EUROPEAN CENTRE FOR LAW AND JUSTICE

27 September 2021

VIA OVERNIGHT DELIVERY SERVICE
& FIRST CLASS MAIL

[redacted]

Your Excellency:

By way of introduction, the European Centre for Law and Justice ("ECLJ") is an international, Non-Governmental Organisation, dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007.[1] The ECLJ is committed to the principle of bringing to justice those who commit the most heinous international crimes, but the ECLJ believes that this must be accomplished strictly in accordance with the rule of law. We are concerned that certain practices of ICC bodies as well as certain provisions in the Rome Statute do not accord with international law, and as such are a major hindrance to the ICC's ability to fulfill its mandate. We are writing to you to ask that Your Excellency seriously consider proposing changes to the Rome Statute as suggested in this letter. We believe such changes will resolve the problems and enhance the prestige and effectiveness of the Court.

In 2022 the Court will celebrate its 20th birthday. Accordingly, there appears to be no better time than during the upcoming meeting in New York for the Rome Statute Assembly of States Parties ("Assembly") to acknowledge identified problems and shortcomings and to fix them. We appreciate Your Excellency's kind consideration of our proposed changes.

INTRODUCTION

Considerable controversy surrounds the ICC and its claim that it may investigate and try nationals of non-Party States without the prior consent of such States. This concern was raised repeatedly during the drafting of the Rome Statute and has continued to be raised by non-Party States to this day. Several non-Party States have asserted that the customary international law principle, *pacta tertiis nec nocent nec prosunt*,[2]

[1] U.N. Eco. & Soc. Council, List of Non-Governmental Organizations in Consultative Status with the Economic and Social Council as of 1 September 2019, U.N. Doc. E/2019/INF/5 (2019).
[2] "A treaty does not create either obligations or rights for a third State without its consent".

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precludes an international criminal court like the ICC from lawfully exercising jurisdiction over their nationals without the explicit, prior consent of those States. This principle is clearly enunciated in Article 34 of the Vienna Convention on the Law of Treaties (hereinafter, "Vienna Convention").[3] Such States argue that the Rome Statute includes terms that violate customary international law, thereby undermining the legitimacy of the treaty and its institutions. The Representative of India may have expressed this view best: *"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"*.[4]

Those who argue the contrary, to wit, that, pursuant to Articles 12(2)(a) and 27 of the Rome Statute, the ICC may assert jurisdiction over nationals of non-consenting third States in certain circumstances, maintain that the ICC tries individuals, not States, and, therefore, it does not infringe the legal rights of third States *per se* for the simple reason 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".[5] Proponents of this view posit that the ICC may distinguish between a State and its nationals and conclude therefrom that the ICC is not violating customary international law *vis-à-vis* third *States* when it attempts to bring individual *nationals* of such States before the Court.

Each of the foregoing positions will be discussed more fully *infra*.

In this letter, we identify various ongoing topics of controversy regarding the ICC and propose actions the Assembly can take to resolve them. Until these concerns are resolved, they will continue to foment strong international opposition to, and criticism of, the Court as well as distract ICC officials and judges from their proper focus. This will diminish further the reputation of the ICC and weaken the Court's real impact in the pursuit of justice.

In our view, the Assembly can and should correct anomalies in the ICC system and place the ICC on a solid legal foundation recognised by both States Parties and non-Party States alike. If the Assembly of States Parties acts to correct current shortcomings in the Rome Statute and in ICC practice, we believe that opposition to the Court from non-Party States would quickly dissipate and ICC institutions could execute their tasks as originally foreseen, free from external resistance and criticism.

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[3]Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("A treaty does not create either obligations or rights for a third State without its consent"). Article 34 simply incorporates the customary law principle into the treaty. "Third State" is defined as "a State not a party to the treaty". *Id.* at art. 2.1(h).

[4]Dilip Lahiri, Head of Delegation of India, Explanation of Vote on the Adoption of the Statute of the International Criminal Court (17 July 1998).

[5]*See* 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, 620 (2003). *But see* Jay Alan Sekulow & Robert Weston Ash, *The Issue of ICC Jurisdiction Over Nationals of Non-Consenting, Non-Party States to the Rome Statute: Refuting Professor Dapo Akande's Arguments*, 16 S.C. J. INT'L L. & BUS. 1 (2020).

ISSUES, ARGUMENTS & SUGGESTED CHANGES

ISSUE ONE: Disregard of the Customary International Law Rule *Pacta Tertiis Nec Nocent Nec Prosunt*

1) All treaties, including the Rome Statute, are governed by general principles of customary international law. One of the most fundamental and important of such principles is that "[a] treaty does not create either obligations or rights for a third State without its consent".[6] This principle derives from the sovereign equality of States. Because individual States are sovereign over their affairs and equal with other States,[7] they may enter or refrain from entering into international agreements at their discretion. No *State* is bound by a treaty to which it is not a party. This is what makes treaties consent-based. Accordingly, no group of States can make a treaty that binds States outside that group. Even the United Nations does not consider itself above this basic principle.[8]
2) Because of the consent-based nature of treaties, the relationship between States Parties to a treaty is governed by the terms of that treaty, whereas the relationship between States Parties to a treaty and third States is governed by general principles of customary international law. When States make treaties, they may modify customary law rules *inter se*, but they lack authority to modify those rules for third States not a party to the treaty.
3) Because the ICC is a creation of a treaty, it is also subject to these general principles.[9] The relationship between institutions created by the Rome Statute (such as the Office of the Prosecutor ("OTP"), the ICC, and the various panels of judges) and its *States Parties* is governed by the terms of the Statute, whereas the relationship between institutions created by the Rome Statute and *third States* is governed by general principles of customary international law.
4) No one disputes that the customary international law principle, "[a] treaty does not create either obligations or rights for a third State without its consent," applies to *States*. The question then becomes whether the assertion, "there is no provision in the ICC Statute that requires non-party states (*as distinct from their*

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[6]Vienna Convention, *supra* note 3, art. 34.
[7]The U.N. Charter includes a provision that "[t]he Organization is based on the principle of the sovereign equality of all its Members." U.N. Charter at art. 2, ¶ 1. In the 1922 *Norwegian Shipowners' Case,* the Permanent Court of Arbitration emphasised, "International Law and Justice is based upon the principle of equality between the States". *Norwegian Shipowners' Claims* (Nor. V. USA), 11 R.I.A.A. 307, 338 (Perm. Ct. Arb. 1922). The 1943 Moscow Declaration, where the Allies called for the creation of the U.N., declared the U.N. to be a "general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security". Declaration of Four Nations on General Security, 9 Dep't St. Bull. 308 (1943), reprinted in 38 Am. J. Int'l L. 5 (1944) https://avalon.law.yale.edu/wwii/moscow.asp. The preamble to the Vienna Convention emphasises its basis on fundamental principles, such as "the sovereign equality and independence of all States". Vienna Convention on the Law of Treaties, preamble, 23 May 1969, 1155 U.N.T.S. 331, 341, https://treaties.un.org/doc/Publication/U.N.T.S./Volume%201155/volume-1155-I-18232-English.pdf.
[8]U.N. Charter art. 2, ¶ 1. ("The Organization is based on the principle of the sovereign equality of all its Members").
[9]Vienna Convention, *supra* note 3, art. 34.

nationals) to perform or to refrain from performing any actions",[10] lawfully permits a treaty like the Rome Statute to distinguish between a third State and its nationals for purposes of trying and punishing Article 5 crimes allegedly committed by a third State's nationals on the territory of a State Party.

5) This in turn requires an answer to the following: "When a ***State*** decides to accede to or reject a treaty, on whose behalf is the State acting and what legal effects does such a decision have *vis-à-vis* the respective State's nationals?" To answer this, one must first understand what is meant when one says that a ***State*** "decides" to do such-and-such (like accede to or reject a treaty). In reality, it means that governing *officials* of such State have made a decision. That must be the case for the simple reason that no State *qua* State can decide or do anything; only real persons representing such a State can make decisions. The International Law Commission ("ILC") agrees. The ILC has emphasised that States cannot be distinguished from the people that constitute them.[11] We must not "deny the elementary fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives'".[12]

6) From this, it follows that, when States (to wit, the governing officials of such States) make decisions, they act on behalf of their nationals, and their decisions bind their nationals. This is true irrespective of the State's political system. Accordingly, when a ***State*** decides to accede to or reject a treaty, such a decision embraces its entire population. If a State accedes to a treaty, that decision binds all of the State's nationals to the terms of the treaty (irrespective of whether some might prefer a different option). Likewise, if a State rejects a treaty, that decision frees all of that State's nationals from the terms of the rejected treaty (once again irrespective of whether some might prefer otherwise).

7) The Rome Statute itself clearly recognises that decisions by a ***State*** bind its *nationals*, thereby refuting the State-nationals distinction. For example, Article 124 of the Statute recognises and confirms that a ***State*** decides how its nationals will be treated. Article 124 permits a State Party to exempt its nationals from prosecution for war crimes for a seven-year period following its accession to the Statute.[13] If a State Party avails itself of the Article 124 option, the ICC honours that decision and exempts that State's nationals—*all of them*—from its jurisdiction for seven years, whereas if a State Party declines to avail itself of the benefit to its nationals provided by Article 124, its citizens—*all of them*—are bound by that decision and do not enjoy the seven-year exemption.

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[10]Akande, *supra* note 5, at 620 (emphasis added).

[11]*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 57, https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf.

[12]*Id.* at 35 (quoting *German Settlers in Poland, Advisory Opinion*, 1923, P.C.I.J., Series B, No. 6, p. 22.).

[13]Rome Statute of the International Criminal Court, art. 124, July 17, 1998, 2187 U.N.T.S. 90 (entered into force Jul. 1, 2002). ("Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory".)

8) Article 15 *bis* 4 provides yet another example. With respect to Article 15 *bis* 4,[14] a State Party may permanently exempt its nationals from prosecution for the crime of aggression. Once again, the Rome Statute recognises and confirms that a ***State's*** decision affects its *nationals*. Further, if a State Party rejects being bound by the crime of aggression, the decision by the State is recognised as wholly sufficient to *permanently* exempt *all of its nationals*.
9) This leads to the logical question: "Why do decisions by *States Parties* to the Rome Statute suffice to exempt *their* nationals from portions of the Rome Statute, a treaty all States Parties have committed to uphold, while decisions by third States to exempt their nationals from the provisions of the Rome Statute *in toto* are insufficient to do so,[15] especially since third States have made no commitment whatsoever to the Rome Statute?"
10) According to customary international law, rejection of the Rome Statute by a *sovereign* third State trumps any and all authority of *non-sovereign* entities like the OTP, the ICC, or any ICC chamber of judges (established pursuant to the terms of a treaty negotiated and agreed to by other States but rejected by the third State) to impose their will on the third State, its nationals, its territory, or its actions.[16]
11) To be just, laws must apply equally to all who fall within the law's jurisdiction. That is not the case with the Rome Statute. As outlined above, the Rome Statute recognises the consent-based nature of treaty law with respect to its States Parties while simultaneously denying it with respect to third States. States Parties are permitted to opt their nationals out of liability for certain offenses. That confirms the *consensual nature* of conventional international law. Yet, third States' nationals can be hauled before the Court despite such States' total rejection of the Statute. No right of third States to refrain from joining the treaty as a whole is recognised. That constitutes a clear and continuous disregard of customary international law, which does recognise such a right.
12) What principle of law or logic leads to such a result? None that we can discern. The State-nationals distinction certainly does not suffice. This is why third States oppose the ICC so vigorously and will doubtless continue to do so until this fundamental legal flaw is corrected. As long as the Statute fails to recognise third States' sovereign rights to withhold their consent to ICC jurisdiction (including for their nationals), the Statute will not accord with international law.
13) Moreover, among a third State's responsibilities is its obligation to protect its nationals from, *inter alia*, actions in contravention of customary international law

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[14] *Id.* at art. 15 *bis* 4 ("The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, *unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar*" (emphasis added)).

[15] There is one exception. The Rome Statute does recognise that a third State's failure to accede to the Statute nonetheless exempts its nationals from the crime of aggression. *Id.* at art. 15 *bis* 5. No explanation is given as to why declining to accede to the Statute only protects nationals of third States from the crime of aggression.

[16] *See* Vienna Convention, *supra* note 3, at art. 34.

by international actors (like the OTP, the ICC, and the ICC's chambers of judges) which claim the authority to violate the rights of third State nationals.

14) In our view, the major—and fatal—error made by the States Parties to the Rome Statute was to presume that they were able to "delegate" to Rome Statute institutions the authority to disregard the right of sovereign third States to keep their nationals free from the jurisdiction of the ICC. *No single State or group of States may delegate such authority to an international criminal court for the simple reason that no State or group of States may delegate authority it does not possess*, and no State or group of States possesses one iota of authority belonging to non-Party States without such States' explicit consent. Attempting to do so violates the sovereign rights of third States to make their own decisions *vis-à-vis* acceding in any respect to the Rome Statute. It also means that *States claiming the right to delegate such authority to the ICC are acting in contravention of well-established principles of customary international law*.

15) In sum, there is no principle of law that permits a court like the ICC, created by a subset of States (even a large subset constituting two-thirds of all States) via a treaty, to impose either its jurisdiction or its decisions on third States (which include their nationals, territories, and actions) without their consent. To do so violates well-established customary international law and specifically the sovereign right of third States to exempt their respective nationals from the terms of a treaty to which such States have not acceded.

REMEDY: Bring the Rome Statute into compliance with customary international law by expressly limiting ICC jurisdiction to nationals of States Parties and those of third States which explicitly consent to ICC jurisdiction over their nationals, *unless* the referral was made by a decision of the UN Security Council acting pursuant to its authority as found in Chapter VII of the UN Charter.[17]

PROPOSED AMENDMENT TO THE ROME STATUTE: To bring the Rome Statute into compliance with customary international law, we propose that the Assembly of State Parties utilise its authority under Article 121 to make the following changes to Article 12(2)(a):

> With respect to Article 12(2)(a), amend the current wording **from** "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft" **to** "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft, ***provided that, when nationals of States***

[17]Note that a UN Security Council (UNSC) referral is not—*and cannot be*—pursuant to Article 13(b) of the Rome Statute for the simple reason that the UNSC is not a State and, as such, is not—and, indeed, cannot be—a party to, or bound by, the Rome Statute. Any UNSC referral would necessarily spring solely from the Council's authority under Chapter VII of the UN Charter. Referral to the ICC would simply substitute for creating an *ad hoc* body to deal with the matter.

which are not parties to the Statute are alleged to have committed crimes under this Statute, the Court will only assert jurisdiction if either the Court has obtained the explicit, prior, written consent of such States to the exercise of such jurisdiction, or the UN Security Council, acting pursuant to its authority under Chapter VII of the UN Charter, has made a referral to the Court;"
(proposed changes in bold italics).

ISSUE TWO: Misinterpretation of Treaty Terms to Obtain Jurisdiction Over Third State Nationals

1) All treaties, including the Rome Statute, are governed by general principles of customary international law. Many of those principles are set forth in the Vienna Convention on the Law of Treaties.[18]
2) Drafters of treaties are free to define the terms they use in the treaty as they desire. If a term is defined within a treaty, that specific meaning would apply to that term throughout the treaty unless the treaty language specifies otherwise.
3) The Rome Statute specifically defines many terms. For example, Article 7.2(a)-(i) defines various terms concerning "crimes against humanity". Article 8.2(a)-(f) defines the term "war crimes" for the purposes of the Rome Statute. Article 8 *bis* 1 defines the "crime of aggression", while 8 *bis* 2 defines what constitutes an "act of aggression" within the crime of aggression. Article 30.2 defines "intent", and Article 30.3 defines "knowledge".
4) According to the Vienna Convention on the Law of Treaties, terms not specifically defined within the treaty are to be understood "in accordance with the[ir] ordinary meaning" "in their context".[19]
5) While the Rome Statute uses the term "State" (or "States") over 400 times, it does not define the term. Accordingly, in every instance where the term "State" is capitalised,[20] it is to be understood using its ordinary meaning, i.e., the universally accepted customary international law meaning of State, to wit, a political entity which embodies the four criteria found in the Montevideo Convention.[21] Those criteria are: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter relations with other States.[22]
6) The second ICC Prosecutor, Mrs. Bensouda ("the Prosecutor"), and Pre-Trial Chamber I ("PTC I") both disregarded the Vienna Convention rule of

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[18]Vienna Convention, *supra* note 3, at preface.
[19]*Id.* at art. 31.
[20]There are times when the term "state", *uncapitalised*, clearly refers to something else. *See, e.g.*, *id.* at art. 31(b) (referring to "a *state* of intoxication") & *id.* at art. 83(4) (requiring that a "judgement shall *state* the reasons on which it is based").
[21]JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 77 (2000) (citing D.J. HARRIS, CASES AND MATERIALS OF INTERNATIONAL LAW 102 (5th ed. 1997)) ("The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law").
[22]Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934).

interpretation with regard to the situation in Palestine when addressing the question of Palestinian statehood. The Prosecutor openly conceded the following to PTC I: (a) that "Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed", (b) that "[t]he Palestinian Authority does not govern Gaza", and (c) that "*the question of Palestine's Statehood under international law does not appear to have been definitively resolved*".[23] These concessions demonstrate the Prosecutor's own understanding that Palestine fails to meet the customary law definition of a State.

7) Yet, instead of asking PTC I to apply the customary law definition of a State to determine the question of Palestinian statehood, the ICC Prosecutor instead urged the Chamber to consider Palestine a State "for the strict purposes of the Statute only".[24] In so doing she disregarded the ordinary meaning of the term implicitly agreed to by the Statute's drafters and sought to apply a different definition for the special case of Palestine alone.

8) Worse than the Prosecutor's departure from her duty to apply the Rome Statute faithfully and impartially is that the two-to-one majority in PTC I (a) readily acceded to the Prosecutor's improper request, (b) failed in its duty to apply the customary international law definition of a State, and (c) applied a contrived definition of "State" with respect to the question of Palestinian statehood. On this spurious basis, the majority concluded that Palestine was a "State" for purposes of the Rome Statute. This ruling was especially egregious because it served as a purportedly "legal" justification permitting the OTP to investigate nationals of an objecting third State, Israel, thereby thrusting the ICC headlong into one of oldest and most intractable political disputes. Moreover, the PTC I majority made a decision on territorial ownership, wholly inappropriately for a criminal tribunal and that after hearing only one side of the argument as well as disregarding the series of agreements (the "Oslo Agreements" and others) between the contesting parties. Those agreements laid out a clear means to resolve the disputes between the claimants. The PTC I majority decision has not only unnecessarily entangled the Court in a political and legal cobweb, it has also shown overt political bias by taking sides in the conflict. Most regrettably, in so doing, the Court has stymied the political process and diminished the chances for a negotiated peace settlement and just solution to the conflict.

9) If the drafters of the Rome Statute had desired to include non-State entities like Palestine within the scope of the Statute, they could have done so by defining "State" accordingly. *But they did not*. The recent decision by the PTC I majority amounted to an unlawful, illegitimate, and unwarranted *de facto* amending of the Statute by construing the term "State" to mean other than what the Rome Statute drafters implicitly intended it to mean and what the States Parties had agreed to. The two judges forming the majority thereby exceeded their authority as judges.

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[23]Situation in Palestine, No. ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ¶¶ 5, 35 (Jan. 22, 2020) [hereinafter Prosecutor's Request], https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF (emphasis added).
[24]*Id.* at ¶ 9.

They effectively modified the Statute, thereby abandoning the legitimate role of judges—*ius dicere non facere*.

10) While the independence of courts is of fundamental importance and must be protected, courts are instruments to ensure the rule of law. When a court crudely exceeds its authority and makes decisions in blatant disregard of well-established customary international law (which the PTC I majority did with respect to the Situation in Palestine), it abrogates its function as a court of law. Ultimately, it is the law that must be supreme, not the courts. Court decisions lose their sanctity if they do not comport with the law.
11) In sum, in the interests of the rule of law and in order to ensure that the Statute is applied as intended by its States Parties, it is within the purview of the Assembly of States Parties to correct distortions in the Court's practice when they occur. No Prosecutor or ICC judge has the authority to redefine the meaning of treaty terms, and, if they do so (as was done with respect to the term "State" in the Situation in Palestine), the Assembly must act to correct them. If the States Parties do not correct glaring misapplications of the law and annul their ensuing outcomes, they can expect more of the same in the future to the clear detriment of the Court's standing and legitimacy.

REMEDIES: (1) Reiterate that the term "State" in the Rome Statute means a sovereign political entity that meets the criteria set forth in the Montevideo Convention. (2) Direct that all Rome Statute institutions (OTP, ICC, and panels of judges) use the intended meaning of State and not a substitute in all of their proceedings. (3) Declare that the PTC I majority's decision on Palestine was wrongly decided due to a misapplication of the law and that the decision is thus *ultra vires* and void *ab initio*. (4) Remind all Rome Statute institutions of their obligations under the Vienna Convention to interpret treaty terms in accordance with the rules set forth in that Convention.

PROPOSED AMENDMENTS TO THE ROME STATUTE: To bring the Rome Statute into compliance with customary international law, under the Assembly's authority in Article 121, we propose the following changes to Article 12(1) and that the Assembly give the following correction and guidance:

1) To clarify the meaning of "State" in the Statute, amend the text of Article 12(1) **from** "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5" **to** "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. ***For the purposes of this Statute, 'State' is defined as a sovereign political entity that embodies the customary law criteria for a State as set forth in Article 1 of the Montevideo Convention of 1933.***" (proposed changes in bold italics).
2) Recognising that the PTC I majority erred in its finding of statehood for Palestine by virtue of using an improper definition of "State", the Assembly should issue

the following correction: ***"In light of the failure of the PTC I majority decision to use the correct definition of 'State' in regard to the Situation in Palestine, the Assembly of States Parties finds the PTC I decision regarding Palestinian statehood to have been decided without authority and hence of no legal effect. Accordingly, no predicate exists for the OTP to investigate the situation in Palestine, and the investigation is to be halted forthwith."*** (proposed language in bold italics).

3) Recognising further that, because both the Prosecutor and a panel of judges misinterpreted the term "State", the Assembly should issue the following declaration: ***"All Rome Statute institutions are advised that terms not specifically defined in the Statute are to be interpreted in accordance with the rules set forth in the Vienna Convention on the Law of Treaties and, in particular, that the term 'State' in the Statute is to be understood as a sovereign political entity that embodies the customary law criteria for a State as set forth in Article 1 of the Montevideo Convention of 1933. The purpose of this guidance is to bring the practice of the Court into conformity with customary international law"*** (proposed language in bold italics).

<u>ISSUE THREE</u>: Disregard of Customary International Law Regarding Legal Immunities for Certain Officials from Third States

1) Both customary international law and many treaties recognise the principle of immunity for designated international actors performing certain internationally recognised and sanctioned tasks.[25]
2) The Rome Statute wrongly arrogates to itself and its institutions the authority to unilaterally disregard such immunities for non-consenting third States in violation of both customary international law and the terms of other treaties to which third States have acceded. Article 27(2) of the Rome Statute reads: "Immunities or special procedural rules which may attach to the official capacity of a person,

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[25]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.

whether under national or international law, shall not bar the Court [ICC] from exercising its jurisdiction over such a person".

3) Third States do not dispute that States Parties may waive or abolish such immunities *inter se* and thereby grant the ICC authority to disregard them with respect to their officials. What third States dispute is the right of such States Parties, via a treaty drafted by them but rejected by third States, to disregard third States' immunities rights without their consent.
4) As with Issue One above, there is no principle of law that permits a court like the ICC, created by a subset of States via a treaty, to impose its decisions on third States without such States' prior consent. In this instance, to do so violates (a) customary international law, (b) the terms of other treaties to which the third States have acceded, (c) the sovereign right of third States to reject the terms of the Rome Statute *in toto*, and (d) the sovereign equality of States that permits no State to impose its will on another State, *whether directly or indirectly*, via language in a treaty not acceded to by the target State.

REMEDY: Bring the Rome Statute into compliance with customary international law by recognising the existence and continuing applicability of customary immunities to officials of third States unless such States explicitly consent to waive them.

PROPOSED AMENDMENTS TO THE ROME STATUTE: To bring the Rome Statute into compliance with customary international law, in accordance with the Assembly's authority under Article 121, we propose the following changes to Article 27:

> We recommend adding the following paragraph to Article 27: "***3. Irrespective of the terms set forth in paragraphs 1. and 2. of this article, when nationals of States which are not parties to this Statute are alleged to have been involved in crimes under this Statute, all customary and/or treaty-based immunities of such nationals shall continue to be observed unless the Court has obtained the explicit, prior, written consent of such States to waive such immunities.***" (proposed changes in bold italics).

CONCLUSION

Considerable criticism has been aimed at the ICC since it began operation in 2002. Much of that criticism has been provoked by the Court and Court personnel engaging in practices that do not comport with customary international law and by an over-zealous attitude of some Court officials who seek to expand the Court's reach beyond what is permissible under customary international law. No Court should engage in actions that disregard the law. Non-Party States almost universally view the ICC as a

problematic, politicised body, and, if the institution continues on its current trajectory, it risks losing the vestiges of legitimacy that it still enjoys.

The responsibility to ensure ICC compliance with the rule of law ultimately resides with the Assembly of States Parties. In accordance with Article 121, States Parties to the Statute may propose changes to the Statute. We respectfully urge Your Excellency to consider and adopt the proposals laid out above. Bringing the Statute and Court practices into conformity with customary international law will go a long way towards repairing and enhancing the standing and legitimacy of the Court.

Respectfully submitted this 27th day of September, 2021,

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