EUROPEAN CENTRE FOR LAW AND JUSTICE

15 July 2015

H.E. Fatou Bensouda
Prosecutor, International Criminal Court
[redacted]

Via FAX: [redacted]
& Overnight Delivery

RE: WHY IT IS UNLAWFUL FOR THE INTERNATIONAL CRIMINAL COURT TO ASSERT JURISDICTION OVER NATIONALS OF NON-CONSENTING, THIRD PARTY STATES

Your Excellency:

By way of introduction, the European Centre for Law and Justice (ECLJ) is an international, non-governmental organisation dedicated to promoting and protecting human rights and the rule of law around the world. The ECLJ also holds Special Consultative Status before the United Nations Economic and Social Council[1]. The ECLJ is contacting you because we are concerned that the Rome Statute purports to give its creation, the International Criminal Court (ICC), lawful authority to try nationals of non-consenting, non-party States for Article 5 crimes they allegedly committed on the territory of a State Party to the Rome Statute. Our concern stems primarily from the following, well-established principle of customary international law: "A treaty does not create either obligations or rights for a third State without its consent"[2]. As such, were you or the OTP to attempt to bring nationals of non-consenting, third party States before the ICC, you would be acting in violation of well-established customary international law. Accordingly, one must conclude therefrom that the provision in the Rome Statute that purports to grant such authority to the OTP is *ultra vires* and *void ab initio*.

[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).

[2]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.

CENTRE EUROPÉEN POUR LA JUSTICE ET LES DROITS DE L'HOMME
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APPLICABLE PRINCIPLES OF LAW

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"[3]. Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law[4]. The three primary sources are: (1) "international conventions . . . establishing *rules expressly recognized by the contesting states*"[5] (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"[6] (commonly referred to a "customary international law" and generally binding on all nations); and (3) "the general principles of law recognized by civilized nations"[7]. Secondary sources of international law include "judicial decisions," "teaching of the most highly qualified publicists of the various nations,"[8] as well as principles of equity and fairness[9]. In this letter, we will focus primarily on the relationship and interaction between conventional international law and customary international law as they apply to the Rome Statute; its creation, the International Criminal Court (ICC); and nationals of non-consenting, third party States.

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

[4]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.
> (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.

[5]ICJ Statute, *supra* note 4, art. 38(1)(a) (emphasis added). Note especially the phrase, "establishing rules expressly recognized by the contesting states." Such rules need not be recognised 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)).

[6]ICJ Statute, *supra* note 4, 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 5, 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.*

[7]ICJ Statute, *supra* note 4, art. 38(1)(c); *see also* O'CONNELL, *supra* note 3, at 60. These include common principles of law and justice reflected in the legal systems of civilized states.

[8]ICJ Statute, *supra* note 4, 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 systematisation 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 5, at 123.

[9]HENKIN, *supra* note 5, at 123.

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[10]. 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[11]. Although it is not necessarily *written* law, customary 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[12].

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[13]. Accordingly, because 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 reach of an institution like the International Criminal Court (ICC), an institution created pursuant to the Rome Statute[14], 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[15]).

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[10]Vienna Convention, *supra* note 2, art. 26 ("Every treaty in force is binding upon the *parties* to it and must be performed by them in good faith" (emphasis added)).

[11]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.

[12]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 recognise no legal obligation to do the latter.

[13]*See, e.g.*, Vienna Convention, *supra* note 2, 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.

[14]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).

[15]*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 14, 2015), 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

The Rome Statute exists solely because its States Parties (i.e., States that have signed and ratified the treaty) have negotiated and/or 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[16]. *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 State players in the international community were uncomfortable with a treaty which contravened international legal norms[17].

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 was 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)[18]. It did so in an attempt 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"[19]. More recently, the Union of the Comoros filed a referral with the ICC Prosecutor, requesting that the Office of the 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[20]. And, more recently still, Palestinian officials have once again sought to accede to the ICC in order to bring Israeli soldiers and government officials before the ICC to answer for alleged crimes committed during the 2014 incursion into the Gaza Strip called "Operation Protective Edge"[21].

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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).

[16]Rome Statute, *supra* note 14, art. 12(2)(a).

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

[18]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 14, art. 12(3), which the PA attempted to do, *see infra* note 19, even though it was not a State.

[19]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 recognised 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.

[20]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.

[21]*See, e.g.*, William Booth, *Palestinians Press International Criminal Court to Charge Israel*, WASH. POST, 25 June 2015, https://www.washingtonpost.com/world/middle_east/palestinians-press-international-criminal-court-to-charge-israel-with-war-crimes/2015/06/25/c0c85306-19d1-11e5-bed8-1093ee58dad0_story.html. The ECLJ believes that the OTP erred as a matter of law in allowing Palestine to accede to the ICC's jurisdiction based solely on the UN General Assembly's agreeing to change Palestine's status *at the UN* from "Entity" with observer status to "Non-member State" with observer status. Under the UN Charter, when Member States act collectively as part of the General Assembly, they are bound by the terms governing that body. Those terms limit the General Assembly to making "recommendations". *See, e.g.*, UN CHARTER arts. 10–14. Hence, the General Assembly could not create or recognise in any way, shape or form a Palestinian "State".

Accordingly, irrespective of the truthfulness or falsehood of the allegations of criminal wrongdoing in the above examples, the ICC is not the proper 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.

I. DESPITE THE ROME STATUTE'S STATED GOAL OF ENSURING THAT THE PERPETRATORS OF THE MOST SERIOUS INTERNATIONAL CRIMES NOT GO UNPUNISHED[22], 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[23]). Among the explicit limitations are the following:

(1) The Rome Statute only permits "States"[24] to accede to ICC jurisdiction[25].

(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[26]. The Statute further limits the ICC's jurisdiction over war crimes to those committed as "part of a plan or policy or as part of a large-scale commission of such crimes"[27]. 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"[28].

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[22]Rome Statute, *supra* note 14, pmbl paras. 4 & 5.
[23]*Id.*
[24]The term "State," in UN and international practice, especially when capitalised, refers to recognised, sovereign nation-states. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-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).
[25]*See, e.g.*, Rome Statute, *supra* note 14, 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, for example, with respect to the Darfur region of Sudan). S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).
[26]Rome Statute, *supra* note 14, 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, 583, 605 (Antonio Cassese et al. eds., 2002).
[27]Rome Statute, *supra* note 14, art. 8.
[28]*Id.* art. 17(1)(d).

(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.[29] 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[30]. 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[31].

(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[32]. Were a State Party to reject the definition of aggression or any amendment to other listed 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[33].

(6) The Statute precludes trials *in absentia*[34].

(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[35]. 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[36].

(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[37]. 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 even permits *its own*

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[29] *Id.* art. 11. *See also id. art.* 8*bis* (regarding crime of aggression).
[30] *Id.* art. 16.
[31] *Id.* art. 124.
[32] *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 1 January 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.
[33] *Id.* art. 26.
[34] *Id.* art. 63.
[35] *Id.* pmbl. para. 10; *id.* art. 1.
[36] *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.
[37] Rome Statute, *supra* note 14, 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* Kaul, *supra* note 26, at 583, 612.

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*[38]. That 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[39] 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[40]. 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*).

II. 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.

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: 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 recognise 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.

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[38]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:
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> (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, *supra* note 14, 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).

[39]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.

[40]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).

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*[41]. We must recognise, 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 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"[42], 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[43], 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"[44], 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[45].

When "States" (meaning *the authorised 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*

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[41]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 14, 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 2, 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 recognise.*

[42]Vienna Convention, *supra* note 2, 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.

[43]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).

[44]*See, e.g.*, CRS REPORT, *supra* note 40, at 5.

[45]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 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.

nationals and territories (provided that the agreement does not violate a *jus cogens* norm). 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[46] does not—*and lawfully may not*—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[47]. *Accordingly, if no individual State or group of like-minded States may lawfully 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*)[48], 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[49]. That the Rome Statute purports to grant such authority[50] 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 possesses 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 to ICC jurisdiction for alleged Article 5 crimes committed on the soil of a State Party to the Rome Statute[51]. Were either to do so, he or she would be acting in clear

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[46]Rome Statute, *supra* note 14, art. 12(2)(a).

[47]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.

[48]*See, e.g.*, CRS REPORT, *supra* note 40, 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).

[49]*See supra* note 39.

[50]*See* Rome Statute, *supra* note 14, art. 12(2)(a).

[51]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,

violation of customary international law and be a law-breaker. 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 Recognise 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"[52] is well-established and has been recognised 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[53]. The ICJ's case 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*")[54]. That case centred 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[55]. When the war ended, both Albania and Italy claimed the gold and submitted competing claims to international arbitration[56].

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"[57] in the event that the gold was found to belong to Albania. After the arbitrator found in favour 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[58].

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"[59]. 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

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incorporating by reference the appropriate provisions of the Rome Statute into its decision, thereby obligating the UN Member State to comply with those provisions.

[52] *See* Vienna Convention, *supra* note 2, art. 34; RESTATEMENT, *supra* note 4, § 324(1).

[53] ICJ Statute, *supra* note 4, arts. 34(1), 36(2)–(3).

[54] Monetary Gold (It. v. Fr., U.K., & U.S.), 1954 I.C.J. 19 (15 June).

[55] *Id.* at 19.

[56] *Id.*

[57] *Id.* at 21.

[58] *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 authorised by all named parties to adjudicate the matter. *See id.* at 31.

[59] *Id.* at 31.

also the amount of compensation"[60]. Therefore, the ICJ held that it "cannot decide such a dispute without the consent of Albania"[61]. 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"[62]. 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[63]. 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 continental shelf[64]. Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975[65], claimed that any treaty executed without its consent was invalid[66]. 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"[67]. 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[68]. 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[69]. 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[70].

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 this principle in its 2001 decision, *Larsen v. Hawaiian Kingdom*[71]. In that case, Larsen refused to pay fines associated with traffic citations[72]. 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[73] 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[74]. 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[75]. Moreover, even

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[60] *Id.* at 32.
[61] *Id.*
[62] *Id.* (emphasis added).
[63] East Timor (Port. v. Austl.), 1995 I.C.J. 90 (30 June).
[64] *Id.* at 101–02.
[65] *See id.* at 95–96.
[66] *Id.* at 94–95.
[67] *Id.* at 102.
[68] *Id.* at 105.
[69] *Id.* at 104.
[70] *Id.* at 105. Such would be the case with Israel concerning Operation Cast Lead, the enforcement of the naval blockade of the Gaza Strip, and Operation Protective Edge, since those matters implicate Israel's inherent right to self-defence in a situation of armed conflict.
[71] *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.
[72] *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.
[73] *Id.* para. 47.
[74] Award, *supra* note 71, para. 2.3.
[75] *Id.* para. 11.23.

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[76].

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"[77]. *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.

Some argue that the ICC may investigate and try nationals of non-consenting, non-party States under the principle of universality[78]. 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

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[76] *Id.* para. 11.21.

[77] *Id.* para. 11.20 (emphasis added).

[78] *See, e.g.*, Dapo Akande, *The Jurisdiction of the International Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 626 (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 Akande 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.

[i.e., Article 5 crimes]"[79]. The first assumption is followed by the argument "that States must be entitled to do collectively what they have the power to do individually"[80]. From these statements, the argument continues as follows:

> 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[81].

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[82]. 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 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

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[79]Kaul, *supra* note 26, at 583, 587. *But see* CRS REPORT, *supra* note 40, 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).

[80]Kaul, *supra* note 26, at 583, 587. 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.

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

[82]*See* Vienna Convention, *supra* note 2, art. 34.

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 recognises 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. *Such application would make the persons doing so lawbreakers themselves.*

The rule of law is the bedrock principle which underlies civilised society. It is too important a principle to compromise because, once compromised, it is difficult to reestablish 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 customary international law.

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As we have done in the past, the ECLJ will continue, when we deem appropriate, to submit letters and legal memoranda regarding this and related topics to assist you and the OTP as you deal with these important issues.

Respectfully submitted,

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