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UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT (ICC): A PRAGMATIC AND HOLISTIC APPROACH TO THE CONSIDERATION AND APPLICATION OF UNIVERSAL JURISDICTION BY THE ICC

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Abstract

The article portrays the fact that the International Criminal Court (ICC) exercises universal jurisdiction albeit quasi in nature. The proactive interpretation of the Article 12 of the Rome Statute by the ICC, the spirit of the Rome Statute, the decisions of other international tribunals and the recognized doctrines of international law provide firm support for the ICC to exercise true universal jurisdiction. The article has taken a holistic approach towards the existing literatures relevant to the Universal Jurisdiction of ICC with a priority to case laws of ICC. Decisions of international criminal tribunals including the ICC have been critically considered to find the status of Universal Jurisdiction in International Criminal Law Jurisprudence. The decisions of ICC rendered at different stage in the situation in Bangladesh/Myanmar, Afghanistan and Palestine are discussed at length as they involve countries not party to the Rome Statute i.e. Myanmar, the US and Israel, and thus the issue of exercising Universal Jurisdiction appeared either obliquely or in disguise in these situations. The article is an attempt to add value to the present jurisdictional practice exercised by the ICC. It aims to provide support to further the jurisdictional reach of the ICC so it can become a true international criminal court with true universal jurisdiction to truly align with the purpose of the Rome Statute – putting an end to impunity for the most serious crimes.

INTRODUCTION

Universal jurisdiction of the International Criminal Court (ICC) in its simplest form means that the ICC can exercise its jurisdiction over a crime, irrespective of it having a territorial, personal or other connection to the crime.[1] This is known as true or pure universal jurisdiction.[2] In this work the terms "true universal jurisdiction" and "universal jurisdiction" are used interchangeably. Among different jurisdictions (e.g. territorial, temporal, personal, subject matter *etc.*) the universal jurisdiction of the ICC can be a vital tool in the present world of globalisation to bring the nations together for building a better world, given that universal jurisdiction can be a catalyst to bring the ideal of universal justice closer to reality.[3] Unfortunately, the ICC has not been given the power to prosecute under true universal jurisdiction, but it exercises quasi-universal jurisdiction in some respects.[4] Nevertheless, in this work we will discuss how close the jurisdiction of the ICC comes to being universal. In doing so, we will closely look into the extent to which universal jurisdiction has been considered and applied by the ICC.

The history of the ICC during its drafting stage bears testimony to the fact that there has been a compromise by the drafters of the Rome Statute[5] not to bestow universal jurisdiction to the ICC. Some States were fierce opponent of the universal jurisdiction[6] and some thought that universal jurisdiction was far too ambitious as States rarely exercise the same and thus would be met with opposition from States resulting in refusal to ratify the Rome Statute.[7] Some States even went further in arguing the legality of ICC as a Court that can exercise universal jurisdiction; the US argued that "there was no rationale in law" for such a court.[8] These debates culminated in Article 12 of the Rome Statute that reflects the compromise with universal jurisdiction,[9] limited the jurisdiction from the aspirational standards of universal jurisdiction

and states that the ICC has jurisdiction over crimes committed on the territory of state parties and over nationals of state parties:

> Article 12(2): ……..the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

However, as the seed of universal jurisdiction was there during the inception of the ICC, if not in the statute but in the talks,[10] it can be hoped that calculated incremental steps towards achieving the same might someday award universal jurisdiction to the ICC. As universal jurisdiction was strongly argued and debated at length during the pre-drafting and drafting stages,[11] as well as during the Rome Conference,[12] an incremental approach to modify the current Article 12 may eventually be accepted by the opponents, if their concerns can be addressed properly. But this cannot be achieved over night. Further, the existing jurisdictions of ICC and universal jurisdiction itself have to be considered precisely to form insights and argue solution(s). A pragmatic approach is needed that will judge the possibility of exercising universal jurisdiction by the ICC with existing and possible impediments. Further, a utilitarian approach as to whether the same "should" be exercised by the ICC may complement the pragmatic approach.[13] Overall, a holistic approach that takes care of all the possible aspects of bestowing universal jurisdiction to the ICC will eventually pave the road towards a workable

suggestion in bestowing universal jurisdiction on the ICC. However, the author suggests, that the ICC should have true universal jurisdiction.

ICC AND JURISDICTION

Jurisdiction has been an issue ever since the inception of the ICC and continues to be until the present day. Given the ICC's holistic nature compared to other prominent international criminal tribunals e.g. the Nuremberg Tribunal, International Criminal Tribunal for Former Rwanda (ICTR) *etc.*, as the ICC was not setup for a specific conflict or event, the ICC faces frequent challenges in determining its jurisdiction to try a particular case.[14] The Nuremberg Tribunal had personal jurisdiction to try and punish persons acting in the interests of the European Axis Countries, who committed one of the crimes amenable to the tribunal;[15] the ICTR had both territorial and personal jurisdictions to try Rwandan nationals for committing crimes in neighbouring countries.[16] But it is member States' wilful submission to the jurisdiction of ICC, as joining the Rome Statute is sovereign and voluntary decision for each state to make,[17] that draws the main distinction between the ICC and the aforesaid courts in the context of jurisdiction. Further, universal jurisdiction is the widest and most ambitious form of jurisdiction for the ICC that has already been met with serious opposition from States like the United States ever since the idea of a true International Criminal Court started to take shape through the drafting of Rome Statue. As such, an introduction to the applicable types of jurisdiction of the ICC is necessary as they will be referred to elsewhere in this work.

As such there are subject matter, temporal, territorial and personal jurisdictions of the ICC.[18] If an alleged crime falls within the categories of the crimes the ICC can prosecute then the ICC has subject matter jurisdiction (*ratione materiae*) to try the offender of the crime. The crimes are genocide,[19] crimes against humanity,[20] war crimes,[21] and aggression.[22] Temporal

jurisdiction (*rationie temporis*) means the ICC can only exercise jurisdiction over crimes that are committed after the entry into force of the Statute i.e. after 1 July 2002.[23] Territorial jurisdiction (*rationie loci*) refers to the fact that the ICC can only exercise jurisdiction over crimes that are committed on the territory of State parties, irrespective of the offender's nationality.[24] Personal Jurisdiction (*rationae personae*) grants the ICC the jurisdiction to try the nationals of a State party accused of a crime.[25] It is worth noting that if a State temporarily accepts the jurisdiction of the ICC on an *ad hoc* basis then the ICC has territorial jurisdiction over the crimes committed on the territory of that State;[26] the same principle applies with regard to personal jurisdiction over nationals of non-State parties if that State accept ICC's jurisdiction on an *ad hoc* basis.[27] Further, the ICC can exercise territorial and personal jurisdiction over any "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."[28]

UNIVERSAL JURISDICTION AND THE ICC

Basis for universal jurisdiction

Universal jurisdiction is the remotest form of extraterritorial jurisdiction.[29] Extra territorial jurisdiction in this context means a state exercising jurisdiction over certain offences committed outside the territory of that state.[30] There are extraterritorial jurisdictions that retain a connection to the territory thereby engaging a link to the state, but universal jurisdiction gives a prosecuting state the right to exercise jurisdiction over extraterritorial crimes committed by foreign nationals even against foreign nationals.[31] The main basis of exercising universal jurisdiction as propagated by international lawyers like Rosalyn C. Higgins QC and Malcolm N. Shaw QC is that the prosecuting state has a legal right to exercise jurisdiction over certain

offences as those were committed against the international community as a whole[32] and hence are offensive to the international community as a whole.[33]

The aforesaid basis calls for a close look into the two interrelated maxims that operate within the dynamics of universal jurisdiction in the context of international law. The maxims are *jus cogens* and *obligatio erga omnes. Jus cogens* means compelling law or peremptory norm which is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.[34] The authority of this peremptory norm is so firm that even treaty or customary rules will become void if they run contrary to it.[35] *Obligatio erga omnes* literally translates to "obligation towards everyone" which furthers *Jus cogens* in that it compels *all the states* of the international community to take legal action against wrongdoers in some situations. It is due to the fact, as stated in the Barcelona Traction case by the ICJ, that the rights are involved are so important that all States can be held to have a legal interest in their protection.[36] Accordingly, the "obligation towards everyone" in this instance led to the outlawing of genocide and acts of aggression and developing principles to protect the basic rights of the human being, protection from racial discrimination and slavery *etc.*

Universal jurisdiction in different courts other than the ICC

Courts of different States and some International Courts have played important roles in shedding light on and furthering the concept of universal jurisdiction for international crimes.[37] Undoubtedly, they strengthened the foundation of universal jurisdiction and rooted it firmly in international law which in turn has helped the curious mind of this author to argue in favour of bestowing the same to the ICC with full conviction. Faryadi Zardad, an Afghan Warlord, was sentenced by the Old Bailey Criminal Court of London for conspiracy to torture and take

hostages under the UN Convention against Torture of 1984 (ratified by the UK in 1988) and the British Criminal Justice Act 1988 due to Zardad's committing crimes against humanity in Afghanistan during the Taliban era in Afghanistan.[38] The convict's appeal to the British Court of Appeal was also rejected as the court affirmed the judgment provided by the Old Bailey.[39] Zardad's trial was the first in the UK that was based on the principle of universal jurisdiction where a conviction was secured at trial.[40] Zardad was first found in South London and then investigation against him was started, followed by his arrest, prosecution, trial and conviction. Further, what Lord Goldsmith, the then Attorney General for the UK, said has added momentum to the acceptability of universal jurisdiction at national level: "An international convention and English law allow the trial in England of anyone who has committed torture or hostage-taking".[41]

France, for the first time applied universal jurisdiction by trying and convicting the former Mauritanian Captain Ely Ould Dah under the UN Convention against Torture 1984. He was accused of torturing two black soldiers when he was an intelligence officer in Mauritania in the context of an ethnic purge and repression led by the Mauritanian Government in the early 90s.[42] Captain Dah was arrested in July 1999 but was released under Judicial Control in September 1999, whereby he escaped and was later convicted in absentia by the French "*Cour d'assises*".[43] This case is particularly important because on application to the European Court of Human Rights (ECtHR) by the convict, the ECtHR in deciding the admissibility of the application declared that France had universal jurisdiction to try the case and that France had right to try Captain Dah due to the principle of *Jus Cogens* that sanctified the prohibition against torture.[44]

The first case of universal jurisdiction in the African Continent, the case of Hissene Habre is also worth noting because of its multi dimension and involvement of different countries. Hissene Habre was the former president of Chad and ruled the country until 1990 when he was

ousted.[45] In 1992, the national commission of inquiry for Chad accused the Habre government of 40,000 political murders and systematic torture.[46] He had been in exile in Senegal for 10 years under nominal house arrest when in January 2000, one association (AVCRP) and seven victims filed a formal complaint against Habre in the regional tribunal of Dakar, Senegal accusing Habre for Torture and Crimes against Humanity.[47] In February 2000, Habre was charged by the Tribunal for Complicity in crimes against humanity, barbarity and acts of torture.[48] Unfortunately, on appeal, the appellate court in Senegal denied universal jurisdiction of Senegal in this case as the acts of torture were committed outside Senegal by a foreign national.[49] It decided to cancel the proceeding against Habre and the decision was upheld by the Senegal's Court of Cassation.[50]

The matter did not stop there. The UN intervened and its Committee Against Torture (CAT) issued an injunction upon Senegal not to expel Hebre from Senegal and to take all necessary measure to stop Hebre from leaving the country in order to ensure that he did not flee from prosecution.[51] Meanwhile, in November 2000, before the Court of Cassation of Senegal decided against the universal jurisdiction of Senegal,[52] while the famous Belgian universal jurisdiction legislation (War Crimes Law of Belgium) was in place, 21 victims (3 of them having already obtained Belgium Nationality) filed another complaint in Belgium against Habre.[53] In September 2005, the Belgian Judge issued an arrest warrant against Habre[54] and requested his extradition from Senegal;[55] Habre was arrested in November 2005 in Dakar, Senegal and detained in pursuant to the warrant.[56] Unfortunately, the appellate Court in Senegal ruled that Habre could not be extradited because of his immunity as head of State.[57] This decision that was subject to criticism[58] because Chad had already waived the immunity;[59] Habre was thus released from detention.[60] This release provoked the CAT to rule against Senegal for violating the Convention Against Torture and to ask them either to extradite or prosecute Habre.[61] Then in January 2007, following a decision of the African Union to

prosecute Habre,[62] Senegal adopted a law to prosecute crimes against humanity, genocide, war crimes, and torture[63] even if the offence is committed outside Senegal.[64] In August 2008 Chad's criminal court convicted Habre[65] and sentenced him to death in absentia due to "undermining the constitutional order and the integrity and security of the territory".[66]

The ICJ now came into the picture. In February 2009 Belgium instituted proceedings against Senegal in the International Court of Justice (ICJ) for the extradition of Habre.[67] The ICJ during July 2012 ruled that Senegal must prosecute or extradite Habre without further delay.[68] Relevant here is the decision of the ICJ that involves universal application of the doctrine of *Jus Cogens*: "the Court……considers that the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)".[69] The UN injunction, Belgian Prosecution and the ICJ each applied the principle of universal jurisdiction alongside the Rome Statute. These are instances for the ICC that there are contemporary practices of universal jurisdiction in different Courts. The principle of *Jus Cogens* (peremptory norm) leads to *Obligatio Erga Omnes* i.e. an obligation towards everyone compelling all the States of International Community to take action against wrongdoer.[70] As torture can be a crime against humanity contrary to Article 7(1)(f) of the Rome Statute, the prohibition of torture is therefore an obligation on the ICC as a forum of States. Accordingly, it shall prosecute a wrongdoer for torture when the same constitutes crime against humanity.[71]

However previously, in November 2010, the Court of Justice of the Economic Community of West African States (ECOWAS) ruled that Senegal must try Habre through an *ad hoc* or special procedure of international character.[72] The ICJ decision coupled with the ECOWAS ruling and the ruling from African Union (AU) thus compelled Senegal to establish a Court embedded in the Senegalese Justice System, [73] the Extraordinary African Chambers' (EAC).[74] Ultimately, in July 2013, the EAC formally indicted Habre for crimes against humanity, war crimes, and torture;[75] Habre was convicted on May 2016 and sentenced to life by the EAC.[76]

An appeal by Habre was later rejected by the EAC.[77] The events of this case clearly portray the importance of universal jurisdiction. The first ever conviction of an African former head of State was only possible due to the fact that the universal jurisdiction played the lead role and was positively accepted by the concerned States i.e. Chad, Senegal and Belgium, the international or regional community (ECOWAS and AU) and International Courts (the ICJ and the EAC). The *Obligatio Erga Omnes (*obligation towards everyone)[78] compelled Senegal, as a member of international community to bring Habre to justice because of the *Jus Cogen* (compelling)[79] nature of the law of crimes against humanity,[80] torture,[81] and war crimes[82] perpetrated by Habre while he was in power.

The International Courts are also acting as forerunners of universal jurisdiction. The International Criminal Tribunal for Former Yugoslavia (ICTY) held in *Prosecutor vs Tadic*[83] that:

> Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.[84]

The appeal chamber of Special Court of Sierra Leone (SCSL) in the case of *Proseuctor v Kallon and Kamara*[85] held that in a case where the jurisdiction of a Court is universal, a State cannot deprive another State of its "jurisdiction to prosecute the offender by the grant of

amnesty".[86] The principles of *Jus Cogen* and *Obligatio Erga Omnes* were beautifully applied by the SCSL where it held that the obligation to protect human dignity is "*Jus Cogen"* (peremptory norm/compelling law) and by the same token the obligation to prosecute for violation of human dignity constituting crimes is *"obligatio Erga Omnes"* and as such Sierra Leone cannot discard such crimes by sweeping them into oblivion and forgetfulness.[87]

Further, in the legendary *Eichmann Case,*[88] the Supreme Court of Israel positively considered the proposition that the abhorrent crimes such as crimes against humanity, genocide, and torture were of such a grave nature that they constituted *delicta juris contium* (wrong against the law of nations).[89] When the case was at the District Court of Jerusalem, Israel, the District Court stated that:

> Therefore so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[90]

Universal jurisdiction before the ICC

In line with the foregoing decisions mentioned in the preceding paragraphs, it can be argued that the position of both national and international tribunals seemingly provides significant support for the ICC's right to exercise universal jurisdiction. Nonetheless, the exercise of universal jurisdiction by the ICC has not always been consistent. As already stated above, there were significant exchanges made during the inception of the ICC regarding incorporation

of universal jurisdiction in the Rome Statute.[91] During the drafting stage of the Rome Statute, universal jurisdiction of ICC was argued in a broadest way by the German delegation[92] in that had it been granted to the ICC, "pure" universal jurisdiction would have been exercised. It is because the jurisdiction would then be over any offence committed anywhere in the world irrespective of whether the alleged offender was present in the territory of a member State of the Rome Statute.[93] However, as argued above,[94] such a proposition was compromised and Article 12 was the consequence.[95] This compromise led to serious criticisms. Scholars like Leila Nadya Sadat expressed her concern about the "travelling tyrants" who are not covered with the current jurisdiction of ICC,[96] whereas, Hans-Peter Kaul was anxious about domestic conflict or internal war – a widely happening phenomenon in the present world[97] – where the hands of ICC are tied due to its restricted jurisdiction.[98]

When the prosecutor asked the ICC to exercise its jurisdiction in the Rohingya situation between Bangladesh and Myanmar,[99] where only Bangladesh is the State party to the Rome Statute,[100] the article 12 of the Rome Statute touching upon the question of universal jurisdiction was thoroughly considered. In this case "the Prosecutor submitted that the reference to 'conduct' in article 12(2)(a) of the Statute means only that 'at least one legal element of an article 5 crime' must occur on the territory of a State party".[101] The ICC concurred with the submission of the Prosecutor on the ground that a strict reading and denial of jurisdiction in the given case would run counter to the object and purpose of the Rome Statute.[102]

The Article 7(1)(d) makes deportation or forcible transfer of a population a crime against humanity. Article 12(2)(a) states that the ICC can exercise jurisdiction if the State on the territory of which the conduct in question occurred is a member State. Now, arguably the conduct of deportation occurred in Myanmar [103] which is not a party to Rome Statute nor has it accepted the jurisdiction of ICC by lodging a declaration before the registrar in compliance

with Article 12(3). However, the ICC has chosen to define the word "deportation" in a constructive way which ultimately vested territorial jurisdiction upon it.[104] The ICC grounded its interpretation of Article 12(2)(a), so to vest territorial jurisdiction on itself, (i) on contextual interpretation that takes into account relevant rules of international law in particular the Article 31(3)(c) of the Vienna Convention on the Law of Treaties[105] and public international law and (ii) on the object and purpose of the Rome Statute.[106]

The interpretation of the word "deportation" by the ICC is interesting because it stated that the crime of deportation is inherently trans-boundary in nature and hence an element of the crime of deportation is "forced displacement across international borders".[107] However, it further stated that "the drafters of the Rome Statute did not limit the crime of deportation from one State party to another State party"[108] and the Statute "only speaks of displacement from the area in which they (the victims) were lawfully present".[109] As such, the ICC held that "the inclusion of the inherently trans-boundary crime of deportation in the Statute without limitation as to the requirement of destination"[110] reflects the intention of the drafters of the Statute to vest territorial jurisdiction on the ICC when one element of the crime is committed within the territory of a State party.

The aforesaid reading of the drafters' intention by the ICC is in fact an example of the ICC's teleological approach[111] to the Rome Statute as it extended the meaning of deportation to include its trans-boundary nature so to bring Myanmar within the Court's jurisdiction. According to a literal reading of Section 7(2)(d), if the Rohingya victims were lawfully present in Myanmar's territory, then the displacement occurred in Myanmar and hence no territorial jurisdiction could have been claimed by the ICC given that Myanmar is not a State party. Further, one can always argue, by applying the purposive interpretation, that requirement of destination was omitted from the Article 7(2)(d) because the drafters assumed that the crime of deportation can only be tried by the ICC if the "displacement" occurs within a State party. This

purposive approach in turn, is a pragmatic approach[112] as well because it serves the spirit of the Rome Statute[113] by at least bringing the perpetrators within the jurisdiction of the Court.

The Pre-Trial Chamber III has recently shed some light into the issue of territorial jurisdiction involved in the Rohingya situation through its decision pursuant to Article 15 of the Statute.[114] Even after the decision of the Pre-Trial Chamber on territorial jurisdiction, the Court felt compelled to interpret the principle of territoriality further.[115] In answering the question as to whether the Court may exercise its jurisdiction over crimes that occurred partially on the territory of a State party and partially on the territory of a non-State party the Pre-Trial Chamber addressed two issues,[116] namely (i) meaning of the term 'conduct' in article 12(2)(a) of the Statute, and (ii) location of the conduct. In addressing the former the Chamber concluded in the following terms:

> The legal elements of the crime of deportation require, inter alia, that the 'perpetrator deport […] by expulsion or other coercive acts'. This element may be carried out by the perpetrator either by physically removing the deportees or by coercive acts that cause them to leave the area where they were lawfully present. In such a situation, the victims' behaviour or response as a consequence of coercive environment is required to be established for the completion of the crime.[117]

The Chamber, in line with the established principle of *actus reus* that conduct involves both act and consequence,[118] thus concluded that part of *actus reus* of the crime of deportation occurred in the territory of Bangladesh, a State party, because the crime of deportation

completed when the victims crossed the border into Bangladesh due the alleged coercive acts of the perpetrators in Myanmar.[119]

Now, the reasoning and opinion of the Pre-Trial Chamber in relation to the latter issue of location of conduct provides an exhaustive summary of the Customary International Law (CIL) with regard to domestic prosecuting authorities asserting territorial jurisdiction in transboundary criminal matters.[120] The Chamber observes that CIL is the maximum the State parties to the Rome Statute could have transferred to the Court[121] and in the absence of any explicit restriction to the delegation of the territoriality principle, it is presumed that the same territorial jurisdiction the States have under international law has been transferred to the ICC.[122] In this context, the Chamber beautifully summarized five different principles of CIL developed by different States to exercise territorial jurisdiction in transboundary crimes[123]:

> (i) the *objective territoriality principle*, according to which the State may assert territorial jurisdiction if the crime is initiated abroad but completed in the State's territory;
>
> (ii) the *subjective* territoriality principle, according to which the State may assert territorial jurisdiction if the crime has been initiated in the State's territory but completed abroad;
>
> (iii) the *principle of ubiquity*, according to which the State may assert territorial jurisdiction if the crime took place in whole or in part on the territory of the State irrespective of whether the part occurring on the territory is a constitutive element of the crime;

(iv) the *constitutive element theory*, according to which a State may assert territorial jurisdiction if at least one constitutive element of the crime occurred on the territory of the State; and

(v) the *effects doctrine*, according to which the State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State.[124]

In line with the above principles, the Chamber ruled that under CIL, even if part of the criminal conduct takes place outside its territory, States are free to assert territorial jurisdiction, as long as there is a link with their territory.[125] Accordingly, there is a clear link between the territory of Bangladesh and the act of deportation taking place in Myanmar as the alleged deportation of the Rohingyas involved the victims crossing the border. According to the Chamber this falls within objective territoriality principle, ubiquity principle and the constitutive element theory.[126] Therefore, as member States have delegated the same territorial jurisdiction which they have under CIL to the ICC,[127] the Rohingya situation falls within the permitted limit of CIL.[128]

The aforesaid analysis has brought to the fore the fact that the ICC is interpreting the jurisdiction it has been granted as widely as possible to ensure the effective protection and realisation of International Criminal Law (ICL) standards. This in effect means that the ICC is indirectly creeping towards universal jurisdiction through broad interpretation of its territorial jurisdiction. "True" universal jurisdiction cannot be achieved overnight. Thus, a shift towards a liberal and accommodating interpretation as demonstrated by the ICC in its decision on jurisdiction in the Rohingya situation can be a stepping-stone towards achieving the same. This liberal and accommodating interpretation vests "quasi-universal jurisdiction" on the ICC. Despite the fact that no national of a State party allegedly committed the crime and no crime

was committed, in strict and traditional sense, within the territory of a State party, the ICC nonetheless chose to extend its jurisdiction to the situation based on its reasoning that deportation is inherently trans-boundary in nature with Bangladesh being a State party at the recipient end. This reasoning has provided a logical way to bring the perpetrators to justice.

The concept of universal jurisdiction of the ICC gets further support from the aforesaid decision of the Chamber when the Chamber stated that it would be wrong to read Article 12(1)(a) in a manner so as to limit the Court's territorial jurisdiction to crimes committed exclusively in the territory of member States for the same will go against the principle of effective and good faith interpretation.[129] The Chamber further stated that there is no indication anywhere in the Rome Statute that the drafters intended to limit the territorial jurisdiction of the ICC in a manner that it can never "hear cases involving war crimes committed in international armed conflicts involving non-States Parties".[130] Thus, a positive corollary is that, should the intention of the drafters of the Rome Statute and the principles of good faith and effective interpretation of the same clearly support the ICC exercising jurisdiction over non-State parties in some cases, the ICC can be said to have *Original* quasi-universal jurisdiction over non-State parties. Consequently, it suggests that successfully developing universal jurisdiction from *Original* quasi-universal Jurisdiction is highly probable through pro-active and holistic interpretation of the ICC.

The decision of the pre-trial chamber of the ICC to investigate the alleged crimes against humanity and war crimes committed during the armed conflict since 1 May 2003 in the Islamic Republic of Afghanistan,[131] as well as regarding similar crimes related to the armed conflict in Afghanistan allegedly committed in the territory of other State parties to the Rome Statute since 1 July 2002[132] is also noteworthy. The decision affirms the quasi-universal jurisdiction of the ICC; however, in the given context it denies the ICC quasi-universal jurisdiction through interpretation. The prosecutors specifically sought to investigate the alleged crimes committed

by US Forces and the CIA (a non-State party) for capturing and transferring several individuals,[133] on suspicion of being members of terrorist groups to their facilities situated within the territory of State parties.[134] As per the prosecutors, the alleged crimes were committed in the context of or associated with the ongoing armed conflict in Afghanistan.[135]

In deciding the territorial Jurisdiction (*Ratione Loci*), the Court's obiter dictum and findings are interesting. Although the ICC denied itself the jurisdiction to try the US Forces and members of the CIA as sought by the prosecutor for the aforesaid alleged crimes, it stated that the ICC has jurisdiction if the conduct was either completed in the territory of a State party or if it was initiated in the territory of a State party and continued in the territory of a non-State party or vice versa (quasi-universal Jurisdiction).[136] It means that if somehow a tangential link of completion or initiation of an act of torture, war crime, inhumane and degrading treatment *etc.* within the territory of a State party (or vice versa) can be shown then a non-State party can be brought to justice. Similar analogy was instrumental to bring Myanmar (non-State party) to justice in the Rohingya situation as discussed above.[137] As a result, if the torture somehow initiates in Afghanistan but resumes and completes in Guantanamo Bay or at a US Supermax Prison in Virginia then the US can be brought to justice.

However, in the Afghan scenario, some of the victims were captured or tortured outside Afghanistan on the territory of a State party.[138] These are *hors de combat*[139] persons who were captured in Afghanistan but tortured outside that country or captured outside Afghanistan.[140] Moreover, the prosecutor specifically sought that the ICC exercises its jurisdiction for that alleged torture, committed during the US detention programme, carried out by the CIA, of persons captured in the context of or associated with the armed conflict in Afghanistan having no direct link with the conflict in Afghanistan; instead, they were suspected to have link or information about the 9/11 attack on the Twin Towers.[141]

The Court found, unlike argued by the prosecution, the requirements of "in the context of" and "associated with" the ongoing armed conflict in Afghanistan as cumulative not alternative.[142] The Court decided that the relevant nexus between the alleged torture and the armed conflict in Afghanistan could only be satisfied if the victims were captured within the territory of Afghanistan.[143] Accordingly, those victims who were captured outside Afghanistan fell out of Court's jurisdiction for want of the aforesaid nexus. The court was reluctant to extend the scope of international humanitarian law for non-international armed conflict, such as the one alleged by the prosecutor in Afghanistan, beyond the borders of the State where hostilities are actually taking place as per the spirit and wording of the Common Article 3 of the Geneva Conventions.[144] Further, in relation to the victims captured in Afghanistan the Court was also reluctant to exercise its jurisdiction for those alleged act of torture because the Common Article 3 is there to protect the rights and interests of those victims allegedly tortured in a non-State party within the context of non-international armed conflict.[145]

However, the Court saw the alleged conduct of 'inflicting severe physical or mental pain' separately from the act of capture and abduction that precedes torture.[146] In this manner the Court refrained itself from exercising jurisdiction for the alleged infliction of severe physical and mental pain that took place in a non-State party although the earlier capture and abduction took place in Afghanistan (a State party; and where the non-international armed conflict was taking place so to attract the Rome Statute and relevant International Humanitarian Law (IHL) and International Criminal Law (ICL) e.g. the Geneva Conventions Common Article 3).

This segregation between capture and torture is objectionable as arguably the capture and abduction that leads to "torture" or "infliction of severe physical or mental pain" is part of torture or infliction of severe physical or mental pain. Capture by an establishment like the CIA and abduction by the same to a foreign land itself is horrific and inflicts severe physical and mental pain. A holistic interpretation of the term "torture" surely incorporates capture and

abduction in it. This line of interpretation will be effective to bring the perpetrators to justice. We have already seen above, how the Chamber concluded in the Rohingya situation that States and hence the ICC are free to assert territorial jurisdiction, even if part of the criminal conduct takes place outside its (the member States') territory, as long as there is a link with their territory.[147] Further, according to the constitutive element theory existing in CIL as stated by the Chamber[148] it can thus be argued that if earlier capture takes place in Afghanistan and then subsequent torture in a non-State party, the perpetrators of the non-State party can be tried by the ICC since one of the constitutive elements of the act of torture has been committed within the territory of a State party.

Nonetheless, the above discussion clearly portrays the pro-active approach taken by the Pre-Trial Chamber to subtly keep itself away from the ambit of universal jurisdiction. Had the Pre-Trial Chamber only decided the "act of torture" in a holistic manner incorporating capture and abduction, the quasi-universal jurisdiction could have been exercised over the alleged crimes committed by the US, in the manner it was exercised by the Court in the Bangladesh/Myanmar situation stated above. The interesting finding of the Pre-Trial Chamber regarding the application of IHL and ICL in the context of the Rome Statute warrants attention from jurists and legal professionals alike to see whether they should be applied in the manner the Pre-Trial Chamber applied them in this present context of Afghanistan. However, the decision of the Pre-Trial Chamber of the ICC in the Afghan situation has brought the contentious matter of universal jurisdiction to the surface.

Fortunately, the decision of the Pre-Trial Chamber has been amended in appeal by the Appeals Chamber.[149] The ICC has bestowed quasi-universal jurisdiction through this act of amendment and associated reasoning. The Appeals Chamber in its judgment amended the decision of the Pre-Trial Chamber in the following terms:

> The 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' is amended to the effect that the Prosecutor is authorised to commence an investigation 'in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States parties in the period since 1 July 2002'.[150]

The reasons for the aforesaid decision has been expounded under the heading "scope of authorization"[151] and summarised against two points, namely, (i) whether the scope of authorisation is limited to the incidents mentioned in the request and those closely linked thereto,[152] and (ii) whether certain acts committed outside Afghanistan would amount to war crimes if the victims of these acts were captured outside Afghanistan.[153]

In deciding the former point, the Appeals Chamber reasoned that the Pre-Trial chamber erred in deciding that investigation should be restricted to the incidents specifically mentioned in the Prosecutor's Request and incidents that are "closely linked" to those incidents.[154] The Appeals Chamber reasoned that restricting so "would erroneously inhibit the Prosecutor's truth-seeking function".[155] It also reasoned that restricting the same, in the manner as suggested by the Pre-Trial Chamber,[156] would lead to cumbersome and unwieldy procedures[157] not required by the Rome Statute and likely to have a significant detrimental effect on the conduct of investigations.[158]

In relation to the latter point i.e. the point (ii) stated above, the Appeals Chamber decided that the Pre-Trial chamber erred in deciding that the acts in question committed by the CIA against the victims who were captured or tortured outside Afghanistan on the territory of a State party lacked the nexus with an internal armed conflict so to trigger the application of IHL.[159] The Appeals Chamber further decided that the finding of the Pre-Trial Chamber that the "two requirements" namely, "associated with" and "in the context of" are cumulative not alternative was also erroneous.[160] As the Pre-Trial Chamber based its reasoning on the *chapeau*[161] of the Article 3 of the Geneva Convention,[162] the Appeals Chamber found, in the contrary, that the interpretation of Article 3 by the Pre-Trial Chamber was incorrect.[163] The Appeals Chamber reasoned in the following terms:

> While it is true that the chapeau of Common Article 3 refers to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', this phrase does not have the function ascribed to it by the Pre-Trial Chamber, namely to limit the applicability of the provision to the State on the territory of which the armed conflict occurs. Rather, in the view of the Appeals Chamber, it simply describes the circumstances under which Common Article 3 applies: there must be an armed conflict not of an international character in one of the States Parties to the Geneva Convention.[164]

This reasoning of the Appeals Chamber gets support from the interpretation of Article 3 by the ICRC:

> …which suggests that this phrase does not have the effect of restricting the application of Common Article 3 to the territory of the State in which the armed conflict occurs, but rather was aimed at ensuring that the provision would bind only those States that had ratified the Geneva Conventions.[165]

Further, given there has been universal ratification of the Geneva Convention,[166] any armed conflict not of an international character thus cannot but take place on the territories of one of the State parties to the Convention and hence the Article 3 has lost its important in practice.[167] The Appeals Chamber not only confined itself within the *chapeau* of Article 3, it went further to consider the rest of the text of Article 3 and reasoned that Article 3 in its entirety does not suggest that the nexus required in the Rome Statute will not be fulfilled if the victims are not captured in Afghanistan or if the torture occurs outside Afghanistan.[168] It is because the sub-paragraph (1) stipulate that all those falling under the protection of Article 3 shall *in all circumstances be treated humanely* and that certain acts against these persons "shall remain prohibited at any time and in any place whatsoever".[169] The Appeals Chamber further opined that such an erroneous interpretation of Article 3 would frustrate the purpose of the Geneva Convention that aims at providing minimum guarantees in relation to armed conflict.[170] Consequently, the Appeals Chamber rules that merely because the alleged conduct takes place outside Afghanistan and the alleged capture did not take place in Afghanistan does not necessarily mean that the required nexus of 'in the context of' and "have been associated with" armed conflict in Afghanistan cannot exist. A reason for this is that the non-international armed conflict can spill over to neighbouring State not party to the conflict.[171]

The aforesaid reasoning leading to the judgment amending the decision of the Pre-Trial Chamber quoted verbatim above clearly portrays that a holistic approach to interpretation can

bring the alleged perpetrators (in this instance the CIA) within the vicinity of the Rome Statute and consequently, the ICC. The purposive interpretation has clearly been applied as the Court looked into the purpose of the Geneva Convention. Further, the Court considered the intrinsic aids to interpretation especially a text in its entirety as well as extrinsic material e.g. the ICRC commentaries[172], Amici Curiae submissions[173] *etc.* to conclusively resolve the issues in question. This exercise of jurisdiction upon the alleged CIA acts of torture is an excellent instance of quasi-universal jurisdiction as the alleged crimes were not committed by any national of a State party and were not committed within the territory of a State party. This quasi-universal jurisdiction would have got greater force had the "act of torture" been interpreted by the Appeals Chamber in a holistic manner incorporating "capture and abduction" as argued above.

Universal jurisdiction of the ICC may become a burning issue with respect to the situation in the State of Palestine. Palestine first accepted the jurisdiction of ICC over alleged crimes committed within the territory of occupied Palestine, including East Jerusalem, from 13 June 2014 with a declaration lodged with the Registrar of the ICC on 31 December 2014 under Article 12(3) of the Rome Statute.[174] On 2 January 2015, Palestine deposited its instrument of accession to the Rome Statute[175] and on 1 April 2015 it became 123rd member of the Rome Statute through a ceremony held at the seat of the Court at The Hague.[176] The Office of the Prosecutor (OTP) of the ICC opened a preliminary examination into the situation in Palestine on 16 January 2015.[177] Then on 15 May 2018, the State of Palestine referred the Situation in Palestine from 13 June 2014 onwards to the OTP of ICC, which was formally received by them on 22 May 2018, under Article 13(a) and 14 of the Rome Statute.[178] From 24 May 2018 the matter has been pending in the Pre-Trial Chamber I of the ICC and investigation by the OTP is ongoing.

Interestingly, there were arguments coming from the realm of some liberal scholars that the Rome Statute can be interpreted liberally and selectively by allowing the ICC jurisdiction over crimes even if the clear jurisdictional parameters are not met as the object and purpose of the ICC is to end impunity for mass crimes.[179] If seen from the perspectives of *Jus Cogen* and *Obligatio Erga Omnes,* the liberal interpretation would justify the exercise of universal jurisdiction, as they (*Jus Cogen* and *Obligatio Erga Omnes)* compel the International Community as well as the ICC to prosecute individual(s) liable for the alleged crimes committed in the occupied Palestinian territory. However, the liberal argument of the scholars was discarded by the Chief Prosecutor as "…..neither good law nor makes for responsible judicial action"[180], though she did not explain why she thinks that the same is not good law.

However, after the statement was made, Palestine officially acceded to the Rome Statute and eventually became a member of the ICC; now the ICC can claim territorial jurisdiction over the crimes committed in the occupied Palestinian territory. The Prosecution has applied for an Article 19 ruling from the Pre-Trial Chamber regarding the Court's territorial Jurisdiction in Palestine over the crimes committed in the Occupied Palestinian Territory (OPT) comprising the West Bank, East Jerusalem and Gaza on 22 January 2020.[181] Accordingly, the perpetrators among the Israeli nationals and officials being nationals of a non-State party became subjected to a question of the jurisdiction of ICC.

On 5 February 2021, the Pre-Trial Chamber, by a majority, decided that the Court may exercise its criminal jurisdiction in the Situation in Palestine, and that its territorial jurisdiction extends to Gaza and the West Bank, including East Jerusalem.[182] The Chamber also unanimously decided that Palestine is a state party to the Rome Statute.[183] That the decision means that the OTP has competence to investigate the alleged crimes committed in the said territory. The OTP thinks that there is a reasonable basis to proceed and that there are admissible potential cases and thus on 3 March 2021 they have confirmed the initiation of

investigation respecting the Situation in Palestine for the crimes that have allegedly been committed since 13 June 2014, the date when referral was made to the OTP by Palestine.[184] There are 43 amicus curie submissions submitted for and against the exercise of territorial jurisdiction by the ICC, which the Chamber considered in deciding its territorial jurisdiction[185] and a good number of them touched upon the question of universal jurisdiction.[186]

As the chamber has decided the Statehood of Palestine in the positive and conferred territorial jurisdiction in Palestine, it has surely broadened the existing jurisdictional horizon of the ICC. Although the same will not automatically confer universal jurisdiction on the ICC it is surely a welcome decision in that the ICC has set a precedent for the weaker states in similar footing like Palestine to seek redress through accession to the Rome Statute. An existing member state subjected to atrocities by a stronger state can start taking action in the light of Palestinian formula. In this regard, the submission of Professor John Quigley as Amici before the ICC is relevant:

> If Palestine's status is relevant, this Court must decide. The federal appeals court in the United States, when confronted with an issue of Palestine's status that was relevant to an insurance claim, said that the Palestinian administration in the West Bank was "the de jure government of Palestine." The PCIJ did the same when the issue of Palestine's status was relevant to the suit of the Greek concessionaire. Political expediency should not cause this Chamber to shirk its responsibility of equally assessing Palestine's status as a State.[187]

As the ICC disregarded political expediency in favour of overwhelming arguments for Palestine as a state, it has made it clear to all that it is the final arbiter of its own jurisdiction. It is because defining statehood should not be seen separately from the issue of exercising jurisdiction as statehood always comes before *rationie loci* (territorial jurisdiction) where the former is a pre-condition to apply the latter. Accordingly, if there is overwhelming support in law for vesting universal jurisdiction upon the ICC, a court established to bring an end to the atrocities in the world, then the political considerations should at least become secondary to the legal considerations.

Finally, one must know that Universal jurisdiction is extra-territorial in nature.[188] Territorial jurisdiction (*Rationae Loci*) on the other hand allows the ICC jurisdiction over crimes that are committed on the territory of state parties, irrespective of the offender's nationality.[189] This "commission of offence on the territory of state parties" has been interpreted liberally by the ICC, as we have seen above in the Rohingya situation and the Situation in Palestine,[190] enabling it jurisdiction over nationals of non-state parties thus exercising quasi-universal jurisdiction. Further, this territorial jurisdiction under Article 12 has an essence of extra-territoriality as the nationals of non-state parties can be tried by the ICC under Article 12; and objections to the same are untenable in law as expounded in the following paragraph i.e. *Lotus* Principle and Universal Jurisdiction of the ICC.

LOTUS PRINCIPLE AND UNIVERSAL JURISDICTION OF THE ICC

The argument made above in favour of quasi-universal jurisdiction of the ICC over atrocities committed by nationals of non-party States may be opposed by different quarters on different grounds. At this juncture, support can be drawn from the *Lotus* principle/decision. The *Lotus* principle is often used to counter the US reasons for opposing the existence of the ICC.[191] The

principle was developed in the case *of S.S. Lotus (France v Turkey)*.[192] Although the case related to the high seas, it has relevance to the universal jurisdiction of the ICC. In this case it was decided that if a legitimate interest in exercising jurisdiction can be shown then the burden is upon those denying the jurisdiction to prove whether any international legal rule prohibits the exercise of the same.[193] As Professor Michael P. Scharf pointed out:

> In the Context of the ICC, application of the *Lotus* principle would mean that sovereign States are free to collectively establish an international jurisdiction applicable to the nationals of non-party States unless it can be shown that this violates a prohibitive rule of international law.[194]

The US Ambassador for War Crimes David J. Schaffer and Professor Madeline Morris vehemently opposed the application of Article 12 incorporating universal jurisdiction[195] arguing that i) that the *Lotus* principle is now obsolete[196] and ii) that the non-assignment principle in domestic and private international law means that exercise of jurisdiction over non-party nationals will amount to prejudice to the rights of obligor State.[197] Professor Scharf beautifully rebutted those arguments[198] with examples that prove, i) that there were recent (at the time of Professor Scharf's writing the Article) ICJ decisions[199] including even US decisions[200] accepting the continuing vitality of the *Lotus* principle; ii) that the analogy with domestic law and private international law has to be drawn very cautiously as there is no instance of incorporation of substantive principles like easements, trusts into the domain of public international law;[201] and iii) that the obligor in the case of ICC is the individual offender not the State of the offender's nationality and there is clear distinction between obliging an individual offender and it's State.[202] Accordingly, depending upon this seminal *Lotus* principle

it can be argued that the ICC can exercise jurisdiction over nationals of non-party States. As exercising jurisdiction over nationals of non-party States is a significant feature of universal jurisdiction, the *Lotus* principle strengthens ICC's claim to universal jurisdiction.

NATIONALITY AND UNIVERSAL JURISDICTION OF ICC

The ICC can only try the nationals of a State, not the State itself.[203] The issue of nationality becomes more problematic when the perpetrator belongs to a non-party State to the Rome Statute and the alleged action takes place in the territory of a non-State party. This issue has already been discussed above at length in relation to the Rohingya and Afghan Situation. However, there are certain other issues that may complicate the exercise of jurisdiction over a national of a non-State party e.g. the meaning of "State of nationality" and "national", the dual nationality of a perpetrator, change of nationality, refugee status[204] and Stateless persons,[205] the discussion of which are beyond the scope of the present article. The present scope and instances of application of Article 12 afford quasi-universal jurisdiction to the ICC at its best. However, if the ICC can be bestowed with true universal jurisdiction then none of these issues will matter any longer as ICC then can try anyone irrespective of their nationality be that one of dual, single, changed, refugee *etc.*

OBJECTIONS TO UNIVERSAL JURISDICTION OF ICC AND THEIR ANSWERS

Though the Rome Statute as a whole faced strong opposition from States with superior military might like the US, China, and India at its very inception, however, there only appears a few objections against the universal jurisdiction of the ICC. The main objections against universal jurisdiction and their solutions are:

(i) *Objection:* Article 34 of the Vienna Convention on the Law of Treaties states, "A treaty does not create either obligations or rights for a third State without its consent".[206] Based on this Article the USA opposed the Rome Statute arguing that the consent of the State of the nationality of the accused is an inevitable requirement.[207]

Answer: The answer to this objection is already provided in the discussion on the *Lotus* principle above. The ICC has jurisdiction over the *nationals* of the non-party States if that national commits crime within the territory of a State party. It is not exercising jurisdiction over the non-party State/third State for it to raise any objection as such.[208]

(ii) *Objection:* Sensitive political issues will bring pressure on the ICC in general and on the prosecutor in particular.[209]

Answer: There was immense geopolitical pressure surrounding Palestine's move to join the ICC and the prosecutor's move for "preliminary examination".[210] Myanmar's political interest was involved when the matter was brought to ICC to try the perpetrators for atrocities against the Rohingya population.[211] There was evident US political influence surrounding investigation of crimes committed by US forces in Afghanistan.[212] The ICC is getting conversant with sensitive political issues and eventually will cope with these sort of pressures, interest and influence. The exercise of quasi-universal jurisdiction over Myanmar, the decision on jurisdiction regarding the situation in Afghanistan and the progress of the OTP regarding situations in occupied Palestinian territory bear testimony to these facts.

(iii) *Objection:* There is no duty to prosecute in international criminal law that puts an obligation on the ICC to prosecute for and punish for international crimes going beyond its territorial jurisdiction.[213]

Answer: The Rome Statute has an answer to the objection. In the preamble of the statute the contracting parties pledge that "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".[214] Further the purpose of the Rome Statute is putting an end to impunity for those "most serious" crimes.[215] Therefore, the crimes with which ICC is concerned are of such nature that there is a duty to prosecute for them as enshrined in the quoted passages of the preamble above. This duty gets added momentum due to the established principles of *jus cogens* and *obligatio erga omnes.*

(iv) *Objection:* Universal jurisdiction will overburden the ICC with claims that it may fail to meet;[216] the non-party State will not co-operate with the ICC to undertake the investigation for the crime.[217]

Answer: Universal jurisdiction cannot be achieved overnight. It is an incremental process. The Rome Statute already contains elements for the accomplishment of universal jurisdiction. The pro-active interpretation of those elements has the effect of bestowing quasi-universal jurisdiction. It can validly be expected that gradual practice of such interpretation coupled with widespread ratification of the Rome Statute will eventually strengthen the foothold of ICC to exercise universal jurisdiction over nationals of remaining non-party States. Further, the Security Council referral under Article 13(b), rightly termed as "Universal Jurisdiction Lite" by Cedric Ryngaert,[218] can also be used positively to bring most outrageous situation within the jurisdiction of ICC. The unwilling States can also be compelled through the UN mechanisms to co-operate with the ICC in investigating the crimes. Meanwhile, the resources of the OTP and the Court will continue to grow.

CONCLUDING REMARKS

It is apparent that the ICC does not have true or pure universal jurisdiction in a strict sense. But given the compelling reasons ensuing from recognised doctrines of International Law and the spirit of the Rome Statute and the pragmatic reasons of having a true International Criminal Court safeguarding the rights of the victims and acting as a major deterrent to the abhorrent crimes it can be said with conviction that the ICC should be granted true universal jurisdiction. Although there are claims that the ICC has so far exercised its jurisdiction in a biased way,[219] effectively targeting African States and ignoring allegations of war crimes committed by members of Western States, these claims are exaggerated; according to David Bosco "there is little evidence that the prosecutor's office is animated by a political or ideological agenda, or that it has operated without regard to the relevant law and evidence".[220] The words of Hale and Ranking provide further support when they welcomed the ICC decision on jurisdiction in the Rohingya situation and said that "most important was its normative value – namely that it demonstrated a willingness to adhere to the law over politics and apply international criminal law as a 'standard'".[221]

However, it can be said that the ICC does have quasi-universal jurisdiction over nationals of non-State parties if the conduct in question is committed within the territory of a State party by virtue of Article 12(1)(a). The interpretation of "Conduct committed within the territory of a State party" can be very instrumental in this regard as already demonstrated by the ICC in the Rohingya situation and in the case of Islamic Republic of Afghanistan. Alongside liberal and purposive interpretation by the ICC of its jurisdiction, jurisdictional claims could also be secured through a revision of the Article 12(1)(a) of the Rome Statute to consolidate the existing quasi-universal jurisdiction of the court in the following manner:

(a) The State on the territory of which the conduct in question occurred or, [*the state on the territory of which the perpetrator is found*][222] or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

This will allow the ICC to try an individual of a non-party State provided they are found within the territory of a State party irrespective of them committing the alleged offence in the territory of a State party. This will retain the territorial link that exists in quasi-universal jurisdiction, will broaden the scope of quasi-universal jurisdiction and will pave the road towards bestowing true universal jurisdiction to the ICC. This will amount to a 'systematic integration', as Galand suggests, of the Rome Statute to ensure its applicability to non-party States.[223]

Further, it should not be forgotten that vesting Universal jurisdiction to the ICC also depend upon the Court's interpretation of the Rome Statute. Interpretation is crucial in this respect. It is through interpretation that the Court has been able to prove quasi-universal jurisdiction of ICC. Hence, it is expected that over time, the court will decide on issues like the Statehood of Palestine for the purpose of Rome Statute, which will empower the Court further and make it the final arbiter of its own jurisdiction so to disallow political considerations to delimit the vicinity of its jurisdiction.

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† I dedicate this article to my friend, student and brother Charles Mtonga, a wonderful soul and kind spirit, who left this earth during the outbreak of Covid – 19.

†I take this opportunity to convey my heartfelt gratitude to Dr Sophie Gallop of Nottingham Trent University, for her patient hearing and feedback on a previous draft.

[1] Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?' (2009) 12(4) New Criminal Law Review 498, 499

[2] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56(1) The International and Comparative Law Quarterly 49, 51

[3] *ibid* 52

[4] See the discussion on situation in Palestine and the Rohingya situation in this work.

The term "quasi-universal" jurisdiction was also coined by Dr D. Dimitrakos of the McGeorge School of Law of the University of the Pacific in the context of ICC. He believes that the ICC has "quasi-universal jurisdiction" because "it (the Rome Statute) can allow the Court to assert jurisdiction in cases which could only be justified by universal jurisdiction in its most genuine form": D. Dimitrakos, 'The Principle Of Universal Jurisdiction & The International Criminal Court' (2014) Social Science Research Network 28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383587> accessed 20 September 2019

[5] The Rome Statute of the International Criminal Court (Adopted at Rome on 17 July 1998, came into force on 1 July 2002) 2187 UNTS 3 (The Rome Statute)

[6] Bekou and Cryer (n 2) 53-55; US was an active opponent to universal jurisdiction of the ICC so as two other populous states i.e. China and India.

[7] William A. Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press 2004) 74

[8] *ibid*

[9] *ibid* 75

[10] The International Commission of Jurists (ICJ) in its lengthy report on the ICC implicitly argued for universal jurisdiction by stating that ICC should have "inherent jurisdiction" for certain offences due to the nature of those crimes (ICJ, 1995: 27-28, 34). The Human Rights Watch (HRW) in its first comprehensive report on ICC in 1996 explicitly proposed that the ICC should have universal jurisdiction; that no state consent is required for certain cases concerning certain crimes including crimes against humanity, genocide and war crimes. The Women's Caucus for Gender Justice (WCGJ) also proposed universal jurisdiction. The International Committee of the Red Cross (ICRC) in 1997 in its paper on ICC strongly supported universal jurisdiction (ICRC, 1997b). Samoa, the first state that positively addressed the issue of universal jurisdiction of the ICC during PrepComs (Preparatory Committee Negotiations) stated that since the crimes concerned are already subjected to universal jurisdiction under Customary International Law, therefore, no state consent is necessary to try those crimes. During the PrepComs, Germany too proposed universal jurisdiction (Wilmhurst, 1999:132). In May 1998, NGOs like Amnesty International (AI) and Lawyers Committee for Human Rights (LCHR) pleaded for universal jurisdiction of the ICC with LCHR devoting a complete paper on universal jurisdiction (AI, 1998a; LCHR, 1998b). These culminated the Coalition for the International Criminal Court (CICC) to adopt universal jurisdiction as third principle in its 'Basic Principles of ICC' just before the Rome Conference (CICC, 1998a). The president of the ICRC made Universal Jurisdiction one of the main points in his address to the opening session of the Rome conference. During the Rome Conference, the European Parliament in 1998 unanimously adopted a resolution explicitly pleading for universal jurisdiction (European Parliament, 1998). According to CICC, while the German option for universal jurisdiction was not included in the Bureau Paper of the Rome Conference (Bureau Discussion Paper, 1998: Draft Art. 7), which only included the Korean, British (Original and Alternative options) and US-inspired options, 23 states were unhappy and expressed their regret in subsequent discussions due to the exclusion of universal jurisdiction. When a bureau proposal based on the Bureau Paper were published which excluded universal jurisdiction, AI, WCGJ, HRW and LCHR appealed to the Rome Conference Jointly and Separately with AI and WCGJ arguing for universal jurisdiction (An Appeal from Four Major Human Rights Organization, 1998). The ICRC in a Separate statement also argued for universal jurisdiction (Opting in on War Crimes, 1998).

[11] *ibid*

[12] *ibid*

[13] A "Utilitarian" approach propagated by eminent jurists Jeremy Bentham and John Stuart Mill (JSM did caveat this approach in his later work i.e. 'On Liberty') that assesses an action in terms of its consequence (greatest good for greatest number of people) is implied in this work in support of universal jurisdiction. Universal jurisdiction also gets its support from the doctrine of *Jus Cogens* and *Obligatio Erga Omnes* prevailing in International Law

(see the chapter "Universal Jurisdiction and the ICC" below). As such a utilitarian approach tells us whether an action 'should' be taken.

[14] The positive decisions rendered by the ICTY in the Case of *Prosecutor v Tadic* (See text to n 84) and by the SCSL in the case of *Prosecutor v Kallon and Kamara* (See text to n 86) firmly upholding universal jurisdiction in comparison to ICC's jurisdictional position in *the Situation of The People's Republic of Bangladesh/The Republic of the Union of Myanmar (Rohingya Issue)*(See text to n 101, 104, 105, 106) and in *the Situation of The Islamic Republic of Afghanistan* (See text to n 149, 150) bear testimony to the fact that deciding Jurisdiction is challenging for the ICC as it involves a consideration of many arguments, laws, theories and facts *etc.*

[15] Agreement for the prosecution and punishment of Major War Criminals of the European Axis and the Charter of the International Military Tribunal (IMT) (Signed on 8 August 1945, registered on 15 March 1951) 82 UNTS 279, art 6.

[16] Statute of the International Criminal Tribunal for Rwanda: United Nations Security Council (UNSC) Res 955 (8 November 1994) UN Doc S/RES/955 (1994), Annex

[17] International Criminal Court Publications, *Joining the International Criminal Court. Why Does it Matter?* page 6 <https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf> accessed 4 April 2020

[18] Schabas (n 7) 68

[19] The Rome Statute (n 5) Article 5

[20] *ibid* art 6

[21] *ibid* art 7

[22] *ibid* art 8

[23] *ibid* art 11

[24] *ibid* art 12(2)(a)

[25] *ibid* art 12(2)(b)

[26] Schabas (n 7) 78; Situation In The Republic Of Cote D'ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) Case No.: ICC-02/11 Date: 3 October 2011, para 13

[27] The Rome Statute (n 5) art 12(3); Rules of procedure and evidence of the ICC, ICC-ASP/1/3 and Corr.1 Part II.A., rule 44

[28] The Rome Statute (n 5) art 13(2)

[29] Aisling O'Sullivan, *Universal Jurisdiction in International Criminal Law* (First Published 2017, Routledge 2017) 89

[30] *ibid*

[31] *ibid*

[32] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (First Published 1994, Clarendon Press Oxford 1994) 56-57

[33] Malcolm N. Shaw, *International Law* (6th edition, Cambridge University Press 2008) 668

[34] International Law Commission, 'Definition of a peremptory norm of general international law (jus cogens)' (Report, Seventy-first session, A/74/10, 29 April–7 June and 8 July–9 August 2019) 142 < https://undocs.org/en/A/74/10> accessed on 1 October 2019

[35] Anthony D'Amato, 'IT'S A BIRD, IT'S A PLANE, IT'S JUS COGENS!' (2010) 6(1) Connecticut Journal of International Law 1, 3

[36] *Barcelona Traction, Light and Power Company, Limited [Belgium v Spain (Second Phase)],* Judgment, I.C.J. Reports 1970, p. 3, [33]-[34]

[37] Peter Weiss, 'Universal Jurisdiction: Past, Present and Future' (2008) 102 (APRIL 9-12) Proceedings of the Annual Meeting (American Society of International Law) 406, 408

[38] 'FARYADI SARWAR ZARDAD' (*Trial International*, 26 April 2016) <https://trialinternational.org/latest-post/faryadi-sarwar-zardad> accessed 25 May 2019

[39] Regina vs Faryadi Sarwar Zardad [2007] EWCA Crim 279

[40] 'ZARDAD' (n 38)

[41] 'Afghan Warlord Guilty of Torture' (*BBC World*, 18 April 2005) <http://news.bbc.co.uk/2/hi/uk_news/4693239.stm> accessed 25 July 2019

[42] 'ELY OULD DAH' (*Trial International*, 8 March 2012) <https://trialinternational.org/latest-post/ely-ould-dah/> accessed 25 July 2019

[43] *ibid*

[44] *Ely Ould Dah v France* (2009) 48 ILM 884, 894

[45] 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' (*Human Rights Watch*, 3 May 2016) <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#2> accessed 25 July 2019

[46] *ibid*

[47]'HISSENE HABRE' (*Trial International*, 29 April 2016) <https://trialinternational.org/latest-post/hissene-habre/> accessed 25 July 2019
[48] *ibid*
[49] *ibid*
[50] *ibid*
[51] *ibid*
[52] 'Hissène Habré case, Court of Cassation, 20 March 2001' (*International Committee of the Red Cross*, 20 March 2001) <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/90e26efa1bb31189c1256b21005549b0> accessed 25 July 2019
[53] 'Chronology of the Habre Case' (*Human Rights Watch*, 27 April 2015) <https://hrw.org/news/2015/04/27/chronology-habre-case> accessed 25 July 2019
[54] *ibid*
[55] *ibid*
[56] *ibid*
[57] 'The Prosecutor vs Hissene Habre et al.' (*International Crimes Database*) <https://internationalcrimesdatabase.org/Case/761> accessed 25 July 2019
[58] HABRE (n 47)
[59] Reed Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2015) 13(2) Oxford Journal of International Criminal Justice 209, 216
[60] *ibid* 212
[61] *ibid*
[62] *ibid*
[63] *ibid*
[64] Senegal's Criminal Procedure Code (1965), as amended in 2007, Article 669
[65] 'Chad court sentences ex-leader Habre, rebels to death' (*Reuters*, 15 August 2008) <https://reuters.com/article/us-chad-sentence/chad-court-sentences-ex-leader-habre-rebels-to-death-idUSLF73016320080815> accessed 25 July 2019
[66] *ibid*
[67] Brody (n 59) 213
[68] *ibid*
[69] Questions relating to the Obligation to Prosecute or Extradite
(Belgium v. Senegal) (*ICJ*, Summary of the Judgment of 20 July 2012) 12 <https://icj-cij.org/files/case-related/144/17086.pdf> accessed 27 July 2019
[70] *Barcelona Traction* (n 36) [33]
[71] The Rome Statute (n 5) art 7(1)(f); Under the Rome Statute, torture is a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack
[72] Brody (n 58) 212, 213
[73] *ibid* 213
[74] *ibid*
[75] *ibid*
[76] 'Hissène Habré, Chad's former dictator, just got a life sentence for crimes he committed in the 1980s' (*The Washington Post*, 1 June 2016) <https://washingtonpost.com/news/monkey-cage/wp/2016/06/01/hissene-habre-chads-former-dictator-just-got-a-life-sentence-for-crimes-he-committed-in-the-1980s/?noredirect=on> accessed on 25 July 2019
[77] 'Court upholds life sentence for former Chad ruler Habre' (*Reuters*, 27 April 2017) <https://af.reuters.com/article/topNews/idAFKBN17T1QQ-OZATP?pageNumber=2&virtualBrandChannel=0> accessed on 25 July 2019
[78] *Barcelona Traction* (n 36) [33]
[79] Peremptory Norms (n 34)
[80] Rights violated in Crimes against humanity are so important that they are considered as *Jus Cogens.*
[81] The Rome Statute (n 5) art 7(1)(f)
[82] *ibid* art 8
[83] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1995) IT-94-I
[84] *ibid* [62]
[85] *Prosecutor vs Morris Kallon and Brima Bazzy Kamara* (Decision on Challenge to Jurisdiction: Lome Accord Amnesty, 13 March 2014) (Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E)) [67]-[73]
[86] *ibid* [67]
[87] *ibid* [71]
[88] *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36
[89] *ibid* [12]

[90] *Attorney-General of the Government of Israel v. Eichmann* (District Court of Jerusalem, Israel, Criminal Case No. 40/61, Judgment, 11 December 1961) [12]
[91] See n 10
[92] Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93(1) American Journal of International Law 2, 8
[93] Bekou and Cryer (n 2) 51
[94] Schabas (n 7) 75
[95] Schabas (n 7) 75
[96] Leila N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational, New York, 2002) 118
[97] Bekou and Cryer (n 2) 51
[98] *ibid* 51
[99] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 6 September 2018) ICC-RoC46(3)-01/18
[100] Bangladesh deposited its instrument of ratification of the Rome Statute with the UN Secretary General on 23 March 2010, during the resumed session of the 8th Assembly of States Parties (ASP) of the ICC that was taking place in New York. Thus it became the 111th State of the Rome Statute: People's Republic of Bangladesh - Campaign for the Rome Statute of the ICC (parliamentarians for global action) <https://www.pgaction.org/ilhr/rome-statute/asia/bangladesh.html> accessed on 21 August 2019
[101] *The People's Republic of Bangladesh/Republic of the Union of Myanmar* (n 99) [63]
[102] *ibid* [70]; the ICC states "It follows that a restrictive reading of article 12(2)(a) of the Statute, which would deny the Court's jurisdiction on the basis that one or more elements of a crime within the jurisdiction of the Court or part of such a crime was committed on the territory of a State not Party to the Statute, would not be in keeping with such an object and purpose".
[103] "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds: Article 7(2)(d) of the Rome Statute.
[104] *The People's Republic of Bangladesh/Republic of the Union of Myanmar* (n 99) [73]
[105] *ibid* [65]
[106] *ibid* [69]
[107] *ibid* [71]
[108] *ibid* [71]
[109] *ibid* [71]
[110] *ibid* [71]
[111] Lord Denning beautifully defined Teleological Approach in the following term: "We had a valuable paper on it by the President of the court (Judge H. Kutscher) which is well worth studying: 'Methods of interpretation as seen by a judge at the Court of Justice, Luxembourg 1976.' They adopt a method which they call in English by strange words - at any rate they were strange to me - the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly." *James Buchanan & Co. Ltd. V. Babco Forwarding & Shipping (U.K.) Ltd.* - [1977] Q.B. 208, 214 (Denning MR)
[112] Pragmatic approach to statutory interpretation or pragmatic dynamism coin the idea that the meaning of a statute evolves over time; a meaning that infuses the statute with vitality and significance today. In the given situation the pragmatic approach produces the best possible and practical outcome: bringing the perpetrator to justice. This style of interpretation has been discussed by US Legislative Attorney Valerie C. Brennon in a report wherein she termed "Dynamic Statutory Interpretation" proposed by William N. Eskridge, Jr. as "Pragmatic Dynamism": Valerie C. Brennon, "Statutory Interpretation: Theories, Tools, and Trends" (2018) R45153 Congressional Research Service (US Library of Congress) Report 9 <https://fas.org/sgp/crs/misc/R45153.pdf> accessed on 1 December 2019
[113] Preamble of the Rome Statute: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished……Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.."

[114] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019) case no. ICC-01/19
[115] *ibid* [45]
[116] *ibid* [45]
[117] *ibid* [52]
[118] *ibid* [50]
[119] *ibid* [53]
[120] *ibid* [56]
[121] *ibid* [55]
[122] *ibid* [60]
[123] *ibid* [56]
[124] *ibid* [56]
[125] *ibid* [58]
[126] *ibid* [62]
[127] *ibid* [60]
[128] *ibid* [62]
[129] *ibid* [59]
[130] *ibid* [60]
[131] *Situation in the Islamic Republic of Afghanistan* (Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019) case no. ICC-02/17
[132] 'Afghanistan, Situation in the Islamic Republic of Afghanistan, ICC-02/17, Investigation' (*International Criminal Court*) <https://icc-cpi.int/afghanistan> accessed 15 June 2020
[133] *The Islamic Republic Of Afghanistan* (n 131)[23]; "Annex 2C to the Request contains information to the effect that several individuals were captured, detained and transferred by US armed forces to specific US-controlled facilities (particularly, the airbases in Bagram and Kandahar), on the basis of suspicions either of being members or co-operators of Al-Qaeda, the Taliban or other associated armed groups; or of having knowledge of operations and planned attacks as well as information on these groups. Other individuals were also allegedly captured in various places and similarly mistreated inside or outside Afghanistan by the CIA, allegedly with a view to forcing confessions, obtaining information or retaliating for the attacks suffered on 11 September 2001 on US territory".
[134] *ibid* [53]
[135] *The Islamic Republic Of Afghanistan* (n 131) [51]: "The Prosecutor submits that the capture of persons 'undertaken in the context of or associated with the ongoing armed conflict in Afghanistan and their later alleged mistreatment on the territory of a State Party, combine to provide the requisite nexus' (emphasis added)".
[136] *ibid* [50]
[137] See the discussion of n 125
[138] *The Islamic Republic of Afghanistan* (n 131) [53]
[139] *Hors de combat* is a French term used in diplomacy and international law to refer to persons who are incapable of performing their ability to wage war. Examples include fighter pilots or aircrews parachuting from their disabled aircraft, as well as the sick, wounded, detained, or otherwise disabled.
[140] *The Islamic Republic Of Afghanistan* (n 131) [51]
[141] *ibid*
[142] *ibid* [52]
[143] *ibid* [53]
[144] *ibid*: "…..In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions […]".
[145] *ibid* [54]
[146] *ibid* [54]
[147] *The People's Republic of Bangladesh/Republic of the Union of Myanmar* (n 114) [58]
[148] *ibid* [56]
[149] *Situation in the Islamic Republic of Afghanistan* (Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020) case no. ICC-02/17 OA4
[150] *ibid* 3
[151] *ibid* 23
[152] *ibid* 24
[153] *ibid* 28
[154] *ibid* [61]

[155] *ibid* [61]
[156] *ibid* [63] The Pre-trial chamber in restricting the incidents that are closely linked to also suggested in the alternative that investigation of incidents not closely related to those authorised would be possible if they were the subject of a new request for authorisation under article 15.
[157] *ibid* [63]
[158] *ibid* [63]
[159] *ibid* [71]
[160] *ibid* [71]
[161] Chapeau means introductory text appearing in a treaty that broadly defines its principles, objectives, and background. In the present context it is the introductory text of the Article 3.
[162] *The Islamic Republic Of Afghanistan* (n 131)[53]
[163] *The Islamic Republic of Afghanistan* (n 149) [72]
[164] *ibid* [73]
[165] *ibid* [73]
[166] *ibid* [73]
[167] *ibid* [73]
[168] *ibid* [74]
[169] *ibid* [74]
[170] *ibid* [74]
[171] ICRC, 'Commentary of 2016, Article 3: Conflicts not of an International Character' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> accessed 15 March 2020
[172] *The Islamic Republic of Afghanistan* (n 149) 32, 33
[173] *ibid* 2
[174] Declaration Accepting the Jurisdiction of the International Criminal Court (*International Criminal Court*, 31 December 2014) <https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf> accessed 24 July 2019
[175] Palestine submitted the instrument with the Secretary-General of the United Nations, in accordance with article 125(2) of the Statute.
[176] 'ICC welcomes Palestine as a new State Party' (*International Criminal Court*, Press Release: 1 April 2015) <https://icc-cpi.int/Pages/item.aspx?name=pr1103> accessed 24 July 2019; It is worth noting what the Vice-President Kuniko Ozaki stated during the ceremony held on 1 April 2015: "Accession to a treaty is, of course, just the first step. As the Rome Statute today enters into force for the State of Palestine, Palestine acquires all the rights as well as responsibilities that come with being a State Party to the Statute. These are substantive commitments, which cannot be taken lightly".
[177] 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (*International Criminal Court*, Press Release: 16 January 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> accessed 25 July 2019
[178] 'Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine', (*International Criminal Court*, Statement : 22 May 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat> accessed 24 July 2019'; the following is worth noting: "……..Specifically, pursuant to articles 13(a) and 14 of the Rome Statute of the International Criminal Court ("ICC" or "Court"), the State of Palestine "requests the Prosecutor to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine".
[179] "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine" (*International Criminal Court*, Statement: 2 September 2014) <https://icc-cpi.int//Pages/item.aspx?name=otp-st-14-09-02> accessed 24 July 2019; In this statement Ms. Bensouda addresses the concerns of Liberal Scholars without naming them.
[180] *ibid*
[181] *Situation in the State of Palestine* (Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine) ICC-01/18-12, 22 January 2020 <https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF> accessed on 14 March 2020
[182] *Situation in the State of Palestine, (*Decision on the 'Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2020) 60, case no. ICC-01/18
[183] ibid; Although Palestine has already become the 123rd member of the Rome Statute after following different procedures, still the prosecution's foresight as to the Chamber's opinion touching upon the issue of statehood of Palestine can be sensed from the following: "Following the deposit of its instrument of accession with the United Nations Secretary-General pursuant to Article 125(3) on 2 January 2015, Palestine became a state party to the Rome Statute under Article 12(1). The Court need not conduct a different assessment regarding Palestine's statehood to exercise its jurisdiction in the territory of Palestine in accordance to Article 12(2)(a). Alternatively, if the Chamber deems it necessary to assess whether Palestine satisfies the criteria of

statehood under international law, it could conclude that Palestine is a state under the relevant principles and rules of international law for the sole purposes of the Rome Statute", *The State of Palestine,* (n 181) [218]
[184] "Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine", (*International Criminal Court,* 3 March 2021) https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine accessed 17 March 2021
[185] *Situation in the State of Palestine,* Decision on the 'Prosecution request', (n 182) 2-3; the amicus curie submissions have not been considered in this Article.
[186] *Situation in the State of Palestine,* (Submission Pursuant to Rule 103 (Todd F. Buchwald and Steven J. Rapp, 16 March 2020) 21 https://legal-tools.org/doc/cktp8d/pdf/ accessed 17 March 2021; *Situation in the State of Palestine* (Observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence (Professor Robert Badinter et al), 16 March 2020), 24, 25, 28, https://legal-tools.org/doc/frdqxo/pdf/ accessed 17 March 2021; *Situation in the State of Palestine* (Amicus Brief (Yael Vias Gvirsman, 16 March 2020) 5 https://legal-tools.org/doc/g2yfve/pdf/ accessed 17 March 2021.
[187] *Situation in the State of Palestine,* (Submissions Pursuant to Rule 103 (John Quigley), 3 March 2020) [60] https://www.icc-cpi.int/CourtRecords/CR2020_00794.PDF accessed 17 March 2021
[188] ICRC Advisory Service on International Humanitarian Law, 'Universal jurisdiction over War Crimes' (March 2014) https://www.icrc.org/en/download/file/1086/universal-jurisdiction-icrc-eng.pdf accessed 17 March 2021; note that at the first column of the advice, under the heading "state jurisdiction", universal jurisdiction has been mentioned as a "further basis for asserting extraterritorial jurisdiction".
[189] The Rome Statute, (n 5) Art. 12(2)(a).
[190] See the discussion of footnote 119 and 182 above.
[191] Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party sates: A Critique of the U.S. Position' (2001) 64(1) Law and Contemporary Problems 67, 72
[192] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)
[193] *ibid* 19
[194] Scharf (n 185) 73
[195] *ibid* 71-72
[196] *ibid* 73
[197] *ibid* 74
[198] *ibid* 73
[199] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226
[200] Scharf (n 185) 73
[201] *ibid* 74: There are instances of import of procedural principles from domestic law e.g. res judicata, use of circumstantial evidence *etc.* but not of substantive principles.
[202] Scharf (n 185) 75
[203] The Rome Statute (n 5) Article 1
[204] Zsuzsanna Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court' (2001) 95(3) The American Journal of International Law 606, 607-615, 619 -622; this article discusses the issues at length and provides recommendations as to their solutions.
[205] Rosa Ana Alija-Fernandez, 'Justice for No-Land's Men? The United States Military Trials against Spanish Kapos in Mauthausen and Universal Jurisdiciton' in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (First Published 2013, Oxford University Press 2013); this article discusses the application of universal jurisdiction to nationals of neutral states and stateless people.
[206] Vienna Convention on the law of treaties (with annex) (Adopted at Vienna on 23 May 1969, entered into force on 27 January 1980) United Nations, Treaty Series, vol. 1155, p. 331 <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> accessed on 15 July 2019
[207] Sarah Babaian, *The International Criminal Court – An International Criminal World Court?* (First Published 2018, Springer International Publishing AG 2018) 26
[208] Scharf (n 185) 74, 75
[209] Bensouda (n 180): The existence of pressure can be sensed, however, whether the prosecutor succumbs to it is a different matter altogether.
[210] David Bosco, 'Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court' (2016) 22(1) Global Governance 155, 158-159
[211] Ronan LeeSource, 'Myanmar's Citizenship Law as State Crime: A Case for the International Criminal Court' (2019) 8(2) State Crime Journal 241, 261
[212] Nadia Shamsi, 'The ICC: A Political Tool? How The Rome Statute Is Susceptible To The Pressures Of More Power States' (2016) 24(1) Willamette Journal of International Law and Dispute Resolution 85, 89-92

[213] C. Tomuschat, 'The duty to prosecute international crimes committed by individuals' in H.-J. Cremer and H. Steinberger (eds.), *Tradition und Weltoffenheit des Rechts* (Springer, 2002) 315-349
[214] The Rome Statute (n 5) Preamble
[215] *ibid*
[216] Ryngaert, (n 1) 502
[217] Bekou and Cryer (n 2) 66
[218] Ryngaert (n 1) 503
[219] Bosco (n 210) 169
[220] *ibid*
[221] Kip Hale and Melinda Rankin, 'Extending the 'system' of international criminal law? The ICC's decision on jurisdiction over alleged deportations of Rohingya people' (2019) 73(1) 22, Australian Journal of International Affairs 26-27
[222] Italic emphasis added.
[223] Alexandre Skander Galand, 'The Nature of the Rome Statute of the International Criminal Court (and its Amended Jurisdictional Scheme)' (2019) 17(5), Journal of International Criminal Justice 933, 956