

**THE ICC’S EXERCISE OF JURISDICTION OVER THE DEPORTATION OF ROHINGYAS:  
CRITIQUING THE READING IN OF THE OBJECTIVE TERRITORIAL DOCTRINE IN ARTICLE  
12(2)(A) OF THE ROME STATUTE**

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*This article critiques the ruling of the Pre-Trial Chamber-I wherein it decided to exercise jurisdiction over the deportation of Rohingyas from Myanmar to Bangladesh. This judgment is significant because it marks the jurisdiction of the court over a crime that occurred in Myanmar, a non-state party to the Rome Statute. The Pre-Trial Chamber concluded that it had the competence to exercise jurisdiction over the cross-border deportation of Rohingyas because an element of the crime had occurred in the territory of Bangladesh, a state party. The court arrived at this conclusion by resorting to an expansive interpretation of Article 12(2)(a) of the Rome Statute by reading in the objective territorial doctrine. This article argues that although such an expansive interpretation is desirable, it is legally untenable given the present framework of the Statute. The article does this by analysing how the decision diverges from the tenets of the Rome Statute as well as the established rules of treaty interpretation. It also briefly considers the ramifications of the ruling and evaluates the decision from the perspective of the Global South.*

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## INTRODUCTION

Much has been written<sup>1</sup> lauding the Pre-Trial Chamber-I’s (PTC) decision<sup>2</sup> to exercise jurisdiction over the deportation of Rohingyas from Myanmar to Bangladesh. The decision is momentous because it endeavours to achieve accountability for mass atrocities and transnational human rights abuses.<sup>3</sup> The judgment is also remarkable because it marks the jurisdiction of the PTC over crimes occurring in the territory of a non-state party by resorting to an expansive interpretation of the court’s territorial jurisdiction. An expansive interpretation, although desirable from a policy perspective, needs to be looked at with much scrutiny because of its implications on the future operation of the Rome Statute and other international legal principles.<sup>4</sup>

In its decision, the PTC deliberated on whether the International Criminal Court (ICC) could exercise jurisdiction over the crime against humanity of deporting Rohingyas from

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<sup>1</sup> Kip Hale & Melinda Rankin, *Extending the ‘System’ of International Criminal Law? The ICC’s Decision on Jurisdiction over Alleged Deportations of Rohingya People*, 73 AJIA 22, 27 (2019); Payam Akhavan, *The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute*, 17 JICJ 325 (2019).

<sup>2</sup> Decision on the Prosecution’s Request for a Ruling on Jurisdiction under art. 19(3) of the Statute, ICC-RoC46(3)-01/18, PTC- I (Sept. 6, 2018) [**“PTC-I Jurisdiction Ruling”**].

<sup>3</sup> Caleb H. Wheeler, *Human Rights Enforcement at the Borders – ICC Jurisdiction over the Rohingya Situation*, 17 JICJ 609 (2019) [**“Wheeler”**].

<sup>4</sup> Mahnoush H. Arsanjani & W. Michael Reisman, *The Law in Action of the International Criminal Court*, 99 AJIL 385, 389 (2005) [**“Arsanjani and Reisman”**].

Myanmar, a non-state party, to Bangladesh, a state party. The PTC, adopting a wide interpretation of the territorial jurisdiction of the ICC, ruled in the affirmative. It concluded that the crime had partially taken place in the territory of a non-state party and partially in the territory of a state party.<sup>5</sup> Since an element of the crime had taken place in the territory of a state party (Bangladesh), the court had the competence to exercise jurisdiction. This judgment has far-reaching consequences on future decisions of the ICC, particularly in bringing the ISIS to justice. Despite its positive implications, the teleological interpretation of a treaty hinged strongly on state consent can be questioned.

To that end, this article scrutinizes the PTC's decision, focusing only on jurisdictional issues. The article then critiques the judgment for its divergence from the tenets of the Rome Statute and the established rules of treaty interpretation. The article concludes by briefly mulling over the practical consequences of the judgment and evaluating the decision from the perspective of the Global South.

## I. THE JURISDICTIONAL FRAMEWORK OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute recognizes four kinds of jurisdiction: subject-matter jurisdiction, jurisdiction over persons, territorial and nationality jurisdiction, and temporal jurisdiction.<sup>6</sup> The Rome Statute also entitles the ICC to exercise jurisdiction over a non-state party in cases where the situation is referred to the court by the U.N. Security Council<sup>7</sup> or when a non-state party *ad-hoc* accepts the jurisdiction of the court.<sup>8</sup>

The scope of the ICC's jurisdiction was a moot point of contention during the Rome Conference.<sup>9</sup> There were alternative proposals put forth by different states. Germany, at one end of the spectrum, proposed that the ICC should be conferred with universal jurisdiction over core crimes, much like what states possess.<sup>10</sup> The US, on the other end, insisted on the creation of a stringent jurisdictional design that would require the consent of both the state of the

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<sup>5</sup> PTC-I Jurisdiction Ruling, *supra* note 2, ¶ 73.

<sup>6</sup> Conor Donohue, The Unanswered "Question of Questions": The Jurisdictional Competence of the International Criminal Court (2016) (unpublished LL.B. thesis, Victoria University of Wellington) <https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5077/paper.pdf?sequence=1>.

<sup>7</sup> Rome Statute of the International Criminal Court, art. 13(b), Jul. 17, 1998, 2187 U.N.T.S. 90 ["**Rome Statute**"].

<sup>8</sup> Rome Statute, art. 12(3).

<sup>9</sup> David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

<sup>10</sup> Rep. of the Prep. Com. on the Establishment of an International Criminal Court, U.N. Doc A/AC.249/1998/DP.2 (Mar. 23, 1998) <https://www.legal-tools.org/doc/5e6109/pdf/>.

nationality of the accused and the state of the territory where the offence occurred.<sup>11</sup> The issue was so divisive that no consensus could be achieved amongst the states. Ultimately, the preconditions for the exercise of jurisdiction of the ICC, embodied in Article 12 of the Rome Statute, were adopted as a take it or leave it package on the midnight of the last day of the Conference behind closed doors.<sup>12</sup>

It is imperative to highlight the drafting history of Article 12 to show how this Article was a result of difficult compromises and long deliberations. The nature of the negotiations and the result achieved necessitate that this Article be carefully interpreted.<sup>13</sup> Since its introduction, Article 12 has remained in a nascent stage with no disputes surrounding it until the *Mbarushimana* case.<sup>14</sup> Scholarly literature interpreting the Article is also limited, with the most comprehensive research done by Dr. Michail Vagias.<sup>15</sup>

## II. SCHEME OF ARTICLE 12(2)(A) OF THE ROME STATUTE

The extant scheme of Article 12(2)(a) of the Rome Statute allows the ICC to exercise territorial jurisdiction in the event of a state party referral<sup>16</sup> or subsequent to Prosecutor's *proprio motu* initiation of investigation<sup>17</sup> in the following situations:

- (i) if the *conduct in question* occurs in the territory of a State party; or
- (ii) if the crime was committed on board a vessel or aircraft registered in a State party.<sup>18</sup>

In the Rohingya case, the crux of the jurisdictional dispute revolved around the interpretation of the term 'conduct in question'. As stated above, Article 12(2)(a) was adopted as a part of a last-minute package and, thus, there is not enough legislative guidance for interpreting the same. If we trace the history of Article 12(2)(a), we find that Article 12(2)(a) was represented by Article 21 of the Draft Statute of the International Criminal Court

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<sup>11</sup> CARSTEN STAHN, *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 142 (Oxford University Press, 2015).

<sup>12</sup> Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371 (2016).

<sup>13</sup> P. Saland, *International Criminal Law Principles*, in R.S. Lee (eds.), *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE. ISSUES, NEGOTIATIONS, RESULTS* 139 (Kluwer Law International, 1999) ["Saland"].

<sup>14</sup> Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on the Defence Challenge to the Jurisdiction of the Court (Oct. 26, 2011).

<sup>15</sup> MICHAEL VAGIAS, *TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 37-161 (Cambridge University Press, 2014) ["Vagias"].

<sup>16</sup> Rome Statute, art 13(a).

<sup>17</sup> Rome Statute, art. 13(c).

<sup>18</sup> Rome Statute, art. 12(2)(a).

formulated in the year 1994.<sup>19</sup> Draft Article 21 granted the ICC the power to exercise territorial jurisdiction in case the ‘act or omission’ occurred in the territory of a state party.<sup>20</sup> There was no mention of the term ‘conduct’ in the draft Article. It was only in 1998 that the term ‘conduct’ was used to replace ‘act or omission’ as part of a last-minute deal because no consensus regarding the interpretation of the term ‘omission’ could be achieved.<sup>21</sup>

Interestingly, the state parties again deliberated over the scope of territorial jurisdiction of the ICC during the Kampala Amendment negotiations on the crime of aggression in 2008.<sup>22</sup> The Working Group on the Crime of Aggression looked into the meaning of the term ‘conduct’ and considered whether the crime of aggression for the purposes of Article 12(2)(a) would also have been committed where the consequences of the crime were felt.<sup>23</sup> Different viewpoints were put forth by different delegations. There were some delegations who were of the opinion that the term ‘conduct’ was not only restricted to ‘act or omission’, but also included within its ambit the consequences of the conduct. Other delegations resisted and required an amendment to the Statute and Elements of Crime for such an interpretation. Even after reappraisal, no firm decision could be achieved.<sup>24</sup> In light of this ambiguity, the consent-based nature of the treaty, and the far-reaching consequences of the judgment, it becomes imperative to scrutinize it.

### III. PTC’S INTERPRETATION OF ARTICLE 12(2)(A) OF THE ROME STATUTE

The PTC adjudicated upon two primary questions. Firstly, the court sought to ascertain the meaning of the term ‘conduct’ in Article 12(2)(a). Secondly, it deliberated upon whether Article 12(2)(a) necessitates that the entire conduct take place in one territory.<sup>25</sup>

With respect to the first question, the PTC opted for a teleological interpretation of the term ‘conduct’ based on Article 31(1) of the Vienna Convention on the Law of Treaties

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<sup>19</sup> Int’l. L. Comm’n, Draft Statute for an International Criminal Court, Y.B. INT’L. L. COMM’N, 1994 Vol. II Part 2 (U.N. Doc. A/CN.4/SER. A/1994/Add.1) at 41.

<sup>20</sup> *Id.*

<sup>21</sup> Jean-Baptiste Maillart, *Article 12(2)(a) Rome Statute: The Missing Piece of the Jurisdictional Puzzle*, EJIL: TALK! (Aug. 7, 2014), [https://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/#:~:text=Article%2012\(2\)\(a\)%20of%20the%20Rome%20Statute%20provides,Court's%20jurisdiction%20by%20a%20declaration](https://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/#:~:text=Article%2012(2)(a)%20of%20the%20Rome%20Statute%20provides,Court's%20jurisdiction%20by%20a%20declaration).

<sup>22</sup> Vagias, *supra* note 15, at 81.

<sup>23</sup> ICC Assembly of States Parties, Report of the Special Working Group on the Crime of Aggression on its 7<sup>th</sup> Session, ICC ASP/7/20 ¶ 38-39 (Nov. 14, 2008).

<sup>24</sup> Vagias, *supra* note 15, at 82.

<sup>25</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, PTC- III (Nov. 14, 2019) [“**PTC-III Decision**”].

(VCLT).<sup>26</sup> In the absence of any explanation provided by the *travaux préparatoires*, the PTC was of the view that the term ‘conduct’ must be contextually interpreted in line with the object and purpose and Article 20 of the Rome Statute.<sup>27</sup> Under Article 20(1) and 20(3), the term ‘conduct’ is inclusive of the entire set of facts surrounding a crime<sup>28</sup> and thus also includes the consequences of the conduct. The PTC interpreted the term ‘conduct’ so broadly that it concluded that any element of the crime would be a conduct within the meaning of Article 12(2)(a).<sup>29</sup> As per the Elements of Crime, a crime is constituted of three separate elements: conduct, consequences, and circumstances.<sup>30</sup> The PTC concluded that any one of these elements occurring in a state party territory would entitle the ICC to exercise jurisdiction. The practical implication of this deduction is that if the entire culpable conduct occurs in a non-state party, but its consequences are felt in the territory of a state party, then the ICC would have jurisdiction.

For the second question, the PTC asserted that the objective territorial principle could be read into the phraseology of Article 12(2)(a) after an analysis of international legal principles and national legislations.<sup>31</sup> The objective territorial doctrine is a principle of customary international law<sup>32</sup> which stipulates that a state has jurisdiction over a crime if a constituent or an essential element of the crime occurs in the territory of a state party.<sup>33</sup> Thus, the PTC concluded, that the entire conduct need not take place in the territory of a state party. Even if a part of the crime or an element of the crime takes place in the territory of a state party, then the ICC would have jurisdiction. As per the PTC’s explanation, since the consequences of the crime of deportation – that is, the victim’s crossing the border – manifested in Bangladesh, the ICC was entitled to exercise jurisdiction by way of the objective territorial principle.

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<sup>26</sup> Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [“VCLT”].

<sup>27</sup> PTC-III Decision, *supra* note 25, ¶ 49.

<sup>28</sup> Michail Vagias, *The Territorial Jurisdiction of International Criminal Court: Certain Contested Issues*, 119 (PH. D. thesis, Bynkers Hoek Publishing).

<sup>29</sup> Wheeler, *supra* note 3, at 620.

<sup>30</sup> International Criminal Court, *Elements of Crimes, General Introduction*, ¶ 7(a), <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf> [“**Elements of Crime**”].

<sup>31</sup> PTC-I Jurisdiction Ruling, *supra* note 2, ¶ 73.

<sup>32</sup> CEDRIC RYANGAERT, *JURISDICTION IN INTERNATIONAL LAW* 34-48 (Oxford University Press, 2015); S.S. Lotus (France v. Turkey), (Ser. A) No. 10, at 23, Judgment, P.C.I.J. (Sept. 7, 1927).

<sup>33</sup> Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT’L. L. 145, 155 (1972-1973).

#### IV. A CRITIQUE OF THE PTC'S INTERPRETATION

The determination of the PTC is remarkable because it is a step towards ending impunity and ensuring accountability for mass atrocities. Yet, the decision can be questioned for its reliance on imperfect legal foundations.

The ICC as an international court is conferred with limited and attributed jurisdiction.<sup>34</sup> The state parties intended to confer only narrow jurisdiction to the ICC, as can be seen from the principle of complementarity.<sup>35</sup> Although a plea for an expansive jurisdiction is desirable, it is untenable given the present framework of the Statute and established legal principles.

A fundamental principle of criminal law is that criminal provisions must be narrowly interpreted in favour of the accused.<sup>36</sup> This aligns with the principle of legality (*nullum crimen sine lege*) enshrined in Article 22 of the Rome Statute which calls for strict interpretation and rejects interpretation by analogy.<sup>37</sup> The term 'conduct in question' from a strict construction approach would only mean the 'act or omission' prohibited by the crime in question as opposed to the consequences of the crime.<sup>38</sup>

This interpretation is supported by three contentions. Firstly, Article 30 of the Rome Statute makes a clear distinction between the conduct and the consequence of the crime.<sup>39</sup> Secondly, the Elements of Crime stipulates that a crime is composed of three distinct elements: conduct, consequences and the circumstances.<sup>40</sup> This explicit demarcation indicates that the drafters intended to differentiate between the terms 'conduct' and 'consequence'. Moreover, Article 12 itself makes a distinction between the terms 'conduct' and 'crime' by using conduct in the context of territorial jurisdiction and crime in the context of acts committed on vessels or aircraft.<sup>41</sup> Thus, the terms 'conduct' and 'crime' are not synonymous, with the word 'conduct' denoting only the 'act or omission' underlying the crime and not the consequences of the crime.

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<sup>34</sup> Vagias, *supra* note 15, at 85.<sup>[1]</sup>

<sup>35</sup> Douglas Guilfoyle, *The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar*, 73 AJIA 2, 5 (2019) ["Guilfoyle"].

<sup>36</sup> Prosecutor v. Bemba, ICC-01/05-01/08, Confirmation of Charges, ¶ 369 (Jun. 15, 2009).

<sup>37</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 82 (Cambridge University Press, 2011).

<sup>38</sup> Vagias, *supra* note 15, at 82; Saland, *supra* note 13, at 205.

<sup>39</sup> Rome Statute, art. 30.

<sup>40</sup> Elements of Crime, *supra* note 30, ¶ 7(a).

<sup>41</sup> Guilfoyle, *supra* note 35.

Limitations on the expansive interpretation of the ICC's jurisdiction can further be discerned from the preamble of the Statute which emphasizes non-intervention. Thus, state sovereignty and state consent are the hallmarks of the Statute. The restricted scope of the ICC's jurisdiction is also apparent in Article 10 of the Rome Statute, which stipulates that "*nothing in this part should be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*".<sup>42</sup> This Article applies to both the substantive part of the Statute and to provisions related to jurisdiction and admissibility.<sup>43</sup> The intent of Article 10 was to prevent the thwarting of the progressive development of international law with respect to crimes described in the Statute.<sup>44</sup> Yet, through the last phrase, the drafters intended to insulate the Rome Statute from the same progressive development. A perusal of the preamble and Article 10 clarifies that the intent of the drafting committee was to build an agreement between the state parties and give primacy to state consent.

An analysis of Article 12(2)(a) through the established rules of treaty interpretation corroborates this contention. Contemporaneity is a rule of treaty interpretation that gives primacy to the common will of the states.<sup>45</sup> It is founded on the assumption that state parties enter into a treaty based on a common understanding and agreement on the terms used in the treaty.<sup>46</sup> The terms of the treaty should, therefore, be interpreted in light of the meaning they possessed at the time of entering into an agreement.<sup>47</sup> An expansive interpretation of the treaty, beyond what was contemplated and agreed upon by the states, would be impermissible according to the rule of contemporaneity. On the other hand, the PTC in this case can be said to have resorted to an evolutive rule of treaty interpretation. The ICJ in *Dispute Regarding Navigational and Related Rights* between Costa Rica and Nicaragua had interpreted the meaning of the term 'comercio' (commerce) through an evolutive lens.<sup>48</sup> The ICJ in that case had arrived at the conclusion that general terms in a treaty are capable of evolving to give way

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<sup>42</sup> Rome Statute, art. 10.

<sup>43</sup> Arsanjani and Reisman, *supra* note 4, at 390.

<sup>44</sup> OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 645 (Beck/Hart Publishing, 2016).

<sup>45</sup> MALCOLM SHAW, INTERNATIONAL LAW 708 (Cambridge University Press, 2018).

<sup>46</sup> Epaminontas E. Triantafilou, *Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties*, 32 ICSID REV. 138, 146 (2017) ["Triantafilou"].

<sup>47</sup> Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 B. YIL. 203 (1957).

<sup>48</sup> Triantafilou, *supra* note 46.

to developments in international law.<sup>49</sup> Thus, these general terms should be interpreted expansively to accommodate such evolution.

To interpret ‘conduct’ as inclusive of consequences of the crime would indeed be preferable in light of the developments in international law, the growing number of cross-boundary disputes, and crimes committed through the internet. However, it is important to note that Article 10 of the Rome Statute explicitly forbids such an innovative and evolutive interpretation of the Statute. The interpretation of the term ‘conduct’ in line with the principle of contemporaneity would be fundamental in the context of the Rome Statute and would encompass only the ‘act or omission’ and not the consequences of the crime.

In its haste to ensure accountability, the PTC failed to properly analyse the Statute and the internal constraints contained therein. The PTC accepted the argument put forth by the Office of the Prosecutor on that there were several international principles and national legislations that endorsed the objective territorial doctrine and thus the same could be read into the phraseology of Article 12(2)(a).<sup>50</sup> This conclusion is highly problematic. Article 21 of the Rome Statute stipulates that the court in the first instance should apply the Statute, the Elements of Crime, and the Rules of Procedure of Evidence.<sup>51</sup> A perusal of the Statute and the Elements of Crime favours a case against the reading in of the objective territorial doctrine as argued above. Moreover, the court’s reliance on national legislations as a source of the objective territorial doctrine can be called into question.<sup>52</sup> The national laws examined by the PTC explicitly endow the states with the power to exercise jurisdiction in case any element of the crime occurs in their territory.<sup>53</sup> The same is not true for the Rome Statute whose phraseology markedly differs from that in the national legislations.

## V. PRACTICAL IMPLICATIONS OF THE RULING

The judgment is lauded because it refuses to afford impunity to human rights abuses occurring in the territory of non-state parties. As an effect of this dictum, a state party is now

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<sup>49</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009, I.C.J. Rep. 213 (Jul. 13) at 242.

<sup>50</sup> PTC-I Jurisdiction Ruling, *supra* note 2, ¶ 66.

<sup>51</sup> Rome Statute, art. 21.

<sup>52</sup> Wheeler, *supra* note 3, at 625.

<sup>53</sup> Wheeler, *supra* note 3, at 626.

empowered to refer a situation to the ICC even if only the consequences of the crime are felt in its territory.

This ruling provides a segue into prosecuting the Islamic State's leadership. A parallel can be drawn between the Rohingya deportation and the crimes committed by the ISIS. Syria and Iraq, like Myanmar are non-state parties to the Rome Statute. Yet, the court relying on the Rohingya precedent will be able to establish jurisdiction, as the effects of the crimes committed by the ISIS have been felt in several state parties, including France and Afghanistan.<sup>54</sup> Thus, state parties like France could refer the ISIS situation to the ICC under Article 14 of the Rome Statute, entitling the ICC to investigate into the same.<sup>55</sup> Many scholars have also recognized the value of this precedent in empowering the ICC to exercise jurisdiction over the deportation of millions of refugees from Syria, a non-state party, to Jordan, a state party to the Statute.<sup>56</sup> Similarly, the court could rely on this precedent to establish jurisdiction over the detention of migrants by the United States along the US-Mexico border since Mexico is a state party to the Statute.

This judgment would also prove to be valuable in enabling the ICC to exercise jurisdiction over modern crimes committed through the internet, where the consequences of the crimes are felt in several states. For instance, the ICC relying on this precedent could establish jurisdiction over the crime of incitement of genocide taking place via social media websites. An essential element of the crime of incitement of genocide under Article 25(3)(e) of the Rome Statute is 'public display' or the accessibility to the statement.<sup>57</sup> Thus, even if the alleged inciting statement is posted on a social media website maintained in a non-state party, but can be accessed and viewed in a state party, the ICC would be able to exercise territorial jurisdiction.<sup>58</sup>

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<sup>54</sup> Prosecuting ISIS: Some Prospects and Challenges, 32 (unpublished LL.B. thesis, Faculty of Law, University of Oslo) [https://www.duo.uio.no/bitstream/handle/10852/70960/PIL\\_THESIS.pdf?sequence=1&isAllowed=y](https://www.duo.uio.no/bitstream/handle/10852/70960/PIL_THESIS.pdf?sequence=1&isAllowed=y).

<sup>55</sup> *Id.*

<sup>56</sup> Priya Pillai, *ICC ruling on Rohingyas can impact India as well*, HINDUSTAN TIMES (Sept. 19, 2018), <https://www.hindustantimes.com/analysis/icc-ruling-on-rohingyas-can-impact-india-as-well/story-4wPIo90MFqIcAfwgXuoXTK.html>; Caroline Sweeny, *Accountability for Syria: Is International Criminal Court Now a Realistic Option?*, 17 JICJ 1083 (2020).

<sup>57</sup> *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 677 (Nov. 28, 2007).

<sup>58</sup> Vagias, *supra* note 15, at 91; Michail Vagias, *The Territorial Jurisdiction of the ICC for Core Crimes Committed through the Internet*, 21 JCSL 523, 534 (2016).

Although, the above-mentioned ramifications of the judgment are desirable, they lack a firm legal footing. This judgment sets a dangerous precedent allowing for jurisdictional overreach and renders the concept of state sovereignty and state consent nugatory.

#### CONCLUDING REMARKS FROM A GLOBAL SOUTH PERSPECTIVE

While Rohingyas indeed deserve justice to be done, an expansive interpretation against the tenets of the Statute poses the possibility of entrenching the inequalities against third world countries that have always surrounded international law.<sup>59</sup> The ICC has been perceived with much optimism by the international community. Unlike the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the Rome Statute was negotiated on a consensual and an egalitarian basis.<sup>60</sup> Third world countries had actively participated in these negotiations and, thus, it is in their interest that the Statute is interpreted in its true letter and spirit.

This is not the first time that the ICC has digressed from the foundations of the Rome Statute and established international principles against a third world country. A similar situation arose in *Omar Al-Bashir*<sup>61</sup> where the ICC rendered the immunities provisions obsolete and indicted Omar Al-Bashir for war crimes and crimes against humanity. Al-Bashir was the President of Sudan, a non-state party and, unlike other state parties, he had not waived off his head of state immunity by signing the Rome Statute.<sup>62</sup> The ICC nevertheless decided to deviate from established customary international law principles and exercised jurisdiction, asserting that he was bound by the same waiver clause as the other state parties.<sup>63</sup>

In its drive to hold Omar Al-Bashir accountable, the PTC, like in the present case, did not give any due to the customary principle of *pacta tertiis* embodied in Article 34 of the VCLT.<sup>64</sup> Article 34 explicitly provides that a treaty cannot create rights or impose obligations on third parties without their consent.<sup>65</sup> In indicting Omar Al-Bashir and exercising jurisdiction over the deportation of Rohingyas, the ICC can be seen as refusing to third world states the

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<sup>59</sup> Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 AJIL UNBOUND 255 (2016).

<sup>60</sup> Antony Anghie and B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE JIL 77 (2003).

<sup>61</sup> Prosecutor v. Omar Al Bashir, ICC-02/05-01/09, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

<sup>62</sup> Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, 12 CHINESE JIL 467 (2013).

<sup>63</sup> *Id.*

<sup>64</sup> Int'l. L. Comm'n, Draft Articles on the Law of Treaties, Y.B. INT'L. L. COMM'N, 1966 Vol. II (U.N. Doc. A/CN.4/SER. A/1966/Add.1), at 226 ¶ 2.

<sup>65</sup> VCLT, *supra* note 26, art. 34.

protections that would extend to the other more powerful states, by fracturing important rules of international law.

This judgment runs the risk of further antagonizing non-state parties and disincentivizing them from cooperating with the ICC. The alternative, although cumbersome, would have been to amend the Statute and Elements of Crime, as suggested by a few state parties in the Working Group on the Crime of Aggression.<sup>66</sup>

This article has argued that although the desire to exercise jurisdiction over the deportation of Rohingyas is understandable, the rationale of the court can be rebutted by relying on the provisions of the Rome Statute and rules of treaty interpretation. The expansive interpretation adopted by the court based on unsound legal footing runs the risk of undermining the work done by the international court and prosecutors to end impunity. Long standing rules of international criminal law and public international law should not be circumvented in the haste to achieve accountability.

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<sup>66</sup> Carlos E. Gomez, *The International Criminal Court's Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights*, 50 CAL. W. INT'L L.J. 177, 203 (2019).