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ARTICLES

THE ISSUE OF ICC JURISDICTION OVER NATIONALS OF NON-
CONSENTING, NON-PARTY STATES TO THE ROME STATUTE:
REFUTING PROFESSOR DAPO AKANDE'S ARGUMENTS

Dr. Jay Alan Sekulow

Robert Weston Ash

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**THE ISSUE OF ICC JURISDICTION
OVER NATIONALS OF NON-
CONSENTING, NON-PARTY STATES TO
THE ROME STATUTE: REFUTING
PROFESSOR DAPO AKANDE’S
ARGUMENTS**

by

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INTRODUCTION

It is no secret that the United States of America vigorously opposes the International Criminal Court (ICC) and the ICC Prosecutor's claims that the ICC has authority to investigate and try nationals of non-party States without the States' consent. The position of the United States is based primarily and firmly on the customary international law principle that "[a] treaty does not create either obligations or rights for a third State without its consent."¹

of Science (B.S.) degree from the United States Military Academy at West Point, New York; his Master of International Public Policy (M.I.P.P.) degree from the School of Advanced International Studies (SAIS) of the Johns Hopkins University, Washington, DC; and his Juris Doctor (J.D.) degree (*cum laude*) from the Regent University School of Law, Virginia Beach, Virginia. During his Army career, Mr. Ash was a George and Carol Olmsted Scholar who studied two years at the University of Zurich, in Zurich, Switzerland. He also served as a Congressional Fellow for one year in the office of Senator John McCain of Arizona. Mr. Ash has taught international law and national security law courses at the Regent University School of Law, and he currently heads the national security practice of the ACLJ.

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. Ninety-one States Parties to the Rome Statute are also signatories to the Vienna Convention on the Law of Treaties. Hence, those ninety-one States are doubly bound. They are bound by the principle as customary international law, and they have consented to be bound by the identical principle as conventional international law. Accordingly, States Parties to both treaties violated their solemn obligations under both customary and conventional international law when they

The United States, having declined to accede to the Rome Statute,² is just such a “third State” *vis-à-vis* the Rome Statute and its terms. Accordingly, having rejected the treaty *in its entirety*,³ the United States, pursuant to customary international law, strongly asserts that without its prior consent, the United States is free of any obligations set forth in the Rome Statute as well as any interaction with any organ created by the treaty.⁴ Moreover, no third State or group of States may waive or modify *by treaty* the sovereign rights of the United States *vis-à-vis* its nationals, territory, or actions without its consent. Finally, no third State or group of States may waive or modify *by treaty* any other rights enjoyed by the United States under customary international law without its consent.⁵

Despite the unambiguous international law principle that treaties do not bind non-party States, the ICC Office of the

included Article 12(2)(a) in the Rome Statute, which disregards the right of non-party States to a treaty to be free of any obligations set forth in such treaty without their prior consent. Rome Statute of the International Criminal Court art. 12(2)(a), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

² Press Release, U.S. Dep’t of Def., Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002) [hereinafter Rumsfeld Statement on the ICC Treaty], <https://archive.defense.gov/Releases/Release.aspx?ReleaseID=3337> (announcing that the United States will not become a party to the ICC treaty and is effectively withdrawing from signatory status); *see also* *Speech Transcript: John Bolton on U.S. Policy Toward the International Criminal Court*, EPOCH TIMES, Sept. 10, 2018 [hereinafter *Bolton Speech Transcript*], https://www.theepochtimes.com/speech-transcript-john-bolton-on-u-s-policy-toward-the-international-criminal-court_2656808.html.

³ Having declined to ratify the treaty, the treaty’s terms do not apply to the United States. Hence, when a State rejects a treaty like the Rome Statute, it rejects the treaty “in its entirety” (save only for any terms of customary international law contained therein, provided the rejecting State was not a persistent objector as such custom developed).

⁴ *See* Vienna Convention, *supra* note 1, at art. 34; *see also* *Bolton Speech Transcript, supra* note 2.

⁵ Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute’s Unlawful Application to Non-State Parties*, 44 VA. J. INT’L L. 63, 66–68 (2003).

Prosecutor (OTP) is nonetheless asserting its jurisdictional reach over nationals of non-party States to the Rome Statute without obtaining the prior consent of an accused's State of nationality. Among the nationals over whom the OTP is currently seeking to assert its jurisdiction are nationals of the United States of America.⁶ This explains the vigorous pushback by officials of the United States Government.

⁶ See, e.g., Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶¶ 23–24, 43–66 (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF. The ICC Prosecutor's attempt to ensnare nationals of non-consenting, non-party States to the Rome Statute is not limited to nationals of the United States. Two other examples quickly come to mind, to wit, the OTP's attempts to assert its jurisdiction over nationals of Myanmar and Israel, see Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Request for Authorisation of an Investigation Pursuant to Article 15, ¶¶ 72–84 (July 4, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF; Report on Preliminary Examination Activities 2018; ICC-OTP, ¶¶ 251–84 (Dec. 5, 2019), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>, both of which, like the United States, have declined to accede to the Rome Statute and do not recognize or consent to ICC jurisdiction over their nationals. Moreover, it is not just the United States that objects to the Rome Statute's jurisdictional regime under Article 12(2)(a). Other States also strenuously object. See, e.g., Lu Jianping & Wang Zhixiang, *China's Attitude Towards the ICC*, 3 J. INT'L CRIM. JUST. 608, 608 (2005) (noting China's objection that the ICC's "jurisdiction is not based on the principle of voluntary acceptance" and that "complementarity gives the ICC the power to judge whether a state is able or willing to conduct proper trials of its own nationals"); Dilip Lahiri, Head of Delegation of India, Explanation of Vote on the Adoption of the Statute of the International Criminal Court (July 17, 1998), <https://www.legal-tools.org/doc/9f86d4/pdf/> ("It is truly unfortunate that a Statute drafted for an institution to defend the law should start out straying so sharply from established international law. Before it tries its first criminal, the ICC would have claimed a victim of its own—the Vienna Convention on the Law of Treaties.").

In an article⁷ widely acclaimed by proponents of broad ICC jurisdiction,⁸ Professor Dapo Akande supports the view that custom has developed to the point where a treaty-based court like the ICC may exercise jurisdiction over nationals of non-party States in certain circumstances. He does so by arguing the following four points.

First, in order to circumvent the customary rule that treaties do not bind non-party States, he differentiates between a “State” and its “nationals.”⁹ He claims that non-party States have no obligations under the Rome Statute, whereas, a State’s nationals may be subject to ICC jurisdiction under certain circumstances. Yet, because a State is never distinct from its nationals or territory (both of which are elements that constitute a State), the State-vs-nationals distinction is simply contrived, irreparably flawed, and, hence, inapt as justification for expanded ICC jurisdiction.¹⁰

⁷ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT’L CRIM. JUST. 618 (2003).

⁸ See, e.g., Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-RoC46(3)-01/18, Amicus Curiae, ¶ 22 & n.27 (June 18, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_03130.PDF (citing Akande, *supra* note 7) (“The delegated-jurisdiction theory supports the ICC’s jurisdiction over nationals of nonparty States, which can occur *inter alia* in cases of objective territoriality such as in the circumstances giving rise to the Prosecutor’s Request.”); Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Prosecution Response to the Hashemite Kingdom of Jordan’s Appeal, ¶ 43 & n.67 (Apr. 3, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01918.PDF (citing Akande, *supra* note 7) (explaining that Article 98 of the Rome Statute was meant “to ensure that a State Party would not become subject to competing obligations under international law”).

⁹ Akande, *supra* note 7, at 620–21, 634–37.

¹⁰ It is critical to understand whether such a distinction has any substance because the OTP relies heavily on it as justification to bring within the ICC’s ambit nationals of non-party States accused of committing crimes laid out in the Rome Statute. In fact, the OTP is already acting on it. See, e.g., Situation on Registered Vessels of Comoros, Greece and

Second, Professor Akande asserts that, because States routinely “delegate” part of their criminal jurisdiction to other States under what he dubs collectively as “anti-terrorism treaties,” precedent is sufficiently established for States to do the same with respect to the ICC. Yet, as discussed *infra*, the anti-terrorism treaties to which he refers only govern interactions between States Parties to those treaties, not interactions with non-party States or treaty-created criminal tribunals. Further, no “delegation” of jurisdiction actually occurs because, based on the sovereign equality of States, all States possess equal, inherent authority to act in such circumstances, making delegation wholly unnecessary.¹¹ As such, the anti-terrorism treaties do not support the ICC’s jurisdictional regime.

Third, Professor Akande asserts that prosecuting States are not required to obtain the consent of the accused’s State of nationality under the anti-terrorism treaties. While this statement is certainly true with respect to States, any argument that the same should apply to treaty-based criminal courts is false.

Fourth, Professor Akande asserts that there is a long line of precedents whereby treaty-based international criminal courts have exercised jurisdiction over nationals of non-party States without the consent of the accused’s State of nationality.¹² Such practice, he claims, has crystallized into custom. None of the examples Professor Akande provided, however, stands for such a proposition. There is no evidence whatsoever that, historically, international criminal

Cambodia, Article 53(1) Report, ICC-OTP, ¶ 14 (Nov. 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf) (justifying jurisdiction over nationals of Israel, a non-consenting, non-party State, by concluding that although “Israel is not a State Party, according to Article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-party State *nationals* alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party” (emphasis added)).

¹¹ See *infra* Section V.A.1 for a detailed discussion of the delegation theory.

¹² Akande, *supra* note 7, at 627–33.

courts have been permitted to exercise jurisdiction over nationals of non-consenting, non-party States, absent the involvement of the United Nations Security Council (UNSC).

We assert that any attempt by the OTP, the ICC, or any ICC chamber of judges to exercise jurisdiction over nationals of the United States under Article 12(2)(a): (1) violates the well-settled customary international law principle that “[a] treaty does not create either obligations or rights for a third State without its consent”¹³; (2) infringes on the sovereign right of the United States to reject *in toto* a treaty, thereby exempting its nationals, its territory, and its actions from the reach and effects of such treaty; and (3) is, therefore, *ipso facto* illegal. Additionally, asserting ICC jurisdiction may also violate well-established and longstanding customary international law provisions dealing with legal immunities.¹⁴

¹³ Vienna Convention, *supra* note 1, at art. 34.

¹⁴ Article 27(2) of the Rome Statute violates, for example, the Convention on Special Missions art. 21, June 21, 1985, 1400 U.N.T.S. 231 (“The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.”); *see also* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents art. 1(1), Feb. 20, 1977, 1035 U.N.T.S. 167 (“‘Internationally protected person’ means: (a) [a] Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him; (b) [a]ny representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.”). These United Nations conventions recognize long-standing, generally accepted legal immunities under customary international law and “[a]ffirm[] that the rules of customary international law continue to govern questions not regulated by the provisions of the present Convention.” Convention on Special Missions, *supra*, at Preamble.

In Section I, we give a general overview of applicable international law, including sources of international law, particularly as they pertain to custom and convention. In Section II, we discuss the law that governs the Rome Statute. In Section III, we discuss the United States' objections to the Rome Statute's application to the United States and its nationals. Specifically, Section III shows how Article 12(2)(a) of the Rome Statute violates customary international law, the sovereignty of non-party States, and the principle of sovereign equality of States. Further, this section points out the fundamental flaw in Professor Akande's State-vs-nationals distinction as well as flaws in the exemptions that the Rome Statute permitted for nationals of its States Parties. In Section IV, we begin reviewing and responding to Professor Akande's claim that custom has developed to the point whereby a treaty-based international criminal court may assert jurisdiction over nationals of non-consenting, non-party States in certain circumstances. Section V reviews the examples Professor Akande has given that he claims provide evidence of the alleged custom. First, this section discusses what he calls the "anti-terrorism" treaties and delegation of jurisdiction from one State to another under them. Second, this section discusses U.S. cases that Professor Akande claims indicate that even the United States agrees—*by practice*—with prosecuting foreign nationals without the consent of the State of their nationality when they can establish jurisdiction under rules of customary international law. We explain why these cases lend no support for the ICC's basis of jurisdiction because States are generally not required to obtain consent of the accused's State of nationality because in such cases jurisdiction is established under rules of customary international law. Finally, this section discusses each international tribunal that Professor Akande believes provides precedent for trying accused before international criminal tribunals without the consent of the accused's State of nationality. None of the tribunals stands for such a principle. In fact, many of these tribunals confirm the opposite, to wit, that to be legitimate, jurisdiction of international criminal courts must be consent-based.

I. GENERAL OVERVIEW OF APPLICABLE INTERNATIONAL 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.”¹⁵ Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law.¹⁶ The three primary sources are: (1) “international conventions . . . establishing *rules expressly recognized by the contesting states*”¹⁷ (commonly referred to as “conventional international law” and generally binding¹⁸ on the parties to the respective convention); (2) “international custom, as evidence of a general practice accepted as law”¹⁹ (commonly

¹⁵ MARY ELLEN O’CONNELL ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 3 (6th ed. 2010).

¹⁶ Statute of the International Court of Justice art. 38, June 26, 1945 [hereinafter ICJ Statute].

¹⁷ *Id.* at 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 have even questioned 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 [sic] to the parties to it.’” LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 95 (3d ed. 1993) (quoting Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* at 153, 157–58 (Von Asbeck et al. eds., 1958)).

¹⁸ We say “generally binding” because many international treaties permit States to accede with specific reservations or understandings that may limit how the treaty is applied to such States. The theory behind permitting such reservations is that it is better for a large number of States to agree to most of the terms of a treaty than for very few States to agree entirely with a treaty.

¹⁹ ICJ Statute, *supra* note 16, at 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 17, at 87. That “one reservation” applies to the “State which, while the custom is in process of formation, unambiguously and

referred to as “customary international law” and generally binding²⁰ on all nations); and (3) “the general principles of law recognized by

persistently registers its objection to the recognition of the practice as law.”
Id.

²⁰ Here, we say “generally binding” because a State may opt out of a customary law principle if it had been a persistent objector while the custom was in the process of formation. HENKIN, *supra* note 17, at 87. Regarding the Rome Statute, we assert that the actions taken by the United States Government *vis-à-vis* the ICC constitute evidence of persistent objection thereto. For the continuing forceful U.S. response to the ICC, *see, e.g.*, Rumsfeld Statement on the ICC Treaty, *supra* note 2; *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int’l Operations of the Comm. on Foreign Relations, United States Senate*, 105th Cong. 13 (1998) [hereinafter Scheffer Testimony], <https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf> (noting testimony from the Honorable David Scheffer, Ambassador-at-Large for War Crimes Issues) (“[T]he [Rome Statute] purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty [T]his [is] contrary to the most fundamental principles of treaty law”); President William J. Clinton, Statement on the Rome Treaty on the International Criminal Court, Weekly Comp. Pres. Doc. 4 (Dec. 31, 2000) [hereinafter Clinton Statement on the Rome Treaty], <https://www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf> (“In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty but also claim jurisdiction over personnel of states that have not.”); Brett D. Schaefer, *Beating the ICC*, HERITAGE FOUND. (Feb. 18, 2013), <https://www.heritage.org/global-politics/commentary/beating-the-icc> (noting the consistency of U.S. policy toward the ICC irrespective of which Party is occupying the White House); and *Bolton Speech Transcript*, *supra* note 2, reflects persistent objection by the United States Government to the increasing role played by international courts like the ICC as well as to their claim that they may exercise jurisdiction over U.S. nationals without the prior consent of the United States.

civilized nations.”²¹ Secondary sources of international law include “judicial decisions,” “teachings of the most highly qualified publicists of the various nations,”²² as well as principles of equity and fairness.²³ For purposes of this analysis, we will focus primarily on the relationship and interaction between conventional international law and customary international law *as they apply to the jurisdictional reach of treaty-based, international criminal courts* on nationals of non-consenting, non-party States.

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 only binding on the parties to such agreements.²⁴ 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.²⁵ Although it is not necessarily *written* law, customary international law is nonetheless considered

²¹ ICJ Statute, *supra* note 16, at art. 38(1)(c); *see also* O’CONNELL, *supra* note 15, at 60. These include common principles of law and justice reflected in the legal systems of civilized States.

²² ICJ Statute, *supra* note 16, at 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 17, at 123.

²³ HENKIN, *supra* note 17, at 113.

²⁴ Vienna Convention, *supra* note 1, at art. 34.

²⁵ There is one notable exception. A State may exempt itself from an international custom if that State is a “persistent objector” during the period of time that the custom develops. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204–05, 211 (2010).

“law” because States generally comply with its requirements because they believe that they have a legal obligation to do so.²⁶ “To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative.”²⁷ We would point out that this is not the case with the Rome Statute. Although approximately two-thirds of all States have acceded to the treaty, one-third of all States—including three permanent members of the UNSC—representing two-thirds of the globe’s population have not.²⁸ It is difficult to understand how such statistics support

²⁶ See, e.g., North Sea Continental Shelf (Ger./Den.), Judgment, 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.

²⁷ JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, AND PROCESS: A PROBLEM-ORIENTED APPROACH 78 (3rd ed. 2010).

²⁸ The United States Department of State recognizes the existence of 195 independent States. *Independent States in the World Fact Sheet*, U.S. DEP’T OF STATE BUREAU OF INTELLIGENCE & RESEARCH (Mar. 27, 2019), <https://www.state.gov/independent-states-in-the-world/>. Of these, 123 States are parties to the Rome Statute. *Status of Rome Statute of the International Criminal Court*, UNITED NATIONS (Feb. 2, 2020), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10&chapter=18&clang=en. Although 63.08% (or just under 2/3) of the world’s States have acceded to the ICC, they account for just under 1/3 of the world’s population. The global population in July 2018 was estimated to be 7,503,828,180. Central Intelligence Agency, *World, THE WORLD FACTBOOK* (Jan. 21, 2020), <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html>. Non-party States to the Rome Statute include the following (with estimated population in parentheses): China

“virtually uniform, extensive and representative” State practice. Further, “[n]ot all state practice results in customary law Consistent state practice becomes law when states follow the practice out of a sense of legal obligation encapsulated in the phrase *opinio juris sive necessitatis*.”²⁹

II. LAW GOVERNING THE ROME STATUTE

All treaties, including the Rome Statute, are governed by general principles of international law. That “[a] treaty does not create either obligations or rights for a third State without its consent”³⁰ is an example of such a principle. While the relationship between States Parties to a treaty is governed by the express terms of the respective treaty, the relationship between States Parties and non-party States is governed by general principles of customary international law. Further, although States are free to modify custom *inter se* by entering into treaties, they lack authority to modify

(1,394,015,977), India (1,326,093,247), the United States (332,639,102), Indonesia (267,026,366), Pakistan (233,500,636), Russia (141,722,205), the Philippines (109,180,815), Ethiopia (108,113,150), Egypt (104,124,440), Vietnam (98,721,275), Iran (84,923,314), Turkey (82,017,514), Thailand (68,977,400), Burma/Myanmar (56,590,071), Sudan (45,561,556), Ukraine (43,922,939), Algeria (42,972,878), Iraq (38,872,655), Saudi Arabia (34,173,498), Angola (32,522,339), Uzbekistan (30,565,411), Nepal (30,327,877), Mozambique (30,098,197), Yemen (29,884,405), North Korea (25,643,466), Taiwan (23,603,049), Sri Lanka (22,889,201), Kazakhstan (19,091,949), Zimbabwe (14,546,314), Rwanda (12,712,431), Burundi (11,865,821), Somalia (11,757,124), Cuba (11,059,062), South Sudan (10,561,244), Azerbaijan (10,205,810), United Arab Emirates (9,992,083), Belarus (9,477,918), Israel (8,675,475), Togo (8,608,444), Laos (7,447,369), Papua New Guinea (7,259,456), Libya (6,890,535), Nicaragua (6,203,441), Eritrea (6,081,196), Kyrgyzstan (5,964,897), Turkmenistan (5,528,627), Oman (4,664,844), Mauritania (4,005,475), and Kuwait (2,993,706). This totals to 5,034,276,204 or 67.09% (just over 2/3) of the world’s population.

²⁹ DUNOFF, *supra* note 27 at 79.

³⁰ Vienna Convention, *supra* note 1, at art. 34.

custom for third States not party to the treaty.³¹ Because the ICC is a creation of a treaty, it is subject to these general principles.³² As such, the relationship between States Parties to the Rome Statute is governed by the terms of the Rome Statute, whereas the relationship between States Parties to the Rome Statute and non-party States is governed by general principles of customary international law.

Although it is true that principles enshrined in a treaty 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 they have a legal obligation to do so,³³ that has not occurred with respect to the various elements of the Rome Statute (such as Articles 12(2)(a) and 27), as evidenced by the significant number of States rejecting the ICC as well as the continuing criticism lodged against the court and its actions by non-party States.³⁴

³¹ 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*, *supra* note 26, ¶ 71.

³² See, e.g., Vienna Convention, *supra* note 1.

³³ *North Sea Continental Shelf*, *supra* note 26, ¶ 71.

³⁴ Such States include China, see Jianping, *China's Attitude Towards the ICC*, *supra* note 6, at 608 ("While some of those who failed to vote or voted against the Rome Statute in July 1998 eventually signed before the deadline, China has never changed its stance."); Dan Zhu, *China, The International Criminal Court, And Global Governance*, AUSTRALIAN OUTLOOK (Jan. 10, 2020), <http://www.internationalaffairs.org.au/australian-outlook/china-the-international-criminal-court-and-global-governance/> ("In fact, China has been particularly concerned about the ICC's potential interference in its policy and ability to address possible recurrences of extremist, separatist and terrorist violence in Xinjiang and Tibet provinces, which it deems as purely internal affairs and hence not subject to international scrutiny."), and India, see Lahiri, *supra* note 6 ("[T]he scope of the Statute has been broadened so much that it could be misused for political purposes or through misplaced zeal, to address situations and cases for which the ICC was not intended, and where, as a matter of principle, it

Despite such ongoing criticism of the ICC by non-party States, Professor Akande nonetheless claims that there has been sufficient State practice to establish that treaty-based international criminal courts may lawfully exercise jurisdiction over nationals of non-consenting, non-party States in certain circumstances. From that questionable claim, he concludes that Article 12(2)(a) of the Rome Statute (that allows the ICC to exercise jurisdiction over nationals of non-consenting, non-party States in certain circumstances) reflects a rule that has developed into a custom by virtue of such State practice. If, as he claims, such a custom has indeed crystallized, one would then be justified in concluding that the principle that “[a] treaty does not create either obligations or rights for a third State without its consent”³⁵ no longer governs and the jurisdiction of international criminal tribunals (like the ICC) may now be exercised over nationals of non-consenting, non-party States.

Yet, as one examines the evidence proffered by Professor Akande to support his thesis, one can quickly see that he utterly fails to establish what he claims.³⁶ Professor Akande resorts to sleights of hand and leaps of logic to make his case. No customary rule has crystallized to contradict the principle that “[a] treaty does not create either obligations or rights for a third State without its consent,”³⁷ and the regime under Article 12(2)(a) that claims jurisdiction over nationals of non-consenting, non-party States wholly contradicts existing norms of customary international law.

should not intrude.”); Kiran Menon, *Asia and the ICC: 20 Years Later*, THE DIPLOMAT (Oct. 13, 2018) <https://thediplomat.com/2018/10/asia-and-the-icc-20-years-later/> (“The possibility that historically delicate and contentious conflicts in various internal regions especially in Kashmir and various northeastern states could be examined and investigated, has led to opposition [particularly to Article 8] from the Indian political sphere.”).

³⁵ Vienna Convention, *supra* note 1, at art. 34.

³⁶ See Section V.B. for detailed discussion.

³⁷ Vienna Convention, *supra* note 1, at art. 34.

III. THE RATIONALE FOR U.S. OBJECTIONS TO THE ICC'S EXERCISE OF JURISDICTION OVER ITS NATIONALS WITHOUT ITS CONSENT

The United States has made its objections to the Rome Statute and the ICC abundantly clear.³⁸ U.S. objections have also been persistent over time³⁹ and were recently reiterated by U.S.

³⁸ See *supra* note 20. It is noteworthy that the United States' position has been consistent over time and indicates that the United States is a vigorous and persistent objector to the Rome Statute and its terms. *Id.* Accordingly, even if international custom were developing *vis-à-vis* ICC expansion of jurisdiction to include nationals of non-consenting, third-party States (which we believe to be wrong *in fact* and questionable *at best*), the United States would nevertheless not be governed by such custom in light of its persistent objection thereto ever since the language of Rome Statute was approved and the custom was in "development."

³⁹ Less than a month before President Clinton was to leave office, he issued what can best be described as a tepid endorsement of the ICC. Clinton Statement on the Rome Treaty, *supra* note 20. In his signing statement, President Clinton confirmed strong, historic U.S. support for the ideal of international accountability for the perpetrators of the most heinous international crimes even as he catalogued significant flaws in the Rome Statute, including, but not limited to, the ICC's projected violation of customary international law by claiming jurisdiction over nationals of States that had not ratified the treaty. The President noted that ICC "jurisdiction over U.S. personnel should come only after U.S. ratification of the treaty," *id.*, —to wit, only with explicit, prior, U.S. consent, a concept well-established in customary international law. See, e.g., Vienna Convention, *supra* note 1, at art. 34. Further, in light of significant U.S. concerns about the treaty, President Clinton declared: "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." Clinton Statement on the Rome Treaty, *supra* note 20. Declining to submit the treaty to the Senate is significant. President Clinton was well aware that the United States Senate was on record opposing the treaty as drafted. See, e.g., *The Future of U.S.—U.N. Relations: A Dialogue Between the U.S. Senate Committee on Foreign Relations and the U.N. Security Council: Hearing Before the S. Comm. on Foreign Relations* (2000) (statement of Jesse Helms, Chairman,

Ambassador John Bolton, former National Security Advisor to the President of the United States, in a speech he delivered before the Federalist Society.⁴⁰ It is significant that the Congress of the United States fully agrees with the Executive Branch on this issue and has, accordingly, enacted legislation to protect U.S. military personnel from, and to forbid U.S. cooperation with, the ICC, its officials, and its organs.⁴¹ The ICC's decision to breach a long-standing

S. Comm. on Foreign Relations), <https://www.govinfo.gov/content/pkg/CHRG-106shrg62154/pdf/CHRG-106shrg62154.pdf>. It would have been impossible for the Senate to ratify the treaty without significant amendments which other States were unwilling to entertain.

Hence, despite the active participation by U.S. officials in attempting to draft a treaty that would create an international criminal court to achieve the laudable goal of bringing to justice perpetrators of the most heinous international crimes, the United States Government ultimately concluded that the ICC was not such a court, that U.S. officials could not trust the court as constituted to administer the required level of justice acceptable to the United States. President Clinton's statement confirms the U.S. view that the ICC falls far short of acceptable standards even as he expressed hope that such shortcomings might one day be corrected. Since President Clinton's stated rationale for signing the Rome Treaty was "to remain engaged in making the ICC an instrument of impartial and effective justice," Clinton Statement on the Rome Treaty, *supra* note 20, it is difficult to argue seriously that the United States has not been a persistent objector *vis-à-vis* the Rome Statute from the point where the treaty's text had been fixed and approved by the majority of States voting for the treaty.

The true (and continuing) position of the United States was confirmed on May 6, 2002, when the incoming Bush Administration moved to "unsign" the treaty and to make known its unwavering objections to the ICC *as constituted* as well as to the ICC's claim to be able to assert and exercise jurisdiction over nationals of non-consenting, non-party States, like the United States. Press Release, Richard Boucher, Spokesman, U.S. Dep't of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

⁴⁰ *Bolton Speech Transcript, supra* note 2.

⁴¹ *See, e.g.,* American Service-Members' Protection Act, 22 U.S.C. §§ 7401, 7421, 7423 (2002). International law attorneys Steven Kay and Joshua Kern, in their recent Article 15 Communication to the ICC, correctly

customary law norm by unlawfully exercising jurisdiction without the consent of the non-party States (e.g., by applying the Rome Statute to nationals of non-consenting, non-party States) has already prompted the United States to initiate protective measures against the ICC's unlawful acts.⁴²

*A. ARTICLE 12(2)(A) OF THE ROME STATUTE, WHICH
SANCTIONS THE ICC'S EXERCISE OF JURISDICTION
OVER NATIONALS OF NON-CONSENTING, NON-PARTY
STATES, VIOLATES CUSTOMARY INTERNATIONAL LAW*

The current position of the United States *vis-à-vis* the Rome Statute and the ICC could not be clearer—absent specific sanction by the UNSC⁴³ or explicit consent by appropriate officials of the

state that continuing the wrongful pursuit of non-consenting, non-party State nationals could inevitably lead to “acts of retorsion and countermeasures.” Steven Kay & Joshua Kern, *Article 15 Communication: Preconditions to the Exercise of Jurisdiction over Nationals of Non-States Parties*, ¶ 4 (Aug. 19, 2019), https://www.9bedfordrow.co.uk/media/1303/190819_art-15-communication_icc_nsp_9br.pdf.

⁴² See American Service-Members' Protection Act, *supra* note 41. See also Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>.

⁴³ Note that United Nations Security Council (UNSC) referrals, when they occur, are based on the UNSC's authority under Chapter VII of the UN Charter. In other words, Article 13(b) of the Rome Statute, does not “authorize” the UNSC to issue a referral. The Rome Statute has no authority over the UN since the UN is not a State. The UN Charter allows the UNSC to establish international criminal tribunals. If it chooses to refer a matter to the ICC instead of establishing an *ad hoc* tribunal, that does not establish jurisdiction under the Rome Statute, but rather pursuant to the UN Charter. In effect, the UNSC is simply incorporating by reference the ICC, thereby “converting” the ICC into a quasi-UNSC tribunal. Hence, the United States' support of the UNSC's referring a matter to the ICC is based on authority under the UN Charter, not on authority from the Rome Statute. Moreover,

United States Government, pursuant to *customary international law*, the ICC has no legal right or authority to investigate and/or to try any U.S. national for alleged commission in any place of any of the crimes listed in the Rome Statute.⁴⁴ We also believe that States Parties to the Rome Statute, which are also States Parties to the Vienna Convention on the Law of Treaties (Vienna Convention), are also *bound under conventional international law* to support the position of the United States regarding the ICC and its claimed jurisdiction over U.S. nationals.⁴⁵ Accordingly, in order for the Rome Statute to be in accord with customary international law, Article 12(2)(a) would have to be understood to apply only to nationals of States Parties to the Rome Statute and to nationals of non-party States that otherwise expressly consent to ICC jurisdiction.

Rather than be governed by terms in the Rome Statute found to be unacceptable, non-consenting States, like the United States of America, opt instead to be governed by applicable principles of customary international law—*as is their right*. Under customary international law, no other State or international organization (like the ICC) established by other States has the right or the authority to overrule or circumvent the sovereign decision of the United States

since State membership in the UN is almost universal, in the vast majority of instances, jurisdiction would be *ipso facto* consent-based.

⁴⁴ This does *not* mean that the United States does not recognize the right of foreign States to investigate and try U.S. nationals for heinous crimes committed on their soil in their domestic criminal courts as is sanctioned under customary international law. It only means that the United States does not concur in having its nationals transferred to or tried by an international court (like the ICC) which the United States Government has found wanting and has rejected, as is its right under customary international law with respect to treaties.

⁴⁵ See Rome Statute, *supra* note 1. The principle governing relations between a third-party State and a treaty to which it has not acceded is governed by the general formula *pacta tertiis nec nocent nec prosunt* (“[a] treaty does not create either obligations or rights for a third State without its consent”). Vienna Convention, *supra* note 1, at art. 34. The foregoing principle is central in State practice and is well-established in custom.

to keep its nationals *wholly outside* such treaty regime. Any attempt to do so is *ipso facto* unlawful and a violation of the very rule of law that ICC proponents purportedly seek to uphold and enhance internationally. It is indeed strange to suggest that one may willy-nilly violate unambiguous, long-standing customary international law principles simply to achieve otherwise desirable ends.⁴⁶ This point was made powerfully by the representative of India when he declared India's opposition to the ICC: "It is truly unfortunate that a Statute drafted for an institution to defend the law should start out straying so sharply from established international law. Before it tries its first criminal, the ICC would have claimed a victim of its own—the Vienna Convention on the Law of Treaties."⁴⁷ Violating contrary unambiguous customary international law has been, and remains, a dangerous path to pursue as it elevates subjective desires for results (no matter how noble and desirable they appear to be) over well-established, internationally-recognized principles of customary

⁴⁶ As Sir William Scott of the British High Court of Admiralty noted long ago with respect to the slave trade in *The Louis* case,

[t]he great object [to halt the slave trade], therefore, ought to be to obtain the concurrence of other nations, by application, by remonstrance, by example, by every peaceable instrument which men can employ to attract the consent of men. *But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose.*

Report of the Committee to Which Was Referred So Much of the President's Message as Relates to the Slave Trade, H.R. REP. NO. 16–59, at 13. (2d Sess. 1821), *reprinted in* Samuel J. May Anti-Slavery Collection (emphasis added), <http://ebooks.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery&cc=mayantislavery&idno=28893024&view=image&seq=13&size=100>. The same is true of an international criminal court today. Just because the court's purpose is laudable does not justify its disregarding unambiguous, though contrary, principles of law. For a more recent statement of the same sentiment, see *infra* note 47 and accompanying text.

⁴⁷ Lahiri, *supra* note 6. This is a strong statement which also refutes the State-vs-nationals claim.

international law. Such an approach subverts the international rule of law and is unlawful *ab initio*.

Recognition of this principle is absolutely critical when determining the legal reach of an institution like the ICC, an institution created pursuant to the Rome Statute, a treaty recently characterized by former U.S. National Security Advisor John Bolton as rejected by “more than 70 nations, representing two-thirds of the world’s population, and over 70% of the world’s armed forces”⁴⁸ *The foregoing statistics are sufficient in and of themselves to demonstrate that proponents of wide ICC jurisdiction have failed magnificently to convince a significant number of key States that the ICC may exercise jurisdiction over nationals of non-party States.*⁴⁹ This fact alone shows that no custom has formed that replaces or even modifies the principle that “[a] treaty does not create either obligations or rights for a third State without its consent.”⁵⁰ In our view, a major part of the problem with the ICC is that it is subject to political manipulation and that it seeks to extend its jurisdiction by unlawful means, one of the most obvious being its total disregard for the sovereign rights of a non-party State to be wholly free from

⁴⁸ *Bolton Speech Transcript*, *supra* note 2; see also DAVID HOILE, JUSTICE DENIED: THE REALITY OF THE INTERNATIONAL CRIMINAL COURT 3 (2d ed. 2014) (“[Rome Statute] members represent less than one third of the world’s population”); David Davenport, *The New Diplomacy*, HOOVER INST.: POL’Y REV. (Dec. 1, 2002), <https://www.hoover.org/research/new-diplomacy> (noting the Rome Statute was imposed on the world “with less than half its people in support,” thereby “undercut[ting] the very principles for which [international] organizations [like the ICC] claim to stand”); Lahiri, *supra* note 6 (“[I]t was odd . . . that the draft adopted a definition of crimes against humanity with which the representatives of over half of humanity did not agree. And now we are about to adopt a Statute to which the Governments who represent two-thirds of humanity would not be a party.”).

⁴⁹ It is noteworthy that among the non-party States to the Rome Statute are the United States, Russia, China, India, Pakistan, Israel, Syria, Turkey, the DPRK, and Iran, to name but a few of the notable players in international affairs.

⁵⁰ Vienna Convention, *supra* note 1, at art. 34.

the provisions of a treaty rejected by the governing officials of that State *vis-à-vis* its nationals, territory, and actions.

Recalling that customary international law is considered “law” because States comply with its requirements because they believe that they have a legal obligation to do so,⁵¹ the decision by a large number of States to reject outright ICC authority over their nationals refutes as a matter of both law and fact Professor Akande’s claims that custom has developed to the point where a court like the ICC can forego the consent of non-party States *vis-à-vis* the ICC’s exercising jurisdiction over their nationals. As such, *non-party States in this matter clearly recognize no custom requiring their nationals to submit to a treaty-based court that they have rejected.* Hence, absent clearly recognized “custom,” there is no legal obligation for a non-party State’s nationals to submit, and no lawful authority to compel submission. Moreover, there is ample reason to resist institutions like the OTP, ICC, and the various chambers of judges which violate well-established customary international law.

The Rome Statute exists solely because its States Parties have negotiated and agreed to its terms. The claim that the ICC may indeed exercise jurisdiction over nationals of non-consenting, non-party States is an open, notorious, and continuing violation of customary international law. As UK attorneys Steven Kay and Joshua Kern reminded the ICC in their Article 15 Communication, “[p]rior to the Rome Conference, no norm of customary international law had been developed permitting the exercise of jurisdiction by an international criminal court over a national of a non-consenting State absent an enabling decision of the Security Council.”⁵² Nothing has changed in that regard. Such jurisdictional regime had been proposed for the first time in the Rome Statute. Indeed, this very issue was one of the points of contention during the drafting of the Rome Statute, and many significant States in the international community rejected provisions which contravened

⁵¹ See, e.g., North Sea Continental Shelf, *supra* note 26, ¶ 77.

⁵² Kay & Kern, *supra* note 41, ¶ 48.

well-established international legal norms.⁵³ This explains in large part why so many significant States have refused—and continue to refuse—to accede to the treaty. It may also explain why some States Parties have withdrawn,⁵⁴ or are threatening to withdraw,⁵⁵ from the treaty. It certainly shows that no such custom has developed.

⁵³ See The Ministry of Foreign Affairs of the Russian Federation, Statement by the Ministry of Foreign Affairs, Nov. 16, 2016, http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/2523566 (“Unfortunately the Court failed to meet the expectations to become a truly independent, authoritative international tribunal The decision of the Russian Federation not to become a party to the Rome Statute (to withdraw its signature from the Statute) entails legal consequences provided for by the Vienna Convention on the Law of Treaties of 1969.”); Ma Xinmin, Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, 5, Dec. 1, 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-CHI.pdf (“It is important for the Court to strictly follow the rules set out in the Rome Statute in handling the relationship between the Rome Statute and general international law. Regrettably, this is not the case in the past judicial practice of the Court.”); Lahiri, *supra* note 6; *Bolton Speech Transcript*, *supra* note 2; see generally David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12 (1999).

⁵⁴ The following States have withdrawn: Burundi, see Agence France-Presse, *Burundi becomes first nation to leave international criminal court*, THE GUARDIAN (Oct. 27, 2017), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>; Russia, see Robbie Gramer, *Why Russia Just Withdrew from the ICC*, FOREIGN POL’Y (Nov. 16, 2016, 10:18 AM), <https://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/>; and the Philippines, see Amy Gunia, *The Philippines Has Officially Left the International Criminal Court*, TIME (Mar. 18, 2019), <https://time.com/5553323/philippines-leaves-international-criminal-court/>.

⁵⁵ The Gambia and South Africa also filed notices of withdrawal from the ICC in 2016. See Gramer, *supra* note 54. The Gambia later revoked its withdrawal after a change in administration, and South Africa’s withdrawal was voided by a South African High Court, which held the move

Moreover, even assuming *arguendo* that Professor Akande were correct about the development of custom regarding ICC jurisdiction, he nonetheless fails to acknowledge that the United States has been a persistent objector to the Rome Statute as currently written and to the creation of an international criminal court which can reach nationals of non-party States without such States' consent.⁵⁶ As a persistent objector, the United States is not bound by such alleged "custom."

B. ARTICLE 12(2)(A) OF THE ROME STATUTE VIOLATES BOTH THE SOVEREIGNTY OF NON-PARTY STATES AS WELL AS THE SOVEREIGN EQUALITY OF STATES

As the Supreme Court of the United States aptly noted almost 200 years ago in *The Antelope* case, "[n]o principle of general law is more universally acknowledged, than the perfect equality of nations It results from this equality, that no one can rightfully impose a rule on another [Further, a]s no nation can prescribe a rule for others, none can make a law of nations."⁵⁷ One of the key realities surrounding the doctrine of the sovereign equality of

"unconstitutional and invalid." See Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal From International Criminal Court*, NPR (Feb. 14, 2017, 5:23 PM), <https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court>; Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>. Uganda, Kenya, Zambia, and Namibia have also threatened to withdraw from the court. Duane E. Omondi Gumba, *Will other African countries follow Burundi out of the ICC?*, INST. FOR SECURITY STUD. (Nov. 16, 2017), <https://issafrica.org/iss-today/will-other-african-countries-follow-burundi-out-of-the-icc>.

⁵⁶ See *supra* notes 38–40.

⁵⁷ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825). Although the evolution of international human rights law is slowly chipping away at this absolutist principle, it is questionable whether such ideals have developed sufficiently to be recognized as custom. See *infra* note 58.

nations is that “there is no international legislative power through which one or more states may act collectively to impose their will, or institutions, on the others.”⁵⁸ That would apply to States Parties to the Rome Statute as well.

In accordance with the principle of the sovereign equality of States, no foreign State may legitimately dispute the sovereign right of the United States to decide, as it has *vis-à-vis* application of the terms of the Rome Statute to U.S. nationals. There is no principle in international law that permits one State to modify or waive the sovereign rights of another State with respect to acceding to or rejecting a treaty. And, if no foreign State may do so, certainly no *non-sovereign*, subordinate creation of a collection of foreign States (like the OTP, the ICC, or the various ICC chambers of judges) may do so (since any authority such entities exercise has been delegated to them by the States Parties, and States Parties can only delegate authority they lawfully possess,⁵⁹ which excludes negating a third

⁵⁸ Casey & Rivkin, *supra* note 5, at 67 (citing EMMERICH DE Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED IN THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 11–12 (Luke White ed., 1792)). Today there are certain fundamental rules which are assumed to apply to all nations even within their borders, whether they like it or not, even if they are not members of the UN—e.g., the prohibition of genocide, mass atrocities that shock the human conscience, etc. although, in practice, it is difficult to convince nations to risk the lives of their nationals to halt such atrocities as they are transpiring. Contours of such developing law are still imprecise and controversial, placing the claim of custom in question.

⁵⁹ As Messieurs Casey and Rivkin aptly note, [t]he fundamental principle of *par in parem non habet jurisdiction[em]*, that “legal persons of equal standing cannot have their disputes settled in the court of one of them,” undercuts the ICC’s claims to jurisdiction over the nationals of non-state parties, since that court’s power is dependent upon the legal authority of the Rome Statute states parties. *Id.* at 74 (emphasis added) (quoting IAN BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 324 (4th ed. 1995)). This would apply here because the ICC would, in effect, be the equivalent of a court of a State Party.

State's right to reject the Rome Statute *in toto*). Rejection of the Rome Statute by the *sovereign* entity, the United States of America, trumps any and all authority of inferior, *non-sovereign* entities like the OTP, the ICC, or any ICC chamber of judges (established pursuant to the terms of a treaty rejected by the United States) to impose their will on the United States, its nationals, its territory, or its actions.

Despite total rejection of the Rome Statute by the United States, the ICC nonetheless claims that Article 12(2)(a) allows the court to supersede the sovereign decision of the United States to free itself *and its nationals* from the jurisdictional web of the ICC. In the U.S. view, applying Article 12(2)(a) to U.S. nationals violates both U.S. sovereignty and customary international law and is, therefore, void *ab initio* regarding U.S. nationals. The mere threat of such unlawful application has prodded the Congress of the United States to enact legislation aimed to protect U.S. nationals from being unlawfully forced to appear before the ICC.⁶⁰ This demonstrates the firm resolve of the United States to protect its legal interests, as set forth in customary international law. Further attempts by the ICC to ensnare U.S. nationals will doubtless trigger additional measures aimed at the court and court officials to protect the sovereign interests of the United States in protecting its nationals from a court,

Moreover, although some treaties suggest the possibility of criminal enforcement via international tribunals, they nonetheless recognize the need for consent. The Genocide Convention, for example, provides the following:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or *by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*

Convention on the Prevention and Punishment of the Crime of Genocide art. VI, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added).

⁶⁰ See, e.g., American Service-Members' Protection Act, *supra* note 41, § 7421.

which, in its current state, the United States views as illegitimate and severely (if not irredeemably) flawed.⁶¹ It is not beyond imagination that the United States Congress could enact further legislation to criminalize future attempts to subject U.S. nationals to ICC jurisdiction if ICC officials continue to exceed their legitimate authority and act unlawfully *vis-à-vis* U.S. nationals.

The United States has no objection to other States freely subjecting their populations to the terms of such treaty (as is their sovereign right under customary international law), provided that no U.S. national is adversely affected thereby. In the U.S. view, being compelled to appear before the ICC adversely affects U.S. nationals because they would lose important protections based on comity and the sovereign equality of States that exist when one State deals with another State.⁶²

*C. PROFESSOR AKANDE’S “STATE-VS-NATIONALS”
 DISTINCTION CREATES NO EXCEPTION TO THE RULE
 OF CONSENT-BASED TREATY APPLICATION*

In order to circumvent the rule that a treaty does not create obligations for a State not a party to such treaty, Professor Akande employs a verbal sleight of hand in an attempt to make his

⁶¹ See *infra* Section III.D. for a discussion of such flaws.

⁶² As the Supreme Court of the United States aptly noted in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951), for example, States retain an interest in what happens to their citizens even when outside their home territory:

As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.

Id. at 585. The foregoing concerns State-to-State actions which are wholly missing with respect to the ICC when a non-party State would have to deal with a court it had rejected. This can have a significant, negative impact on the rights of U.S. nationals hauled before the ICC.

arguments stick. In answer to the assertion that the Rome Statute violates the customary international law rights of non-party States, Professor Akande claims that “there is no provision in the ICC Statute that requires non-party states (*as distinct from their nationals*) to perform or to refrain from performing any actions.”⁶³ He states further that, “[t]o be sure, the prosecution of non-party nationals might affect the interests of that non-party but this is not the same as saying that obligations are imposed on the non-party.”⁶⁴ That is simply not true legally, factually, or logically.

His “State-vs-nationals” distinction is a false dichotomy that fails to acknowledge key realities: **First**, population is one of the inherent elements that makes a State a State. As such, the phrase “State obligation” in a treaty *ipso facto* includes obligation by its nationals; **Second**, no “State” *qua* State is able to “perform or refrain from performing” any act, meaning that every *State* action is accomplished by real persons, usually officials of the State, acting on behalf of that State’s people (i.e., its nationals), thereby explaining why there are no requirements regarding action by a “State” (as Professor Akande uses the term⁶⁵) included in the Rome Statute; **Third**, it is impossible to investigate and/or try a “State” *qua* State (one may investigate and try only real persons, to wit, *nationals* of such State); and **Fourth**, among the United States Government’s responsibilities is its obligation to protect its people (i.e., *U.S. nationals*) from, *inter alia*, actions in contravention of customary international law by international actors (like the ICC)

⁶³ Akande, *supra* note 7, at 620 (emphasis added).

⁶⁴ *Id.*

⁶⁵ Professor Akande discusses “State” as if a State were able to exist as an independent entity wholly separate from its constituent parts, which include its population (i.e., its nationals). See *infra* note 68 for characteristics of a State. Since every State actor is a real person, we believe that Professor Akande’s approach is irredeemably flawed fiction that cannot serve as an adequate basis to justify violating well-established customary international law principles applicable to States simply so that the ICC may investigate and try nationals of non-consenting States not a party to the Rome Statute.

which claim treaty-based authority to violate the rights of American nationals under international law. No sovereign State can—*or should*—long tolerate such unlawful conduct directed against its nationals and interests.

Accordingly, the claim that “there is no provision in the ICC Statute that requires non-party states . . . to perform or to refrain from performing any actions,”⁶⁶ *while literally true*, is essentially meaningless and intentionally misleading. There is a simple reason why no obligations for non-party *States* (as Professor Akande uses the term) were written into the Rome Statute—because the drafters of the treaty clearly understood that no State *qua* State can “do” or “perform” anything. Hence, including in a treaty provisions prohibiting “States” from doing what they are wholly incapable of doing in the first place would be ludicrous on its face, since only *real persons* (i.e., the *nationals* of such States) can act. Further, the very concept of a “State” necessarily includes real persons (i.e., its nationals) as a constituent part; hence, no nationals, no State. It is as simple as that. The “punish individuals, not States” argument is, in reality, a *contrived argument* that seeks to sidestep the inconvenient strictures of contrary customary international law in order to permit the ICC to bring within its jurisdictional reach otherwise unreachable persons.

Stated somewhat differently, the distinction is misleading because when a “State” exercises its sovereign will regarding the acceptance or rejection of a convention or treaty it is in reality government officials of that State who are, in fact, acting as agents on behalf of that State’s population—its *nationals*.⁶⁷ To reiterate,

⁶⁶ Akande, *supra* note 7, at 620.

⁶⁷ 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 1, at 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 or be tried by a court whose jurisdiction was created pursuant to a convention that his State of nationality rejected. See Vienna Convention, *supra* note 1, at art. 34. That does *not*

one 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, one cannot haul “Nigeria” or “Jordan” or “Canada” before the bar of any court; one can only haul “Nigerians” and “Jordanians” and “Canadians” before such a court.

Hence, when the President of the United States and the United States Congress speak on such issues, they are not speaking merely on their own behalf but on behalf of the people (i.e., the nationals) of the United States *as a whole*. Further, the use of the name of the State—to wit, “the United States of America” or a shorter form like “the United States” or “the U.S.”—is a convenient shorthand that embodies all that a State is (which certainly includes its *nationals*⁶⁸). It is similar to using the phrase “the White House” as shorthand to refer to members of the Trump Administration or “Wall Street” to refer to the financial center of the United States. Yet, when one hears a statement like “The White House announced today . . . ,” no one believes or is suggesting that the literal building did anything. Instead, it is understood that Administration officials said or did

mean that such an individual is not subject to investigation and trial; he may be investigated and tried by the criminal courts of the State on whose territory he allegedly committed the crime, a principle well-established in customary international law and respected by the United States. *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 whose very legitimacy and authority his State of nationality does not—and does not have to—recognize.* No foreign State may lawfully change that decision, whether *via* a treaty or any other means.

⁶⁸ Recall that customary international law defines a State as having the following four characteristics: “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.” Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097; Alexandra Rickart, *Emerging Issues: To Be or Not to Be, That Is the Statehood Question*, 3 UNIV. BALT. J. INT’L L. 145, 145 & n.1 (2015) (“[The Montevideo Convention is] considered to be customary international law that applies to all States.”). Note that three of the four characteristics of a State require the existence of real persons (i.e., a country’s “nationals”).

something. The term “State” in agreements and treaties is used—and is understood to be used—in a similar fashion. Hence, let’s not give further credence to the easily refutable fiction that a “State” exists—or *can exist*—separate from its “nationals.”

So, let’s be crystal clear. When one says that the United States of America refuses to accede to the Rome Statute, what one actually means is that *officials* of the United States, acting as agents on behalf of, in the interests of, and in protection of, *nationals* of the United States, have declined to subject the government, the people, the territory, the interests, and the actions of the United States to the jurisdiction of the ICC, an international criminal court *created by other States pursuant to a treaty intentionally rejected in its entirety by U.S. officials*. We do not think it could be any clearer.

D. THE ROME STATUTE ALSO PROVIDED EXEMPTIONS
FOR NATIONALS OF ITS STATES PARTIES WHILE
WITHHOLDING THEM FROM NATIONALS OF NON-
CONSENTING, NON-PARTY STATES

Even States Parties to the Rome Statute tacitly (if not overtly) recognized that State action ineluctably involves a State’s “nationals,” not a “State” itself. They did so when they intentionally included provisions in the treaty which were designed to exempt *their own nationals* from ICC jurisdiction in certain circumstances. For example, according to the terms of the Rome Statute as drafted, States Parties were permitted to elect the *following exemptions for their own nationals*: **First**, each State upon acceding to the Rome Statute could declare that the treaty would not apply to its territory or *nationals* regarding war crimes for up to seven years from the respective State’s date of accession⁶⁹ and **Second**, a State Party could limit ICC jurisdiction over its *nationals* by explicitly rejecting the definition of aggression, once adopted, or any future amendments to the other listed crimes.⁷⁰ Were a State Party to reject

⁶⁹ Rome Statute, *supra* note 1, at art. 124.

⁷⁰ *Id.* at art. 121(5).

the definition of aggression or any amendment to other listed crimes, that State Party (meaning its *nationals*) would not be answerable for the crime of aggression *at all* or for the amended crimes; the State Party's *nationals* would remain answerable for the original crimes.

Once again, such exemptions protect State Party nationals, not the “State” itself, since no State qua State can ever be hauled before a court and no State qua State is capable of committing any criminal offense.⁷¹ Hence, once again, Professor Akande’s “State-vs-nationals” distinction is exposed for the contrivance it is—as even the States Parties recognized when they included additional protections for their own nationals as indicated above.

Now, if officials of the States Parties to the Rome Statute could decide that it was wholly appropriate to exempt *their own nationals* from provisions of the treaty *they drafted*, there is no principled reason why non-party States could not decide to exempt their nationals from the entire treaty (*as customary international law clearly allows*). Pursuant to customary international law, declining to accede to the Rome Statute frees the non-party State’s nationals from being subject to ICC jurisdiction (absent proper UNSC referral).

⁷¹ For example, when people spoke of punishing “Germany” for war crimes and other offenses following World War II, it was German *officials* who were brought before the bar, and it was German *officials* who suffered punishment for various crimes. Germany as a State was punished only in the sense that the German population in general suffered from the results of its officials’ acts and ultimate surrender; to wit, the German people suffered under foreign occupation and all that that entailed. The German “State” *qua* State committed no crimes and could not be brought before the bar of any court—only German nationals committed such crimes, and only German nationals were tried and punished. The same could be said about dealing with crimes committed by the Khmer Rouge in the former Democratic Kampuchea. Only real persons committed crimes, and only real persons could be tried and punished for them. Hence, all acts punishable by law involve persons, not States *per se*. Even lawsuits filed against artificial persons like corporations can only “punish” real persons, to wit, the corporation’s officers, directors, and shareholders.

Summarizing the above, the officials of the ICC have in effect withheld from nationals of non-party States exemptions to which the nationals of its States Parties are entitled (since such exemptions had to be affirmatively sought by the States Parties). That produces a truly bizarre and unjust result for any legal system. *Not only did it violate customary international law for a treaty-based criminal court to apply the terms of the treaty that created it to the nationals of a non-party State without that State's prior consent, it also violated the principles of equity and fundamental fairness to apply the terms of such treaty more harshly to the nationals of States that rejected the treaty altogether than to the nationals of the treaty's States Parties.*

Accordingly, the Rome Statute is a significantly flawed instrument (as confirmed, *inter alia*, by the fact that approximately one-third of all States, including a significant number of recognized world and regional powers representing two-thirds of the world's population, have, in fact, rejected the treaty).⁷² As the representative of the Indian Government noted during the adoption of the Rome Statute, "it was odd . . . that the draft adopted a definition of crimes against humanity with which the representatives of over half of humanity did not agree. And now we are about to adopt a Statute to which the Governments who represent two-thirds of humanity would not be a party."⁷³

Further, the treaty created new crimes and redefined other offenses over which it has jurisdiction. This was done without obtaining the consent of non-party States, yet it is those new and redefined crimes to which nationals of non-party States swept into the ICC's jurisdictional web would have to answer. That, too, is a significant flaw in the treaty. Additionally, the treaty does away with various customary international law protections, such as, longstanding immunities defenses,⁷⁴ without non-party State input or consent, yet another significant flaw. The foregoing, however, are

⁷² See *supra* note 28.

⁷³ Lahiri, *supra* note 6.

⁷⁴ See *supra* note 14.

just a sampling of serious flaws concerning the ICC. The ICC also suffers from additional, serious procedural and administrative flaws.⁷⁵

⁷⁵ Hopefully, the following examples (coupled with those already discussed in the accompanying text above) will suffice to establish why the United States finds the ICC to be an unacceptable court for investigating and trying U.S. nationals: **First**, there has been a history of unethical coaching of prosecution witnesses, *see, e.g.*, HOILE, *supra* note 48, at xvi (noting that “the very first witness on the very first day of the ICC’s first-ever trial . . . admitted he had been coached in what to say” by an NGO); Oliver Mathenge, *Ruto Wants Bensouda Probed over ICC Witness Coaching, Sexual Harassment*, STAR (May 3, 2016, 5:00 PM), http://www.the-star.co.ke/news/2016/05/03/ruto-wants-bensouda-probed-over-icc-witness-coaching-sexual-harassment_c1343956 (claiming the continuance of the improper and unethical practice of coaching prosecution witnesses by NGOs under the current Chief Prosecutor); **Second**, unqualified judges have been appointed, *see, e.g.*, T. MARKUS FUNK, VICTIMS’ RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT 74 (2nd ed. 2015) (noting that “there in fact is no general requirement that ICC judges have *any* practical in-court experience or, for that matter, even have attended law school or obtained a law degree”); Afua Hirsch, *System for Appointing Judges ‘Undermining International Courts’: Politicised Voting and a Lack of Transparency Has Led to Unqualified Judges Taking Key Positions*, *Study Claims*, GUARDIAN (Sept. 8, 2010, 2:08 PM), <https://www.theguardian.com/law/2010/sep/08/law-international-court-justice-legal> (“Unqualified judges, in some cases with no expertise on international law and in one case no legal qualifications, have been appointed to key positions because of highly politicised voting systems and a lack of transparency.”); and **Third**, the treaty includes measures penalizing the defense, *see, e.g.*, GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 536 (4th ed. 2012) (concluding that “[t]he worst feature of the Rome Statute is that it makes no provision for the defence”); *id.* at 545 (noting that “[u]necessarily, and indeed oppressively, the prosecution is [] given a right of appeal against an acquittal, and the defendant may even be imprisoned pending such an appeal”); *id.* at 551 (noting that “[a]t the ICC there have been genuine and serious problems in working out a disclosure regime which is fair to the defence”). There are additional problems as well. *See generally* HOILE, *supra* note 48.

In June 2010 and December 2017, the Assembly of States Parties adopted two amendments to Article 8.⁷⁶ Despite Article 121(5)'s language that allows only States Parties to reject ICC jurisdiction over their nationals with respect to amended crimes, the amendments extended the exemptions to non-party States as well.⁷⁷ The language in the two amendments to Article 8 shows a somewhat bizarre application of the Vienna Convention's customary rules on treaty law. Specifically, the Assembly of States Parties allowed the consent-based application of the treaty for the amendments but not with respect to accepting the jurisdiction of the ICC itself (which should be governed by the identical principle of consent). If a non-party State can reject ICC jurisdiction with respect to the amended crimes, there is no principled reason why that State should not be able to reject jurisdiction of the ICC altogether pursuant to the exact same principle.

The existence of such open and notorious flaws fully justifies the mistrust of the ICC by the United States and explains the vigorous pushback by American officials against the ICC and its efforts to assert jurisdiction over U.S. nationals. Such flaws may also explain the continuing reluctance of other States to accede to the Rome Statute as well as the increasing number of States Parties withdrawing, or threatening to withdraw, from the treaty.

IV. REVIEW & CRITIQUE OF PROFESSOR AKANDE'S ANALYSIS

Professor Akande's claim that a treaty-based international criminal court may exercise jurisdiction over nationals of non-consenting, non-party States is based on faulty reasoning. For example, he extrapolates from well-established custom applicable to States and simply concludes that the identical principle would apply to international criminal courts. His logic is as follows: *First*,

⁷⁶ Rome Statute, *supra* note 1, at art. 15bis(4)–(5) & n.5; Res. ICC-ASP/16/Res.4, at para. 2.

⁷⁷ *Id.*

he claims that ICC jurisdiction is based on the idea of delegated jurisdiction (we do not dispute this fact, since any tribunal established by treaty is impotent to act until States Parties delegate to it the authority they wish it to exercise);⁷⁸ **Second**, to support the idea of “delegation of jurisdiction,” he claims that so-called anti-terrorism treaties allow State-to-State “delegation of jurisdiction” and, therefore, a *State’s* delegation of jurisdiction to the ICC over nationals of non-consenting, non-party States is a natural progression from the same principle (we dispute, first, that such treaties involve delegation of jurisdiction at all, since all States possess inherent and equal authority; we further dispute the conclusion that rules governing horizontal State-to-State relations similarly apply to vertical sovereign State-to-non-sovereign, treaty-created criminal tribunal relations);⁷⁹ **Third**, he claims that, because consent of the accused’s State of nationality is not required under the anti-terrorism treaties when a State prosecutes a foreign national, no consent of the accused’s State of nationality is required in the ICC’s situation (again, we dispute that horizontal State-to-State relations automatically apply to vertical State-to-international criminal tribunal relations);⁸⁰ and **Finally**, he claims that there are many examples of international criminal tribunals trying accused persons without the consent of the States of their nationality (we dispute the implication of this statement because many of the international criminal tribunals to which he refers were created by the UNSC pursuant to the UN Charter, which enjoys almost universal accession, thereby making the tribunals consent-based).⁸¹ Professor Akande’s foregoing assertions are a mixture of truth and error. Accordingly, his claims cannot be sustained, and his argument fails.

While Professor Akande acknowledges that ICC jurisdiction is *not* based on universal jurisdiction,⁸² he nonetheless cites to the principle of universal jurisdiction in an attempt to buttress his claim

⁷⁸ See *infra* Section V.A.1. for a detailed discussion of the delegation theory.

⁷⁹ *Id.*

⁸⁰ See *infra* Section V.A.2. for a detailed discussion.

⁸¹ See *infra* Section V.B. for a detailed discussion.

⁸² Akande, *supra* note 7, at 623.

of ICC jurisdiction over nationals of non-consenting, non-party States. He writes:

International law permits (or, in certain cases, requires) all states [i.e., all states in the international community of nations] to exercise criminal jurisdiction in respect of certain crimes because those crimes are deemed to be prejudicial to the interests of the international community as a whole. States that have no link of territoriality or nationality to offences which fall within the scope of *universal jurisdiction* are permitted to exercise jurisdiction The state exercising *universal jurisdiction* is in effect acting on behalf of the international community as a whole. *Given all of this, it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states—acting as agents of the community—simultaneously prevented those states [i.e., all states in the international community of nations] from acting collectively in the prosecution of these crimes.*⁸³

⁸³ *Id.* at 626 (emphasis added) (footnotes omitted). The language used in this quoted material indicates that *all States* have jurisdiction over some international criminal acts, which is true. When a State exercises its jurisdiction over such offenses, it does so on its own behalf and can be viewed as also acting to the benefit of the international community as a whole. When Professor Akande uses the phrase “those states” in the last sentence above, he is referring to all States that make up the international community of nations. We have no objection to the truthfulness of his statement *provided that all States actually agree to act collectively by creating an international court to act in parallel with national courts*, which clearly have jurisdiction. Where we part company is with Professor Akande’s inference that creation of an international court by a well-meaning *subset of all States* (which the Rome Statute has done) is sufficient in and of itself to implicate the subset of States that disagrees with the position that the well-meaning subset of States has agreed upon.

We *generally* concur in Professor Akande's statement of the law as expressed above with respect to universal crimes, such as piracy or the slave trade. We would also generally concur in his statement regarding collective action to the extent that it involves "all states." In other words, if "all states" agree to act collectively in the prosecution of certain crimes, then the institution created to deal with such offenses would theoretically enjoy the consent of "all states," thereby wholly conforming to the consent-based nature of conventional international law. We must disagree, however, that States that individually prosecute *universal crimes* are acting as "agents" for the community of nations in general. Although prosecution of universal crimes by an individual State undoubtedly *benefits* all nations, "agency" is a concept with a precise legal meaning. It is defined as a "[r]elation in which one person acts for or represents another *by [the] latter's authority*, either in the relationship of principal and agent, master and servant, or employer or proprietor and independent contractor."⁸⁴ Further, agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."⁸⁵ Agency is in effect a transfer of authority to act in a certain way from one person (or entity) possessing such authority to another person (or entity) previously without such authority. Yet, because all States possess inherent and equal authority to prosecute universal offenses, no State that does so needs another's permission to so act. No transfer of authority is involved. Hence, despite a *benefit* to all nations, the prosecuting State is no one's "agent."⁸⁶

⁸⁴ *Agency*, BLACK'S LAW DICTIONARY 62 (6th ed. 1990) (emphasis added).

⁸⁵ *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 1(1) (AM. LAW INST. 1958)).

⁸⁶ This is not to suggest that one State cannot serve as an "agent" for another State in some circumstances. For example, it is not uncommon for *State A* to ask *State B* to represent *State A's* interests in *State C*, a country with which *State A* does not have diplomatic relations. In those circumstances, *State B* would be serving as *State A's* agent and would be

With respect to the ICC, “all states” are clearly not involved. The ICC enjoys the consent of only some States (approximately one-third of “all states”—including three Permanent Members of the UN Security Council—do not consent). It is well-established that customary international law recognizes that a *State*’s criminal courts may prosecute certain crimes (like piracy, for example) irrespective of a territorial or nationality linkage to the prosecuting State. Yet, customary international law does not extend such jurisdiction to an *international criminal court created by a treaty negotiated by some States*. Conventional international law is by definition consent-based.⁸⁷ If the State of nationality of an accused is not a party to the treaty creating the international court, there is no consent, and the court created by such treaty lacks valid jurisdiction over such accused.⁸⁸ Moreover, to date, approximately one-third of all States (representing approximately two-thirds of the world’s population) reject extending ICC jurisdiction over their nationals, *period*. Further, no State Party to the Rome Statute possesses any authority whatsoever to waive a non-party State’s rights to be free of any and all association with the ICC. The terms in the Rome Statute that suggest otherwise⁸⁹ are *ultra vires* and void *ab initio* with respect to

bound by any limitations *State A* would set on such representation. This is not the case regarding universal jurisdiction offenses.

⁸⁷ In reality, to some degree, all international law is consent-based: [R]ules of international law in general, and the authority of international institutions in particular, cannot be imposed—either by treaty or custom—on states that have not consented to them. Although the consent may be implied in certain circumstances (as when a new customary rule develops over a long period without dissent), under no circumstance can consent be dispensed with altogether.

That, however, is precisely what the ICC states parties have done in their efforts to incorporate “universality” into the Rome Statute. Under that instrument, the ICC asserts jurisdiction over the nationals, including governmental officials, of non-parties. Such claims are unprecedented and unsupported by any established doctrine of international law.

Casey & Rivkin, *supra* note 5, at 64.

⁸⁸ See also *supra* note 43.

⁸⁹ See, e.g., Rome Statute, *supra* note 1, arts. 12(2)(a), 27.

non-party States since States Parties could only delegate to the ICC authority they lawfully possessed.

The fact that Professor Akande concludes that such a situation is “extraordinary and incoherent” does nothing to establish the legality of his preferred position, to wit, an ICC with broader jurisdictional reach than customary international law on treaty application otherwise permits. It is simply an inconvenient fact for the proponents of broad ICC jurisdiction that Article 12(2)(a) of the Rome Statute violates both customary international law as well as the sovereign right of a non-party State (meaning its government, nationals, territory, and actions) to be free of any and all obligations of the legal regime established in the Rome Statute. The fact that noncompliance with the Rome Statute may be anathema to those who want the Statute’s provisions to apply universally to all States does not legitimize the aggressive push to expand ICC jurisdiction to nationals of non-party States in contravention of the unambiguous, well-established rule of law refuting such authority. ICC proponents appear to be all too willing to jettison otherwise unambiguous principles of customary international law in favor of an “ends-justify-the-means” approach because they cannot otherwise legitimately or lawfully attain their goals in the face of firm resistance by non-consenting, non-party States like the United States.

Yet, the law is the law, and illegal means are illegal means no matter how one tries to dress them up as something else. Customary international law and the sovereignty of States support a State’s right to reject a treaty *in toto* (save only for any customary international law included in its terms). When a State rejects a treaty, that State exempts itself from every provision contrary to custom in such a treaty.

In the remainder of Professor Akande’s quotation cited above,⁹⁰ Professor Akande’s choice of words appears to acknowledge the Achilles heel of his argument. Note how his language changes to reflect aspirations which sound more in policy rather than in law, to wit, what the law “should be” as opposed to what the law “is”:

⁹⁰ See *supra* note 83.

The natural *assumption*, failing the existence of a specific rule to the contrary, *should be* that where states are acting individually to protect collective interests and values, they are not prohibited, and *should rather be encouraged*, to take collective action for the protection of those collective interests. Thus, the same principle permitting individual states to prosecute individuals for international crimes, on the basis of universal jurisdiction and without the consent of the state of nationality, *suggests* that those states *should be able* to act collectively to achieve the same end. This *may be done* by setting up an international tribunal which exercises the joint authority of *those states* to prosecute.⁹¹

Professor Akande's policy argument appears to have been included to reinforce for proponents (and hopefully convince opponents) that expanded ICC jurisdiction is a good idea and essentially the same as allowing a State's criminal court to prosecute certain offenses. Non-consenting, non-party States like the United States reject outright—as is their right under customary international law—the notion that a State's criminal courts and the ICC are essentially equivalent. They are in fact different, and they extend different rights and protections to an accused. To the extent that States wish to accede to the Rome Statute and its terms and obligations (save only for any terms and/or obligations that violate the rights of non-consenting, non-party States), they are free to do so. But the contrary principle is also true—to the extent that States wish to reject the Rome Statute and its terms and obligations (save only for any terms and/or obligations in the treaty that simply restate already binding customary international law), they are likewise free to do so.

⁹¹ Akande, *supra* note 7, at 626 (emphasis added) (footnote omitted).

V. EVIDENCE PROFESSOR AKANDE CITES TO
SUPPORT HIS ARGUMENT IS WHOLLY
INSUFFICIENT TO ESTABLISH THAT CUSTOM
HAS DEVELOPED AS HE CLAIMS

Professor Akande cites to a number of examples which he believes establishes that custom has developed to the point where international criminal courts like the ICC may indeed lawfully assert jurisdiction over nationals of non-consenting, non-party States. The examples he provides to support his thesis include “anti-terrorism treaties,” *ad hoc* international criminal tribunals created by the UNSC,⁹² the Nuremberg Tribunal,⁹³ the Special Court for Sierra Leone,⁹⁴ the Rhine Navigation Convention of Mannheim,⁹⁵ the European Court of Justice,⁹⁶ and the Caribbean Court of Justice.⁹⁷ As shown below, his examples fall woefully short of establishing the fact that a new custom has developed. Not one example he cites supports his claim that an international criminal court may exercise jurisdiction without the consent of the accused’s State of nationality, let alone establish a custom to that effect.

A. *A STATE’S EXERCISE OF JURISDICTION UNDER ANTI-
TERRORISM TREATIES IS NOT ANALOGOUS TO THE
ICC’S EXERCISE OF JURISDICTION UNDER THE ROME
STATUTE*

Professor Akande asserts that “[t]he argument that states may not delegate their criminal jurisdiction [*to the ICC*] without the consent of the state of nationality fails to properly account for the many treaties by which states delegate their criminal jurisdiction to *other states*” without the consent of the State of the accused’s nationality.⁹⁸ This argument disregards three key facts. *First*, under

⁹² *Id.* at 628–31.

⁹³ *Id.* at 627–28.

⁹⁴ *Id.* at 631–32.

⁹⁵ *Id.* at 632.

⁹⁶ *Id.* at 632–33.

⁹⁷ *Id.* at 633.

⁹⁸ *Id.* at 622 (footnote omitted).

the anti-terrorism treaties, States do not *delegate* jurisdiction to each other, let alone to an international criminal tribunal, and, as such, the jurisdictional regime under the anti-terrorism treaties is distinguishable from the jurisdictional regime under the Rome Statute. **Second**, the anti-terrorism treaties do not bind non-parties; therefore, non-party States do not have any obligations under the anti-terrorism treaties—another distinguishing factor. **Third**, a State trying a foreign national under an anti-terrorism treaty is not required to obtain the consent of the accused’s State of nationality because the trying State’s jurisdiction is established under already recognized customary international law principles,⁹⁹ irrespective of the anti-terrorism treaty being cited. Therefore, the consent of the accused’s State of nationality under an anti-terrorism treaty has no similarity to the idea of State consent under the Rome Statute.

The major flaw in Professor Akande’s logic is his presumption that a State’s trying a national of another State in its domestic courts without the consent of the accused’s State of nationality (a principle

⁹⁹ Under customary international law, there are five recognized means of obtaining jurisdiction over foreign nationals wholly independent of treaty-based language. The five customary means are: the objective territorial principle, the nationality principle, the protective principle, the passive personality principle, and the universality principle. JUSTICE FOR CRIMES AGAINST HUMANITY 47–48 (Mark Lattimer & Philippe Sands eds., 2003) [hereinafter Lattimer & Sands] (Objective territorial jurisdiction includes “jurisdiction over conduct commenced outside the forum state with effects inside that state”; protective jurisdiction is jurisdiction “over crimes committed against the forum state’s particular interests, such as harming its national security or counterfeiting its currency”; passive personality jurisdiction is “jurisdiction over crimes committed abroad against a state’s own nationals”; and universal jurisdiction is “the ability of states to investigate and prosecute conduct abroad which is not linked to the forum state by the nationality of the suspect or of the victim or by harm to the forum state’s own interests.”). The nationality principle permits a country to exercise criminal jurisdiction over any of its nationals accused of criminal offenses in another State. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786–87 (1988). Hence, if any of these means applies, non-party States would have little reason to complain, and, if they sought to complain, they could do so by State-to-State interaction as recognized by customary international law, since none of the anti-terrorism treaties envisions use of an international criminal tribunal.

well-established in customary international law) establishes the fact that custom has developed to the point where an international tribunal, created via treaty by some States, may also try a national of a non-consenting, non-party State. That conclusion is a *gross non sequitur* and factually and legally specious.

Note that none of the anti-terrorism treaties “delegates” jurisdiction to an international tribunal of any description much less to an international criminal court—the *underlying issue for the United States with respect to the ICC*. Instead, in every instance, a State’s criminal courts exercise jurisdiction. Accordingly, nothing in these treaties even remotely establishes a change in *custom* applicable to treaty-based international tribunals like the ICC. States’ exercise of jurisdiction under the anti-terrorism treaties is simply not analogous to the exercise of jurisdiction by the ICC.

The United States does not dispute the principle that individual States have the right to delegate their criminal jurisdiction to a court like the ICC for their own nationals, nationals of other States Parties, and nationals of non-party States that consent thereto. The very purpose of making treaties is to establish rules that govern the relations of the negotiating States *inter se*—note, *inter se*—not *vis-à-vis* non-consenting, third States. What the United States disputes is a claimed, generalized right of a State Party to delegate its otherwise legitimate criminal jurisdiction over a foreign State’s national to an international criminal court rejected by the accused’s State of nationality without the accused’s State’s consent.¹⁰⁰

¹⁰⁰ *Protecting American Constitutionalism and Sovereignty from the International Criminal Court*, WHITE HOUSE (Sept. 10, 2018), <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/>.

I. The “Extradite or Prosecute” Requirement Under the Anti-Terrorism Treaties Does Not Constitute Delegation of One State’s Criminal Jurisdiction to Another State

Professor Akande lays great emphasis on the notion of delegation of jurisdiction. To delegate is defined as “to transfer authority from one person to another; to empower one to perform a task in behalf of another.”¹⁰¹ Delegation, in effect, is giving to another what he does not already possess, or empowering another to do that which he could not otherwise do *but for* such empowerment. None of the anti-terrorism treaties contains any language that could mean or suggest that States are empowering other States to act as their “agents” or “representatives” as would be the case under the delegation theory. States do not delegate authority to one another in these circumstances—they are legally equal and possess inherent authority. As equals, no State possesses more legal authority than any other State. Hence, delegation of jurisdiction is inapt.

Perhaps an example would be useful here. Let us assume a national of State A boards an aircraft flagged by State B, commits a crime on board the aircraft against a national of State C while the aircraft is in the airspace of State D, following which the aircraft lands in State E. States A through D (inclusive), may each exercise jurisdiction over the crime under customary international law¹⁰² regardless of whether a treaty exists among them because each State has an internationally recognized link to the crime, whether by nationality of the accused, nationality of the victim, nationality of the aircraft, or because the crime occurred in the respective State’s airspace. Given the foregoing links which translate into customary grounds for asserting criminal jurisdiction over foreign nationals, States B, C, and D could each prosecute the accused without having to obtain consent of State A, the accused’s State of nationality. Absent a treaty among them directing otherwise, each State, as a sovereign entity, could likewise decline to prosecute and, under the facts as set forth, no State would be obligated to extradite the accused to another State for trial. The only State in the above scenario that does not appear to have any concrete link to the crime

¹⁰¹ *Delegate*, BLACK’S LAW DICTIONARY 426 (6th ed. 1990).

¹⁰² *See supra* note 99.

is State E where the accused landed and disembarked. Absent a treaty directing otherwise or some already existing domestic legal requirement, State E is not required to do anything.

Now, let us assume that all five States were parties to one of the anti-terrorism treaties. Turning again to State E, State E would be obligated to extradite or prosecute the accused—extradite the accused to States A, B, C, or D, whichever is willing to prosecute, *or* take measures to establish jurisdiction to prosecute the accused under its national laws (assuming such a law did not already exist). In order to prosecute the accused in its national courts, State E would probably enact a law (a long-arm statute or a universal jurisdiction statute) that recognizes the crime covered by the treaty as prosecutable under its domestic law. Contrary to Professor Akande's claim, the anti-terrorism treaties to which he refers do not give the State of custody (State E, in this example) a "right" to prosecute. Neither do the treaties require State-to-State delegation of jurisdiction. Instead, the terms of the treaties, freely entered into by State E, create an *obligation* on State E's part to extradite or prosecute. Further, by acceding to the respective treaty, State E had consented to such an obligation!

Professor Akande simply concludes that, *despite the absence of such language in the anti-terrorism treaties*, if State E decides to prosecute, it is prosecuting "on behalf of" other States as opposed to prosecuting pursuant to its treaty obligations. He erroneously concludes that there can be only one "explanation" if State E chooses to prosecute, and that explanation is that State E is acting under the authority "delegated" by other States. That is simply untrue. As discussed above, the State that has no link to the crime and, finding the offender in its territory, would generally have no jurisdiction or means or interest to prosecute the accused *but for* the fact that that State is a treaty member. For that reason, the State has freely obligated itself to extradite or take measures to establish jurisdiction and prosecute the accused, or be in violation of treaty obligations. No "delegation" whatsoever has occurred or is required among State Parties to the anti-terrorism treaties. Any requirement to extradite or prosecute flows from the terms of the treaty to which State E has acceded.

More importantly, Professor Akande gives no example in which States with custody (like State E in the foregoing example), which have no link to the crime, have prosecuted the accused pursuant to

the anti-terrorism treaties. Yet, even if such examples exist, they would not support the claim that a custom has developed whereby a *treaty-based international criminal court* may exercise jurisdiction over a national of a non-party State without that State's consent.

Given the foregoing, the anti-terrorism treaties do not provide evidence that there is a pattern of "delegating" jurisdiction at all, much less in any way analogous to delegating authority to an international criminal court, thereby binding non-party States to a treaty, which is Professor Akande's claim. State-to-State dealings occur horizontally between and among legal equals, whereas State-to-ICC dealings occur vertically between legal unequals—between the superiors (sovereign States, each possessing inherent authority to exercise jurisdiction by virtue of being sovereign) and the inferiors (the ICC and its various component parts which are legally impotent to act until specific authority is delegated to them by those who possess such authority, to wit, the States Parties to the Rome Statute).

We believe that, with respect to the ICC, the States Parties to the Rome Statute drafted a treaty which purports to delegate more authority to the court than the States Parties possessed,¹⁰³ and the key principle of delegation is that one cannot delegate more authority than one actually possesses. Further, since the United States has declined to delegate one scintilla of its sovereign authority to the ICC, the ICC possesses absolutely no legitimate authority to exercise against the United States, its nationals, and its interests.

¹⁰³ See, e.g., Rome Statute, *supra* note 1, at art. 12(2)(a) (allowing the ICC to try nationals of non-consenting, non-party States without such States' consent); *id.* at art. 27 (allowing the ICC to disregard immunities defenses found in customary international law without non-party States' consent). Under such circumstances, to the extent that States Parties delegate more authority than they possess (which they undoubtedly did since no State can waive another State's sovereign rights without consent), treaty terms that reflect such wrongful delegation are void *ab initio*.

2. *Consent of an Accused's State of Nationality is Not Required When Jurisdiction is Established by Way of the Five Customary Bases of Jurisdiction, None of Which Applies to a Treaty-Based International Criminal Tribunal*

Professor Akande's second argument regarding the anti-terrorism treaties is predicated on the following:

The US is a party to many of [the] anti-terrorism treaties and, like other states, has initiated domestic prosecutions under these treaties, of non-party nationals, without seeking the consent of the state of nationality This [Professor Akande believes] is significant evidence that no state has hitherto taken the view that states may not delegate their jurisdiction to other states without the consent of the state of nationality.¹⁰⁴

Even if one were to believe that States "delegate" jurisdiction to other States under the anti-terrorism treaties, which the facts and treaty language belie,¹⁰⁵ Professor Akande has given no examples indicating that States in fact prosecute the accused under those circumstances. Further, if such prosecutions do occur, that would only provide an example that *States* prosecute foreigners without the consent of the State of nationality which, in itself, would lend no support for Professor Akande's thesis that a treaty-based international tribunal may also exercise jurisdiction over nationals of non-consenting, non-party States. Customary international law

¹⁰⁴ Akande, *supra* note 7, at 624.

¹⁰⁵ See Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 704 U.N.T.S. 219 (186 Member States); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105 (185 Member States); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 974 U.N.T.S. 177 (188 Member States).

that governs State-to-State interactions is not *ipso facto* applicable to interactions between other international actors as Professor Akande appears to presume.

An important point to keep in mind is that recourse to national criminal courts to try foreigners differs significantly from recourse to an international criminal court created by a treaty that a significant number of important States has rejected.¹⁰⁶ As discussed above,

¹⁰⁶ And *not* because an international court has greater prestige, as Professor Akande suggests. Akande, *supra* note 7, at 625. In fact, we assert that international courts are significantly less prestigious and trustworthy because they are unaccountable and are more susceptible to political manipulation than courts in developed nations committed to the rule of law, such as the United States. A case in point should hopefully suffice to demonstrate why the United States is rightly skeptical of international courts. In our view, the so-called Wall Case advisory opinion by the ICJ is such an example. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (Jul. 9), <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>. In that advisory opinion, the Court concluded that Israel was not justified under Article 51 of the UN Charter to build a barrier to stop infiltration of terrorists and suicide bombers into Jewish communities from communities in the so-called “West Bank” because Israel was not defending itself against a “State.” *Id.* ¶ 139. What a ludicrous conclusion. Nowhere in the text of Article 51 does it state that the inherent right to self-defense is limited to instances involving “another State,” although that is the conclusion of the ICJ. *See id.* (“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.” (emphasis added)). What rule or principle of international law forbids the building of a wall *except when aimed at another State*? Where is such a rule found either in custom or convention? That rule was simply made up out of whole cloth to condemn Israel’s actions. It totally (and inexplicably) disregards defending against non-State actors who may threaten a State. The opinion clearly reveals the questionable legal reasoning of too many international judges, the lack of balance in considering evidence (or even being willing to deal with an issue when one side declines to provide

customary international law generally accepts the principle that foreign nationals may legitimately be tried in the domestic criminal courts of the State in which the criminal act is alleged to have been committed (or have been brought before such State's criminal courts via a long-arm jurisdictional principle recognized in customary international law, none of which requires consent by an accused's State of nationality¹⁰⁷). The United States does not dispute this.¹⁰⁸ Just as the United States frequently tries foreign nationals in U.S. domestic courts for criminal acts, comity dictates that the United

evidence as is its right *vis-à-vis* non-binding advisory opinions), and that too many international jurists apparently cannot resist interjecting their political views into their decisions. *See, e.g.*, Declaration of Judge Buergenthal, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 3 (Jul. 9) <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-05-EN.pdf> (finding opinion lacks credibility because the Court failed to examine "Israel's legitimate right of self-defence [as well as its] military necessity and security needs"); *id.* ¶ 5 (calling "legally dubious" the Court's conclusion that Israel's right to self-defence was "not applicable in the present case"); *id.* ¶ 7 (criticizing the Court for "barely address[ing] the summaries of Israel's position . . . which contradict or cast doubt on the material the Court claims to rely on"); and *id.* ¶ 8 (criticizing the Court for failing to address Israeli arguments). This Advisory Opinion nonetheless continues to be cited as if it were well-reasoned and authoritative, and it is continually cited as a bludgeon against Israeli attempts to protect its citizens from anti-Israel terrorist groups. That is disgraceful, reflects poorly on international courts, and explains why the United States, among others, fundamentally distrusts such courts and, thus, chooses to interact with them as little as possible.

¹⁰⁷ *See supra* note 99.

¹⁰⁸ Admittedly, such a custom can be modified by agreement between States. A common example of such an agreement is embodied in the so-called Status of Forces Agreements (SOFA), which govern the legal presence of foreign military forces in a State's territory and which determine under what circumstances and for which offenses the host nation retains jurisdiction over foreign national lawbreakers on its soil, and under what circumstances and for which offenses the sending nation must try the alleged lawbreakers.

States recognize the same customary right for other States *vis-à-vis* U.S. nationals. Should a dispute arise about the trial or treatment of an accused U.S. national in a foreign State's court (or vice versa), State-to-State talks can be initiated in an attempt to resolve it. Such State-to-State interactions are well-established and understood, and are generally governed by customary international law.¹⁰⁹ Hence, the United States does not object *per se* to a foreign court trying an American national without obtaining *prior* American consent to do so. When the issue involves a national of one State being tried in another State, the law is well-established in custom, and the procedures are well-known and tried. The same cannot be said with respect to a court like the ICC which not only claims the right to investigate and try non-party State nationals, but also the right to evaluate whether the non-party State's judicial system is operating to the standard deemed acceptable by ICC officials (via the Rome Statute principle of complementarity¹¹⁰). Both of these claimed "rights" violate the sovereignty of third-party States as well as customary international law, and no longstanding procedures exist for the State of nationality to intervene with an international criminal court as exists between States. To whom would the sovereign of an objecting third-party State appeal on behalf of its nationals in the case of alleged or actual wrongdoing by the ICC? The ICC Prosecutor is answerable to no foreign sovereign and need not deal with an objecting third-party sovereign, rendering that sovereign

¹⁰⁹ The same cannot be said about a non-party State dealing with officials of an international court whose jurisdiction the non-party State has not accepted. There are no recognized, agreed-to channels of interaction between officials of a non-party State and officials of an international court like the ICC (created by other States) whose jurisdiction the non-party State has not accepted.

¹¹⁰ Rome Statute, *supra* note 1, at art. 1 (stating that the ICC jurisdiction "shall be complementary to national criminal jurisdictions"). See also *China's Attitude Towards the ICC*, *supra* note 6 (noting China's objection that the ICC's "jurisdiction is not based on the principle of voluntary acceptance" and that "complementarity gives the ICC the power to judge whether a state is able or willing to conduct proper trials of its own nationals").

impotent to fulfill its sovereign duty *vis-à-vis* its own nationals (absent exercise of more extreme measures). In our view, that is a significant violation of a State's sovereign rights which hampers its ability to protect the interests of its nationals.

Let us now turn to the three U.S. court cases Professor Akande cites. Each case involves prosecution of a foreign national for, *inter alia*, a terrorism offense enumerated in one of the anti-terrorism treaties. Contrary to Professor Akande's assertion, *in none of the three cases did the U.S. try the accused based on jurisdiction delegated by another State.*

To be lawfully tried in a U.S. court, the court must possess both jurisdiction over the person and jurisdiction over the offense. What Professor Akande fails to acknowledge in *United States v. Yunis*¹¹¹ (and in the other two cases for that matter) is the fact that customary international law recognizes multiple ways for a State to establish lawful jurisdiction over the person without having to obtain the consent of the accused's State of nationality.¹¹² That is doubtless why Professor Akande discovered that no States of nationality have protested with respect to "consent" under the anti-terrorism treaties; the means used to obtain jurisdiction over the accused were lawful under customary international law and were recognized as such by the accused's State of nationality.

In *Yunis*, for example, the court cited, *inter alia*, the "universal principle" and the "passive personality principle"¹¹³ from customary international law to justify the accused's presence before the court. Those principles are well-recognized in customary international law and independently establish personal jurisdiction without having to resort to the terms of an otherwise applicable treaty.

¹¹¹ 924 F.2d 1086 (D.C. Cir. 1991).

¹¹² See *supra* note 99. The five customary sources of establishing jurisdiction do not apply to international tribunals.

¹¹³ 924 F.2d 1086 at 1091 ("Under the passive personal [sic] principle, a state may punish non-nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly strong interest in the crime."). The court wrongly labelled it the "passive personal principle."

Hence, to conclude as Professor Akande does that the *Yunis* case shows that the United States has supported exercising its jurisdiction without having to obtain the prior consent of the accused's State of nationality, while true, does not establish the point he sought to make. If the United States can establish a basis for personal jurisdiction in custom (which binds all States save for those that were persistent objectors as the custom developed), it has jurisdiction to proceed irrespective of the consent of the accused's State of nationality—and *need not seek it*. The same is true of other States with respect to U.S. nationals. Hence, this customary law principle is recognized and accepted, *thereby extinguishing a legitimate basis to object*. Yet, if the accused's State of nationality nonetheless objected, it could raise its objections State-to-State, as is the usual practice.

Further, in *Yunis* the United States was not transferring the case to an international criminal court created by a treaty which the accused's State of nationality had rejected, *which once again is the basis for the United States' objection to the Rome Statute and the ICC*. Had the United States sought to do so, perhaps Professor Akande might have had a point. Additionally, he fails to recognize that the ICC and other international courts do not have recourse to the five customary international law means of obtaining personal jurisdiction enjoyed by States.

Similarly, in *United States v. Rezaq*¹¹⁴ the United States court noted that the case fell within “the so-called ‘passive personality principle’”¹¹⁵ because victim “Scarlett Rogenkamp was a United States citizen, and there was abundant evidence that she was chosen as a victim because of her nationality.”¹¹⁶ Hence, no prior consent from the accused's State of nationality was required. Additionally, as in *Yunis*, the case was not being transferred to an international court created by other States. Accordingly, it is not similar to the issue at hand, to wit, whether the ICC, a court created by a sub-set

¹¹⁴ 134 F.3d 1121 (D.C. Cir. 1998).

¹¹⁵ *Id.* at 1133.

¹¹⁶ *Id.*

of States via the Rome Statute, can assert any form of jurisdiction over American nationals whose State of nationality, the United States, has rejected the Rome Statute as is its right under customary international law. Again, this case does not support Professor Akande's thesis.

In *United States v. Yousef*,¹¹⁷ the third U.S. case Professor Akande cites, the court noted that jurisdiction could be asserted by the United States pursuant to the "protective principle" of customary international law.¹¹⁸ As such, no prior consent by the accused's States of nationality was required. And, once again, the case was not being transferred to an international court created by other States.

None of the three U.S. cases to which Professor Akande refers establishes that the United States has consented to the principle that Professor Akande claims it has. No prior consent was necessary or sought by the United States because *no prior consent was required under the five well-recognized bases of obtaining personal jurisdiction under customary international law*.¹¹⁹ If no consent was required by applicable customary international law or by the terms of a treaty to which the United States had acceded, one cannot simply assume what Professor Akande has assumed, to wit, that the United States has, in fact, acquiesced *by practice* in the claims Professor Akande has made. ***Key here regarding the ICC is the fact that the United States is objecting to having the terms of a treaty that it has rejected applied to its nationals, and none of the U.S. cases cited by Professor Akande involved an international court at all, much less an international court created by a treaty which the accused's States of nationality had rejected.*** These cases are inapt and do not support Professor Akande's thesis.

¹¹⁷ 327 F.3d 56 (2d Cir. 2003).

¹¹⁸ *Id.* at 91–92 (finding that "contrary to *Yousef's* claims, customary international law *does* provide a substantial basis for jurisdiction by the United States over each of these counts, although not (as the District Court held) under the universality principle." (emphasis in original)).

¹¹⁹ *See supra* note 99.

As such, exercise of jurisdiction by sovereign States under the anti-terrorism treaties is clearly distinguishable from exercise of jurisdiction by the ICC and does not constitute “evidence of extensive practice of states delegating part of their criminal jurisdiction over non-nationals either to other states or to tribunals created by international agreements.”¹²⁰ To assert otherwise has absolutely no basis in law or common sense.

*B. OTHER INTERNATIONAL TRIBUNALS PURPORTED TO
HAVE EXERCISED JURISDICTION WITHOUT THE
CONSENT OF THE ACCUSED’S STATE OF NATIONALITY*

Professor Akande points to other international tribunals in support of his thesis. However, his examples utterly fail to establish that any prior international criminal tribunal has exercised jurisdiction over an accused without the consent of his State of nationality, let alone the development of a custom to that effect.

1. The Nuremberg Tribunal

Although Professor Akande initially raised the Nuremberg Tribunal as a possible source of support for his views, he quickly concluded that “one cannot rely with any certainty on the Nuremberg Tribunal as a precedent for delegation without the consent of the state of nationality.”¹²¹ We agree that the Nuremberg Tribunal does not support his argument *vis-à-vis* international criminal courts, primarily because the four victorious allied powers were exercising the sovereign powers of Germany by virtue of Germany’s unconditional surrender in World War II. Hence, the Nuremberg Tribunal’s jurisdiction was, in effect, based on the consent of the State of nationality.¹²²

¹²⁰ Akande, *supra* note 7, at 633.

¹²¹ *Id.* at 627–28.

¹²² *Id.* at 627.

2. *The International Criminal Tribunals for Former Yugoslavia (ICTY) and for Rwanda (ICTR)*

Next, Professor Akande refers to the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) and the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) as “precedents” of “extensive practice of states delegating part of their criminal jurisdiction over non-nationals . . . to tribunals created by international agreements.”¹²³ Recall that the U.S. objection to the ICC is predicated on the fact that the ICC was created by a treaty rejected by the United States. Both UN tribunals were created by UNSC resolutions¹²⁴ as subsidiary organs of the UNSC in the exercise of its Chapter VII authority under the UN Charter.¹²⁵ Professor Akande admits that almost all States are members of the UN and, as such, have given consent to the terms of the UN Charter, which includes the UNSC’s authority to establish international criminal tribunals.¹²⁶ Accordingly, under the UN Charter, *all* Member States have consented to the UNSC’s authority to create *ad hoc* international tribunals and/or refer cases to international tribunals (like the ICC). Consequently, the UNSC’s creating *ad hoc* international tribunals for prosecution of crimes or making referrals to the ICC merely confirms the consent-based nature of such tribunals and is inapt—without more—to prove that nationals of non-party States can be tried by those tribunals without the prior consent of their State of nationality. To establish his point, Professor Akande would need to cite to a widespread and significant number of actual instances where jurisdiction was exercised by such international tribunals without the consent of, or despite the objection by, the non-party State to the UN Charter. In other words, to establish that custom has developed as he claims, Professor Akande would need to produce evidence that non-party States

¹²³ *Id.* at 628, 633.

¹²⁴ S.C. Res. 955 (Nov. 8, 1994); S.C. Res. 827 (May 25, 1993).

¹²⁵ MALCOLM N. SHAW, INTERNATIONAL LAW 403, 407 (6th ed. 2008).

¹²⁶ Akande, *supra* note 7, at 628.

acquiesced in such jurisdiction over their nationals because they believed that they had a legal obligation to do so.

Professor Akande fails to meet the burden of proof. He cites to only one case concerning *ad hoc* UN-created tribunals to support his conclusion of widespread practice of international tribunals trying nationals of non-party States without their consent. And the facts of that case are considerably muddled. He asserts that, at least in the case of the Federal Republic of Yugoslavia (FRY),¹²⁷ it can be argued that the FRY was not a member of the UN when its nationals were compelled to appear before the ICTY.¹²⁸ While some States admittedly did not consider the FRY to be a member of the UN,¹²⁹ FRY officials maintained the opposite, and the ICTY held that the FRY was a UN member.¹³⁰ Hence, regardless of whether the FRY was an actual, lawful member of the UN at the time, it apparently considered itself to be a UN member and thereby bound to submit to the jurisdiction of the ICTY. That would explain why no serious complaints as to jurisdiction of the ICTY were raised. Moreover, no matter on which side of the issue one falls (to wit, that the FRY was or was not a UN member), one disputed case by itself is insufficient precedent to support development of a custom, especially since the only State with a colorable basis to object to jurisdiction by the ICTY considered itself bound to the decision of the UNSC and therefore with no lawful basis to object. Hence, the UN-created

¹²⁷ The Federal Republic of Yugoslavia (FRY) is the name adopted by one of the States that emerged from the breakup of Yugoslavia. The FRY was composed of Serbia and Montenegro. See *Serbia and Montenegro*, NATIONS ONLINE, https://www.nationsonline.org/oneworld/serbia_montenegro.htm (“The remaining republics of Serbia and Montenegro declared a new ‘Federal Republic of Yugoslavia’ in 1992.”); *Profile: Serbia and Montenegro*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/country_profiles/1039269.stm (last updated Jun. 5, 2006) (“Serbia and Montenegro together formed the Federal Republic of Yugoslavia between 1992 and 2003,” then known as the “Union of Serbia and Montenegro” until 2006, when the two nations separated.).

¹²⁸ Akande, *supra* note 7, at 628–29.

¹²⁹ *Id.* at 629 & n.61.

¹³⁰ *Id.* at 628–29.

tribunals cited by Professor Akande fail to support his argument for precedent supporting the ICC's expansionist reach to encompass nationals of non-party States.

3. *The Special Court for Sierra Leone*

The Special Court for Sierra Leone (SCSL) was created pursuant to an agreement between the UN Security Council and Sierra Leone.¹³¹ As is clear, Sierra Leone consented to the court's jurisdiction by becoming a party to the agreement that established the court. Professor Akande begins his argument by noting that "[t]here is nothing in the Court's Statute that *limits* the jurisdiction of the Court to nationals of Sierra Leone."¹³² Be that as it may, the absence of limiting words in the statute *vis-à-vis* jurisdiction of the court to nationals of Sierra Leone is significantly different from a treaty provision that expressly *extends* jurisdiction to nationals of non-party States (as does Article 12(2)(a) in the Rome Statute). Absent an explicit explanation as to why no limiting language was included in the agreement creating the Special Court, its omission could have been either an intentional decision because States generally knew that under customary international law that agreement did not apply to them or simply an oversight. With respect to the Rome Statute, we know that extended jurisdiction to reach non-party State nationals was intentional by the States that agreed to it.¹³³ Nevertheless, since we do not know whether it was intentional to exclude limiting language in the Sierra Leone

¹³¹ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137. Despite the fact that the SCSL was constituted in a different manner than the ICTY and ICTR, it was nonetheless constituted pursuant to UN Security Council resolution and, hence, appears to be simply an additional variant of UN-created international criminal tribunals. As a UN member, having one's nationals be subject to jurisdiction of a court created (albeit indirectly) by the UN Security Council does not support Professor Akande's thesis of extending jurisdiction over nationals of non-party States without their consent.

¹³² Akande, *supra* note 7, at 631 (emphasis added).

¹³³ See Scheffer Testimony, *supra* note 20, at 14 ("But as the jurisdiction provision is now framed, it purports to extend jurisdiction over non-party states for the same new or amended crimes.").

agreement, we cannot simply assume that silence in the Sierra Leone agreement supports Professor Akande's assumption that the court was free to exercise jurisdiction over nationals of non-consenting, non-party States or that non-consenting States would have no lawful basis upon which to object if expanding the court's jurisdiction were attempted. Moreover, even if the omission had been intended to assert jurisdiction over non-nationals of Sierra Leone, absent a number of cases where non-Sierra Leone nationals were tried and their States of nationality did not complain due to the alleged developed custom, we cannot draw any meaningful conclusion from this example.

The sole example that Professor Akande does cite in support of his argument about developing custom is the Special Court's trial of Liberia's Head of State, despite the fact that Liberia was not a party to the agreement that created the court. It is immaterial that the SCSL was constituted under Article 24(1) of the UN Charter and not under Chapter VII, since it was nonetheless constituted by the UN Security Council and, hence, was simply an additional variant of UNSC-created international criminal tribunals.¹³⁴ Accordingly, since most States (including Liberia) are members of the United Nations their membership constitutes their consent to the provisions of such UNSC-created international tribunals. Accordingly, jurisdiction of the SCSL is consensual *vis-à-vis* UN Member States. Nonetheless, contrary to Professor Akande's assertions, Liberia did in fact object (when Charles Taylor was still in power) on the grounds that it was not a party to the agreement as well as that Taylor enjoyed immunity as the Head of State.¹³⁵ Only once Taylor was ousted from power did Liberia fully support the trial before the

¹³⁴ See *supra* note 124.

¹³⁵ Press Release, International Court of Justice, Liberia Applies to the International Court of Justice in a Dispute with Sierra Leone Concerning an International Arrest Warrant Issued by the Special Court for Sierra Leone Against the Liberian President, Press Release No. 2003/26 (Aug. 5, 2003), <https://www.icj-cij.org/files/press-releases/0/000-20030805-PRE-01-00-EN.pdf>. See also S.C. Res. 1315, 2–3 (Aug. 14, 2000).

court.¹³⁶ This suggests a political motive that calls into question any claim that the government of Liberia was complying because of a recognized “custom.”

4. *The Rhine Navigation Convention of Mannheim*

As with all the treaties and tribunals discussed above, jurisdiction under the Rhine Navigation Convention (Mannheim Convention) is also not analogous to the Rome Statute’s non-consent-based regime. **First**, note that the “Central Commission for Navigation on the Rhine is empowered to *act as a court of appeal from decisions of national courts* in criminal and civil cases concerning Rhine shipping,”¹³⁷ not as an international criminal *trial* court. **Second**, the Mannheim Commission possesses no inherent jurisdiction over crimes under international law. **Third**, *trials* would still be held in a State’s domestic courts, a recognized practice sanctioned by customary international law to which no consent by the accused’s State of nationality is required.

Professor Akande notes that “[s]ome of the cases before the Central Commission have involved nationals of states not party to the Mannheim Convention and these states have not objected to this exercise of jurisdiction over their nationals.”¹³⁸ Yet, he provides not one actual case for the reader to review. Instead, he simply cites to a “[t]elephone conversation” with a “Mr Bour, Registrar of the Appeals Chamber of the Central Commission,”¹³⁹ to support his assertion. We do not question Professor Akande’s veracity regarding his having obtained such assurances via a conversation with the Appeals Chamber Registrar, but simply referring to “some” cases cited by an otherwise unknown official, without providing for independent review even a single case is wholly insufficient to establish the claim that a custom has developed. Citing to the

¹³⁶ *Nigeria to Hand Over Liberia’s Taylor for Trial*, NPR (Mar. 25, 2006), <https://www.npr.org/templates/story/story.php?storyId=5301534>.

¹³⁷ Akande, *supra* note 7, at 632 (emphasis added) (footnote omitted).

¹³⁸ *Id.* (footnote omitted). The lack of objection by a State proves nothing. One would have to know the reason for the lack of objection to be able to draw any conclusion.

¹³⁹ *Id.* at n.81.

Mannheim Commission's Central Commission added nothing to his argument. It certainly does nothing to establish that custom now permits a court like the ICC to extend its jurisdiction to nationals of non-consenting, non-party States.

5. *The European Communities Treaty*

Professor Akande next cites the example of Article 234 of the European Communities Treaty, under which cases before national courts of European Council (EC) States may be referred to the European Court of Justice (ECJ).¹⁴⁰ He claims that “[s]ome of the criminal proceedings in which the ECJ has participated under the preliminary reference procedure have involved persons that are not nationals of EC Member States.”¹⁴¹ **First**, even if this claim were true, Professor Akande cites to only *one* “criminal proceeding” not “*some* criminal proceedings,” which is unfortunate if he wishes to nail down his point.¹⁴²

Second, and more importantly, the case before the ECJ that he cited has no relevance to the point Professor Akande attempted to make, i.e., that there are sufficient examples in which international *criminal* tribunals have exercised jurisdiction over nationals of non-consenting, non-party States. The case he cited involved a request by Germany for a preliminary ruling on the interpretation of Article 54 of the Convention Implementing the Schengen Agreement of June 14, 1985 (CISA), which prohibits Schengen States from trying anyone who has already been tried by one Schengen State for the same crime.¹⁴³

¹⁴⁰ *Id.* at 632 (footnote omitted).

¹⁴¹ *Id.* at 633.

¹⁴² *Id.* at n.88.

¹⁴³ Case C-187/01, *Oberlandesgericht Köln v. Hüseyin Gözütok*, 2003 E.C.R. I-1378, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48044&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6824307>; *see also* Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French

The case Professor Akande cited was a *dispute between Germany and the Netherlands* (both parties to the CISA) concerning whether Germany could prosecute a Turkish national who had already faced criminal proceedings for the identical crime in the Netherlands. The ECJ was not prosecuting the Turkish national or dealing with him directly at all, nor had Germany or the Netherlands “delegated” jurisdiction over the Turkish national to the ECJ.¹⁴⁴ The fact that the case involved a Turkish national was wholly tangential to the issue before the ECJ. Had the ECJ ultimately decided that Germany could indeed try the Turkish national, even then it would have been a domestic criminal court in Germany which would be trying him, not the ECJ. Hence, the ECJ’s role was simply to interpret Article 54 of the CISA that prohibits double jeopardy. The ECJ found against Germany and that ended the case. Once again, Professor Akande’s example was wholly inapt and did not provide any evidence in support of extended jurisdiction of the ICC over nationals of non-consenting, non-party States to the Rome Statute.

6. *The Caribbean Court of Justice*

The last tribunal Professor Akande cites to support his thesis is the Caribbean Court of Justice (CCJ). He notes that “the CCJ is empowered to decide on civil and criminal *appeals from the courts of the member states*.”¹⁴⁵ As in the cases of the Rhine Navigation Convention and the European Communities Treaty, the CCJ only has appellate jurisdiction over cases from Member States’ domestic courts. Interestingly, Professor Akande states that, “[s]ince the CCJ will be exercising a jurisdiction which otherwise belongs to the member states, it *may* deal with cases involving nationals of non-member states including those cases where jurisdiction is exercised on the basis of universal jurisdiction.”¹⁴⁶ Since Professor Akande cited no specific CCJ case, his statement seems to imply that the CCJ has not yet heard a case involving a national of a non-

Republic on the Gradual Abolition of Checks at their Common Borders art. 54, Jun. 19, 1990, 2000 O.J. (L 239) 43.

¹⁴⁴ See Case C-187/01, *supra* note 143, ¶¶ 16–18.

¹⁴⁵ Akande, *supra* note 7, at 633 (emphasis added) (footnote omitted).

¹⁴⁶ *Id.* (emphasis added).

consenting, non-party State to the treaty that established the court. If that is the case, then citing to the CCJ does nothing to support Professor Akande's claim that custom has *already* developed to permit an international criminal court like the ICC to exercise its jurisdiction over nationals of non-consenting, non-party States like the United States. If the court has actually heard cases involving nationals of non-party States, Professor Akande should have cited them so that they can be reviewed to determine if they are germane to the issue at hand. As it now stands, he has established nothing in support of his thesis *vis-à-vis* the ICC by citing to the CCJ.

CONCLUSION

Proponents of broad ICC jurisdiction like Professor Akande support the notion that the ICC is allowed to investigate and try nationals of non-consenting, non-party States in certain circumstances.¹⁴⁷ Since customary international law maintains that "[a] treaty does not create either obligations or rights for a third State without its consent,"¹⁴⁸ such proponents must establish either that a State and its nationals are separate entities that can be treated differently under international law *or* that an internationally recognized custom has in fact developed that permits an international criminal court like the ICC to act without a third State's consent *or* both. Professor Akande fails to establish any of the foregoing.

The argument that States and their nationals are separable is specious. All State actions are inseparable from a State's nationals. No State *qua* State can act in any way; only its nationals can act. No State *qua* State can commit crimes; only its nationals can commit crimes. No State *qua* State can be tried and punished; only its nationals can be tried and punished. To argue as many do that the ICC "punishes individuals, not States," although literally true, is a wholly meaningless statement *in fact*, since it constitutes an easily refuted straw man argument. Only real persons can be punished pursuant to law. Accordingly, the argument that the ICC may try

¹⁴⁷ See Rome Statute, *supra* note 1, at art. 12(2)(a). See also, Akande, *supra* note 7.

¹⁴⁸ Vienna Convention, *supra* note 1, at art. 34.

individuals from non-consenting, non-party States because individuals are distinct from their States of nationality is simply a contrived argument used to circumvent well-established, contrary, customary international law principles that limit the ICC's jurisdictional reach.

Professor Akande has cited to a myriad of examples—including various treaties, international tribunals, and U.S. court cases—that he claims prove that custom has indeed developed to permit ICC jurisdiction over nationals of non-consenting, non-party States. Our analysis shows that none of his examples is apt, and many suggest the very opposite of what he claims. No custom has developed that allows an international criminal court like the ICC to exercise jurisdiction over nationals of non-consenting, non-party States. ***When one-third of all States (representing two-thirds of the world's population) do not agree, that is more than sufficient evidence against the existence of such an alleged custom.*** Absent such custom, any provisions in the Rome Statute that claim that the ICC has authority over nationals of non-consenting, non-party States are *ipso facto* in violation of customary international law. In that light, any action by the ICC which attempts to assert jurisdiction over nationals of non-consenting, non-party States is *ultra vires* and legally void *ab initio*. Accordingly, the United States is fully justified in taking whatever action it deems necessary and prudent to protect its nationals from any actions taken by the ICC, its prosecutors, and its chambers of judges *vis-à-vis* nationals of the United States. The same also applies to every other non-consenting, non-party State to the Rome Statute *vis-à-vis* its nationals.

In conclusion, it is worth repeating what the representative from India aptly noted when the Rome Statute was adopted: “It is truly unfortunate that a Statute drafted for an institution to defend the law should start out straying so sharply from established international law. Before it tries its first criminal, the ICC would have claimed a victim of its own—the Vienna Convention on the Law of Treaties.”¹⁴⁹ This is precisely what happened, and this is precisely why the United States so strongly opposes the Rome Statute. Were officials and agencies of the ICC to pursue legal action against U.S.

¹⁴⁹ Lahiri, *supra* note 6.

nationals, they would be acting contrary to well-established customary international law and, thereby, become lawbreakers themselves. Thwarting such potential lawlessness aimed against U.S. nationals justifies a robust American response.