deportation is forced displacement across international borders, which means that the conduct of the crime must take place on more than one territory.

4.3.2 The decision

The Court thus concludes that the minimum precondition for the exercise of jurisdiction is that at least one element of the crime must occur on the territory of a Member State. Because of the inherently transboundary nature of the crime of deportation, the conduct necessarily has to occur on at least two territories. One element of the crime, the completion, took place in Bangladesh, Member to the Rome Statute. The Court thus came to the conclusion that the ICC can exercise its jurisdiction based on a contextual interpretation of article 12(2)(a) over the crime of deportation as a whole, regardless of the fact that Myanmar is not State Party.

4.4 Conclusion

Myanmar has seen violence for centuries, although it has spiked since August 2017.[162] This violence against the Rohingya caused them to flee to neighboring State Bangladesh. Relocation must be forceful in order to amount to deportation.[163] Fleeing might seem voluntary. However, the military attacks and the burning of the Rohingya villages qualify as coercive acts, and thus the crime amounts to deportation. As Myanmar is not party to the Rome Statute, the ICC has no jurisdiction over crimes that occur on their territory. However, the Court used a contextual interpretation of article 12(2)(a) of the Rome Statute. This interpretation is based on two main arguments: a number of national jurisdiction of the Court's Member States contain legislation that mention that the exercise of criminal jurisdiction requires the commission of at least one legal element of the crime on the territory of a State, and a restrictive reading would not be in

[160] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, 40-41.
[161] ibid 41.
[162] Christina Fink, 'Myanmar in 2018: The Rohingya crisis continues' (2019) 59(1) Asian Survey 177.
[163] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010),* 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art. 7(2)d.

line with the object and purpose of the Statute.[164] The judges argue that the crime of deportation necessarily takes place on two territories because of the inherently transboundary nature of the crime, and the Court can thus exercise jurisdiction over that crime if at least one of these territories belong to a State that is a Member.[165] In doing so, the Court extends the principle of territoriality. The next chapter will examine whether this interpretation is allowed under international law, and whether the decision of the Court in justified in light of the sources of international criminal law.

[164] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, paras 64-69.
[165] ibid para 44.

Chapter 5 – Contextual interpretation article 12(2)(a)

5.1 Introduction

The decision of the Court to extend their jurisdiction to a non-Member State when a crime partially takes place on the territory of a Member State imposes certain obligations on non-Member States. This seems to be directly in violation of article 34 of the VCLT, which reads that no treaty imposes obligations or duties on states who are not party to the treaty.[166] The Court justifies this violation of article 34 by claiming that a contextual reading of article 12(2)(a) of the Rome Statute is necessary to be in line with the object and purpose of the statute, and further argues that numerous states adopted this extended territorial principle.[167] Is the Court decision justified in interpreting article 12(2)(a) in such a broad way? This chapter will examine treaty law on the interpretation of treaties. It will show whether the interpretation of the Court is in line with these rules on interpretation. The Rome Statute will be examined to provide the context for article 12(2)(a) and the object and purpose of the ICC. Next, the preparatory works of this article will be thoroughly studied to find the ordinary meaning. This way, the interpretation of the Court will be examined against treaty law (is the interpretation in line with the original meaning of the drafters?). Furthermore, the decision of the Court will be examined in light of the principle of legality.

5.2 Treaty law on interpretation

The Court extends its territorial jurisdiction by interpreting article 12(2)(a) in a contextual manner.[168] Article 31 of the VCLT provides the general rule of interpretation of treaties. The article reads: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[169] This means that in interpreting a term, it should be determined what the common intention of the parties is, to find the ordinary meaning.[170] A term or article of a treaty should be read in light of the intentions of the States party to the treaty. It should furthermore be interpreted in context of the entire treaty, and in light of the object and purpose. The object and purpose of a treaty can usually be found in the preamble. This reflects the intention of the drafters of the treaty as a whole. Should the ordinary meaning of the article not provide ample

[166] United Nations, *Vienna Convention on the Law of Treaties (1969),* 1155 UNTS, art 34.
[167] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018 para 66.
[168] ibid para 65.
[169] United Nations, *Vienna Convention on the Law of Treaties (1969),* 1155 UNTS, article 31(1).
[170] Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission* (Oxford University Press, Oxford 2011) 109.

clarification on what a term should be interpreted to mean, the preparatory works of the treaty can help to determine how a treaty article should be interpreted, according to article 32 of the VCLT.[171] This means establishing what the meaning of the article was at the time of conclusion of the treaty, what the options for the drafters of the article were, and how it came to be. Article 31(3) furthermore establishes that in interpretation, a term should not only be read in its context, but also in the wider context of rules of international law.[172]

5.2.1 Context

The interpretation of a part of a treaty should be in light of the context of the treaty as a whole. Articles are not written in isolation, they are linked to the treaty they appear in.[173] The meaning of article 12(2)(a) should be interpreted in light of the Rome Statute as a whole. The Rome Statute puts forth the establishment of an international permanent criminal court, to prosecute people for crimes against the international community as a whole. The establishment of such a Court was almost universally accepted.[174] The intention was to establish a Court that would have jurisdiction over the most serious crimes, for domestic jurisdiction could not be trusted to prosecute those, since these crimes are often committed by politically or military officials.[175] However, the Court does not enjoy universal jurisdiction. The exercise of the Court's jurisdiction is depended on the acceptance of the territorial State, or the State of nationality of the accused. At the moment a State becomes party to the Rome Statute, it accepts the Court's jurisdiction over the crimes expressed in article 5.[176] However, the Court has the power to extend its jurisdiction through multiple provisions, to prevent the territorial jurisdiction to become a loophole.[177] If a crime is referred to the Court by the UNSC, the Court has jurisdiction over the crime regardless of the location or the nationality of the perpetrator of the crime.[178] Furthermore,

[171] United Nations, *Vienna Convention on the Law of Treaties (1969),* 1155 UNTS, art 32.
[172] ibid art 31(3).
[173] Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission* (Oxford University Press, Oxford 2011).
[174] Stéphane Bourgon, 'Jurisdiction Ratione Loci' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 567.
[175] Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction* (2002) 184.
[176] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art 5.
[177] Bourgon (n 174) 569.
[178] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art 13(b).

a non-Member State may accept the jurisdiction of the Court *ad hoc* by lodging a declaration, granting the Court the right to exercise jurisdiction over that specific crime.[179]

5.2.2 Object and purpose

Any interpretation of part of a treaty should be in line with the object and purpose of the treaty as a whole. In most cases, this object and purpose can be found in the preamble. The intention of the contracting States was to establish a permanent international court with the power to prosecute people for the most serious crimes to the international community as a whole. The preamble reads that the Court is "*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,"*[180] The ICC's jurisdiction would be complementary to national jurisdictions: the ICC would only act where a State is unable or unwilling to do so itself.[181] The contracting States conferred upon the Court international legal personality, which is laid down in article 4 of the Rome Statute.[182] This means that the Court has legal competency, which is undeniable for non-Member States. The Court has derived its power from its Member States, who thus have the power to confer the right they themselves would have under international law on the Court.[183] The preamble reaffirms that States should respect the national integrity of states.[184] The Court was established to be in close link with the UN, as is reflected in the preamble: "*Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system […]*"[185]. This is furthermore reflected in article 2 of the Rome Statute that establishes the close relationship of the Court with the United Nations.[186] This close link with the UN is especially of relevance to the Security Council. Through a referral of the UNSC, the UN has the power to extend the jurisdiction of the ICC to non-Member States, in order to secure that the most serious

[179] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010),* 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 12(3).
[180] ibid preamble.
[181] ibid preamble: "*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".*
[182] ibid art 4.
[183] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 592.
[184] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010),* 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html Preamble.
[185] ibid.
[186] ibid article 2.

crimes do not go unpunished.[187] The UNSC additionally has power to defer an investigation or prosecution according to article 16.[188]

Thus, the object and purpose of the Rome Statute is the establishment of a Court with jurisdiction over the core crimes that are of concern to the international community as a whole, and leave no room for impunity. The Court is complementary and does not have universal jurisdiction. However, the Statute does provide multiple provisions through which the jurisdiction of the Court can be extended, most notably the close relationship of the Court with the UN.

5.3 Interpreting article 12

Article 12(2)(a) is the central legal source for determining the scope of the territorial jurisdiction of the Court. The Court argues that a contextual interpretation of article 12(2)(a) is necessary, even though it imposes certain obligations on Myanmar as a non-Member State.[189]

5.3.1 Contextual reading article 12(2)(a)

The Court argues for a contextual reading of article 12(2)(a), which forms the justification for the expansion of this article.[190] The Court rules that only one element of a crime has to take place of the territory of a Member State in order for the court to have jurisdiction over the crime.[191] According to the Chamber, this contextual reading is necessary and justified for two main reasons. Territoriality is not an absolute principle and multiple jurisdictions from Member States contain legislation that mention territorial jurisdiction over a crime partially committed on the State's territory.[192] The Court argues that this is just because of the international legal personality they have obtained. This is an important argument, although not decisive. The second main argument is that of the object and purpose of the Statute. As elaborated upon earlier this chapter, the object and purpose of the statute is to prosecute perpetrators for the most serious crimes of concern to the international community as a whole.

[187] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010*), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 13(b).
[188] ibid article 16.
[189] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 65.
[190] ibid.
[191] ibid para 64.
[192] ibid para 66.

5.3.2 Preparatory works

The drafting of article 12(2)(a) of the Rome Statute was one of the most controversial points of negotiation at the Rome Diplomatic Conference.[193] The article as it is written down is the result of a compromise between two opposing principles of customary international law: universal jurisdiction and State sovereignty. On the one side, many States wished for the Court to have universal jurisdiction over the core crimes of genocide, war crimes and crimes against humanity. On the opposing side were States, most notably the US, arguing for a more restrictive jurisdiction. The establishment of a permanent international criminal court was widely supported: the negotiations were of almost universal participation.[194] The main discussions were how the jurisdiction of the Court would be triggered and which states, if any, would have to accept the Court's jurisdiction.

The reasoning of States proposing universal jurisdiction for the Court was that the core crimes that constitute the *ratione materiae* (subject-matter jurisdiction) of the Court enjoy universal jurisdiction under customary international law.[195] All States may claim jurisdiction over these crimes. Thus, it seemed logical to these States that they had the power to confer these individual claims of jurisdiction to an international entity, which would thus be able to claim universal jurisdiction. Although it is generally argued that based on State practice, the customary law principle of universal jurisdiction does apply to crimes of humanity, this is contested by some States, such as the United States.[196] The US argues that this principle conflicts with the principle of State sovereignty, and thus prefers a more restrictive jurisdiction for the Court.[197]

The 1994 Draft Statute by the ILC formed the start of negotiations. This draft put forth a rather restrictive jurisdiction, which lead to issues among states. The main questions around article 12 concerned automatic or optional jurisdiction, and the question of which States would have to accept jurisdiction.[198] A preparatory committee was established.[199] The draft it submitted in

[193] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 584.
[194] ibid.
[195] ibid 587.
[196] ibid 590.
[197] Ibid 599.
[198] ibid 596.
[199] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 148.

1998 containing the most relevant proposals formed the basis for the negotiations at the Rome Conference.[200]

5.3.2.1 UK proposal

The first proposal was that of the United Kingdom (UK). Regarding article 12, the UK proposed automatic jurisdiction, meaning that a State would accept the Court's jurisdiction by ratifying the Statute. The States that had to accept the Court's jurisdiction were both the custodial state, and the territorial state.[201] However, States thought this proposal was too restrictive. As a response came the proposal by Germany.

5.3.2.2 German proposal

The German proposal was the most vocal proposal for the notion of universal jurisdiction. Germany believed that the ICC should have the same jurisdiction as their Member States have under international law, since the States can confer the authority to exercise jurisdiction they have themselves on the Court.[202] Germany thought this to be logical, since the material jurisdiction of the Court would consist of the most serious crimes of concern to the international community as a whole, and it would ensure the effectiveness of the Court and not leave room for any loopholes.[203] With the German proposal, there would be no need for preconditions for jurisdiction, and thus article 12 of the Statute could be eliminated entirely.[204] A State would not need to have a nexus to the crime in order to be able to claim jurisdiction over it.[205] There was much support for the German proposal.[206] However, a significant amount of States, among whom most notably the US, were firmly opposed to this view.

5.3.2.3 Korean proposal

The proposal that resembles the jurisdiction of the court as it is now the most is the Korean proposal. The Republic of Korea proposed a draft statute with automatic jurisdiction, and the requirement of acceptance from one or more of the four interested states, which entailed the territorial state, the custodial state, the State of the nationality of the perpetrator or the State of

[200] ibid.
[201] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 597.
[202] Christopher Keith Hall, 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) American Journal of Int. L. 550.
[203] Hans-Peter Kaul (n 201) 598.
[204] ibid.
[205] Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction* (2002) 180.
[206] Kaul (n 201) 598.

the nationality of the victim.[207] The Korean proposal was already a compromise between the two opposite views of the UK and the German proposals. It required a nexus to the crime without accumulation of State consent, while still relying on State consent for the Court's jurisdiction. Korea argued that the jurisdiction of the Court is based on the consent of States. Universal jurisdiction for the Court would not be compatible with the complementarity of the Court.[208] The Korean proposal acquired wide support by many States and NGOs.[209]

5.3.2.4 United States proposal

However, the US was of different opinion and opposed to previous proposals. The US especially emphasized the need for the State of nationality of the accused together with the territorial State to accept the Court's jurisdiction.[210] The US felt it unacceptable for a Court to exercise jurisdiction over nationals of a non-Member State. The US further showed support for an 'opting-in' approach, where each State had to accept ad hoc jurisdiction of the Court for each specific crime.[211] However, the majority of States felt this approach to jurisdiction was too wide and would not make for an effective court.[212]

5.3.3 Compromise

The outcome of these proposals was a compromise made by the Conference Bureau. In this proposal, article 12 was presented as it currently is: automatic jurisdiction, in combination with State acceptance as a precondition. The ICC can only exercise its jurisdiction if either the territorial State or the State of nationality of the accused are State parties to the Rome Statute.[213] The United States missed the need for consent of the State of the nationality and proposed a restrictive amendment in the final session which included this nationality nexus. The amendment did not gain much support and was outvoted.[214]

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[207] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 599.
[208] Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction* (2002) 181.
[209] Philippe Kirsch, John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) The American Journal of Int. L., Vol. 93, No. 1, 2-12 ; Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction* (2002) 182.
[210] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 149.
[211] Kaul (n 207) 600.
[212] ibid.
[213] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html article 12.
[214] Kaul (n 207) 605.

Article 12 was thus a compromise between two conflicting principles of customary international law (universal jurisdiction and state sovereignty) with the principles of territoriality and nationality at its basis. A majority of States favored universal jurisdiction, or a disjunctive list of States whose consent was needed, as in the Korean proposal, to ensure the greatest possible justice.[215] However, some States preferred a more restrictive approach towards the exercise of jurisdiction, especially the United States. The article was food for much discussion. The wording of the article is not extensive and detailed, as a result of the difficult drafting process.

The intention of the drafters was to put the territoriality principle at the basis of *the loci rationale*. The Court does not enjoy universal jurisdiction over all crimes, but many provisions are in place to provide the possibility of extension of their jurisdiction.

5.4 Interpretation in light of international law

A part of a treaty should be interpreted in light of international law.[216] The intention of the drafters was for the court to exercise jurisdiction the States themselves have under international law. The German proposal was based on this approach. The Court furthermore points out that multiple nations have adopted laws that reflect the idea that one element of a crime is sufficient for a claim of territorial jurisdiction.[217] As explained in a previous chapter, the territoriality principle consists of multiple principles: the principle of objective and subjective territoriality. With these principles, only a part of a crime is committed on a State's territory. The principle of objective territoriality, where a State can claim jurisdiction when a crime is concluded on its territory, was already established in the Lotus case of 1927.[218] Even the Dutch jurist Matthaeus already voiced what is now generally accepted in international criminal law in the 1622 *De Criminibus*: it is sufficient for one constituent element of a crime to take place on the territory of a State for it to claim jurisdiction.[219] This is called the ubiquity principle.[220] It differs per domestic jurisdiction what extent the element must be. In the UK, for example, the State can exercise jurisdiction only where the last relevant act took place on its territory.[221] Germany enjoys a wider territorial jurisdiction. The German Criminal Code establishes that the German

[215] Philippe Kirsch, Darryl Robinson, 'Reaching agreement at the Rome Conference' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 83.
[216] United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS, art 31(3)(c).
[217] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 66.
[218] George Wendell Berge, '*The Case of the S.S. Lotus'* (1928) 26 Mich. L. Rev. 361, 367.
[219] Cedric Ryngaert, 'Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) Intl. Crim. L. Rev. 188.
[220] ibid 198.
[221] ibid.

Courts can claim jurisdiction based on territoriality if the result of the crime occurs on the German territory.[222] In most domestic laws, a provision can be found that refers to jurisdiction of cross-border crimes. The French Penal Code reads: "*An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory"*[223]. Many States adhere to a principle of territoriality where a crime is not necessarily committed on the territory of the State in whole. This is often formulated as "in part of in whole". An example is Belgium, where it was decided in the Teherancheque case of 1979 that a crime would fall under Belgian jurisdiction if it occurred in whole or in part on the Belgian territory.[224] In the Netherlands, there are no statutory provisions which lay down these territorial principles. However, Courts may exercise jurisdiction even when not all elements of a crime took place on the territory of the Netherlands.[225]

To conclude, it is firmly anchored in international law that one element of a crime suffices as a claim to jurisdiction. Multiple scholars confirm that the ICC has the power to extend its territorial jurisdiction to crimes of which only one element occurred on the territory of a Member State.[226]

5.5 Article 34 VCLT

Article 34 of the Vienna Convention on the Law of Treaties of 1969 reads that "*A treaty does not create either obligations or rights for a third State without its consent*"[227]. The Government of Myanmar rejected the Court's claim to jurisdiction over the alleged crime of deportation by stating that Myanmar is not a party to the Rome Statute, and stressed that "no treaty can be imposed on a country that has not ratified it"[228]. Myanmar is of the opinion that the decision of the ICC to extend its jurisdiction is in violation of article 34 of the VCLT.[229] By extending its territorial jurisdiction, the Rome Statute imposes certain obligations on a State that is not Member to the Statute. Myanmar did not consent to be bound by the Rome Statute, and thus

[222] Federal Law Gazette, *German Criminal Code* (last amended 2009).
[223] Cedric Ryngaert, 'Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) Intl. Crim. L. Rev. 188.
[224] *Teherancheque case,* 2e Kamer, Cassatie, 23 januari 1979.
[225] Cedric Ryngaert, 'Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) Intl. Crim. L. Rev. 201.
[226] Stéphane Bourgon, 'Jurisdiction Ratione Loci' (2002) in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 567 ; Gennady M. Danilenko, '*ICC Statute and Third States'* (2002) 1877.
[227] United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS, art 34.
[228] *Annex E to Prosecution Notice of Documents for Use in Status Conference*, ICC-RoC46(3)-01/18-27-AnxE, International Criminal Court (ICC), 19 June 2018.
[229] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*", ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 35.

the decision of the Court seems to go directly against article 34 of the VCLT. However, as discussed in Chapter 2, this principle of *pacta tertiis nec nocent nec prosunt* has its exceptions.[230] It is clear that the extended territoriality principle that the Court adheres to is not of *jus cogens* norm. The only relevant exceptions to article 34 here are a rule of customary law, a well-established custom, or a repetition of the State's commitments elsewhere. It is firmly anchored in international law that a State can exercise jurisdiction in cases of one element of a crime taking place on the territory. It is also well-established in international criminal law that States can confer the powers they themselves have onto the Court. This is derived from the principle of sovereignty of States. Not only are States sovereign in what happens on their territory, States have the power to determine what they want to do with those powers. Sovereignty of States furthermore includes the responsibility to protect its nationals.[231]

5.6 Principle of legality

The principle of legality is a fundamental principle of criminal law. Article 22 of the Rome Statue describes this principle: "*Nullum crimen sine lege*"[232], which is Latin for "there is no crime without a law"[233]. This principle consists of two parts: non-retroactivity and clarity of the law. Non-retroactivity entails that a person cannot be convicted for an action which was not a crime at the time the action took place.[234] There is, however, an exception to this general principle: where the conduct is criminal "*according to the general principles of law recognized by the community of nations*"[235] The ICC can only apply rules that are beyond any doubt part of customary law.

5.7 Conclusion

According to articles 31 and 32 of the VCLT, a treaty article should be interpreted according to the ordinary meaning in line with the context and the object and purpose of a treaty. The context of article 12 is that the Court was established as a permanent court that could prosecute people for the most serious crimes committed against the international community as a whole. This is furthermore reflected in the object and purpose of the Rome Statute: to prevent impunity for serious crimes. During the preparatory works of the Rome Statute, article 12 was the center of

[230] ibid para 36.
[231] International Commission on Intervention and State Sovereignty, '*Responsibility to Protect',* International Development Research Centre, 2001.
[232] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010*), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html art 22.
[233] Gabriel Hallevy, *A modern treatise on the principle of legality in criminal law* (Springer, Berlin 2010) 8.
[234] Jerome Hall, 'General Principles of Criminal Law' (1947) Harvard L. Rev. 847.
[235] United Nations, '*International Covenant on Civil and Political Rights'* (19 December 1966), art 15(2).

many discussions.[236] A significant number of States was in favor of universal jurisdiction for the Court, based on the fact that the States had the power to confer to the Court jurisdiction they themselves have in international law. However, some States, among whom the United States, would rather see a more restrictive jurisdiction.[237] Article 12 as it is written in the Rome Statute is a compromise between these two views. The Court has a strong link with the United Nations, especially the Security Council, through which the Court's jurisdiction can be extended to include non-Member States. In international law, there are some firmly grounded principles, such as the principle of ubiquity, in which it suffices if only one element of a crime takes place on the territory of the State. This is reflected in legislation of a multitude of nations. It is also firmly established that States have the power to confer their jurisdiction to an international institution such as the ICC, which is derived from the principle of State sovereignty. The principle of legality is not violated by the ICC's decision, for it is firmly established in customary international law that territorial jurisdiction can be claimed when one element of the crime takes place on the territory. The Court is thus justified in interpreting article 12(2)(a) in such a broad way.

[236] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' (2002) in in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press) 584.
[237] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (3rd ed., Cambridge University Press, United Kingdom 2014) 149.

Chapter 6 – Conclusion

The ICC was established on a treaty basis: the Rome Statute forms the foundation of the Court. The Court can exercise jurisdiction over genocide, war crimes, crimes against humanity, and as of 17 July 2018 the crime of aggression.[238] These crimes are further defined in articles 6, 7, 8 & 8bis.[239] The Court does not have universal jurisdiction, the requirement is that the territorial State or the State of the nationality of the accused should accept the Court's jurisdiction. [240] Since the ICC is treaty based, the Rome Statute only binds its Member States. Myanmar thus argues that the ICC cannot exercise jurisdiction over the alleged crime of deportation of the Rohingya in Myanmar, based on article 34 of the VCLT. However, this article has its exceptions. A customary rule of law can still bind a third State, for instance. The Court argues for a contextual interpretation of article 12(2)(a), by which it extends its territoriality. [241] This is in line with the object and purpose of the Statute, as well as with the intention of the drafters. The Court was established to punish perpetrators for the most serious crimes committed against the international community as a whole. The intention of the drafters of article 12 was to leave no room for loopholes, and to prevent impunity. It is firmly established in international law, and a well-repetitioned custom, that States have the power to confer the jurisdiction they themselves would enjoy under international law upon the Court. Furthermore, it is generally accepted as customary international law that territorial jurisdiction can be claimed in instances where only a part of a crime takes place on the territory of the States. The decision of the Pre-Trial Chamber I to extend its territorial jurisdiction is thus a reflection of general international law, practiced among its Member States. The decision does not violate article 34 of the VCLT, nor does it violate the principle of legality. Thus, the ICC was well within its rights with the decision to claim jurisdiction over the crime against humanity of deportation of Rohingya people in Myanmar. Not only is it not a violation of sources of international criminal law, the decision is also justified. Considering the heinous character of the crime in question, the contextual and broad reading of article 12(2)(a) is justified against the principle of sovereignty. State sovereignty not only entails the right to determine what happens in the territory of the State, it also includes the duty to take care of the nationals of the State. The principle of sovereignty does not outweigh the rights of people, and a broad interpretation of article 12(2)(a)

[238] Claus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 JICJ 1, 15.
[239] UN General Assembly, *Rome Statute of the International Criminal* Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html.
[240] ibid art 12.
[241] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* ICC-RoC46(3)-01/18, International Criminal Court (ICC) PT1, 6 September 2018, para 65.

is preferred, in order to ensure justice. Thus, the decision made by the ICC to extend its territorial jurisdiction to the alleged crime of deportation of the Rohingya people in Myanmar is just in light of the sources of international criminal law. This leaves less room for impunity for the most serious crimes, and this extended reach of the Court's territorial jurisdiction ensures justice for a wider range of people.

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