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Date: **7 August 2015**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng**
Judge Silvia Fernández de Gurmendi
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION ON REGISTERED VESSELS OF THE UNION OF THE COMOROS, THE HELLENIC REPUBLIC OF GREECE AND THE KINGDOM OF CAMBODIA

Public

***Amicus Curiae* Observations of the European Centre for Law & Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: **European Centre for Law & Justice (ECLJ)**

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Your Excellencies:

Submissions

1. By way of introduction, the European Centre for Law & Justice (ECLJ) is an international not-for-profit law firm located in Strasbourg, France, dedicated, *inter alia*, to establishing and strengthening the rule of law in world affairs. The ECLJ also holds Special Consultative Status as an NGO before the United Nations Economic and Social Council[1].

2. This brief is submitted in support of ICC Prosecutor Fatou Bensouda's decision not to initiate a formal investigation into the Mavi Marmara matter[2] and her subsequent decision to appeal in response to the Pre-Trial Chamber I's questioning of her decision[3]. For the reasons given below, the Appeals Panel should accept the Prosecutor's appeal.

3. The ECLJ would welcome the opportunity to present the following arguments in greater detail, either in writing or orally, if requested by the Appeals Panel.

Issue of Jurisdiction

4. The initial task of any court is to determine whether the Court has jurisdiction to hear and adjudicate a matter. Because jurisdiction provides the legal basis on which a court has authority to proceed, it is an issue that one must be able to raise as early as possible in a proceeding. Hence, we raise that issue here.

5. The ECLJ submits that the International Criminal Court (ICC) lacks jurisdiction over the nationals of a non-consenting, non-member State to the Rome Statute based on the well-established customary international law principle that a State that has not become a party to a

[1]NGO Branch, U.N. Dep't of Econ. & Soc. Affairs, Consultative Status for the European Centre for Law and Justice (2007), http://esango.un.org/civilsociety/ (accessed by searching "European Centre for Law and Justice" in the iCSO Database) (last visited 8 Aug. 2015).
[2]Situation on Registered Vessels of Comoros, Greece and Cambodia, ICC-01/13-6-AnxA, Article 53.1. Report (6 Nov. 2014) [hereinafter Prosecutor's Decision Not to Investigate].
[3]Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-34, Decision on the Request of the Union of Comoros to Review the Prosecutor's Decision Not to Initiate and Investigation (16 July 2015) [hereinafter Pre-Trial Chamber Decision].

treaty or other international convention is not bound by the terms of such treaty or convention[4]. Israel is such a State.

6. Accordingly, Article 12.2.(a)[5] of the Rome Statute, which seems to permit the ICC to exercise jurisdiction over nationals of non-consenting, non-member States when such States' nationals are alleged to have committed an Article 5 crime on the territory of a State Party to the Rome Statute, violates well-established customary international law as it applies to non-consenting, non-party States' nationals. As such, application of Article 12.2.(a) against the nationals of such States is *ultra vires*, absent the prior consent of such States.

7. Because none of the States Parties to the Rome Statute could lawfully compel a non-consenting State to accede to the Statute's terms against its will, neither may a creation of the Statute (like the Office of the Prosecutor (OTP)) do so. What States Parties themselves may not lawfully do, may not be done by their agent. The States Parties to the Rome Statute could only convey to the OTP authority that the States Parties themselves lawfully possess. Since the States Parties themselves lacked lawful authority to compel a non-consenting, non-party State to participate in the Rome Statute regime, they lacked authority to authorise the OTP to do so[6]. Hence, Article 12.2.(a) constitutes an unlawful overreach and is, therefore, *void ab initio* vis-à-vis the nationals of non-consenting, non-party States.

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[4]*See, e.g.*, Vienna Convention on the Law of Treaties, art. 34, 23 May 1969, 1155 U.N.T.S. 331. 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. *See also generally* 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) (*see* APPENDIX A for copy of article); *see also id.* at 21–34 (analysing applicable international law).

[5]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 . . . .

Rome Statute of the International Criminal Court art. 12.2.(a), 17 July 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]. Note that Article 12.2.(a) appears to apply irrespective of the nationality of the alleged perpetrator of the crime. Accordingly, nationals of non-party States accused of Article 5 crimes can be subject to ICC prosecution according to the Rome Statute.

[6]Article 13(b) is the only lawful exception to the non-consent-based jurisdiction requirement. Yet, even when the UN Security Council, acting under Chapter VII of the UN Charter, refers a situation to the ICC Prosecutor, the affected non-member State must comply, *not based on any article in the Rome Statute to which it is not a State Party*, but because of its membership in the UN and its obligation under the UN Charter to obey Security Council resolutions promulgated under Chapter VII.

8. Knowingly applying an unlawful provision of a treaty, whether by a prosecutor, a judge or anyone else, violates the rule of law. Hence, the Prosecutor's appeal should be granted for the reason, *inter alia,* that both she and the Pre-Trial Chamber (PTC) lack lawful authority to deal with Israeli nationals due to Article 12.2.(a)'s violation of customary international law.

9. Accordingly, the ICC may not exercise jurisdiction over Israeli commandos and government officials involved in the Mavi Marmara affair since they were all acting in their capacity as agents of the State of Israel, a non-State Party to the Rome Statute.

Issue of Evidence

10. The ECLJ further submits that a critical error on the PTC's part was that it impugned the Prosecutor's conclusions regarding the gravity of the matter which she based on her assessment of the available evidence. Yet, as long as the Prosecutor's conclusions could be reasonably drawn from the available evidence, then the Prosecutor was well within the bounds of her discretion, and the PTC majority was wrong to substitute its preference for the Prosecutor's. ***Only if*** the evidence could ***not*** support the Prosecutor's conclusion in any reasonable circumstance could she have legitimately been found to have erred in her exercise of discretion.

11. The PTC's majority opinion correctly noted that "the Prosecutor has discretion to open an investigation"[7] and that it must give some deference to the Prosecutor's decisions[8]. Nonetheless, the majority seems to have deviated from its own principles when analysing the Prosecutor's Decision Not to Investigate, not because the Prosecutor failed to consider all evidence available or mischaracterised the evidence, but simply because the PTC disagreed with the Prosecutor's conclusion. Substituting its preferred conclusion for the Prosecutor's is not the role of the PTC. As long as the Prosecutor's conclusion is reasonable in light of the facts and law, it should be supported.

12. Moreover, as the PTC dissenting opinion aptly noted, Article 53 "provides the Prosecutor with some margin of discretion" and "calls for a more deferential approach when

[7]Pre-Trial Chamber Decision, *supra* note 3, at ¶ 14.
[8]*Id.* at ¶ 15.

reviewing the Prosecutor's decision"[9]. The dissenting opinion further notes that the PTC's "role is merely to make sure that the Prosecutor has not abused her discretion in arriving at her decision not to initiate an investigation on the basis of the criteria set out in article 53.1. of the Statute"[10]. The majority did not give due deference to the Prosecutor's analysis of evidence and her conclusion. Instead, the majority simply sought to replace the Prosecutor's conclusion with its own.

German Prosecutor Reaches Same Conclusion as ICC Prosecutor

13. The ECLJ urges the Panel to take cognizance of the attached German decision which we submit as a guiding precedent for the OTP's decision[11]. The German Prosecutor General reached a similar conclusion to the ICC Prosecutor regarding similar charges brought under German law by Ms Inge Höger, a member of the German Bundestag who was aboard the Mavi Marmara during the Israeli operation. The German Prosecutor found no legal basis for establishing that the war crimes Ms Höger alleged had been committed:

> "The Israeli actions followed the overall objectives for the operation, namely to gain control of the vessels and not to harm individuals. The reason for the escalation on the 'Mavi Marmara' was the resistance by passengers and crew towards the first Israeli commando and that a group of passengers engaged in "grave, organized and violent" forms of resistance"[12].

Object and Purpose of Article 53

14. The PTC also deviated from Article 53.1.'s purpose when it stated that, "[i]f the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least *one crime* within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor *shall* open an investigation, as only by

[9]Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-34-Anx, Partly Dissenting Opinion of Judge Péter Kovács, ¶ 8 (16 July 2015) [hereinafter Dissenting Opinion].
[10]*Id.* at ¶ 7.
[11]*See* APPENDIX B for a copy of the German Prosecutor's decision in German, immediately followed by an unofficial English translation.
[12]*See* APPENDIX B, English translation of Prosecutor's letter.

investigating could doubts be overcome"[13]. Contrary to the PTC's interpretation, as the dissent noted, Article 53.1.'s purpose is to "stop proceedings in relation to 'acts of [in]sufficient gravity to warrant trial at the international level'"[14]. Under Article 53.1., to determine whether to start an investigation, the Prosecutor is not only bound to consider whether "[t]he information *available to the Prosecutor* provides a *reasonable basis* to *believe* that a crime within the jurisdiction of the Court has been . . . committed"[15], but also whether potential cases that might arise from the investigation are of such gravity that they necessitate the Court's intervention[16].

15. Additionally, contrary to the majority's understanding, as the dissent noted, "the fact that a case addresses one of the most serious crimes of the international community as a whole is not sufficient for it to be admissible before the Court"[17]. In the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, for example, Pre-Trial Chamber II stated that "the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases"[18]. As such, Article 53.1. serves to limit the Court's power of investigation instead of expanding it as suggested by the PTC. In any legal controversy, both sides present conflicting accounts of facts. Article 53 would be rendered superfluous if, as the PTC's majority suggested, the Prosecutor must start investigation just because there are "several plausible explanations of the available

[13]Pre-Trial Chamber Decision, *supra* note 3, at ¶ 13 (emphasis added).
[14]Dissenting Opinion, *supra* note 9, at ¶ 15 (citing to International Law Commission, Summary Record of the 2330th Meeting, 1994 YILC Vol. I, p. 9).
[15]Rome Statute, *supra* note 5, at art. 53.1.(a) (emphasis added). Note that 1) the language "information available to the Prosecutor" shows that the Prosecutor is not required to start an investigation in order to look for more information; 2) the language "reasonable basis" shows that the evidence available does not have to lead to only one conclusion; and 3) the term "believe" shows Article's discretionary nature as opposed to requiring the Prosecutor to apply more stringent and exacting legal requirements, which would certainly be required at the investigation stage.
[16]Rome Statute, *supra* note 5, at arts. 53.1.(b), 17(1)(d).
[17]*See* Dissenting Opinion, *supra* note 9, at ¶ 15 (quoting Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/06-8-Corr, Decision on the Prosecutor's Application for a warrant of arrest, ¶ 41 (10 February 2006)); Prosecutor's Decision Not to Investigate, *supra* note 2, at ¶ 134 (citing Situation in the Republic of Côte d'Ivoire, ICC-02/11-14-Corr, Corrigendum to 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, ¶¶ 202-04 (15 Nov. 2011); Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ¶¶ 48, 50 (31 March 2010).).
[18]*See* Dissenting Opinion, *supra* note 9, at ¶ 16 (citing Situation in the Republic of Kenya, ICC-01/09-19-Corr, ¶ 56).

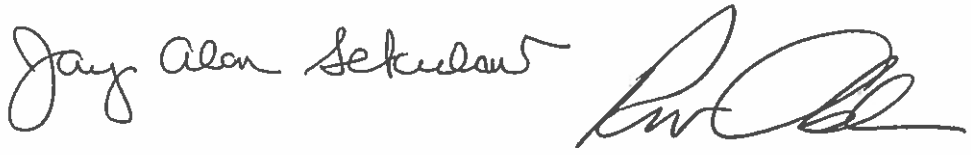
information"[19]. In other words, Article 53.1.'s purpose is that there might be potential cases, but the Prosecutor is not required to start investigation for every possible claim.

16. WHEREFORE, in light of the foregoing, the ECLJ respectfully urges The Appeals Chamber to accept the Prosecutor's appeal and to find:

> ***First***, that, under customary international law, the ICC lacks jurisdiction over the nationals of non-member, non-party States to the Rome Statute (like Israel), absent such States' express consent.
>
> ***Second***, that the PTC was mistaken as a matter of law when it concluded that the Prosecutor had erred in her exercise of discretion and substituted its preference for that of the Prosecutor in this matter.

Word count: 2558[20]

Respectfully submitted this 7th day of August, 2015.



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[19]Pre-Trial Chamber Decision, *supra* note 3, at ¶ 13.

[20]It is certified that this document contains the number of words specified and complies in all respects with the requirements of regulation 36 of the RoC. This statement (51 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, ¶ 32.

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

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[1]Vienna 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.

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

[3]Statute 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

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(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.

[4]ICJ 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 VERZIJL 153, 157–58 (Von Asbeck, et al., eds., 1958)).

[5]ICJ 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.*

[6]ICJ 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

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[7]ICJ 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.

[8]HENKIN, *supra* note 4, at 123.

[9]Vienna 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)).

[10]There 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

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[11]North 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.

[12]*See, 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 few[14]).

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

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[13]Rome 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).

[15]Rome 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

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

[17]Article 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.

[18]Ali 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.

[19]Referral 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 surrendered[25];

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

[21]Antonio 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).

[22]Versailles 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).

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

[24]2 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 armistice[26] 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

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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.

[25]Even 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).

[26]An "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.

[27]Cassese, *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"

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[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

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[33]Convention 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).

[34]G.A. Res. 260 (III) B, U.N. Doc. A/RES/260(III) (Dec. 9, 1498) ("*Invites* the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trail of persons charged with genocide or other crimes over which jurisdictions will be conferred upon that organ by international conventions . . . .").

[35]Rep. 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).

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

[37]Rep. 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 Council[39] (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

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[38]*See* U.N. Charter arts. 39–42.

[39]The 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.

[40]U.N. Charter art. 27, para. 3.

[41]Among 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.

[42]Ivo 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

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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).

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

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

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

[46]*See* 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.

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[47]Request 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.").

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

[49]Rep. 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).

[50]2 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 crimes[55]). 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]

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[51]Rome 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.*

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

[55]*Id.*

[56]The 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

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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 OF THE PRINCIPLES OF NATURAL LAW 3–6, 11 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

[57]*See, 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).

[58]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.

[59]Rome 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

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[60]Rome 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]

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[66] *Id.* art. 26.

[67] *Id.* art. 63.

[68] *Id.* pmbl 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

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[70]Rome 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 instances[72] 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).

[72]Such 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.

[73]JENNIFER 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

[74]The 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]

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[75]Vienna 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.

[76]Even 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.

[78]For 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 Party[79] 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

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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.

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

[80]Once 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 authority[83] 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

[81] *See, 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).

[82] *See supra* note 72.

[83] *See* 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

[84]Even 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.

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

[86]ICJ 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]

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[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

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[92]*Id.* at 31.

[93]*Id.* at 32.

[94]*Id.*

[95]*Id.* (emphasis added).

[96]East 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

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[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. law[106] 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]

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[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.

[107]Award, *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:

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[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.

[112]Hans-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

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[114] *Id.* (emphasis added).

[115] *See* 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.

APPENDIX B

Letter dated 30 September 2014 from

Der Generalbundesanwalt Beim Bundesgerichtshof

to

Frau Inge Höger, MdB

followed by

Unofficial Translation of Letter into English

DER GENERALBUNDESANWALT
BEIM BUNDESGERICHTSHOF

Der Generalbundesanwalt • Postfach 27 20 • 76014 Karlsruhe

Frau
Inge Höger, MdB
Platz der Republik 1
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Aktenzeichen	Bearbeiter/in	☎ (0721)	Datum
3 ARP 77/10-4 (bei Antwort bitte angeben)	StA Adacker	81 91 - 131	30. September 2014

Betrifft: Strafanzeigen wegen des israelischen Vorgehens gegen den Schiffskonvoi für den Gaza-Streifen

Bezug: Ihre Strafanzeige vom 4. Juni 2010

Sehr geehrte Frau Höger,

mit Schreiben vom 4. Juni 2010 haben Sie unter Bezugnahme auf das israelische Vorgehen gegen die sog. „Gaza-Hilfsflottille" am 31. Mai 2010 vor der Küste des Gaza-Streifens Strafanzeige gegen unbekannte Verantwortliche der israelischen Streitkräfte wegen sämtlicher in Betracht kommender Straftatbestände, insbesondere wegen Kriegsverbrechen und Freiheitsberaubung erstattet. Ich habe Ihre Strafanzeige einer umfassenden Prüfung unterzogen, gebe ihr jedoch keine Folge. Nach Auswertung der hier vorliegenden Abschlussberichte der verschiedenen nationalen und internationalen Untersuchungskommissionen und weiterer Quellen ergeben sich keine zureichenden tatsächlichen Anhaltspunkte für die Begehung verfolgbarer Straftaten zum Nachteil deutscher Staatsangehöriger (§ 152 Abs. 2 StPO). Soweit die angezeigten Vorgänge die Staatsangehörigen dritter Staaten betreffen, habe ich gemäß § 153f Abs. 1, 2 StPO von der Strafverfolgung abgesehen. Im Einzelnen gilt Folgendes:

I. Das Vorgehen der israelischen Streitkräfte erweist sich, soweit es sich gegen Sie und weitere an Bord der Flottille befindliche deutsche Staatsangehörige richtete, nach dem VStGB als straflos.

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1. Das Aufbringen der Flottille mit Gewalt durch Betreten der Schiffe und Übernahme des Kommandos stellt keinen strafbaren Angriff gegen die Zivilbevölkerung als solche oder einzelne Zivilpersonen (§ 11 Abs. 1 Satz 1 Nr. 1 VStGB) dar. Von dieser Norm werden nämlich nur solche Maßnahmen unter Strafe gestellt, die zielgerichtet gegen Zivilisten bzw. zivile Objekte ausgeführt werden. Angriffe, die sich gegen Kombattanten, feindliche Kämpfer oder militärische Ziele richten, werden - unabhängig vom tatsächlichen Eintritt sogenannter ziviler Begleitschäden - nicht erfasst. Die Vorschrift pönalisiert damit allein Verstöße gegen den sog. „Unterscheidungsgrundsatz", demzufolge die kriegführenden Parteien zu jeder Zeit zwischen Kombattanten und Zivilisten bzw. militärischen und zivilen Objekten unterscheiden müssen und Kampfhandlungen nur gegen militärische Ziele richten dürfen (vgl. Art. 48, 51 Abs. 2 des Zusatzprotokolls zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer internationaler bewaffneter Konflikte vom 8. Juni 1997 [BGBl. 1990 II, S. 1551; im Folgenden: ZP I]; Art. 13 Abs. 1 und 2 des Zusatzprotokolls zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer nicht internationaler bewaffneter Konflikte vom 8. Juni 1997 [BGBl. 1990 II, S. 1637]; MüKo-StGB/*Dörmann,* 2. Aufl., § 11 VStGB Rn. 28, 31).

   Vorliegend zielte das israelische Vorgehen unter Berücksichtigung des Operationsziels, der Operationspläne und des Gesamtablaufs der Operation allein auf die Übernahme der Kontrolle über die Schiffe ab, aber nicht auf die Schädigung von Einzelpersonen. Dass die Operation in der Folge, was die „Mavi Marmara" anbelangt, einen abweichenden Verlauf nahm, beruht darauf, dass Passagiere und Besatzung dem ersten israelischen Kommando, das mittels eines Schnellbootes an Bord gelangen wollte, Widerstand entgegenbrachten, der im weiteren Verlauf seitens der Gruppe der Passagiere auf dem Oberdeck in „erheblicher, organisierter und gewaltsamer" Weise fortgesetzt wurde (vgl. Report of the Secetary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, Rn. 124 ; im Folgenden: Palmer-Bericht). Es liegen mithin keine konkreten Anhaltspunkte dafür vor, dass die befehlshabenden Offiziere bei Anordnung des gewaltsamen Aufbringens der „Mavi Marmara" sich von der Überlegung leiten ließen, gezielt Zivilpersonen zu schädigen. Für die Frage der Verwirklichung dieses Tatbestandes kommt es aus Rechtsgründen nicht darauf an, dass bei der Operation Todesopfer zu beklagen waren.

2. Darüber hinaus handelt es sich bei dem Aufbringen der Flottille auch nicht um einen verbotenen Angriff auf zivile Objekte (§ 11 Abs. 1 Satz 1 Nr. 2 VStGB). Die Schiffe der Flottille stellten nämlich unter den gegebenen Umständen militärische Ziele dar, die nach den Regeln des humanitären Völkerrechts angegriffen werden durften.

a) Sämtliche Schiffe der Gaza-Flottille sind nach dem Handbuch von San Remo über das in bewaffneten Konflikten auf See anwendbare Völkerrecht vom 12. Juni 1994 (im Folgenden: San-Remo-Manual) trotz des von Anfang an verfolgten Ziels der Blockadebrechung zwar nicht als Kriegs-, sondern als Handelsschiffe anzusehen. Unter der Flagge neutraler Staaten fahrende Handelsschiffe dürfen vom Grundsatz her nicht angegriffen werden, können allerdings im Einzelfall gleichwohl zu militärischen Objekte werden (vgl. San-Remo-Manual, §§ 40, 59, 60, 67). Dies gilt insbesondere für Handelsschiffe, die eine Seeblockade brechen (San-Remo-Manual, § 67 Buchst. a). Diese dürfen aufgebracht und für den Fall, dass sie sich vorsätzlich und klar ersichtlich weigern anzuhalten oder Widerstand gegen ihre Durchsuchung und Aufbringung leisten, auch angegriffen werden (San-Remo-Manual, § 98, § 67 Buchst. a, Alternative 2). Mit der Weigerung anzuhalten werden die Schiffe zu einem zulässigen militärischen Ziel (*Heintschel von Heinegg* in: Fleck, Handbook of International Humanitarian Law, Rn. 1025, Fn. 135). Die Anwesenheit ziviler Passagiere führt dabei nicht dazu, dass die Schiffe allein aus diesem Grund zu verschonen wären (San-Remo-Manual, § 47 Buchst. e, § 139 Buchst. c, Satz 2). Allgemein anerkannt ist ferner, dass mit dem Aufbringen eines Blockadebrechers nicht zugewartet werden muss, bis dieser das Seegebiet, das unter Blockade steht, tatsächlich erreicht hat. Vielmehr erlaubt das Recht der Seeblockade auch einen Zugriff auf hoher See (vgl. Art. 17 und 20 der Londoner Seerechtsdeklaration vom 26. Februar 1909; *Heintschel von Heinegg*, Israel YHR 42 (2012), S. 65, 79). Das blockadebrechende Schiff kann sich insoweit auf die Freiheit der Schifffahrt (Art. 87 des Seerechtsübereinkommens der Vereinten Nationen vom 10. Dezember 1982; BGBl. 1994 II, S. 1799) nicht berufen.

b) Für den vorliegenden Fall kommt es im Anwendungsbereich des § 11 Abs. 1 Satz 1 Nr. 2 VStGB bei Prüfung einer zur Durchsetzung der Seeblockade getroffenen Maßnahme nicht darauf an, ob die Verhängung der Seeblockade selbst rechtmäßig war. Die Rechtmäßigkeitsvoraussetzungen einer Seeblockade werfen eine Reihe äußerst komplexer Fragestellungen auf, die von der an der Maßnahme beteiligten Soldaten in der Regel nicht individuell überblickt und beurteilt werden können. Auf der Ebene des Völkerstrafrechts ist folglich ein Angriff schon dann als nicht gegen ein ziviles Objekt gerichtet anzusehen, wenn (1.) die Seeblockade formell wirksam verhängt, d.h. bekannt gemacht wurde, (2.) das angegriffene Schiff in Kenntnis der verhängten Seeblockade diese bricht und (3.) sich weigert anzuhalten oder sich der

Aufbringung widersetzt. Jedes Schiff, das eine Blockade bewusst und gezielt bricht, ist unter dem Blickwinkel des humanitären Völkerrechts nicht mehr schutzwürdig. Das humanitäre Völkerrecht hat nämlich primär die Aufgabe, den Schutz Unbeteiligter und Wehrloser im bewaffneten Konflikt zu gewährleisten (vgl. *von Kielmansegg*, JZ 2014, S. 373). Ein Schiff, das Kurs auf das unter Blockade stehende Seegebiet nimmt, wendet sich aktiv gegen eine militärische Maßnahme, sei diese nun rechtmäßig oder nicht, und wird so zum Beteiligten am Konfliktgeschehen. Es verliert deshalb in völkerstrafrechtlicher Hinsicht den Status als ziviles Objekt.

So liegt der Fall auch hier. Die israelische Regierung hat die Seeblockade am 5. Januar 2009 in ausreichender Art und Weise allgemein bekannt gemacht (vgl. Israelische Nachricht für Seefahrer 1/2009). Zudem wurden die Schiffe der Hilfsflottille im Rahmen der Kommunikation über Funk am Abend des 30. Mai 2010 nochmals ausdrücklich auf die bestehende Seeblockade hingewiesen. Die Blockadebrechung erfolgte demgegenüber mit voller Absicht. Den Feststellungen der Palmer-Kommission folgend ist nämlich davon auszugehen, dass es den Organisatoren der Flottille vor allem auf das Erzeugen medialer Aufmerksamkeit durch das Brechen der Seeblockade ankam und nur in zweiter Linie auf die Anlieferung humanitärer Güter (Palmer-Bericht, Rn. 87). In einer vom Pressedienst der Fraktion „DIE LINKE" im Deutschen Bundestag am 24. Mai 2010 herausgegebenen Pressemitteilung wurde dementsprechend angekündigt, „*mit den Schiffen die Blockade von Gaza durchbrechen* [zu wollen]." Schließlich haben sich die Schiffsführer der Flottille (dem vorher gefassten Plan folgend) per Funk geweigert beizudrehen oder wenigstens anzuhalten. Die Schiffe der Flottille stellten deshalb ab diesem Zeitpunkt zulässige militärische Ziele dar.

3. Das Aufbringen der Flottille verwirklicht überdies nicht den Tatbestand des § 11 Abs. 1 Satz 1 Nr. 3 VStGB (Angriff mit unverhältnismäßigen Begleitschäden). Denn diese Norm bezieht sich auf (hier nicht gegebene) Distanzangriffe, wie die Beschießungen von Örtlichkeiten durch Artillerie von der Ferne aus oder den Abwurf von Bomben auf eine Munitionsfabrik (vgl. dazu MüKo-StGB/*Dörmann*, 2. Aufl., § 11 VStGB Rn. 78 f., *Werle*, Völkerstrafrecht, 3. Aufl. 2012, Rn. 1298, 1307). Außerdem kann nicht davon ausgegangen werden, dass die für den Einsatz verantwortlichen israelischen Offiziere bei Erteilung des Befehls zum Entern in der Gewissheit handelten, dass der Angriff zu unverhältnismäßigen Schäden führen würde.

4. Eine Strafbarkeit nach § 10 Abs. 1 Satz 1 Nr. 1 VStGB (Angriff gegen humanitäre Operationen) kommt unabhängig davon, ob mit der Flottille auch die Bevölkerung in Gaza versorgt werden sollte, bereits deswegen nicht in Betracht, weil es an der Zustimmung Israels zu etwaigen direkten Hilfslieferungen seitens der Flottille fehlte. Hilfsmissionen genießen nämlich nur dann den Schutz des humanitären Völkerrechts, wenn sie an dem Grundsatz der Neutralität und Unparteilichkeit orientiert sind und die Zustimmung aller betroffenen Konfliktparteien vorliegt (vgl. Art. 70 Abs. 1 Satz 1 ZP I; MüKo-StGB/*Zimmermann-Geiß*, 2. Aufl., § 10 VStGB Rn. 5, 12; ferner San-Remo-Manual, § 47 Buchst. c Nr. II).

5. Die Ihnen und den anderen Anzeigeerstattern widerfahrene Behandlung durch israelische Soldaten nach Erlangung der Kontrolle über das Schiff ist auch nicht nach § 8 Abs. 1 Nr. 3 VStGB strafbar. Der Tatbestand der grausamen und unmenschlichen Behandlung ist auf das Folterverbot bezogen und setzt die Zufügung erheblicher körperlicher oder seelischer Leiden voraus (vgl. IStGHJ, *Prosecutor v. Krstić*, Urteil vom 2. August 2001 - IT-98-33-T, Rn. 513; *Prosecutor v. Kmojelac*, Urteil vom 15. März 2002 - IT-97-25-T, Rn. 131; MüKo-StGB/*Zimmermann-Geiß*, 2. Aufl., § 10 VStGB Rn. 140). Unter Zugrundelegung dieses Maßstabes erscheinen weder die angezeigte kurzzeitige Fesselung noch der erzwungene Aufenthalt auf Deck mit den damit verbundenen Beschwernissen als hinreichend schwerwiegend.

6. Ihre Verbringung von einem Ort auf hoher See nach Israel und von dort nach Deutschland unterfällt auch nicht dem Tatbestand der Vertreibung oder zwangsweisen Überführung gemäß § 8 Abs. 1 Nr. 6 VStGB. Die Vorschrift hat die Vertreibungen des Zweiten Weltkriegs und der unmittelbaren Nachkriegszeit vor Augen und erfasst nur solche Handlungen, die den dauernden Aufenthalt einer Person betreffen. Vertreibung im Sinn der Vorschrift meint daher nur die unfreiwillige Verbringung einer Person aus ihrem Wohngebiet an einen Ort außerhalb der Staatsgrenzen und Überführung die Umsiedelung innerhalb der Staatsgrenzen (vgl. *Werle*, Völkerstrafrecht, 3. Aufl. 2012, Rn. 1218). Beides liegt hier ersichtlich nicht vor.

7. Das Verhalten der israelische Soldaten den Anzeigeerstattern gegenüber verwirklicht überdies nicht den Tatbestand der entwürdigenden oder erniedrigenden Behandlung gemäß § 8 Abs. 1 Nr. 9 VStGB. Die Vorschrift schützt die persönliche Würde eines Menschen vor schwerwiegender Entwürdigung oder Erniedrigung. Der Rechtsprechung des IStGH und der Sondertribunale folgend muss der Angriff auf die Würde eines Menschen

von solcher Schwere sein, dass er allgemein nach objektiven Maßstäben als Gräueltat („*outrage*") angesehen wird (IStGH, *Prosecutor v. Katanga und Ngudjolo Chui*, Vorverfahrenskammer, Beschluss vom 30. September 2008 - ICC-01/04-01/07-717, Rn. 369; Sondertribunal für Sierra Leone, *Prosecutor v. Sesay, Kallon und Gbao,* Urteil vom 2. März 2009 - SCSL-04-15-T1234 - *RUF-Fall*, Rn. 175 f.; *Werle*, Völkerstrafrecht, 3. Aufl. 2012, Rn. 1169). Derartige, in schwerwiegender Weise ehrverletzende Verhaltensweisen sind aber weder vorgetragen noch ist sonst ersichtlich, dass solche zu Ihrem Nachteil begangen wurden. Die kurzzeitige Fesselung nach vorausgegangenen gewaltsamen Auseinandersetzungen an Bord und das erzwungene Sitzen auf dem Boden erfüllen den Tatbestand jedenfalls noch nicht.

8. Ihre Festnahme und -haltung bis zum 1. Juni (6.30 Uhr) erfüllt auch nicht den Tatbestand der rechtswidrigen Gefangenhaltung oder verzögerten Heimschaffung nach § 8 Abs. 3 Nr. 1 VStGB. Aufgrund Fehlens gesicherter völkergewohnheitsrechtlicher Standards für den Fall des nicht-internationalen bewaffneten Konflikts ist das rechtswidrige Festhalten geschützter Personen allein im sog. internationalen (also zwischenstaatlichen) bewaffneten Konflikt mit Strafe bedroht (MüKo-StGB/*Zimmermann-Geiß,* 2. Aufl., § 8 VStGB Rn. 230). Vorliegend ist jedoch schon rechtlich nicht eindeutig, ob es sich bei dem bewaffneten Konflikt zwischen Israel und der Hamas um einen internationalen handelt. Ungeachtet dessen wäre der Tatbestand auch bei Annahme eines solchen hier nicht erfüllt. Nach den Regeln des humanitären Völkerrechts haben die Konfliktparteien nämlich bei der Festhaltung von Personen ein weites Ermessen (MüKo-StGB/*Zimmermann-Geiß*, 2. Aufl., § 8 VStGB Rn. 235). Aus dem Seekriegsrecht ergibt sich zudem ein Recht zur Gefangennahme aller an Bord eines blockadebrechenden Schiffs befindlichen Personen, die ohne weiteres bis zum Erreichen des Hafens und darüber hinaus solange festgehalten werden können, bis ihr Status geklärt ist (San-Remo-Manual, § 161). Gemessen an diesen Vorgaben des Völkergewohnheitsrechts waren weder Ihre Gefangennahme, noch die nachfolgende kurzzeitige Festhaltung rechtswidrig.

9. Schließlich erweist sich auch die angezeigte Beschlagnahme persönlicher Gegenstände und des Reisegepäcks nach dem VStGB als straflos. Denn es ist bereits der objektive Tatbestand der Plünderung oder rechtswidrigen Zerstörung, Aneignung oder Beschlagnahme gemäß § 9 Abs. 1 VStGB nicht erfüllt. Der völkerstrafrechtliche Eigentumsschutz erfasst nämlich nur Übergriffe auf das Eigentum der jeweils gegnerischen Konfliktpartei und ihrer Staatsangehörigen/Gefolgsleute. Damit ist weder das Eigentum eigener Staatsangehöriger, noch das der Staatsangehörigen von neutralen Drittstaaten geschützt. Diese

Beschränkung hat im Wortlaut des § 9 VStGB ihren Niederschlag gefunden („*Sachen der gegnerischen Partei*"). Sie ist einer erweiternden Auslegung nicht zugänglich und gilt für beide Alternativen des Tatbestandes. Vorliegend ist zu sehen, dass der bewaffnete Konflikt zwischen Israel und der Hamas besteht und sämtliche Anzeigeerstatter weder der Hamas (als Kämpfer oder Gefolgsleute) angehören, noch zur Tatzeit deren effektiver Gebietskontrolle unterlagen. Ihr Privateigentum kann daher auch nicht der Hamas zugerechnet werden.

10. Eine Strafbarkeit wegen eines Verbrechens gegen die Menschlichkeit gemäß § 7 Abs. 1 VStGB ist schließlich schon deswegen nicht gegeben, weil die verfahrensgegenständlichen Maßnahmen der israelischen Streitkräfte nicht „im Rahmen eines ausgedehnten oder systematischen Angriffs gegen eine Zivilbevölkerung" erfolgten.

II. Die Verfolgung der angezeigten Vorgänge nach den Vorschriften des StGB, etwa unter dem rechtlichen Gesichtspunkt des Angriffs auf den Seeverkehr (§ 316c Abs. 1 StGB), des (besonders) schweren Raubes (§ 249 Abs. 1, § 250 Abs. 1, 2 StGB) bzw. Diebstahls oder Unterschlagung (§ 242 Abs. 1, § 246 Abs. 1 StGB), der Freiheitsberaubung und/oder Nötigung (§ 239 Abs. 1, § 240 Abs. 1 StGB) und der Körperverletzung (§ 223 Abs. 1 StGB) scheidet bereits deswegen aus, weil der Einleitung eines Ermittlungsverfahrens insoweit das von Amts wegen zu beachtende Verfahrenshindernis der fehlenden deutschen Strafgerichtsbarkeit in Verbindung mit der völkergewohnheitsrechtlich anerkannten allgemeinen Funktionsträgerimmunität entgegensteht (§ 20 Abs. 2 GVG, Art. 25 GG).

Die deutsche Gerichtsbarkeit erstreckt sich nicht auf solche Diensthandlungen ausländischer Funktionsträger, die diese in ihrer dienstlichen Eigenschaft vornehmen. Die Immunität des staatlichen Funktionsträgers ist Ausfluss der sog. „Staatenimmunität", wonach Staaten für hoheitliches Staatshandeln grundsätzlich Immunität von der Gerichtsbarkeit anderer Staaten genießen (IGH, *Jurisdictional Immunities of the State*, Urteil vom 3. Februar 2012, ICJ Reports 2012, 99, Rn. 56 f.). Dies hat zur Folge, dass auch alle staatlichen Funktionsträger in Bezug auf ihr hoheitlich-dienstliches Handeln von der Strafgerichtsbarkeit fremder Staaten befreit sind (BVerfGE 96, 68 [85, 91]; BGH, NJW 1979, 1101 [1102]; BVerwG, NJW 1989, 678, 679; *Ambos*, Internationales Strafrecht, 3. Aufl. 2011, § 7 Rn. 101; *Kreicker*, Völkerrechtliche Exemtionen, Bd. 1, 2007, S. 109 ff., *ders.*, ZIS 2012, 107, 116; *ders.*, ZIS 2014, 129, 131), solange sie keine Völkerstraftaten begehen (*Kreicker*, Völkerrechtliche Exemtionen, Bd. 1, 2007, S. 255 ff. m.w.N.). Wie oben dargelegt, erfüllen die angezeigten Handlungen indes die Tatbestände des VStGB nicht.

III. Soweit die angezeigten Vorgänge die Staatsangehörigen dritter Staaten betreffen, wurde gemäß § 153f Abs. 1, 2 StPO von der Strafverfolgung abgesehen.

Zivilrechtliche Ansprüche bleiben von diesem Bescheid unberührt.

Mit freundlichen Grüßen

Im Auftrag

(Ritscher)

The Office of the Prosecutor General declared that it examined the criminal complaint filed by Ms. Höger on 4 June 2010 but concluded not to press charges against Israeli soldiers for war crimes, unlawful detention and all other potential crimes. Following the internal investigation as well as international fact finding missions and other sources, the Office of the Prosecutor General concluded that there are no reasonable grounds to believe that crimes under German law to the detriment of German citizens were committed (Section 152, par. 2 German Code of Criminal Procedure).

With regard to possible crimes against nationals of third states the Office of the Prosecutor General decided also not to press charges under Section 153 f par. 1 and par. 2. of the Federal Code of Criminal Procedure.

The Prosecutor General held:

(Unofficial Translation):

I. The actions by the Israeli Defence Forces carried out (here: *against you*) and other German nationals are no criminal acts under the VStGB.

1. The interception of the Flotilla through force by means of boarding the vessel, and the takeover by the commando is no criminal attack against the civilian population (Section 11, par. 1, and sentence 1, no. 1). This provision only covers direct attacks the civilian population or civilian objects. Attacks aimed against combatants, hostile fighters or military objects - independent of the results of so-called civilian collateral damage - are not covered. The provision criminalizes only the violation of the principle of distinction, under which parties to an armed conflict at all times have to distinguish between combatants and civilians and civilian and military objects.

In the case before us, the Israeli actions followed the overall objectives for the operation, namely to gain control of the vessels and not to harm individuals. The reason for the escalation on the "Mavi Marmara" was the resistance by passengers and crew towards the first Israeli commando and that a group of passengers engaged in "grave, organized and violent" forms of resistance (Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, No. 124, hereinafter: "**Palmer Report**"). There are no indications that the officers who ordered the interception were led by any intention to target civilians. For the legal reasoning, it is irrelevant that persons died in the course of the operation.

2. Moreover, the operation is not an unlawful attack against civilian objects (Section 11, par. 1, sentence 1 no. 2 VStGB). The vessels of the Flotilla need to be considered military objects under the particular circumstances that may be attacked under the rules of international humanitarian law.

a) All vessels were considered as commercial vessels under the San Remo Manual of 1994, despite their intention to break the blockade. Neutral commercial vessels may not be attacked; they can however turn into military objectives in individual cases (San Remo Manual §§ 40, 59, 60, 67). This applies explicitly for commercial vessels which break a blockade. Such vessels may be attacked (§§ 98, 67 a. alternative 2). With the order to stop these vessels become legitimate military targets (*Heintschel von Heinegg* in: Fleck Handbook of International Humanitarian Law, No. 1025 Footnote 135). Civilians on the vessels do not make the vessel immune from attack. The interception needs not to be postponed until the breaker of the blockade enters into the territory under the blockade (Articles 17 and 20 of the London Declaration on the Laws of the Sea of 26 February 1909, *Heintschel von Heinegg*,

Israel YHR (2012), p. 65, 79). The vessel breaking the blockade cannot rely on the freedom of navigation (Article 87 of UNCLOS).

b) For this examination and the application of Section 11 par. 1 sentence 1 no. 2 and the measures enforcing a blockade, the legality of the blockade is not relevant. The questions concerning the legality of the blockade present a number of complex issues, which cannot be overviewed and examined by the individual soldiers. On the level of international criminal law an attack is not to be regarded as criminal if (1.) the blockade has been formally imposed correctly, meaning notified, (2.) the vessel being attacked has knowledge of the blockade and breaks it and (3.) rejects to stop the vessel or resists interception. Every vessel intentionally and knowingly breaking a blockade lost its protection under the angle of international humanitarian law. The main objective of international humanitarian law has primarily the function to protect uninvolved and those without means of defence (*Kielmansegg*, JZ 2014, p. 373). A vessel that takes course on to the naval territory under blockade turns actively against a military measure, whether this measure is legal or illegal and becomes part of the conflict events. Under international criminal law it therefore loses its status as civilian object. This is the case here before us.

On 5 January 2009, the Israeli Government has sufficiently communicated the blockade in a manner and form in a general way (Israeli notice to seamen, 1/2009). Furthermore, the vessels of the Flotilla were warned by radio on the evening of 30 May 2010 once again. The findings of the Palmer Report are to be followed that the primarily **organizers of the Flotilla intended the wide media attention of breaking the blockade** and only secondary the delivery of humanitarian goods (Palmer Report, no. 87). There was a press release by the party "Die Linke" in the German parliament on 24 May 2010 according to which it was communicated "**to break with the vessels the blockade of Gaza"**. Finally, via radio the captains of the Flotilla vessels (as intended from the beginning) rejected the request to stop or turn. Therefore the vessels need to be regarded as military targets.

3. The interception of the Flotilla is not to be considered under Section 11 par. 1 sentence 1 no. 3 (Attack with excessive collateral damage). This provision covers distant attacks (which did not occur here), as the firing of locations by artillery or the firing of rockets on a ammunition fabric (*Dörmann* in: Munich Commentary of the Act of Crimes against International Law, § 11, No. 78, *Werle*, Völkerstrafrecht, 3rd edition 2012, No. 1298, 1307). Furthermore **it cannot be assumed that the officers responsible for the military operation, when ordering the interception, acted with the certainty that the attack may lead to excessive damage.**

4. Criminal responsibility under § 10 par. 1 sentence 1 no. 1 VStGB (Attack against humanitarian operations) is not to be considered, regardless whether the aim of the Flotilla was to provide for the population of Gaza, because of the lack of consent of Israel for direct aid delivery by the Flotilla. Humanitarian aid missions are protected under international humanitarian law, if they are oriented towards the principle of neutrality and impartiality and have the consent by the affected parties to the conflict (see Article 70, par. 1 sentence 1, First Additional Protocol; *Zimmermann and Geiß*, in § 10 VStGB, No. 5, 12, Munich Commentary on the Penal Code. San-Remo Manual, § 47, letter c no. II).

5. The treatment that the complainants and others were subjected to by Israeli soldiers after they gained control over the vessel is not criminal under Section 8 par. 1 No. 3 VStGB. The actus reus of cruel and inhuman treatment refers to the prohibition of torture and requires the infliction of severe bodily or psychological harm (see ICTY, Prosecutor v. Kristic, Judgment of 2 August 2001 - IT-98-33-T, No.

131); *Zimmermann and Geiß, in:* Munich Commentary on the Penal Code, § 10 VStGB, No. 14). Applying this scale, **neither the complaint about temporary captivation nor the forced staying on deck, with the hardships that come with it appear to be severe enough.**

6. The transfer from a location on the high seas to Israel and from there to Germany is not to be considered under the crime of deportation or forceful transfer under Section 8 par. 1 No. 6 VStGB. **This provision had the deportation of the Second World War in mind and only considers such measures that concern the permanent residence of a person. Deportation in this context therefore only means the involuntary transfer of a person from their place of residence to a location outside of the states' boarders and transfer means the relocation within the states' borders** (*Werle*, Völkerstrafrecht, 3rd edition, No. 1218). Both is not applicable here.

7. The actions of the Israeli soldiers do not fulfill the actus reus of degrading or humiliating treatment under Section 8 par. 1 no. 9 VStGB. This provision protects the personal honor of a person against grave degradation and humiliation. Following the jurisprudence of the ICC and the Special Tribunals, the attack must be of such gravity, that under an objective scale would be viewed as atrocity ("outrage", ICC, Prosecutor v Katanga and Ngudjolo Chui, Pre-Trial Chamber, Decision of 30 September 2008 - ICC - 01/04-01/07-717, No. 369; Special Tribunal for Sierra Leone, Prosecutor v Sesay, Kallon and Gbao, Judgment of 2 March 2009-SCSL 04-15-T-T1234-RUF-Fall, No. 175 f.; *Werle*, Völkerstrafrecht, 3rd edition 2012, No. 1169). Such, behavior that degrades the personal dignity in a grave manner have neither been claimed by the complainants **nor is there any indication that such acts were committed to their detriment.** The temporary captivation following prior violent confrontation on board and the forced sitting on the floor do not fulfill the criteria of this provision.

8. The detention of the complainants until 1 June 2010 (6.30 am) do not fulfill the criteria of unlawful detention or delayed return to home under Section 8, par. 3 No. 1 VStGB. Due to the lack of secured customary law standards on the case of a non-international armed conflict the unlawful detention of protected persons is only criminalized in an international (inter-state) armed conflict (*Zimmermann and Geiß* in: Munich Commentary on the Penal Code, §8 VStGB, No. 230). In this case, however, it is legally not clear, if there is an international or non-international armed conflict going on between Israel and Hamas. **Regardless of this question, the criteria for the perpetration of provision would not be met.** Under the rules of international humanitarian law the parties to a conflict have a broad margin of appreciation when it comes to the detention of persons (*Zimmermann and Geiß* in: Munich Commentary on the Penal Code, §8 VStGB, No. 235). Form the laws on armed conflict on the High Seas, it follows that all persons participating in the breaking of a blockade can be detained without further elaboration until the arrival at the port until their status is determined (San Remo Manual, § 161). Examined under these criteria of customary law **neither the arrest, nor the temporary detention, were unlawful.**

9. Finally, also the confiscation of personal objects and the luggage is not to be considered criminal under the VStGB. Already the objective elements of the crime of looting, unlawful destruction, appropriation or seizure under Section 9 par. 1 VStGB are not met. The protection of property under international criminal law **only covers attacks on the property of the opposing party to the conflict and its citizens/followers**. Therefore, neither the property of their own citizens nor of citizens of a neutral third state are protected. This limitation has been implemented in Section 9 of the VStGB ("Items of the opposing party"). It is not subject to a wide

interpretation and applies to both alternatives of the provision. In the case before us, it can be seen that the conflict exists between Israel and Hamas and none of the complainants belong either to Hamas (as fighters of followers) not its effective territorial control). Their private property can therefore not be attributed to Hamas.

10. A crime against humanity under Section 7 par. 1 VStGB is not to be considered because the measures under assessment of the Israeli Defense Forces **did not occur "in the framework of a widespread or systematic attack against a civilian population".**

II. The prosecution of other crimes of the Federal German Penal Code, vor example under the legal considerations of an attack on the maritime traffic (Section 316c par. 1 Penal Code), the (exceptionally) severe robbery (Section 249 par. 1, Section 250 par. 1, 2 Penal Code) or theft or fraudulent conversion (Section 242 par. 1, 240 par. 1 Penal Code) and battery and assault (Section 223 par. 1 Penal Code) can already be excluded because the public authority needs to consider the German criminal procedural hindrance of lack of jurisdiction of German criminal law in connection with customary international law immunity of officials (Section 20 par. 2 Court Constitution act, Article 25 Basic Law). German jurisdiction applies not to such measures of foreign officials that have been undertaken in their civil servant capacity. The immunity of state officials is an expression of the so-called "state immunity", under which states generally enjoy immunity for state-acts before jurisdiction of other states. (International Court of Justice, Jurisdictional Immunities of the State. Judgment of 3 February 2012, ICJ Reports 2012, p. 99, No. 56). From this follows that **also all other state officials enjoy immunity in relation to their state-acts before foreign jurisdictions** (Federal Constitutional Court 96, 68 (85,91), Federal Court of Justice NJW 1979, 1101 (1102), Federal Administrative Court NJW 1989, 678, 679, *Ambos*, International Criminal Law, 3rd edition, 2011, § 7 No. 101, *Kreicker*, International law excerpts, series 1, 2007, p. 255 ff., with further reference). As outlined above the current acts do not fulfil the objective criteria of crimes under the VStGB.

III. As far as the occurrences regarding citizens of third states are concerned, the prosecution service decided to abstain from prosecution under Sections 153f par. 1, 2 Federal Code of Criminal Procedure.

Civil law claims are not affected by this notice.

(Issued by Prosecutor Ritscher)