



Original: **English**

Date: **1 September 2014**

**THE PRESIDENT OF THE PRE-TRIAL DIVISION**

**Before: President of the Pre-Trial Division**

**SITUATION IN THE ARAB REPUBLIC OF EGYPT**

**Public Document with Public Annex A, Confidential Annex B and Public Redacted Annex C**

**Re-filing before the President of the Pre-Trial Division of the ‘Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014’**

**Source: President Mohammed Morsi and the Freedom and Justice Party of Egypt, represented by Lord Ken Macdonald QC, Prof. John Dugard SC, Rodney Dixon QC and Tayab Ali.**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**  
Ms. Fatou Bensouda, Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

---

**Registrar**  
Mr. Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

### **Re-filing before the President of Pre-Trial Division**

1. President Mohammed Morsi and the Freedom and Justice Party of Egypt (FJP) - the Applicant - hereby re-file before the President of the Pre-Trial Division the “Request for Review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014” originally filed on 23 May 2014 (“Request for Review”).<sup>1</sup>
2. The reason for the present filing is, as set out below, that the original Request for Review was not considered and determined by the President of the Pre-Trial Division in accordance with Regulation 46(3) and the case law of the ICC, as specifically requested by the Applicant in the Request for Review. The Applicant has awaited the appointment of the new President of the Pre-Trial Division to be made public in order to submit the present filing to the Judge so appointed. However, as no appointment has been publicly announced to date, the Applicant hereby makes this filing to the ‘President of the Pre-Trial Division’ as or once appointed for consideration as soon as possible.
3. The background to the present filing is that on 23 May 2014, the Applicant originally filed the Request for Review before the Presidency pursuant to Regulation 46(2), *and in addition or alternatively, with the President of the Pre-Trial Division pursuant to Regulation 46(3).*<sup>2</sup> The Request for Review requested that a Pre-Trial Chamber be constituted by either the Presidency or by the President of the Pre-Trial Division to consider the Applicant’s request for a judicial review of the decision of the Prosecutor not to open a preliminary examination into the alleged crimes committed in Egypt (based on the Declaration submitted pursuant to Article 12(3) of the Statute) in accordance with the applicable provisions of the Statute, Rules, Regulations and the Prosecutor’s own policy on preliminary examinations, as well as of the Registrar’s decision not to accept the Declaration that was filed under Article 12(3).<sup>3</sup> The

---

<sup>1</sup> Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014, 23 May 2014 (hereinafter “Request for Review of 23 May 2014”). The Request for Review of 23 May 2014 is attached as Annex A.

<sup>2</sup> Request for Review of 23 May 2014, para. 2.

<sup>3</sup> Prosecutor’s Decision on the ‘Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt,’ Ref. No. OTP-CR-460/13, 23 April 2014 (the Prosecutor’s decision was transmitted to the Applicant on 25 April 2014) (hereinafter “Prosecutor’s Decision”); Registrar’s Decision on the ‘Declaration

Applicant set out in the Request for Review the full reasons in support of this request, and the Applicant incorporates all of these submissions in the present filing, certain of which are highlighted below. The Request for Review itself is hereby re-filed as Annex A attached hereto.<sup>4</sup> The two confidential annexes 1 and 2 which were filed with the Request for Review are hereby re-filed as Confidential Annex B.<sup>5</sup> As set out in the Request for Review, the Applicant is requesting that the Court place the matter before a Pre-Trial Chamber to consider whether it can judicially review the Prosecutor's decision in the particular circumstances of the present case, and to consider the legal grounds for such a review, including those pertaining to the validity of the Declaration signed on behalf of President Morsi for the ICC to exercise jurisdiction and the accompanying expert opinion (see annex 2 to the Request for Review which is re-filed in Annex B). These are very important legal issues which the Court is being asked to adjudicate.

4. In the Request for Review, the Applicant clearly and expressly requested that Regulation 46(3) should be applied, and that the Request for Review should be considered pursuant to this Regulation and the case law of the ICC, by the President of the Pre-Trial Division. The Applicant stated that:

*“In the event that the Presidency determines that Regulation 46(2) is inapplicable, the Applicant requests that this Application is assigned to a Pre-Trial Chamber in accordance with Regulation 46(3) by the President of Pre-Trial Division as a “matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber.” In the present case, although no Pre-Trial Chamber has been assigned, Regulation 46(3) nevertheless explicitly permits the assignment of a Chamber in such circumstances to deal with any matters, requests, and information arising. Where matters, requests, and information do arise in the absence of a situation, as in the present case, this Regulation envisages that a Chamber can be constituted to deal with such matters. A Chamber should therefore be constituted under this provision.”*<sup>6</sup>

5. As submitted, Regulation 46 thus plainly envisages that in the event that the Presidency does not assign a Pre-Trial Chamber (as has occurred here), this is not the

---

under Article 12(3) and Complaint regarding International Crimes Committed in Egypt,’ Ref. No. 2014/3293/IOR/HvH, 25 April 2014 (“Registrar’s Decision”).

<sup>4</sup> A full procedural history of the Applicant’s Declaration and Complaint, correspondence and submissions made to the Prosecutor and Registrar, and the decisions of the Prosecutor and Registrar are set out in paras. 21-35 of the Request for Review of 23 May 2014 which is attached as Annex A.

<sup>5</sup> Annex B consists of (i) annex 1 to the Request for Review which are the main submissions filed in support of the Complaint as submitted by the Applicant to the Prosecutor requesting her to open a preliminary examination and (ii) annex 2 to the Request for Review which is the expert opinion of Prof. Vaughan Lowe QC that addresses the legal effect of the Declaration signed pursuant to Article 12(3).

<sup>6</sup> Request for Review of 23 May 2014, para. 19.

end of the matter. The President of the Pre-Trial Division can assign a matter that is not linked to an existing Situation (and assigned on this basis to a Pre-Trial Chamber) to be considered by a Pre-Trial Chamber, even though no Situation yet exists. Regulation 46(3) was included to ensure that filings in matters not yet assigned to a Pre-Trial Chamber could nevertheless still be filed and considered and to avoid such filings not being received and addressed by the Court. Any and all filings must after all be capable of being received by the Court and considered through the proper judicial process.

6. Despite the Applicant's explicit request under Regulation 46(3), on 6 June 2014, the Applicant was informed via an email from the Registry that the Presidency decided that "this submission cannot be entertained by the Presidency."<sup>7</sup> This email about the Presidency's decision is attached hereto as Annex C. The wording of the email (as set out below and in Annex C) clearly indicated that the Presidency alone considered the Applicant's Request for Review of 23 May 2014, and that the Request was *not* circulated to, or considered by, the President of the Pre-Trial Division pursuant to the provisions of Regulation 46(3).
7. It bears emphasis that the Presidency's decision was only communicated via an email from the Registry to the Applicant. It was not issued as a formal and public decision in accordance with the usual procedure of the Court in issuing its decisions and rulings. No explanation was given to the Applicant as to why the proper and formal procedure was not followed in the present case. It is not known whether the Prosecution was even served with a copy of the Request for Review and whether the Prosecution filed any submission in response. It is as though the Applicant's request was never filed as there is no public record of it and no record of the decision that was rendered by the Court. It is thus essential for the integrity and transparency of the judicial proceedings before the ICC that the present filing must, in accordance with Regulation 46(3), be filed publicly on the record at the Court, the Prosecution must be notified of its filing so that the Prosecution can file any response, and any decision must be rendered in the proper judicial manner, publicly and on the record.
8. As set out below, (and as was explained in the original Request for Review) the Registry is required to file formally and publicly the present filing pursuant to

---

<sup>7</sup> Email from Legal Coordinator in the Office of the Director, Division of Court Services of the Registry, 6 June 2014.

Regulation 46(3), even though a Situation does not exist in which the Presidency has assigned a Pre-Trial Chamber. The filing must then be considered by the President of Pre-Trial Division and referred to a Pre-Trial Chamber for determination, which must be rendered formally on the record of the Court. It could never be permissible for the Registry to refuse to accept a filing, or for a filing not to be received and considered by the Court, solely because the matter had not yet been assigned to a Pre-Trial Chamber, or because the Registry's technical filing system did not yet cater for such a possibility. Of course, the legal basis / jurisdiction to consider the matter and its merits would be for the Chamber to consider and determine, but it must be right that the matter should (at least) be filed and placed before the Chamber for consideration on the merits. For these reasons, even if it were found that Rule 46(3) is inapplicable (which is not accepted and indeed contrary to all of the reasons set out herein and the authorities cited), the present filing should still be filed and assigned to a Pre-Trial Chamber so that the request can as a minimum be considered by the Judges.

### **The Presidency's decision**

9. The Applicant wishes to highlight that the Presidency's decision relied solely on Regulation 46(2) and failed to consider and mention Regulation 46(3), the jurisprudence of the Pre-Trial Chambers on this Regulation, or the Applicant's submissions concerning this Regulation. Instead, the Presidency's decision explained that the "Presidency has informed the Registry that this submission cannot be entertained by the Presidency."<sup>8</sup> It stated that:

*"In this regard, the Presidency has noted that pursuant to regulation 46(2) of the Regulations of the Court, the Presidency shall assign a situation to a Pre-Trial Chamber 'as soon as the Prosecutor has informed the Presidency in accordance with regulation 45.' Regulation 45, in turn, makes reference to the trigger mechanisms of article 13 of the Rome Statute: the Prosecutor shall inform the Presidency a) when a situation has been triggered by a State Party under article 14; b) in case of a UN Security Council referral (article 13(b)); or c) if the Prosecutor intends to commence an investigation proprio motu pursuant to article 15(3) of the Rome Statute.*

*The Presidency further informed the Registry that the present situation does not fall within the purview of regulation 45 of the Regulations of the Court as none of the trigger mechanisms have been activated in the case at hand. The filing of a declaration under article 12(3) of the Rome Statute merely*

---

<sup>8</sup> Email from Legal Coordinator in the Office of the Director, Division of Court Services of the Registry, 6 June 2014.

*addresses the first step in the Office of the Prosecutor's assessment in a preliminary examination: whether the Court has jurisdiction *ratione personae/ temporis/ loci*. A declaration pursuant to article 12(3) of the Rome Statute – even if considered as validly submitted – does not provide for a trigger under article 13 of the Rome Statute.*

*It is the determination of the Presidency that since the request cannot be entertained by the Presidency, no registration following regulations 45 and 46(2) of the Regulations of the Court is warranted.”<sup>9</sup>*

10. The Applicant submits that it is clear that the Presidency's decision failed to address or take into account Regulation 46(3) and the jurisprudence relied on by the Applicant in the original Request for Review.<sup>10</sup> The Presidency ignored the Applicant's specific request that the Request for Review be additionally or alternatively considered by the President of the Pre-Trial Division, taking into account that Regulation 46(3) permits the President of the Pre-Trial Division to assign a Pre-Trial Chamber to deal with the matter, even if the Presidency has not assigned a Pre-Trial Chamber to deal with a Situation (under Regulation 46(2)).<sup>11</sup> As a result, the Request for Review was only considered by the Presidency and never considered by the President of the Pre-Trial Division in accordance with Regulation 46(3) and the jurisprudence of the Court that requires a Pre-Trial Chamber to be constituted to determine the Applicant's request.

### **Applicable Legal Basis for consideration by President of the Pre-Trial Division**

11. The Request for Review of 23 May 2014 sets out the applicable provisions and jurisprudence in requesting that the President of the Pre-Trial Division consider the Request and assign it to a Pre-Trial Chamber.
12. As stated in the original Request for Review, Regulation 46(3) and the jurisprudence of the Court clearly confirm that the President of the Pre-Trial Division may consider any document or request which is not already assigned to a Pre-Trial Chamber by the Presidency or which is not linked to an existing Situation before the Court.<sup>12</sup>

---

<sup>9</sup> Email from Legal Coordinator in the Office of the Director, Division of Court Services of the Registry, 6 June 2014.

<sup>10</sup> Request for Review of 23 May 2014, paras. 2, 19 and note 19.

<sup>11</sup> Request for Review of 23 May 2014, paras. 2, 19 and note 19.

<sup>12</sup> See paras. 13-16 below. See also, Request for Review of 23 May 2014, paras. 13, 19 and note 19.

13. Regulation 46(3) provides that:

*“Any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division.”<sup>13</sup>*

14. A Pre-Trial Chamber has previously noted that Regulation 46(3) may be used as a legal basis for a request to be considered concerning a matter outside of an assigned Situation. In a decision concerning the Situation in Kenya, the Pre-Trial Chamber noted that Regulation 46(3) could be used in this way by stating that:

*“Albeit not applicable in this context, the Chamber, for possible future purposes, draws the Registrar's attention to regulation 46(3) of the Regulations of the Court and the existing roster in case she deems that a matter, request or information does not arise out of a situation assigned to a Pre-Trial Chamber.”<sup>14</sup>*

15. In addition, a Pre-Trial Chamber has found that a document filed in accordance with Regulation 46(3), must be immediately transmitted by the Registry to the President of the Pre-Trial Chamber for consideration, even if there is not an existing Situation before the Court to which the document is linked. The Pre-Trial Chamber held that:

*“If the document is not linked to a situation of which a Pre-Trial Chamber is seized of, the Registry has to transmit it without undue delay to the President of the Pre-Trial Division in accordance with regulation 46(3) of the Regulations.”<sup>15</sup>*

16. Accordingly, the Applicant requests that the present filing is filed formally by the Registry and transmitted to the President of the Pre-Trial Division (even though it is not linked to a Situation and yet to be assigned to a Pre-Trial Chamber) so that it can then be considered and assigned to a Pre-Trial Chamber in accordance with Regulation 46(3) for determination. This would constitute a sensible and logical interpretation of Regulation 46(3) in accordance with the guidance already given by Pre-Trial Chambers. It would ensure that filings that did not come within the ambit of Regulation 46(2) could be filed and considered as expressly envisaged in Regulation

---

<sup>13</sup> Regulations of the Court, Regulation 46(3).

<sup>14</sup> Situation in the Republic of Kenya, Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, ICC-01/09-39, 31 January 2011, note 2.

<sup>15</sup> Situation in the Republic of Kenya, Decision on a Request for Leave to Appeal, ICC-01/09-38, 11 February 2011, para. 14.



46(3) and would not ‘fall through the cracks’. It would give effect to what must be assumed to be the intention of the Court not to exclude filings on technical grounds solely because they have not as yet been assigned to a Pre-Trial Chamber. Indeed, the very content of the present request *is* for a Pre-Trial Chamber to be constituted to consider whether it has jurisdiction to review the Prosecutor’s decision not to initiate a preliminary examination that would have led to a Situation being opened.

### **Request to the President of Pre-Trial Division**

17. As fully set out in the Applicant’s Request for Review (attached as Annex A), the Applicant requests the President of the Pre-Trial Division to assign a Pre-Trial Chamber to consider the Applicant’s request to review the decisions of the Prosecutor and Registrar respectively on the grounds set out in the Request for Review, having received full submissions from the parties.<sup>16</sup> The Chamber would first have to consider its powers of review under the Statute and those that arise from its inherent powers. Thereafter, the Chamber would need to address the specific grounds of judicial review relied on by the Applicant, as outlined in the Request for Review.<sup>17</sup>
18. The Applicant submits that there are compelling reasons which justify the review of the Prosecutor’s decision to refuse even to open a preliminary examination of the alleged crimes committed in Egypt. The Applicant urges the Court to undertake such a review in light of the serious substantive and procedural errors in the Prosecutor’s and Registrar’s conduct and conclusions, which if corrected would enjoin the Prosecutor to examine the very serious allegations of massive, systematic and widespread crimes which have gone unpunished in Egypt.
19. The importance of investigating these crimes was recently highlighted in the detailed investigative report produced by Human Rights Watch (HRW) which found that despite convincing evidence that “police and army forces systematically and intentionally used excessive lethal force in their policing, resulting in killings of protesters on a scale unprecedented in Egypt”, one year after these incidents “security forces continue to deny any wrongdoing, and authorities have failed to hold a single

---

<sup>16</sup> See, Request for Review of 23 May 2013, para. 3.

<sup>17</sup> Request for Review of 23 May 2013, paras. 36-53.

police or army officer accountable for any of the unlawful killings.”<sup>18</sup> Based on its conclusions that “the killings not only constituted serious violations of international human rights law, but likely amounted to crimes against humanity”<sup>19</sup>, HRW concluded that an investigation should be conducted outside of Egypt, by international bodies such as the UN Human Rights Council, “[i]n light of the failure of Egyptian authorities until now to undertake investigations and continuing rampant impunity for serious abuses.”<sup>20</sup>

20. The judicial review proceedings, as requested by the Applicant, would guarantee that the Prosecutor’s refusal to open a preliminary examination is scrutinised and that there is an international judicial procedure for determining whether there is jurisdiction before the ICC to seek to protect the interests of the victims.

21. Other international courts and tribunals have recognised the need for procedures which allow for access to the court so that the decisions and conduct of the Prosecutor and Registrar can be reviewed by independent and impartial judges. The Special Tribunal for Lebanon has held that the right of access to the court constitutes a peremptory norm under customary international law:

*“The right of access to justice is regarded by the whole international community as essential and indeed crucial to any democratic society. It is therefore warranted to hold that the customary rule prescribing it has acquired the status of a peremptory norm (jus cogens).”*<sup>21</sup>

22. Although it was noted that this right is “subject to certain restrictions” and that “the existence of this right does not automatically entitle individuals to obtain a substantive judicial remedy”, the Tribunal recognised that at the very least, there is a right to access the court and to be heard.

<sup>18</sup> All According to Plan: The Rab’a Massacre and Mass Killings of Protesters in Egypt, HRW, August 2014, p. 5 ([http://www.hrw.org/sites/default/files/reports/egypt0814web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/egypt0814web_0.pdf)).

<sup>19</sup> All According to Plan: The Rab’a Massacre and Mass Killings of Protesters in Egypt, HRW, August 2014, p. 5 ([http://www.hrw.org/sites/default/files/reports/egypt0814web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/egypt0814web_0.pdf)).

<sup>20</sup> All According to Plan: The Rab’a Massacre and Mass Killings of Protesters in Egypt, HRW, August 2014, p. 14, 15 ([http://www.hrw.org/sites/default/files/reports/egypt0814web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/egypt0814web_0.pdf)).

<sup>21</sup> Special Tribunal for Lebanon, CH/PRES/2010/01, Order Assigning Matter to Pre-Trial Judge, 15 April 2010, paras. 28, 29, 36.

23. As noted in the Request for Review<sup>22</sup>, international courts have held that even if there is no provision allowing for judicial review, the court possesses the inherent power to decide to exercise its review powers:

- In the ICJ *Reparations Case*, the Court found that “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”<sup>23</sup>
- In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ held that the “The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as ‘implied’ powers.”<sup>24</sup>
- In *Blaskic*, the ICTY found that the Court possesses inherent powers which “inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.”<sup>25</sup>

24. These rulings have been confirmed and adopted by the ICC in its finding that the Court does have the inherent powers to act even if the provisions of the Statute and Rules do not specifically provide for such measures.<sup>26</sup> The ICC has recognised<sup>27</sup> that the Rome Statute has codified this doctrine of implied powers in Article 4(1) of the Statute, which states that “The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”<sup>28</sup>

<sup>22</sup> Request for Review of 23 May 2013, para. 17.

<sup>23</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949), p. 182. The ICC Trial Chamber relied on this authority when addressing the incidental and implied powers of an international organisation: see, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 67.

<sup>24</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion (8 July 1996). The ICC Trial Chamber relied on this authority when addressing the implied powers of an international organisation: see, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 77.

<sup>25</sup> *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 33.

<sup>26</sup> *Prosecutor v. Ruto et al.*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, paras. 67, 77, 78.

<sup>27</sup> *Prosecutor v. Ruto et al.*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 83.

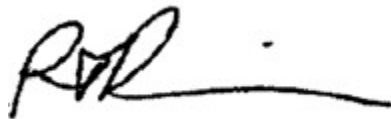
<sup>28</sup> Rome Statute, Article 4(1).

25. In light of the provisions of Regulation 46(3) and the jurisprudence of the Court<sup>29</sup> which provide a clear basis for the President of the Pre-Trial Division to consider any request made outside of an assigned Situation of the Court, and considering the Court's inherent powers as set out above,<sup>30</sup> the Applicant submits that President of the Pre-Trial Division should assign a Chamber to consider the Applicant's request for judicial review.

**Relief sought**

26. For all of the reasons set out herein, and in the attached Request for Review that has been re-filed, the Applicant respectfully requests that this filing and the original Request for Review is filed before the President of the Pre-Trial Division and that the Request for Review and this filing are assigned to a Pre-Trial Chamber for consideration and determination having heard in full from the parties.

Submitted on behalf of the Applicant by Counsel,



**Lord Ken MacDonald QC**

**Prof. John Dugard SC**

**Rodney Dixon QC**

**Tayab Ali**

London, United Kingdom

1 September 2014

---

<sup>29</sup> See paras. 11-15 above.

<sup>30</sup> See paras. 17-24 above.