

APPENDIX A

Jay Alan Sekulow & Robert Weston Ash, *Trying Nationals of Non-Consenting, Non-Party States Before the International Criminal Court: An Unlawful Overreach*, ExpressO (available at: http://works.bepress.com/Robert_ash/1/)

**TRYING NATIONALS OF NON-CONSENTING, NON-PARTY
STATES BEFORE THE INTERNATIONAL CRIMINAL COURT:
AN UNLAWFUL OVERREACH**

by

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“A treaty does not create either obligations or rights for a third State without its consent.”¹

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International law can be defined as “the system of rules, principles, and processes intended to govern relations at the interstate level, including the relations among states, organizations, and individuals.”² Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law.³ The three primary

¹Vienna Convention on the Law of Treaties, art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of binding conventional law for those States which are a party to the treaty which incorporates the customary law principle. As such, those States that have acceded to the Vienna Convention are bound by both conventional and customary law regarding that principle.

²THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 3 (Mary Ellen O’Connell et al. eds., 6th ed. 2010) [hereinafter O’CONNELL].

³Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986) [hereinafter RESTATEMENT], for sources of international law:

- (1) A rule of international law is one that has been accepted as such by the international community of states
 - (a) in the form of customary law;
 - (b) by international agreement; or
 - (c) by derivation from general principles common to major legal systems of the world.
- (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

sources are: (1) “international conventions . . . establishing *rules expressly recognized by the contesting states*”⁴ (commonly referred to as “conventional international law” and generally binding on the parties to the respective convention); (2) “international custom, as evidence of a general practice accepted as law”⁵ (commonly referred to a “customary international law” and generally binding on all nations); and (3) “the general principles of law recognized by civilized nations.”⁶ Secondary sources of international law include “judicial decisions,” “teaching of the

(3) International agreements create law for the states parties thereto

(4) General principles common to the major legal systems . . . may be invoked as supplementary rules of international law where appropriate.

Id.

⁴ICJ Statute, *supra* note 3, art. 38(1)(a) (emphasis added). Note especially the phrase, “establishing rules expressly recognized by the contesting states.” Such rules need not be recognized by states which are *not* parties to the convention. Some jurists question whether treaties should even be considered as a source of international law. Sir Gerald Fitzmaurice, for example, has opined that “‘treaties are no more a source of law than an ordinary private law contract that creates rights and obligations In itself, the treaty and ‘the law’ it contains only applies to the parties to it.’” INTERNATIONAL LAW: CASES AND MATERIALS 95 (Louis Henkin et al., eds., 3d ed. 1993) [hereinafter HENKIN] (quoting Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in SYMBOLAE VERZIIL 153, 157–58 (Von Asbeck, et al., eds., 1958)).

⁵ICJ Statute, *supra* note 3, art. 38(1)(b). “The view of most international lawyers is that customary law is not a form of tacit treaty but an independent form of law; and that, when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every state.” HENKIN, *supra* note 4, at 87. That “one reservation” applies to the State which, “while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law.” *Id.*

⁶ICJ Statute, *supra* note 3, art. 38(1)(c); *see also* O’CONNELL, *supra* note 2, at 60. These include common principles of law and justice reflected in the legal systems of civilized states.

most highly qualified publicists of the various nations,”⁷ as well as principles of equity and fairness.⁸ In this article, we will focus primarily on the relationship and interaction between conventional international law and customary international law.

Conventional international law is found in conventions, treaties, and similar negotiated agreements between and among States as well as agreements between States and other international actors (like the United Nations or NATO), and it is binding on the parties to such agreements.⁹ Accordingly, it is a consent-based legal regime. Customary international law, on the other hand, is law based on custom that develops over an extended period of time and is considered binding on all States.¹⁰ Although it is not necessarily *written* law, customary

⁷ICJ Statute, *supra* note 3, art. 38(1)(d). Louis Henkin aptly notes that “[t]he place of the writer in international law has always been more important than in municipal legal systems. The basic systematization of international law is largely the work of publicists, from Grotius and Gentilis onwards. . . . In the [civil law] systems reference to textbook writers and commentators is a normal practice, as the perusal of any collection of decisions of the German, Swiss or other European Supreme Courts will show.” HENKIN, *supra* note 4, at 123.

⁸HENKIN, *supra* note 4, at 123.

⁹Vienna Convention, *supra* note 1, art. 26 (“Every treaty in force is binding upon the *parties* to it and must be performed by them in good faith” (emphasis added)).

¹⁰There is one notable exception. A State may exempt itself from an international custom if that State is a “persistent objector” during the period that the custom develops. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 211 (2010). Additionally, customary law is frequently incorporated into treaties, thereby making it also binding as *conventional law* for the States Parties to the respective treaty.

international law is nonetheless considered “law” because States generally comply with its requirements because they believe that they have a legal obligation to do so.¹¹

It is a foundational principle of customary international law that a State that has not become a party to a treaty or other international convention is not bound by the terms of such treaty or convention.¹² Accordingly, since principles of customary international law constitute the default provisions governing the relationship between States, they will always supersede contrary provisions of conventional international law as far as States not a party to the respective convention are concerned. In other words, a non-party State to an international convention is not bound by the terms of such convention without its consent. As such, in general (and absent an intervening, bilateral agreement between them that modifies custom), *the relations between a State Party to a convention and a non-party State to that same convention are governed solely by customary international law*. Recognition of this principle is key when determining the legal

¹¹North Sea Continental Shelf (Ger./Den.), 1969 I.C.J. 3, ¶ 77 (Feb. 20) (“The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”). In that sense, customary international law differs from customary usage (such as ceremonial salutes at sea or exempting diplomatic vehicles from certain parking regulations), since States recognize no legal obligation to do the latter.

¹²See, e.g., Vienna Convention, *supra* note 1, art. 34. There can be an exception here, too. Principles enshrined in treaties may evolve into custom over time if non-party States to the respective treaty begin to conform their activities to such principles because they believe that they have a legal obligation to do so. *North Sea Continental Shelf*, 1969 I.C.J. 3, ¶ 71.

reach of an institution like the International Criminal Court (ICC), an institution created pursuant to the Rome Statute,¹³ a treaty to which a significant number of States have not acceded (such as, the United States of America, the People's Republic of China, Russia, India, Pakistan, Israel, Iran, and Egypt, to name but a few¹⁴).

The Rome Statute exists solely because its States Parties (i.e., States that have signed and ratified the treaty) have negotiated, and agreed to, its terms. In certain circumstances, the Statute purports to permit the ICC to exercise jurisdiction over the nationals of non-consenting, non-party States.¹⁵ The grant of such jurisdiction violates customary international law. Indeed, this issue was one of the points of contention during the drafting of the Rome Statute, and many key

¹³Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. As of July 31, 2013, 122 States have acceded to the Statute. *Chapter XVIII*, United Nations Treaty Collection, *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#11 (last visited July 31, 2013).

¹⁴*See* The States Parties to the Rome Statute, *available at* http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited July 22, 2013). Note that among the non-acceding States are the four most populous States in the world (i.e., China, India, the United States, and Indonesia). Cent. Intelligence Agency, *Country Comparison: Population*, The World FactBook (July 31, 2013), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>. As such, approximately one-half of the world's population lives in countries that have rejected the Rome Statute and ICC jurisdiction. Note, further, that many States in volatile regions of the world have also declined to accede to the Statute (e.g., Israel, Iran, Egypt, and Pakistan). The States Parties to the Rome Statute, *available at* http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited July 31, 2013).

¹⁵Rome Statute, *supra* note 13, art. 12(2)(a).

State players in the international community were uncomfortable with a treaty which contravened international legal norms.¹⁶

Despite the fact that the Rome Statute contains a provision that clearly violates customary international law by subjecting nationals of non-consenting, non-party States to the terms of a treaty to which they have not acceded, attempts to bring nationals of such States before the ICC for investigation and possible trial—*via that very provision*—are ongoing. In 2009, for example, despite the fact that Israel is not a State Party to the Rome Statute, the Palestinian Authority (PA) submitted a declaration to the ICC Registrar, in which it purported to accede to the Rome Statute pursuant to Article 12(3).¹⁷ It did so in an effort to bring Israeli soldiers and government officials within ICC jurisdiction, *inter alia*, for alleged crimes committed in the Gaza Strip during the 2008–09 Israeli military incursion known as “Operation Cast Lead.”¹⁸ More recently, the Union of the Comoros filed a referral with the ICC Prosecutor, requesting that the Office of the

¹⁶See generally David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12 (1999).

¹⁷Article 12(3) permits a non-party “State” to accede to ICC jurisdiction by lodging a declaration with the ICC Registrar, *see* Rome Statute, *supra* note 13, art. 12(3), which the PA attempted to do, *see infra* note 18, even though it was not a State.

¹⁸Ali Khashan, Minister of Justice, Palestinian Nat’l Auth., Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009), *available at* <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>. The ICC Office of the Prosecutor subsequently rejected this declaration because it recognized that the PA was not a State for purposes of the Rome Statute. Statement, Office of the Prosecutor, International Criminal Court, Situation in Palestine (Apr. 3, 2012), *available at* <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

Prosecutor (OTP) investigate and (ultimately) try Israeli soldiers for their alleged unlawful actions during the 2010 boarding of the Mavi Marmara, at the time a Comoros-flagged vessel, which was attempting to breach Israel's naval blockade of the Gaza Strip.¹⁹

Irrespective of the truthfulness or falsehood of the allegations of criminal wrongdoing in the above examples, the ICC is not the correct forum when nationals of a non-party State to the Rome Statute, like Israel, are involved, absent such State's express grant of its consent thereto, consent which Israel has not granted—and is unlikely to grant.

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This Article is divided into three parts. Part I traces the development of international criminal tribunals, culminating in the creation of the ICC. Part II examines the nature of the ICC as a court of limited jurisdiction under the Rome Statute. It also introduces the reader to Article 12(2)(a)—the provision that explicitly grants the ICC jurisdiction over the nationals of non-party States. Part III argues that such jurisdiction is unlawful and that current attempts to broaden the meaning and reach of the Rome Statute constitute an assault on unambiguous international custom. This Article concludes with a call to uphold the rule of law by recognizing the ICC's status as a court of limited jurisdiction and to reject the attempt reflected in the Rome Statute to expand its reach in violation of customary international law.

¹⁹Referral of the Union of the Comoros with Respect to the 31 May 2010 Israeli Raid on the Humanitarian Aid Flotilla Bound for Gaza Strip to the International Criminal Court (May 14, 2013), *available at* <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>. As of the writing of this article, the ICC Office of the Prosecutor is currently reviewing this submission.

I. DEVELOPMENT OF INTERNATIONAL CRIMINAL TRIBUNALS.

The historical development of post-conflict tribunals to bring to justice perpetrators of war crimes has not been a smooth process. Nor has it been based on custom; what development there has been has occurred by means of international agreements. Following the First World War, for example, the Treaty of Versailles provided for the establishment of *ad hoc* tribunals to try war criminals,²⁰ although no such tribunals were formed.²¹ Article 227 of the Versailles Treaty specifically called for the establishment of a tribunal composed of five judges (one each from the United States, Great Britain, France, Italy, and Japan) to try the former German Kaiser.²² Article 227 also called for requesting that the government of the Netherlands surrender the Kaiser for trial.²³ Dutch officials declined to surrender the Kaiser to the requesting powers, and no trial was ever held.²⁴ This may have been because Germany had never surrendered²⁵;

²⁰Treaty of Peace Between the Allied and Associated Powers and Germany arts. 227–29, June 28, 1919, 2 Bevans 43 [hereinafter Versailles Treaty].

²¹Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the Criminal Court*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 3, 4 (Antonio Cassese et al. eds., 2002).

²²Versailles Treaty, *supra* note 20, art. 227. At the end of the war, the Kaiser abdicated and was granted asylum in the Netherlands. SPENCER TUCKER & PRISCILLA MARY ROBERTS, *WORLD WAR I: A STUDENT ENCYCLOPEDIA* 1015 (2006).

²³Versailles Treaty, *supra* note 20, art. 227.

²⁴2 LAMAR CECIL, *WILHELM II: EMPEROR AND EXILE, 1900–1941*, at 299–300 (1996). Historians may disagree regarding the issue of who was solely or primarily responsible for the outbreak of the First World War, *see, e.g.*, Hayley Dixon, *Germany and Austria started WWI seeking European domination, historian says*, available at <http://www.telegraph.co.uk/history/britain-at-war/10110657/Germany-and-Austria-started-WWI-seeking-European->

instead, German officials had agreed to an armistice²⁶ with the so-called Allied and Associated Powers.

In 1920, the Advisory Committee of Jurists, which had gathered to prepare the foundation for the Permanent Court of International Justice, also proposed the creation of a High Court of International Justice to try perpetrators of crimes against international public order and international law.²⁷ The League of Nations rejected as “premature” the proposal for such a High Court.²⁸ Following the League of Nations rejection, the idea of a standing international court to deal with international breaches of the peace was kept alive by NGOs, but none of their ideas

domination-historian-says.html; *The Causes of World War One*, available at <http://www.firstworldwar.com/origins/causes.htm> (referring to multiple causes); John Bourne, *Total War I: The Great War*, available at <http://www.english.illinois.edu/maps/ww1/bourneessay.htm> (referring to multiple causes), yet few would dispute that the German violation of Belgian neutrality was not a war crime for which German officials could—or should—be held liable.

²⁵Even today, November 11th in the United States marks “Armistice Day” (since renamed “Veterans Day”), since the fighting in the First World War ceased on the eleventh hour of the eleventh day in the eleventh month in 1918. *History of Veterans Day*, U.S. DEP’T VETERANS AFF., <http://www1.va.gov/opa/vetsday/vetdayhistory.asp> (last visited June 21, 2013).

²⁶An “armistice” is defined as “a temporary cessation of fighting *by mutual consent*.” See *Armistice*, FREE DICTIONARY, <http://www.thefreedictionary.com/armistice> (last visited June 21, 2013) (emphasis added). As such, an armistice does not indicate that one side was defeated in the conflict.

²⁷Cassese, *supra* note 21.

²⁸*Id.* at 5.

came to fruition in the interwar period.²⁹ States were simply not ready to cede their sovereign prerogatives to such a court.

Following the Second World War, the international community was reeling from the sheer magnitude of the horrors perpetrated by the Nazi regime in Europe and by the Japanese regime in large portions of East and South-East Asia.³⁰ Recalling the failure to hold war criminals accountable following the First World War, the Allied powers resolved not to repeat that mistake. In the Spring of 1945, representatives from the United States, the Soviet Union, Great Britain, and France gathered in London to decide how to punish Nazi war criminals. The result was the so-called Nuremberg Charter which established the International Military Tribunal (IMT) to try high-ranking Nazis for “crimes against peace,” “war crimes,” and “crimes against humanity.”³¹ Each power also prosecuted within its respective zone of occupation lower-level Nazis for the same crimes.³²

The Nuremberg trials served as a precedent and started a process that has, by fits and starts, continued to this day. Shortly after the Nuremberg and Tokyo trials, the newly formed United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which recognized the potential of a future “international penal tribunal”

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at 6–7.

³²*Id.* at 7.

to assist states in the punishment of genocide.³³ The General Assembly also invited the International Law Commission (ILC) to investigate the feasibility of creating a permanent international tribunal with power to try individuals for international crimes, such as genocide.³⁴ Accordingly, in 1951, the ILC transmitted a draft statute to the UN, detailing the structure and jurisdiction of the proposed international criminal court.³⁵ In 1952, the General Assembly created a new committee charged with the responsibility of perfecting the draft statute,³⁶ and the committee produced an updated draft for consideration in 1953.³⁷

Despite the multiple drafts presented to the General Assembly, the UN eventually abandoned its efforts to institute an international criminal court owing to the realities of the Cold War. Soon after the Second World War ended, the relations among the victorious allies deteriorated politically to the point where the world was divided into two competing camps: the Western Bloc, led by the United States, and the Eastern (or Soviet) Bloc, led by the Soviet Union. The resulting division manifested itself in international organizations like the UN. The

³³Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, G.A. Res. 260 (III) A, U.N. Doc. A/RES/260(III) (Dec. 9, 1948).

³⁴G.A. Res. 260 (III) B, U.N. Doc. A/RES/260(III) (Dec. 9, 1948) (“*Invites* the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdictions will be conferred upon that organ by international conventions . . .”).

³⁵Rep. of the Comm. on Int’l Criminal Jurisdiction, 1st sess., Aug. 1–31, 1951, U.N. Doc. A/2136; GAOR, 7th Sess., Supp. No. 11, Annex I (1952).

³⁶G.A. Res. 687(VII), U.N. Doc. A/RES/687(VII) (Dec. 5, 1952).

³⁷Rep. of the 1953 Comm. on Int’l Criminal Jurisdiction, July 27–Aug. 20, 1953, U.N. Doc. A/2645; GAOR, 9th Sess., Supp. No. 12, Annex (1954).

UN Security Council, for example, which was charged under Chapter VII of the UN Charter with the responsibility to maintain international peace,³⁸ was rendered virtually impotent by the East-West split. Each of the five permanent members of the UN Security Council³⁹ (often called the P-5) possessed veto power over any action being considered by the Council.⁴⁰ As such, each bloc could effectively check the other bloc's initiatives in the Council. Moreover, as the sides competed for influence around the globe, armed conflicts became more, rather than less, frequent, especially in regions where the two blocs sought to expand their influence or control.⁴¹ Only after the demise of the Soviet Bloc did the Security Council begin to function in a manner more akin to that which was originally intended.

Yet, the demise of the Soviet Union and the end of the Cold War did not lead to peace. The disintegration of the Soviet Bloc unleashed long pent-up frustration and anger among various peoples and groups which led to increasing instability in previously stable regions. For example, the disintegration of Yugoslavia along ethnic lines led to armed conflicts among Croats, Serbs, Muslims, Slovenes, Albanian Kosovars, and others.⁴² These internecine conflicts

³⁸See U.N. Charter arts. 39–42.

³⁹The P-5 consisted of the Republic of China, France, Great Britain, the Soviet Union, and the United States. Over time, the China seat passed from the Nationalist Chinese regime on Taiwan to the People's Republic of China on the mainland, and, with the demise of the Soviet Union, the Soviet seat passed to the Russian Federation.

⁴⁰U.N. Charter art. 27, para. 3.

⁴¹Among the conflicts were the Greek civil war, the French war in Indo-China, the Chinese civil war, the Korean war, the Vietnam war as well as numerous colonial wars in such disparate places as Indonesia, Algeria, and Kenya, to name but a few.

⁴²Ivo Banac, *Bosnian Muslims: From Religious Community to Socialist Nationhood and Post-Communist Statehood, 1918–1922*, in *THE MUSLIMS OF BOSNIA-HERZEGOVINA: THEIR HISTORIC DEVELOPMENT FROM THE MIDDLE AGES*

were characterized by horrific atrocities.⁴³ It was then that the Security Council—no longer hobbled by Cold War intrigue and competition—resolved to create an *ad hoc* tribunal (the International Criminal Tribunal for the Former Yugoslavia or ICTY) to try and punish those responsible for crimes against humanity and war crimes committed in the former Yugoslavia.⁴⁴

Similarly, in response to the genocide in Rwanda, the Security Council created an *ad hoc* tribunal (the International Criminal Tribunal for Rwanda or ICTR) to try and punish those responsible for the horrendous crimes that occurred in Rwanda.⁴⁵ Additionally, a UN-backed, mixed, International-Cambodian tribunal is currently dealing with atrocities committed by members of the Khmer Rouge in Cambodia.⁴⁶ Note that in each of the three tribunals just mentioned, the vast majority of the crimes being handled were committed internally, i.e. within the State involved. In other words, these “international” tribunals are dealing essentially with crimes committed in internal conflicts, i.e., crimes committed within the territory of a State by nationals of that State.

As the *ad hoc* tribunals were being created, momentum was gathering, once again, for the creation of a permanent international criminal tribunal. In 1989, Trinidad and Tobago, motivated by domestic criminal drug-trafficking beyond its ability to control, appealed to the UN to move

TO THE DISSOLUTION OF YUGOSLAVIA 129 (Mark Pinson ed., 1996); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 394–95 (2003).

⁴³Williams, *supra* note 42, at 395–97.

⁴⁴S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

⁴⁵S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁴⁶See G.A. Res. 57/228 B, U.N. Doc. A/RES/57/228 B (May 22, 2003).

forward with creating an international tribunal to deal with international criminal activity.⁴⁷ The General Assembly responded by requesting the ILC to provide an updated version of its previous draft statutes.⁴⁸

In 1994, the ILC transmitted to the General Assembly a new draft statute and recommended, *inter alia*, that UN member states convene to negotiate a treaty establishing such a court.⁴⁹ For the next four years, various UN bodies discussed and amended the statute. Then, from June 15 to July 17, 1998, 160 states gathered in Rome to negotiate a final version of the treaty. On July 17, 1998, the conference voted to adopt the Rome Statute,⁵⁰ whose terms established the International Criminal Court and its jurisdiction.

⁴⁷Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs and Across national Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes, in letter dated Aug. 21, 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General, U.N. Doc. A/44/195, Annex (Aug. 21, 1989) (“The establishment of an international criminal court with jurisdiction to prosecute and punish individuals and entities who engage in, *inter alia*, the illicit trafficking in narcotic drugs across national borders would serve to bolster the legal process whereby such offenders are prosecuted and punished and would also contribute substantially to the progressive development and codification of international law.”).

⁴⁸G.A. Res. 44/39, U.N. Doc. A/RES/44/39 (Dec. 4, 1989).

⁴⁹Rep. of the Int’l Law Comm., 45th sess., May 3–July 23, 1993, U.N. Doc. A/48/10; GAOR, 48th Sess., Supp. No. 10, Annex (1994).

⁵⁰2 U.N. DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT’L CRIMINAL COURT, SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE COMMITTEE OF THE WHOLE, at 362, U.N. Doc. A/CONF.183/13 (Vol. II), U.N. Sales No. E.02.I.5 (2002).

Ratification by 60 States was required for the treaty to take effect.⁵¹ The required sixtieth ratification came on April 11, 2002.⁵² The Rome Statute entered into force on July 1, 2002.⁵³

II. DESPITE THE ROME STATUTE'S STATED GOAL OF ENSURING THAT THE PERPETRATORS OF THE MOST SERIOUS INTERNATIONAL CRIMES NOT GO UNPUNISHED,⁵⁴ THE ICC IS NONETHELESS A COURT OF LIMITED JURISDICTION.

The ICC is, by the Rome Statute's own terms, a court of limited, not plenary, jurisdiction. The ICC is limited in a number of significant ways (each of which, in some measure, works against the actual achievement of the Statute's stated goal of ensuring that the perpetrators of the most serious international crimes are brought to justice for their crimes⁵⁵). Among the explicit limitations are the following:

- (1) The Rome Statute only permits "States"⁵⁶ to accede to ICC jurisdiction.⁵⁷ That is why the ICC Prosecutor ultimately rejected the 2009 Declaration of the Palestinian Authority (PA) attempting to accede to ICC jurisdiction.⁵⁸

⁵¹Rome Statute, *supra* note 13, art. 126.

⁵²*Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last updated June 14, 2013).

⁵³*Id.*

⁵⁴Rome Statute, *supra* note 13, pmbl paras. 4 & 5.

⁵⁵*Id.*

⁵⁶The term "State," in UN and international practice, especially when capitalized, refers to recognized, sovereign nation-states. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-

- (2) The Statute limits ICC jurisdiction to the finite list of crimes found in Article 5: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁵⁹ The Statute further limits the ICC's jurisdiction over war crimes to those committed as "part

operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 29–30 (1990); EMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 3–6, 11 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

⁵⁷See, e.g., Rome Statute, *supra* note 13, art. 12 (limiting accession to "States"); *id.* art. 14 (limiting referral of situations to "States"); *id.* art. 112 (limiting membership in Assembly of States Parties to "States"); *id.* art. 125 (limiting accession to the Statute to "States"). Moreover, Professor Otto Triffterer noted in his Commentary on the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [ICC] Statute [was] open for signature by all States." OTTO TRIFFTERER & KAI AMBOS, *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1287 (1999) (emphasis added). The only exception would be a referral by the UN Security Council acting under Chapter VII of the UN Charter of a situation to the ICC. The Security Council alone has authority to refer a non-State entity to the ICC (as it did with respect to the Darfur region of Sudan). S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

⁵⁸Statement, Office of the Prosecutor, International Criminal Court, Situation in Palestine (Apr. 3, 2012), available at [http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/Situation inPalestine030412ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/Situation%20in%20Palestine030412ENG.pdf).

⁵⁹Rome Statute, *supra* note 13, art. 5. Note that, with respect to the crime of aggression, "Article 121(5) gives States Parties the choice either to accept or not to accept any amendment to Article 5. This means that a State party may exclude the jurisdiction of the Court with regard to the crime of aggression even when this crime should have been defined and accepted by seven-eighths of the States Parties as required by Article 121(4)." Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 21, at 583, 605.

of a plan or policy or as part of a large-scale commission of such crimes.”⁶⁰ Finally, “the Court shall determine that a case is inadmissible where . . . [t]he case is not of sufficient gravity to justify further action by the Court.”⁶¹

(3) The Statute limits ICC jurisdiction by time. The ICC Prosecutor, for example, may only investigate and try crimes committed *after* the treaty came into force.⁶² In addition to the time limit regarding when the treaty came into force, ICC jurisdiction may be deferred by the UN Security Council acting under Chapter VII of the UN Charter for an indefinite number of successive twelve-month periods.⁶³ Further, each State upon acceding to the Statute may declare that the treaty shall not apply to its territory or nationals regarding war crimes for up to seven years from the respective State’s date of accession.⁶⁴

(4) The Statute permits ICC jurisdiction to be limited by a State Party’s explicit rejection of the definition of aggression, once adopted, or of amendments to the other listed crimes.⁶⁵

Were a State Party to reject the definition of aggression or any amendment to other listed

⁶⁰Rome Statute, *supra* note 13, art. 8.

⁶¹*Id.* art. 17(1)(d).

⁶²*Id.* art. 11. *See also id.* art. 8*bis* (regarding crime of aggression).

⁶³*Id.* art. 16.

⁶⁴*Id.* art. 124.

⁶⁵*Id.* arts. 5(2) & 121(5). The definition of “aggression” was agreed to at the 2010 Kampala Review Conference in Uganda. It is to take effect in a State one year after it is adopted by thirty States Parties and after a decision made by the required majority of States on a date after January 1, 2017. Resolution RC/Res.6, INTERNATIONAL CRIMINAL COURT (June 11, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC_Res.6_ENG.pdf.

crimes, it would not be answerable for the crime of aggression or for the amended crimes.

In the case of rejecting amendments to already listed crimes, the State Party would remain answerable, but only for the crimes as originally defined in the Statute.

(5) The Statute precludes prosecution of persons who may have committed Article 5 crimes when under the age of eighteen.⁶⁶

(6) The Statute precludes trials *in absentia*.⁶⁷

(7) The Statute limits the admissibility of ICC prosecutions to situations where national courts are either unwilling or unable to try and punish perpetrators for Article 5 crimes.⁶⁸

In other words, where national courts are willing and able to try and punish accused perpetrators, the ICC lacks the ability to act. This reflects the concept of “complementarity.” According to Luis Moreno-Ocampo, the ICC’s first Prosecutor, the ideal situation would be for the ICC never to have to try a case.⁶⁹

⁶⁶*Id.* art. 26.

⁶⁷*Id.* art. 63.

⁶⁸*Id.* pmb1 para. 10; *id.* art. 1.

⁶⁹*See Global Leaders—Luis Moreno Ocampo*, INT’L BAR ASS’N (Jan. 2, 2013), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=81213dcf-0911-4141-ad29-a486f9b03d37>.

(8) The Statute precludes ICC jurisdiction to try alleged Article 5 perpetrators who are not nationals of a State Party to the Statute *and* who commit the crime in the territory of a non-Party State.⁷⁰ This generally reflects the consent-based nature of treaties.

As we have seen in (3) and (4) above, despite its stated goal of ensuring that perpetrators of Article 5 crimes are to be brought to justice, in reality, the Rome Statute permits *its own* States Parties to opt out of certain provisions and obligations in certain circumstances. Hence, application of the Statute's terms may vary even among States Parties.

It is important to keep in mind the jurisdictional exemptions that the Rome Statute reserves to its own States Parties, especially since *the Rome Statute claims the right of the ICC to investigate and try nationals of non-party States* in certain circumstances. Specifically, Article 12(2)(a) permits the ICC to exercise jurisdiction over alleged perpetrators of Article 5 crimes committed on the territory of a State Party, *irrespective of the nationality of the accused*.⁷¹ That

⁷⁰Rome Statute, *supra* note 13, art. 12 (expressly delineating when the ICC may exercise jurisdiction, which does not include third-party nationals committing Article 5 crimes on third-party States' territory); *see also* Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 21, at 583, 612.

⁷¹ Article 12(2) of the Rome Statute reads, in pertinent part, as follows:

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

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

means that nationals of non-consenting, non-party States may be hauled before the ICC. Yet, the Rome Statute allows nationals *of its own States Parties* to evade ICC jurisdiction in repeated instances⁷² while simultaneously claiming the right of the ICC to try *non-party State nationals* for such crimes. In other words, under the Rome Statute, accused nationals of a State that has rejected the Rome Statute altogether may have fewer rights and protections than the nationals of States that agreed to be bound by the Statute in the first place.⁷³ That is a perverse and wholly unreasonable result. It is also wholly unlawful under customary international law and, hence, *ultra vires* (as explained further *infra*).

III. ARTICLE 12(2)(a) OF THE ROME STATUTE PURPORTING TO ASSERT ICC JURISDICTION OVER THE NATIONALS OF NON-CONSENTING, NON-PARTY STATES DEFIES INTERNATIONAL LAW.

In this section we will argue that the incorporation of Article 12(2)(a) into the Rome Statute stands in defiance of international law, at least as it concerns the nationals of non-consenting, non-party States. In support of this contention, we offer the following three points:

Rome Statute, *supra* note 13, art. 12(2)(a). Note that Article 12(2)(a) applies irrespective of the nationality of the perpetrator of the crime. Accordingly, nationals of non-party States are subject to ICC prosecution according to the Rome Statute. Note further that a non-party State may accede to ICC jurisdiction pursuant to Article 12(3).

⁷²Such as by allowing newly acceding States to defer ICC jurisdiction over their nationals and territories for war crimes for up to seven years, *id.* art. 124, as well as by allowing States Parties to reject the definition of aggression (once adopted) or future amendments to other listed crimes, *id.* art. 121(5). None of this is allowed to non-consenting, non-party States.

⁷³JENNIFER ELSEA, CONG. RESEARCH SERV., RL 31437, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 13 & n. 68 (2002) [hereinafter CRS REPORT] (noting that the ICC appears to have broader jurisdiction over war crimes committed by non-party nationals than by nationals of States Parties to the Statute).

First, Article 12(2)(a) disregards the well-established principle in customary international law requiring a State's consent in order for a treaty to bind that State or its nationals. Second, other international tribunals recognize and have affirmed the consent-based nature of international law. Third, asserting the existence of "universal jurisdiction" over Article 5 crimes does not automatically or necessarily mean that the ICC, a court created by only a portion of the world community, may exercise lawful jurisdiction over the nationals of a non-consenting, non-party State from the world community at large.

A. Article 12(2)(a) of the Rome Statute Constitutes a Legal Overreach Which Violates Customary International Law and is, Therefore, *Ultra Vires* and Void.

When the government of a State exercises its sovereign will regarding the acceptance or rejection of a convention or treaty, the officials of that State are, in fact, acting as agents on behalf of that State's population, its *nationals*.⁷⁴ We must recognize, for example, that the territorial entities we call "Nigeria" or "Jordan" or "Canada" do not—and, indeed, *cannot*—"do" anything. Only people from such entities—to wit, "Nigerians" and "Jordanians" and "Canadians"—can act. Further, we cannot haul "Nigeria" or "Jordan" or "Canada" before the bar

⁷⁴The Rome Statute claims the right to subject the nationals of third-party States who commit (or are alleged to have committed) Article 5 crimes in the territory of a State Party to the Rome Statute to investigation and/or trial by the ICC. Rome Statute, *supra* note 13, art. 12(2)(a). Yet, such a claim violates the right of that individual as determined by his State of nationality not to be transferred to and tried by a Court whose jurisdiction was created pursuant to a convention that his State of nationality rejected. *See Vienna Convention, supra* note 1, art. 34. That does *not* mean that such an individual is not subject to investigation and trial; he may be investigated and tried by the courts of the State on whose territory he allegedly committed the crime. *What is prohibited is his being turned over to a Court created by a treaty to which his State of nationality has refused to accede and, hence, does not recognize.*

of any court; we can only haul “Nigerians” and “Jordanians” and “Canadians” before such a court. Accordingly, when we say that the State of Israel or the United States of America or the People’s Republic of China “refuses to accede” to a treaty like the Rome Statute, what we *really* mean is that actual persons—the *leaders of those States acting on behalf of their respective nationals*—are refusing to place their respective “States” (meaning *their respective nationals and territories*) under the authority of, or within the jurisdiction of a court created pursuant to, such treaty. Thus, when international law states that “[a] treaty does not create either obligations or rights for a third *State* without its consent,”⁷⁵ it is, in reality, referring to obligations and rights on the part of the third *State’s nationals*. To paraphrase, “[a] treaty does not create either obligations or rights for the *nationals* of a third-party *State* without the consent of *that State as embodied by its authorized representatives*.” In truth, all actual *actors* in international law are real persons,⁷⁶ and all decisions in international law affect real persons. Hence, when it is asserted that the purpose of the ICC is to punish “individuals” not “States,”⁷⁷ although that is a *literally true* statement, it is, in a sense, a meaningless statement, since it is impossible to punish “States” as such. One can only punish individual persons in or from such States.⁷⁸

⁷⁵Vienna Convention, *supra* note 1, art. 34 (emphasis added). Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of binding conventional law for those States which are a party to the treaty which incorporates the customary law principle.

⁷⁶Even corporations, which enjoy legal “personality” and possess “nationality,” act through real persons (to wit, their corporate officers and boards of directors), and, if “punished,” it is real persons who pay the penalty (i.e., officers, directors, and shareholders).

⁷⁷*See, e.g.,* CRS REPORT, *supra* note 73, at 5.

⁷⁸For example, the sanctions regime aimed at “Iran” actually targets and punishes, not only the Iranian officials who may have been designated by name, but all other Iranians as well, irrespective of their roles and responsibilities for

When “States” (meaning *the authorized representatives of the people in those States*) get together to negotiate a treaty, they are free to modify the application of customary international law principles *amongst themselves as they see fit pertaining to their respective nationals and territories*. This constitutes agreement based on mutual consent. Yet, such an agreement to modify customary international law *amongst the States Parties* to a treaty like the Rome Statute does not, and indeed cannot, change the law that applies to “States” (meaning *nationals and territories* of such States) that choose *not* to accede to the treaty. Such an imposition is not consent-based. In the final analysis, *a principle of customary international law takes precedence over a contrary principle contained in a treaty with respect to those States (meaning their respective nationals and territories) that are not parties to that treaty*. Hence, the fact that States Parties to the Rome Statute have agreed *amongst themselves* that the ICC shall have jurisdiction over the *nationals of non-party States* who are alleged to have committed an Article 5 crime on the soil of a State Party⁷⁹ does not—and lawfully cannot—override the non-party State’s rights under customary international law *not to be bound* in any way by the terms of a treaty to which it is not a party.⁸⁰ Accordingly, if no individual State or group of like-minded States can lawfully

the Iranian nuclear program. The same is true of the U.S. sanctions regime against “Cuba”; it is individual Cubans who suffer as a result of the sanctions, not the entity “Cuba” *per se*. Hence, the “individual-versus-State” argument is, in reality, a contrived argument that seeks to sidestep the inconvenient strictures of contrary customary law.

⁷⁹Rome Statute, *supra* note 13, art. 12(2)(a).

⁸⁰Once again, that does not mean that the third-party national may not be tried for the alleged offense. He may be tried in the courts of the State in which the alleged crime took place, pursuant to that State’s law and legal procedures. What customary international law prohibits is the transfer of jurisdiction over the accused to the ICC, a court created by a treaty to which the non-consenting, third-party State has not acceded.

compel a third-party State to be bound by terms of a treaty to which the latter has not acceded, neither may a subordinate creation of such individual State or group of States (such as the Office of the Prosecutor (OTP) or the ICC) lawfully do so.

Each State Party to the Rome Statute has freely yielded part of its national sovereignty to the ICC, a specific creation of that treaty. As such, officials at the ICC—*not a sovereign entity itself*—have authority to compel the States Parties, all of which *are* sovereign entities, to yield to the will of the ICC in certain circumstances as laid out in the Rome Statute. ICC officials have no such authority in relation to non-consenting, non-party States (meaning their *nationals* and *territories*),⁸¹ this in spite of what the Rome Statute may say, since States Parties to the Rome Statute lack the authority themselves to encroach upon the rights of non-party States vis-à-vis the nationals and territories of those States.⁸² That the Rome Statute purports to grant such authority⁸³ is a legal overreach in violation of customary international law. Such overreach is both *ultra vires* and *void ab initio*.

Accordingly, notwithstanding explicit language to the contrary in the Rome Statute, neither the ICC Prosecutor nor any ICC judge has any *lawful* authority to violate customary international law by asserting authority over a non-party State's nationals. As such, neither the ICC Prosecutor nor any ICC judge may *lawfully* apply the provision of the Rome Statute (to wit, Article 12(2)(a)) that purports to compel nationals of non-consenting, non-party States to submit

⁸¹See, e.g., CRS REPORT, *supra* note 73, at 21 & n. 111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States).

⁸²See *supra* note 72.

⁸³See Rome Statute, *supra* note 13, art. 12(2)(a).

to ICC jurisdiction for alleged Article 5 crimes committed on the soil of a State Party to the Rome Statute.⁸⁴ Were either to do so, he or she would be acting in clear violation of customary international law. In truth, such a decision would undermine the rule of law—ironically, the very value they would be claiming to uphold.

B. Other International Courts Recognize and Have Affirmed the Consent-Based Limitation to Their Jurisdiction under Customary International Law.

The principle of customary international law that “[a]n international agreement does not create either obligations or rights for a third-party state without its consent”⁸⁵ is well-established and has been recognized by other international courts. In fact, this principle has been expanded upon by international tribunals.

The Statute of the International Court of Justice (ICJ), for example, specifically requires that parties consent to its jurisdiction before the ICJ will adjudicate a matter.⁸⁶ The ICJ’s case

⁸⁴Even when the UN Security Council, acting under Chapter VII of the UN Charter, refers a situation concerning a non-party State’s nationals to the ICC Prosecutor, the Council is acting under its authority as found in the UN Charter, not on any article found in the Rome Statute, since the Council (as a non-State entity) is not—and cannot be—a party to the Rome Statute. Further, compliance by the third-party State is based on its being a party to the UN Charter (which obligates it to obey certain Security Council decisions), not on any obligation that it owes to the Rome Statute or any right claimed by ICC officials. When the Security Council refers a situation to the ICC Prosecutor regarding a non-party State to the Rome Statute, the Council is, in effect, *incorporating by reference* the appropriate provisions of the Rome Statute into its decision, thereby obligating the UN Member State to comply with those provisions.

⁸⁵See Vienna Convention, *supra* note 1, art. 34; RESTATEMENT, *supra* note 3, § 324(1).

⁸⁶ICJ Statute, *supra* note 3, arts. 34(1), 36(2)–(3).

law has affirmed this principle throughout its history. The first time the ICJ had cause to make such a determination came in the 1954 case, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) ("Monetary Gold")*.⁸⁷ That case centered around an incident that occurred in 1943, in the midst of World War II, when the German Army removed a large amount of gold from Rome.⁸⁸ When the war ended, both Albania and Italy claimed the gold and submitted competing claims to international arbitration.⁸⁹

While waiting for the outcome of the arbitration proceeding, the governments of France, the United Kingdom, and the United States signed an agreement to hold the gold in escrow in the United Kingdom so that it could retain the gold "in partial satisfaction of the [j]udgment in the Corfu Channel case"⁹⁰ in the event that the gold was found to belong to Albania. After the arbitrator found in favor of Albania, Italy filed an action with the ICJ against France, the United Kingdom, and the United States. In its application, Italy argued (1) that France, the United Kingdom, and the United States should deliver the gold to Italy, and (2) that its right to the gold superseded the United Kingdom's right to partial satisfaction of damages sustained during the Corfu Channel incident.⁹¹

⁸⁷*Monetary Gold Case (It. v. Fr., U.K., & U.S.)*, 1954 I.C.J. 19 (15 June).

⁸⁸*Id.* at 19.

⁸⁹*Id.*

⁹⁰*Id.* at 21.

⁹¹*Id.* at 22. The ICJ found that a provision in the agreement signed by France, the United Kingdom, and the United States amounted to acceptance of ICJ jurisdiction; therefore, it had been duly authorized by all named parties to adjudicate the matter. *See id.* at 31.

Before proceeding to the merits of Italy’s first claim, the ICJ stated that it “must [first] examine whether . . . jurisdiction [conferred by Italy, France, the United Kingdom, and the United States] is co-extensive with the task entrusted to it.”⁹² As mentioned above, however, integral to this dispute was the claim of Albania—an unnamed party—to the gold. Indeed, the ICJ stated that, “[i]n order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to [Italy]; and, if so, to determine also the amount of compensation.”⁹³ Therefore, the ICJ held that it “cannot decide such a dispute without the consent of Albania.”⁹⁴ The ICJ’s explanation of that ruling is particularly telling: “To adjudicate upon the international responsibility of Albania without her consent would run counter to a *well-established principle of international law* embodied in the [ICJ’s] Statute, namely, that the [ICJ] can only exercise jurisdiction over a State with its consent.”⁹⁵ That well-established principle remains a vital part of customary international law to this day.

In a more recent case concerning East Timor, the ICJ once again applied the principle that an international tribunal cannot decide a case involving the legal rights of a third party without that party’s consent.⁹⁶ In 1989, Australia, believing that the island of East Timor was under Indonesian control, signed a treaty with Indonesia regarding use of East Timor’s

⁹²*Id.* at 31.

⁹³*Id.* at 32.

⁹⁴*Id.*

⁹⁵*Id.* (emphasis added).

⁹⁶East Timor (Port. v. Austl.), 1995 I.C.J. 90 (30 June).

continental shelf.⁹⁷ Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975,⁹⁸ claimed that any treaty executed without its consent was invalid.⁹⁹ Thus, “the fundamental question in the . . . case [wa]s ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.”¹⁰⁰ Like the *Monetary Gold* case, in which the ICJ refused to make a legal determination that would affect the legal rights of a non-consenting third party (Albania), the ICJ in the *East Timor* case refused to rule because Indonesia had not accepted its jurisdiction.¹⁰¹ It further refined the *Monetary Gold* standard by stating that the necessity of determining third-party rights did not necessarily preclude it from exercising jurisdiction.¹⁰² However, when a State’s “rights and obligations . . . constitute the very subject-matter of . . . a judgment,” the ICJ may not exercise jurisdiction without that State’s consent.¹⁰³

The ICJ is not the only international tribunal that has upheld the *Monetary Gold* principle. The Permanent Court of Arbitration (PCA) in The Hague, The Netherlands, applied

⁹⁷*Id.* at 101–02.

⁹⁸*See id.* at 95–96.

⁹⁹*Id.* at 94–95.

¹⁰⁰*Id.* at 102.

¹⁰¹*Id.* at 105.

¹⁰²*Id.* at 104.

¹⁰³*Id.* at 105. Such would be the case with Israel concerning both Operation Cast Lead and the enforcement of the naval blockade of the Gaza Strip, since both matters implicate Israel’s inherent right to self-defense in a situation of armed conflict.

this principle in its 2001 decision, *Larsen v. Hawaiian Kingdom*.¹⁰⁴ In that case, Larsen refused to pay fines associated with traffic citations.¹⁰⁵ Instead of registering his automobile as required by state law, Larsen argued that as a citizen of the Hawaiian Kingdom, he was not subject to U.S. law¹⁰⁶ and that Hawaii was in violation of its obligations under an 1849 treaty between the Hawaiian Kingdom and the United States by allowing U.S. municipal law to govern.¹⁰⁷ The PCA held that because the interests of the United States were “a necessary foundation for the decision between the parties,” it could not rule on the dispute at hand.¹⁰⁸ Moreover, even though both parties to the arbitration proceeding argued that the *Monetary Gold* principle should apply only to ICJ proceedings, *the PCA held that the principle must be applied by all international tribunals*, stating that,

[a]lthough there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice.¹⁰⁹

¹⁰⁴*Larsen v. Hawaiian Kingdom*, Award, 119 I.L.R. 594 (Perm. Ct. Arb. 2001) [hereinafter Award], available at <http://www.pca-cpa.org/upload/files/LHKAward.PDF>.

¹⁰⁵*Larsen v. Hawaiian Kingdom*, Memorial of Lance Paul Larsen, paras. 48–52 (Perm. Ct. Arb. 2000), available at http://www.alohaquest.com/arbitration/memorial_larsen.htm.

¹⁰⁶*Id.* para. 47.

¹⁰⁷Award, *supra* note 104, para. 2.3.

¹⁰⁸*Id.* para. 11.23.

¹⁰⁹*Id.* para. 11.21.

Indeed, “[t]he *principle of consent in international law* would be violated if [the PCA] were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party.”¹¹⁰ *The ICC, as an international tribunal bound by international law, should likewise refrain from invoking jurisdiction to determine the relative rights of nationals of non-consenting, non-party States.*

As in the *East Timor* case and *Larsen v. Hawaiian Kingdom*, where the ICJ and PCA, respectively, refused to exercise jurisdiction *because third-party rights constituted the very subject matter of the proceedings*, the ICC should refuse to exercise jurisdiction over *nationals of non-consenting, non-party States*. Such action would directly contravene the well-established customary international legal principle articulated in the *Monetary Gold* case and subsequently—both in the ICJ and in other international tribunals—that an *international tribunal may not determine the legal rights of a third-party State without its consent if such rights go to the very subject matter of the proceedings*. Because the ICC is an international tribunal akin to the ICJ and the PCA, the ICC should be bound by the *Monetary Gold* principle in accordance with customary international law. In short, absent a referral by the UN Security Council under Chapter VII of the UN Charter, the ICC must decline to exercise jurisdiction over nationals of non-consenting, non-party States.

C. Asserting the Existence of “Universal Jurisdiction” Over Article 5 Crimes Does Not Automatically or Necessarily Require that Nationals of a Non-Consenting, Non-Party State Submit to ICC Jurisdiction.

¹¹⁰*Id.* para. 11.20 (emphasis added).

Some argue that the ICC may investigate and try nationals of non-consenting, non-party States under the principle of universality.¹¹¹ That argument is built upon a number of assumptions. For example, “[t]he universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes [i.e., Article 5 crimes].”¹¹² The first assumption is followed by the argument “that States must be entitled to do collectively what they have the power to do individually.”¹¹³ From these statements, the argument continues as follows:

¹¹¹*See, e.g.,* Dapo Akanda, *The Jurisdiction of the International Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT’L CRIM. JUST. 618, ___ (2003) (arguing that “it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the [world’s] collective interest by individual states . . . simultaneously prevented those states from acting collectively in the prosecution of these crimes” and further that collective action “should be encouraged”). There is nothing wrong with encouraging collective action against such crimes. States Parties to the Rome Statute are free, *amongst themselves*, to resort to the ICC as they see fit. Further, other States that agree with what the Rome Statute provides are free to accede to the Statute and accept its terms. Where Akanda and other proponents of the ICC go astray is by attempting to force—*contrary to Customary International Law*—the terms of the Rome Statute on States that do not agree with its terms as is their sovereign right under international law.

¹¹²Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 21, at 583, 587. *But see* CRS REPORT, *supra* note 73, at 21 & n. 111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States).

¹¹³*Id.* The assertion that States may do collectively what each may do individually is reasonable as far as it goes. A problem arises when that assertion is stretched to mean that mutual agreement amongst a certain group of States can obligate non-consenting States outside that group. Such an assertion violates the sovereign rights of the States not a party to the agreement. As such, mutual agreement amongst a number of States does not affect in any way the rights of States not a party to such agreement.

Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf. Thus a State which becomes a party to the Statute thereby accepts jurisdiction with respect to the international core crimes. *As a consequence, no particular State—be it State Party or non-State Party—must give its specific consent to the exercise of this jurisdiction in a given case.* This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction.¹¹⁴

The first two sentences above are legally correct. The portion of the foregoing quotation in italics is only partly correct vis-à-vis non-party States. While it is true that a non-party State need not give its consent to the exercise of jurisdiction *in some cases* (to wit, cases having nothing whatsoever to do with the non-party State), *it is not true with respect to a case involving that State's nationals or other interests.* Under customary international law, a *non-universal* treaty (i.e., a treaty to which only part of the international community has acceded) that creates a court that claims universal jurisdiction over a host of offenses does not, and cannot, bind a non-consenting, non-party State.¹¹⁵ To assert otherwise is simply not true logically or legally. Moreover, even if one were to accept the fact that “all States may exercise universal jurisdiction” over certain crimes, that does not automatically—*or necessarily*—mean that one must also agree that a non-consenting, non-party State has no say about whether its nationals have to submit to a court like the ICC, a court agreed to and established in a treaty negotiated by *other States*. That is

¹¹⁴*Id.* (emphasis added).

¹¹⁵See Vienna Convention, *supra* note 1, art. 34.

simply a *non-sequitur*. Such “other States” have no authority to decide such matters for a non-party State.

Universal jurisdiction does not inevitably lead to the conclusion that nationals of non-consenting, non-party States are triable by a court created pursuant to an international treaty like the Rome Statute. The inherent sovereignty of the non-consenting, non-party State takes precedence over *other States’* grant of authority to such a court. In short, a *non-sovereign entity* like the ICC has no lawful authority to assert jurisdiction over nationals of a non-consenting, non-party, *sovereign State*.

CONCLUSION

The stated goals of the Rome Statute are laudable. Ensuring that perpetrators of the most serious international crimes do not go unpunished is clearly a worthy goal. Ending impunity for such perpetrators is unquestionably a goal worth pursuing. Those are all goals with which people of good will can agree. However, consistent with the rule of law and in the interest of justice, one must use lawful means to achieve such ends.

Customary international law governs all States, whereas conventional international law governs only those States that have acceded thereto. The Rome Statute contains a provision, to wit, Article 12(2)(a), that can ensnare in the ICC’s jurisdictional web nationals of non-consenting, non-party States. That is a clear violation of customary international law which recognizes that third-party “States” (by which we mean *nationals* and *territories* of such States)

are not—and *cannot be*—bound, absent their consent, by the terms of a treaty to which such States have not acceded. Accordingly, the offending provision in the Rome Statute is *ultra vires* and legally unenforceable with respect to the nationals of non-consenting, non-party States. Any application of Article 12(2)(a) against nationals of such States by either the ICC Prosecutor or any ICC judge would violate the rights of those States under customary international law and be unlawful, absent prior consent by appropriate authorities of such States.

The rule of law is the bedrock principle which underlies civilized society. It is too important a principle to compromise because, once compromised, it is difficult to regain the trust that was lost. *In the final analysis, even the most desirable ends do not justify unlawful means to achieve them.* The Rome Statute created a court of *limited* jurisdiction. Such limitations must be acknowledged and respected. The Rome Statute also includes a provision that unlawfully extends the ICC's jurisdiction to reach nationals of non-consenting, non-party States in clear and direct violation of customary international law. Such a provision must be acknowledged as violating customary international law and be rejected as *ultra vires* and *void ab initio* vis-à-vis the nationals of non-consenting, non-party States to the Rome Statute. ICC jurisdiction may not reach nationals of non-consenting, non-party States without the express consent of such States. To exert such jurisdiction without proper consent would be a lawless act in clear violation of an unambiguous principle of international law.