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**No.: ICC-RoC46(3)-01/14  
Date: 18 September 2014**

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova. Presiding Judge  
Judge Cuno Tarfusser  
Judge Christine Van den Wyngaert**

**REQUEST PURSUANT TO REGULATION 46(3) OF THE REGULATIONS OF COURT**

**Public Document**

**Request for Reconsideration of, and alternatively, Leave to Appeal against the “Decision on 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’” of 12 September 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**

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**Registrar**  
Mr. Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. President Mohammed Morsi and the Freedom and Justice Party of Egypt (FJP) - the Applicant - hereby file this application *in the first instance* respectfully to request that the Pre-Trial Chamber reconsider its “Decision on 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’” dated 12 September 2014<sup>1</sup> in accordance with the jurisprudence of the Court.
2. Reconsideration is requested on the basis that a central and overarching ground of the Applicant’s submission of 1 September 2014<sup>2</sup> and its original filing<sup>3</sup> was not considered and addressed at all by the Pre-Trial Chamber in its Decision, namely that the Court possesses *inherent and implied powers* as part of its judicial function to review the decisions of the Prosecutor not to open an investigation when proper grounds of review exist, and particularly in the circumstances of the present case in which the Applicant maintains that a valid Declaration has been lodged at the time by the Government of Egypt under Article 12(3) to seize the ICC of jurisdiction over crimes allegedly committed in Egypt.<sup>4</sup>
3. Alternatively, and *in the second instance*, if the Pre-Trial Chamber finds it cannot reconsider its Decision of 12 September 2014 on this key legal issue, then the Applicant requests that the Pre-Trial Chamber grant leave to appeal so that this very important issue may be considered by the Appeals Chamber. This request for leave to appeal is made pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.<sup>5</sup>

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<sup>1</sup> Decision on 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’, ICC-RoC46(3)-01/14-3, 12 September 2014 (hereinafter “Decision of 12 September 2014”).

<sup>2</sup> “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’”, ICC-RoC46(3)-01/14-2, 1 September 2014 (hereinafter “Request for Review of 1 September 2014”).

<sup>3</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. See, ICC-RoC46(3)-01/14-2, Public Annex A.

<sup>4</sup> See, Request for Review of 1 September 2014, paras. 17, 23, 24. See also, ICC-RoC46(3)-01/14-2, Public Annex A, paras. 3, 16, 17.

<sup>5</sup> This filing is made in accordance with the time limit for filing an application for leave to appeal pursuant to Rule 155(1) and Regulation 33(1)(d).

## **Background**

4. On 1 September 2014, the Applicant re-filed the Request for Review before the President of the Pre-Trial Division. In a decision dated 10 September 2014, the President of the Pre-Trial Division decided to assign the Request for Review to Pre-Trial Chamber II for consideration and determination.<sup>6</sup> The Chamber was notified of this decision and thus assigned to the matter the following day on 11 September 2014.<sup>7</sup>
5. Counsel for the Applicant was only officially notified of this decision of 10 September 2014 to assign a Chamber on Friday, 12 September 2014 in the late afternoon.<sup>8</sup> Just over two hours later at 19.12pm on Friday evening, Counsel for the Applicant was then notified that Pre-Trial Chamber II had already rendered its decision to dismiss the Applicant's Request for Review, and was provided with a copy of this decision.<sup>9</sup>
6. Counsel and the client were very surprised that a decision had already been taken so quickly on the merits of the matter when it had only been assigned to the Pre-Trial Chamber the day before, on 11 September 2014. There was no indication in any of the court records that the Applicant's Request for Review had even been circulated to the Prosecution as the Respondent in this matter or that the Prosecution had been given any opportunity to respond to the submissions made on behalf of the Applicant that concerned the Prosecutor's procedures and decision not to open an investigation.
7. Indeed, as set out below, the Applicant submits that the haste with which the decision was taken has been shown up by the fact that the Chamber did not address the critical argument relied on by the Applicant in its filings. This argument – that underpins the

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<sup>6</sup> Decision assigning the 'Request for review of the Prosecution'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' to Pre-Trial Chamber II, ICC-RoC46(3)-01/14-1, 10 September 2014 (hereinafter "Decision of 10 September 2014").

<sup>7</sup> Decision of 12 September 2014, para. 2.

<sup>8</sup> The Legal Assistant to Counsel for the Applicant was notified by telephone on 11 September 2014 in the late afternoon that the President of the Pre-Trial Division had decided to assign the matter to Pre-Trial Chamber II, but no official notification or copy of the decision was sent to Counsel on 11 September. Following requests by the Legal Assistant for this decision on 12 September 2014, the decision (which had then just been posted on the ICC website for the first time) was emailed by the Registry staff to the Applicant's Legal Assistant at 16.53pm on Friday, 12 September. No official notification has ever been received for this decision.

<sup>9</sup> The Applicant was officially notified of this decision on 12 September 2014 at 19:12pm by way of an email from a member of the Registry staff to the Legal Assistant.

entire Request for Review and to which an extensive part of the filings were dedicated with several authorities, including from the ICC – is that in the particular circumstances of the present case the inherent and implied powers of the Court permit the Chamber to review the Prosecutor’s decision, particularly as the key legal issue in the present case is whether the Declaration that was lodged in this case on behalf of the Government of Egypt is binding as a matter of international law and thus capable of providing the ICC with jurisdiction – a matter of great legal significance for this case (and potentially other cases in the future).

### **Request for Reconsideration**

#### *i. Legal basis for Reconsideration*

8. There are no express provisions in the Statute, Rules or Regulations which give the Chamber the power to reconsider its decisions.<sup>10</sup> However, different Chambers have held that they may do so in certain circumstances. It is indeed one of the inherent powers of the Court. In *Kenyatta* the Trial Chamber found that “*it would be incorrect to state that decisions can only be varied ‘if permitted by an express provision in the Rome Statute framework’*. *The Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or proprio motu.*”<sup>11</sup>
9. The Trial Chamber in this case noted that reconsideration “should only be done in exceptional circumstances.”<sup>12</sup> Other Chambers have found that reconsideration of a decision is, *inter alia*, possible where the decision is manifestly unsound and its consequences are manifestly unsatisfactory:
  - In *Lubanga*, the Trial Chamber noted that “The jurisprudence of the ad hoc tribunals supports the interpretation that in certain circumstances a Chamber is entitled to depart from its decisions on matters of substance as regards the law or the facts of the case.” The Trial Chamber explained that “This approach by the ad hoc Tribunals reflects the position in many common law national legal systems, in the sense that it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound

<sup>10</sup> Prosecutor v. Kenyatta, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11.

<sup>11</sup> Prosecutor v. Kenyatta, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11.

<sup>12</sup> Prosecutor v. Kenyatta, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11.

and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information.”<sup>13</sup>

- In *Ruto et al.*, the “Chamber acknowledge[d] that it may reconsider past decisions when they are ‘manifestly unsound and their consequences are manifestly unsatisfactory.’”<sup>14</sup> The Trial Chamber in *Kenyatta* supported this finding.<sup>15</sup>

## ii. Grounds for Reconsideration

10. The Applicant submits that the Chamber can rely on this case law to review in its decision in the present case on the basis that it must be regarded as manifestly unsound and unsatisfactory for the decision not to address the key argument relied on by the Applicant to found jurisdiction. The consequence of this failing is that the Applicant is left with no *locus standi* on the merits of its claim. In the interests of fairness in the proceedings before the Court and of justice for the Applicant, the victims and the wider public, the Chamber should consider and rule on the Applicant’s key argument that the Chamber can exercise jurisdiction over the application for judicial review on the basis of its inherent powers, as supported by several authorities including from the ICC.

11. The Chamber plainly only addressed a single issue in its decision – that it had no jurisdiction under the express terms of the Statute, in particular Article 53, to consider the Request for Review.<sup>16</sup> The Applicant had clearly relied on a central argument that even if the Statute did not expressly provide for judicial review powers in the specific (and unique) circumstances of the present case, the Court possessed as part of its inherent and implied powers, the authority to review the Prosecutor’s decision and conduct.<sup>17</sup> Yet, this critical argument was not considered and addressed at all by the Chamber.

<sup>13</sup> Prosecutor v. Lubanga, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, paras. 15, 18.

<sup>14</sup> Prosecutor v. Ruto et al., Decision on the request to present views and concerns of victims on their legal representation at the trial phase, ICC-01/09-01/11-511, 13 December 2012, para. 6.

<sup>15</sup> Prosecutor v. Kenyatta, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11.

<sup>16</sup> Decision of 12 September 2014, para. 7.

<sup>17</sup> Request for Review of 1 September 2014, paras. 17, 23, 24. See also, ICC-RoC46(3)-01/14-2, Public Annex A, paras. 3, 16, 17.

12. It should be highlighted that even in respect of the Applicant's submissions on the express terms of the Statute, the Chamber failed to address the core point of the Applicant's argument, namely that the Declaration in the present case from a democratically elected Government, heading then by President Morsi, should be regarded as being akin to a State referral for the purposes of Article 53.<sup>18</sup> As the Applicant submitted, the "very issue of whether the Declaration does amount to a legitimate referral on behalf of the State of Egypt lies at the heart of the Prosecutor's decision which the Applicant submits should be the subject of review."<sup>19</sup> The oversight in dealing with this argument (whether it is right or wrong as a matter of law) further underlines that the Chamber did not address the submission at the heart of the Applicant's filing, that the Court should not leave it to Prosecutor alone to decide vital legal issues governing the very jurisdiction of the Court, and should instead draw on its judicial powers to oversee the Prosecutor's decisions in the interests of guaranteeing the victims a judicial remedy and of promoting the integrity and transparency of the institution as a whole.
13. Turning to the key argument itself on inherent powers, there can be no doubt that the Applicant has set out this crucial argument in detail and asked the Chamber to consider and rule on it in its original filing and the re-filing.<sup>20</sup> The Applicant cited case law from the ICTY and the ICJ<sup>21</sup> showing that "Jurisprudence from international courts states that courts possess the inherent and necessary powers to fulfil their judicial function by virtue of their existence as a judicial organ."<sup>22</sup> The Applicant emphasised that this doctrine has been accepted by the ICC:

*"These rulings [by the ICJ and ICTY] 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. The ICC has recognised 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>23</sup>

<sup>18</sup> See, ICC-RoC46(3)-01/14-2, Public Annex A, para. 14.

<sup>19</sup> ICC-RoC46(3)-01/14-2, Public Annex A, para. 15.

<sup>20</sup> See, 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 (ICC-RoC46(3)-01/14-2, Public Annex A), paras. See also, Request for Review of 1 September 2014, paras. 17-21-24.

<sup>21</sup> See, Request for Review of 1 September 2014, para. 23; ICC-RoC46(3)-01/14-2, Public Annex A, paras. 17.

<sup>22</sup> See, ICC-RoC46(3)-01/14-2, Public Annex A, para. 17.

<sup>23</sup> Request for Review of 1 September 2014, para. 24 (footnotes omitted).

14. The Court's inherent and implied judicial powers include the determination of jurisdictional matters that are primary to the functioning of the Court. Indeed, given that the exercise of the ICC's jurisdiction depends on the Prosecutor's decisions about whether to initiate investigations and seek charges in any given situation following a State referral or the lodging of a Declaration, or any other referral, the Court must by necessity be capable of considering such decisions and making determinations that are essential to its functioning as a Court. As opposed to the *ad hoc* Tribunals which derive their jurisdiction from the mandate provided by the UN Security Council, the ICC's caseload derives from the very investigations which the Prosecutor decides to open following a preliminary examination into any particular situation.<sup>24</sup> It is thus vital that the Court is, where appropriate, able to review these processes in the initial legal proceedings which are the foundation and source of the Court's pre-trial, trial and appellate work.
15. It is for this reason that the Appeals Chamber of the ICTY in *Tadic* found that it had the power to review even the decisions of the UN Security Council in establishing the Tribunal and its jurisdiction on the basis of the Court's inherent powers.<sup>25</sup> In its decision, the Appeals Chamber held that "*the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consist[s] of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.*"<sup>26</sup> In the same way, the ICC must possess the jurisdiction from its inherent and implied powers to consider important matters of jurisdiction arising from the decisions of the Prosecutor about whether to initiate an investigation, given that these are the very decisions which determine whether the ICC will have jurisdiction in any particular case.
16. Furthermore, in many national jurisdictions, the public, and particularly the victims, have the right to petition in some form to the national courts to review the decisions of national prosecuting authorities when a decision is taken not to investigate or

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<sup>24</sup> Rome Statute, Articles 12-15.

<sup>25</sup> Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 14-22.

<sup>26</sup> Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18 (emphasis added).

prosecute a case.<sup>27</sup> The court will not reconsider the merits of the decision, but will consider the lawfulness of the decision made. This ensures that the victims have the right to challenge the lawfulness of any decision adverse to their interests in a court of law so that the decision of the prosecuting authority can be scrutinised by the judiciary and not left to the sole and unchecked determination of the prosecuting authority. This procedure promotes transparency in the investigation and selection of cases, and certainty and consistency in the standards that are applied by the prosecuting authorities across different cases. It also seeks to prevent bias in the selection of cases and any untoward influence over the national prosecuting authorities. The same rationale should apply before the ICC to justify the review by the Court of the exercise of the Prosecutor's investigative powers, based on the Court's powers that are indispensable to its judicial function and purpose.

17. Rather than seeking to limit the powers of the Court to review decisions of the Prosecutor affecting the jurisdiction of the Court, the Applicant is requesting that the Court use its inherent judicial powers to examine the lawfulness of the Prosecutor's conduct and decisions in the particular circumstances of the present case which concern the validity of a Declaration lodged on behalf of the President of a State shortly after his Government was unlawfully removed from office. The President of the Pre-Trial Division found that this Request for Review was not frivolous.<sup>28</sup> The Court should of course always retain its power to refuse to consider any request for review that is not serious and in which there is no arguable case on any error of law. As occurs in national jurisdictions, the Court should only review decisions as to their lawfulness when it has granted the applicant permission to proceed on the basis that there is an arguable case. This will ensure that valuable court time and resources are not wasted.

18. In the present case, the Applicant submits that it has clearly made out an arguable case that the Prosecutor's decision should be reviewed in that she has acted unlawfully in refusing to accept the Declaration as lodged and to open an investigation. For present

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<sup>27</sup> UK - Civil Procedure Rules, Part 54, Judicial Review and Statutory Review (<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54>); UK - Judicial Review, Courts and Tribunals Judiciary (<http://www.judiciary.gov.uk/you-and-the-judiciary/judicial-review/>); US - 5 U.S. Code Chapter 7 - Judicial Review (available at <http://www.law.cornell.edu/uscode/text/5/part-I/chapter-7>); Canada - John D. Richard, Judicial Review in Canada, 45 Duq. L. Rev. 483 (2006-2007); Israel - Rivka Weill, Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care, Berkeley Journal of International Law (BJIL), Vol. 30, No. 2, 2012.

<sup>28</sup> Decision of 10 September 2014, paras. 3, 4. See also, Decision of 12 September 2014, para. 2.

purposes, the Applicant submits that the Chamber has unquestionably not addressed the key jurisdictional argument on which the Applicant relies for *locus standi*, and thus the Applicant asks the Chamber to reconsider its decision. It is a manifestly unsatisfactory position to be in for the Applicant to be left with a decision that as matters presently stand does not even acknowledge the Applicant's key argument for having standing before the Chamber. The Applicant respectfully requests that this state of affairs should be rectified by the Chamber reconsidering its decision on the basis of the Applicant's principal argument.

### **Leave to Appeal**

19. In the event that the Pre-Trial Chamber refuses to reconsider its Decision of 12 September 2014, the Applicant requests that the Chamber should then grant leave to appeal pursuant to Article 82(1)(d) so that the important issue of the Chamber's powers to review the decision of the Prosecutor can be considered by the Appeals Chamber given that the Pre-Trial Chamber erred in *not* addressing and ruling on this issue in its decision.

*i. Legal basis for leave to appeal*

20. The applicable requirements for leave to appeal are as set out in Article 82(1)(d):

#### ***Article 82***

##### ***Appeal against other decisions***

*1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:*

...

*(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*

21. The jurisprudence of the Court has established that leave to appeal may be granted if the Chamber is satisfied that there is an issue that "would significantly affect the fair and expeditious conduct of the proceedings and that it need not determine whether this

issue would also affect the outcome of the trial.”<sup>29</sup> The Appeals Chamber has found that the issue within the impugned decision need not be “confined to trial proceedings but [may] extend to pre-trial proceedings as well as the investigation of crime.”<sup>30</sup>

22. The Appeals Chamber has emphasised that Article 82(1)(d) serves the purpose of “[p]urging the pre-trial process of errors [and] ... is designed as a safeguard for the integrity of the proceedings.”<sup>31</sup> The Appeals Chamber further stated that “the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”<sup>32</sup> and that the requirement of ‘advancing’ the proceedings is satisfied if granting leave to appeal would move the proceedings forward by “remov[ing] doubts about the correctness of a decision.”<sup>33</sup>

23. In addition, the Applicant submits that as the Applicant and the Prosecutor are the only two parties in the present proceedings, the word “party” in Article 82(1) cannot logically be interpreted in “its ordinary sense to [refer to] the Prosecutor and the Defence.”<sup>34</sup> The current proceedings before the Court cannot be in any way equated to the locus of an *amicus curiae* applicant under Rule 103 in which the Court has refused to recognise the standing of such *amicus* applicants to request leave to appeal.<sup>35</sup>

24. The Applicant notes that the Chamber in the present case found that the Court’s assignment of the Request for Review pursuant to Regulation 46(3) for consideration

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<sup>29</sup> *Prosecutor v. Banda and Jerbo*, Decision on the Defence Application for Leave to Appeal the "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", ICC-02/05-03/09-457, 21 March 2013, para. 19.

<sup>30</sup> Appeal Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chambers 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 11.

<sup>31</sup> Appeal Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chambers 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 11.

<sup>32</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006 paras 19 (“AC Decision of 13 July 2006”).

<sup>33</sup> AC Decision of 13 July 2006, para. 15; *Prosecutor v. Banda and Jerbo*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence', ICC-02/05-03/09-179, 13 July 2011, para. 22.

<sup>34</sup> *Prosecutor v. Gaddafi et al.*, Decision on the admissibility of the Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012, Separate Opinion of Judge Daniel David Ntanda Nsereko.

<sup>35</sup> *Prosecutor v. Gaddafi et al.*, Decision on the 'Application of Mishana Hosseinioun for Leave to Appeal Against Decision on Application under Rule 103', ICC-01/11-01/11-60, 14 February 2012, p. 4, 5; *Prosecutor v. Gaddafi et al.*, Decision on the admissibility of the Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012, Separate Opinion of Judge Daniel David Ntanda Nsereko.

by Pre-Trial Chamber II is a “purely administrative” matter which gives rise to “no substantive rights”.<sup>36</sup> The Applicant submits that this finding does not provide any fair and cogent basis to conclude that the Applicant has no standing even to seek to appeal against the Chamber’s decision on the merits of whether the application for judicial review could be heard by the Chamber. The fact that the Chamber found that it has no power to review the decision of the Prosecutor (a decision on the merits of Applicant’s Request for Review that the Applicant does not enjoy the substantive right to have its judicial review application considered by the Chamber) cannot mean that the Applicant has no standing to request leave to appeal against the very decision on the merits. It would be grossly unfair for the Chamber to deny the Applicant an opportunity to seek leave to appeal the Chamber’s own decision on the basis that this decision had not addressed the Applicant’s key argument, by finding that the Applicant has no rights at all. The Chamber has dismissed the Applicant’s argument that it enjoys the *substantive* right to bring a judicial review application for the Chamber’s consideration, but this decision itself must be subject to appeal based on the Applicant’s *procedural* rights as the Applicant in the proceedings to seek to appeal the substantive decision on the basis of the alleged errors of law. The Applicant would be left with no remedy at all if the contrary were correct.

25. This submission is in fact supported by the Chamber’s own findings. It expressly acknowledged that the Applicant’s Request for Review could be assigned to a Pre-Trial Chamber under Regulation 46(3) and that the issue of the Chamber’s powers to review the Prosecutor’s decision could be considered because the Applicant’s request “[did] not appear (a) to fall outside the competence of the Pre-Trial Chamber, or (b) to be manifestly frivolous.”<sup>37</sup> The Chamber went on to assess the extent of its powers under the Statute (without considering its inherent powers) and found that this assessment “should not in any way be construed as an acknowledgement that the Applicant enjoys *locus standi* in these proceedings”.<sup>38</sup> The Chamber also acknowledged that the Applicant’s “procedural standing” was a separate matter which it did “not deem necessary to discuss”.<sup>39</sup> In other words, the fact that the Chamber found that the Applicant has no standing to have its Request for Review considered on its merits cannot also mean that the Applicant has no procedural rights at all even to

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<sup>36</sup> Decision of 12 September 2014, para. 5.

<sup>37</sup> Decision of 12 September 2014, para. 2.

<sup>38</sup> Decision of 12 September 2014, para. 11.

<sup>39</sup> Decision of 12 September 2014, para. 11.

seek to appeal against the decision on its standing. The Applicant has the standing to seek to challenge the decision on whether its Request for Review can be considered and adjudicated by the Chamber.

26. This argument is further re-enforced by the Chamber's decision in respect of the conduct of the Registrar. In its Request for Review, the Applicant asked the Chamber to review the conduct of the Registrar in issuing a 'decision' in which the Registrar "concluded that your communication [from the Applicant] cannot be treated as a declaration pursuant to Article 12(3) of the Rome Statute."<sup>40</sup> The Applicant submitted that it was important that the extent of powers of the Registrar were reviewed because in this case the Registrar had purported to make a determination about the validity of the Declaration based purely on his consultations with the Egyptian authorities (which were not disclosed) despite the fact that the Applicant questioned this course of action, and without consulting the Applicant in the same way.<sup>41</sup>

27. The Chamber directly addressed the Applicant's request in respect of the Registrar's actions and found that

*"The role of the Registrar in relation to declarations lodged under article 12(3) of the Statute is merely administrative. This is clear from the language of rule 44(2) of the Rules which mandates the Registrar to receive declarations lodged under article 12(3) of the Statute and to inform the relevant 'State' lodging it of the 'consequence' of accepting the jurisdiction of the Court. Beyond that, the Registrar has no power to make a legal or judicial ruling upon receipt of any declaration."*<sup>42</sup>

28. Even though the Chamber relied on this finding to refuse to accept jurisdiction of the matter<sup>43</sup>, the finding itself confirms the correctness of the substantive submissions of the Applicant about the limits of the Registrar's powers in this case and all future cases. As confirmed by the Chamber, the Registrar's 'decision' about the validity of the Declaration was taken outside of the scope of the Registrar's powers and is thus of no force and effect. Here again, the Chamber found that the Applicant had no

<sup>40</sup> ICC-RoC46(3)-01/14-2, Public Annex A, paras. 35, 41.

<sup>41</sup> ICC-RoC46(3)-01/14-2, Public Annex A, para.

<sup>42</sup> Decision of 12 September 2014, para. 10.

<sup>43</sup> Decision of 12 September 2014, para. 10.

standing for the substantive matter of the Registrar's powers to be further considered on the basis that no such powers existed, without in any way curtailing the Applicant's standing to seek to appeal against this finding (which the Applicant does not seek to do given that the substantive ruling confirms the Applicant's argument that the Registrar should not have made any findings about the Declaration).

29. For all of these reasons, the Applicant submits that it does have standing to bring this application for leave to appeal on the grounds set out herein.

*ii. Reasons for granting leave to appeal*

30. The Applicant submits that the decision of the Pre-Trial Chamber contained errors of law and procedure by failing to consider and address at all the Applicant's argument that the Court possesses the inherent and implied judicial powers to review the decision of the Prosecutor in the specific circumstances of the present case, for all of the reasons set out above.

31. In addition, as noted above, the Applicant submits that the decision contained errors of law and procedure by failing to address the core point of the Applicant's argument concerning the interpretation and application of Article 53. The Chamber's decision did not address whether the Declaration in the present case should be equated to being a State referral from a democratically elected Government at the time which has consented to the Court's jurisdiction, and should thus be capable of coming within the express or implied terms of Article 53.

32. In respect of both of these issues, the Applicant submits that the Pre-Trial Chamber failed to address the Applicant's submissions and to give any reasoned decision on them. These errors significantly affect the fair and expeditious conduct of the proceedings in that the Applicant's main arguments in support of the Request for Review have not been addressed and ruled on thereby making it impossible for the relief sought by the Applicant to be considered in a fair, effective and open manner without any delay. If the Chamber had considered the Applicant's arguments and found that it did have the power to review the Prosecutor's decision, it may have resulted in the Prosecutor having to reconsider her decision not to investigate the

crimes allegedly committed in Egypt. Most importantly, the errors affect the fairness of the proceedings in that they prevent the victims of alleged crimes in Egypt from seeking justice before the ICC through all procedural means in circumstances in which the national authorities have taken no steps to investigate these crimes, and are in fact alleged to be the perpetrators.

33. As set out above, the provisions of Article 82(1)(d) are applicable in relation to the initial phases of any case including the investigation, and if it is shown that an appeal would “remove doubts about the correctness of a decision” this would satisfy the requirement that “an immediate resolution by the Appeals Chamber may materially advance the proceedings”. In the present case, the immediate resolution of the issues by the Appeals Chamber would certainly permit the correctness of decision to be determined and thus advance the proceedings so that the parties, and in particular the victims, clearly know what are the powers of the Chamber to review the Prosecutor’s conduct in the present case. An appeal would ensure that the main arguments of the Applicant are indeed considered and ruled on and not left completely unaddressed. Appellate proceedings would serve the purpose of Article 82(1)(d) to safeguard the integrity of the Court’s proceedings.

34. Accordingly, the Applicant submits that the requirements of Article 82(1)(d) have been satisfied and the Pre-Trial Chamber is requested to grant leave to appeal so that the Appeals Chamber may consider the key issue of the Chamber’s powers of review.

### **Conclusion**

35. For all of the reasons set out above, the Applicant respectfully requests the Chamber to reconsider its decision to dismiss the Request for Review for lack of jurisdiction and, having heard from the Prosecution, to find, based on its inherent powers, that it does have the authority to review the Prosecutor’s decision in the present case. The parties should then be given an opportunity to file submissions before the Chamber on the grounds of review so that the Chamber can consider and determine the merits of these grounds.

36. In the alternative, if the Chamber refuses to reconsider its decision on the basis that it did not consider the key argument relied on by the Applicant in the Request for

Review, the Chamber is respectfully requested to grant leave for the issues of the Court's jurisdiction and the scope of the inherent powers of the Court in respect of these very important matters to be considered by the Appeals Chamber.

Submitted on behalf of the Applicant by Counsel,

A handwritten signature in black ink, appearing to be 'R. Dugard', with a long horizontal line extending to the right.

**Lord Ken Macdonald QC**

**Prof. John Dugard SC**

**Rodney Dixon QC**

**Tayab Ali**

London, United Kingdom

18 September 2014