

Public

ANNEX A



Original: **English**

Date: **23 May 2014**

THE PRESIDENCY

and

THE PRESIDENT OF THE PRE-TRIAL DIVISION

Before: Judge Sang-Hyun Song, President
 Judge Sanji Mmasenono Monageng, First Vice-President
 Judge Cuno Tarfusser, Second Vice-President
 Judge Hans-Peter Kaul, President of the Pre-Trial Division

SITUATION IN THE ARAB REPUBLIC OF EGYPT

Public Document with Confidential Annexes 1 and 2 (available to all parties)

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, Michael Mansfield QC, Stephen Kamlish QC, 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

Introduction

1. President Mohammed Morsi and the Freedom and Justice Party of Egypt (FJP), the Applicant, files this Application to request that a Pre-Trial Chamber is constituted in order to review both the Prosecutor's and the Registrar's decisions not to open a preliminary examination of international crimes committed in Egypt, in accordance with the Statute, Rules, Regulations and the Prosecutor's own policy on preliminary examinations.¹
2. This Application is filed before the Presidency pursuant to Regulation 46(2), and in addition or alternatively, submitted to the President of the Pre-Trial Division pursuant to Regulation 46(3).
3. The Applicant requests that a Pre-Trial Chamber is assigned in order to determine its powers of review under the Statute and in accordance with its inherent judicial powers, and to review the Prosecutor's and the Registrar's decisions on the merits, having heard full submissions from the parties on all of these matters. The Applicant relies on the following grounds of review:
 - The Prosecutor's decision to refuse to open a preliminary examination is wrong as a matter of international law in that it incorrectly failed to rely on a Declaration under Article 12(3) of the Statute that had been submitted on behalf of the Applicant as a proper jurisdictional basis to proceed with an investigation of the alleged crimes committed in Egypt;
 - The Prosecutor failed properly to apply her own stated policy on preliminary examinations by refusing to open a preliminary examination in particular in order to consider whether the prerequisites for the ICC having jurisdiction pursuant to the Declaration had been established; and
 - The Prosecutor acted improperly by publicly announcing her decision not to conduct a preliminary examination while the matter was still confidentially

¹ See, 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 under Article 12(3) and Complaint regarding International Crimes Committed in Egypt,' Ref. No. 2014/3293/IOR/HvH, 25 April 2014 ("Registrar's Decision").

under consideration and before the Applicant had been informed of the Prosecutor's decision by the Prosecutor.

4. The Applicant recognises that this is the first application of its kind to request the appointment of a Chamber to review a decision of the Prosecutor not to conduct a preliminary examination. The Applicant submits that this Application should not be dismissed at the first instance by the Presidency or the President of the Pre-Trial Division, but should at least be assigned to a Pre-Trial Chamber to determine the powers of the Chamber to review the Prosecutor's discretionary decision not to open a preliminary examination upon receiving a Declaration filed under Article 12(3) of the Statute, having heard from the Applicant, the Prosecutor and the Registrar.
5. Given the importance of this matter, not only to the present case, but also to genuine cases in the future in which declarations will inevitably have to be assessed, the Applicant urges the Prosecutor to consent to participating in these review proceedings of her decision. This would guarantee transparency of the Prosecutor's decisions and provide an additional level of scrutiny - by the ICC's Judges - of such decisions in the interests of justice, particularly to ensure that the interests of victims could be considered by the Judges. The Prosecutor would of course be able to respond in full both to the jurisdictional matters raised by this Application and to all of the grounds of review on their merits once the matter was assigned to a Chamber.
6. The Applicant submits that it would be contrary to the rule of law that underpins the ICC's jurisdiction if it were not possible for there to be a procedure for the judicial review of the Prosecutor's decision in the present case that could guarantee an open and fair consideration of the merits and a remedy under the law if appropriate.

Legal basis of the Application and request to assign a Pre-Trial Chamber

7. On 13 December 2013, President Morsi and the Freedom and Justice Party filed a Complaint with the Prosecutor based on an Article 12(3) Declaration signed on behalf of President Morsi on 10 August 2013 at a time very shortly after the military coup in Egypt. The Article 12(3) Declaration requested the ICC to exercise its jurisdiction over all crimes committed in Egypt following the military coup on 3 July 2013 which

resulted in the arrest of Egypt's first democratically elected President and the suspension of the Egyptian Constitution.

8. The Complaint set out in detail the legal arguments as to why the Declaration should be accepted by the Prosecutor as being valid and binding on the State of Egypt.² The Applicant submitted that the military regime that ousted President Morsi and his Government had allegedly committed crimes against humanity in that it had systematically, and on a large-scale, violated the rights of those opposed to the unlawful military coup, and had sought to crush any popular dissent. The Applicant has attached hereto as Confidential Annex 1 the main submissions filed in support of the Complaint.³
9. The Declaration and Complaint were accompanied by an extensive body of evidence of very serious international crimes that were committed against civilians in Egypt; including mass killings, unlawful disappearances, widespread detention, torture and mistreatment.⁴ In addition, further evidence was submitted to the Prosecution on 18 March 2013, including expert evidence on the command and control structure of the Egyptian military regime, and further direct evidence of torture and inhumane treatment.⁵ It was also accompanied by an expert legal opinion from an imminent international law academic, Prof. Vaughan Lowe QC, which addressed the legal effect of the Declaration as a matter of international law.⁶ This expert opinion is attached hereto as Confidential Annex 2.
10. On 25 April 2013, the Applicant was notified of the Prosecutor's decision on the Article 12(3) Declaration and the Complaint (which was dated 23 April 2013). The Prosecutor refused to open a preliminary examination on the basis of the Article 12(3) Declaration on the grounds that President Morsi and his democratically elected Government "lack *locus standi* to seize the Court's jurisdiction."⁷ The Prosecutor explained that the Article 12(3) Declaration "submitted to the Registrar on 13

² Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt, 13 December 2013, paras. 26-67 (hereinafter "Declaration and Complaint of 13 December 2013").

³ Filed confidentially given the severe security risks faced by the witnesses who are named.

⁴ Declaration and Complaint of 13 December 2013, paras. 68-131.

⁵ Letter from Counsel of the Applicant to the Office of the Prosecutor, Ref No. TAL/C014156.001, 18 March 2014.

⁶ Legal Opinion on the Article 12(3) Declaration in the Egypt Situation, Prof. Vaughan Lowe QC, 18 March 2013.

⁷ Prosecutor's Decision, p. 3.

December 2013, was not submitted by any person – again, as a matter of international law – with the requisite authority or bearing ‘full powers’ to represent the State of Egypt for the purpose of expressing the consent of that State to the exercise of jurisdiction by the Court.”⁸

11. On the same day, the Registrar issued a decision on the Declaration and the Complaint stating that the “communication cannot be treated as a declaration pursuant to Article 12(3) of the Rome Statute.”⁹ The Registrar’s decision stated that “[u]pon receiving your communication, and as per the established internal procedure, the Registry consulted with the Egyptian authorities on whether or not such communication was transmitted on behalf of the State of Egypt, as a result of which, we did not receive a positive confirmation.”¹⁰

12. The relevant provisions of the Statute, Rules and Regulations that arise from the Prosecutor’s decision are the following. Article 53 of the Statute provides that:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

⁸ Prosecutor’s Decision, p. 3.

⁹ Registrar’s Decision, p. 1.

¹⁰ Registrar’s Decision, p. 1.

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3.

(a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. *The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.*

13. Regulation 46 of the Regulations of the Court states that:

1. *The Presidency shall constitute permanent Pre-Trial Chambers with fixed compositions.*
2. *The Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with regulation 45¹¹. The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice.*
3. *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.*

¹¹ Regulation 45 provides that “The Prosecutor shall inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under article 14 or by the Security Council under article 13, subparagraph (b); and shall provide the Presidency with any other information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber, including, in particular, the intention of the Prosecutor to submit a request under article 15, paragraph 3.”

14. As set out in the Complaint, the Applicant submits that for the purposes of the judicial review, the Declaration should be equated to being a State referral from a democratically elected Government which has consented to the Court's jurisdiction.¹² Article 53(3)(a) of the Statute is thus the appropriate provision under which to review the Prosecutor's decision. The Applicant is requesting the Pre-Trial Chamber (to be assigned) to review the Prosecutor's decision not to proceed on the grounds that the Declaration on behalf of the State of Egypt has provided a legitimate basis for the case to be referred to the ICC, but which has now been wrongly refused by the Prosecutor. The Applicant submits that it is for the Pre-Trial Chamber to review this decision and to decide whether to direct the Prosecutor to reconsider her decision.
15. 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. It would therefore be for the Pre-Trial Chamber to determine both whether it had the power under the Statute to conduct this review and if so to undertake the review on the merits of the case. In the Applicant's submission it would be premature for the Presidency or the President of Pre-Trial Division to decide the scope of the Pre-Trial Chamber's powers at this stage. This is a matter of jurisdiction which should be assigned to the Pre-Trial Chamber, once constituted, to decide having heard from the parties.
16. The Pre-Trial Chamber would have to determine the applicability of Article 53. Even if Article 53 was inapplicable, this Application should be assigned to a Pre-Trial Chamber to consider whether the Chamber should address the merits of the review application under the inherent powers of the Court to oversee the conduct and function of the organs of the Court, including the Prosecutor, in accordance with the provisions of the Statute and the policies of the Prosecutor, and in the interests of justice. The Applicant submits that this is a decision properly to be assigned to a Pre-Trial Chamber to make, which can hear the full submissions of all parties on the subject and make a determination about the legal basis of this Application and, depending on this decision, the merits of the grounds of review.
17. The Applicant makes these submissions mindful of the very serious consequences of the exercise of the Prosecutor's discretionary powers to accept and reject situations for

¹² Declaration and Complaint of 13 December 2013, paras. 20-25.

investigation and prosecution. While the Prosecutor enjoys a wide discretion, these powers should not be capable of being exercised without any judicial limits. In the present case the Prosecutor has acknowledged that the Applicant's Complaint and Declaration are not frivolous. The OTP has accepted that the alleged crimes are very serious as the assembled evidence reveals. The decision not to investigate these wide-ranging allegations should be subject to judicial review to guarantee that the Prosecutor is not left as the sole arbitrator of whether the case should be seized by the ICC. If the Prosecution has made a decision about the binding effect of a Declaration which could be wrong in law, the interests of justice require that there must be a procedure before the ICC to review this decision and to guarantee adherence to the law. International courts have relied on and entrenched their inherent powers to determine all matters relevant to their jurisdiction and judicial functions:

- 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. These powers were recognised by the International Court of Justice (ICJ) in the *Nuclear Tests case*, which held that the ICJ:

*“possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purpose indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.”*¹³

- In *Tadić*, the ICTY recognised that it has “an ‘incidental’ or ‘inherent’ jurisdiction which drives automatically from the exercise of the judicial function.”¹⁴ The Appeals Chamber held that:

“In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of

¹³ Nuclear Tests case, New Zealand v. France, Judgment, 20 December 1974, para. 23.

¹⁴ Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 14. See also, Prosecutor v. Erdemović, Judgment, Appeals Chamber, 7 October 1997, para. 16; Prosecutor v. Delalić et al, Decision on Motion to Preserve and Provide Evidence, Separate Opinion of Judge Hunt, Appeals Chamber, 22 April 1999, para. 3

*jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its 'judicial character', as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.*¹⁵

- In a separate opinion it is stated that “where an objection is raised as regards its own powers, the Tribunal cannot refuse to hear such request ... [w]hat it has to decide it must decide, even if it is against its own interests, it must do so fearlessly.”¹⁶

These are arguments which should properly be developed and considered before the Pre-Trial Chamber, once assigned.

18. As to the mechanism of constituting and of referral to a Pre-Trial Chamber, in accordance with Regulation 46(2), the Applicant brings this Application before the Presidency in order to request that a Pre-Trial Chamber is assigned by the Presidency to review the Prosecutor's decision. It should be taken into account that the Presidency has previously assigned a Pre-Trial Chamber before the Prosecution had decided to open an investigation.¹⁷

19. 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.”¹⁸ 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

¹⁵ Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 11.

¹⁶ Prosecutor v. Tadic, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 33-34.

¹⁷ The Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation-ICC-01-13/Pages/default.aspx).

¹⁸ Regulations of the Court, Regulation 46(3).

present case, this Regulation envisages that a Chamber can be constituted to deal with such matters.¹⁹ A Chamber should therefore be constituted under this provision.

20. It should also be taken into account that it has been held by an ICC Chamber that “[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it.”²⁰ Given that Regulation 46 permits the Presidency or the President of the Pre-Trial Division to decide to assign a Pre-Trial Chamber to deal with matters, requests and information, the Applicant has an implicit right to request that such a decision to constitute a Chamber is made.

Procedural background to the Prosecutor’s decision

21. The Applicant sets out below the procedural background to the present application so that the Presidency is informed of the main steps that have been taken to this point. It demonstrates the significance of the Complaint and the magnitude of the Applicant’s efforts to seek to initiate the investigation of the alleged crimes by the ICC. It would of course be for the Chamber, once assigned, to address these matters in detail (and all documentation and correspondence would be provided to the Chamber for its consideration) and any issues of disclosure that may arise. The background is set out here to assist the Presidency and the President of the Pre-Trial Division in its decision to constitute a Chamber.
22. On 12 November 2013, Counsel for the Applicant first met with the Registrar in order to discuss the Article 12(3) Declaration and Complaint which were to be filed. The procedure for verifying the validity of the Declaration was raised by the Registrar, who suggested that he should contact the military regime to confirm whether the Declaration was accepted. Counsel for the Applicant strongly cautioned against such

¹⁹ See, Situation in the Republic of Kenya, Decision on a Request for Leave to Appeal, ICC-01/09-38, 11 February 2011, para. 19 in which the 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*”. See also, 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 in which it was noted that “*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.*”

²⁰ Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168. OA3, para. 20.

an approach given that it would demonstrate recognition of one side, the military regime, over the democratically elected Government of President Morsi, which was at the heart of the dispute. It was explained to the Registrar that the dispute over who represented the government of Egypt was the key legal issue to be addressed when determining whether to rely on the Declaration as a basis for jurisdiction before the ICC. Furthermore, given that the members of the military regime were alleged to be the main perpetrators of the crimes to be investigated by the ICC if jurisdiction was accepted, it would be most unlikely that the military regime would do anything other than reject the Declaration. Counsel further indicated that the validity of the Declaration was a matter to be determined by the Prosecutor as part of her preliminary examination, as had occurred in the Palestine Situation, and was not a matter to be decided by the Registrar.

23. On 13 December 2013, Counsel for the Applicant met again with the Registrar in The Hague to lodge the Declaration with the Registrar in accordance with Article 12(3) and Rule 44(2), as well as the prior practice of the Court, and to provide the Complaint to the Registrar, including all evidence and supporting documents, for transmission to the Prosecution.²¹ These materials were all filed on a confidential basis. Counsel again objecting to the Registrar consulting with the military regime as a means of verifying the Declaration and, as explained in the Complaint as filed, advised the Registrar that were he to consult the military regime that he should take similar steps to consult with President Morsi in custody.

24. On 19 December 2013, Counsel sent an email to notify the Registrar that a press conference would be held on 6 January 2014 concerning the Complaint and Declaration. Counsel explained that “it is becoming increasingly difficult for us to keep the ICC issue out of the public domain. There is much speculation and many are now speaking about it. In order to ensure that information is released in a controlled and co-ordinated manner I intend to make the lodging of the complaint and circumstances around it public.” Counsel informed the Registrar that “It is very important to my client that the press conference is conducted in a responsible way and in such a manner that it will not embarrass or hinder the work of the ICC,” and invited the Registrar or a representative of the ICC to attend the press conference.²²

²¹ Declaration and Complaint of 13 December 2013.

²² Email from Counsel of the Applicant to the Registrar, 19 December 2013.

25. On 10 February 2014, Counsel for the Applicant met with members of the Jurisdiction, Complementarity and Cooperation Division of the OTP. Counsel inquired as to why a preliminary examination had not been opened by the Prosecution immediately after lodging the Declaration and Complaint on 13 December 2013. Counsel noted that the Prosecution's Policy Paper of November 2013 states that "upon receipt" of an Article 12(3) Declaration the Prosecution "will open a preliminary examination."²³ Counsel were informed that the Prosecution needed to make a determination on the jurisdictional issues pertaining to the Declaration before deciding whether to open a preliminary examination. Counsel stated that this course of action contradicted the Prosecution's stated policy that the issue of jurisdiction should be addressed as part of Phase 2 of a formal preliminary examination.²⁴ Counsel requested that the Prosecution immediately open a preliminary examination to consider all issues arising from the Declaration and the Complaint.²⁵

26. On 12 February 2014, Counsel for the Applicant sent a letter to the Office of the Prosecutor concerning the meeting which took place on 10 February 2013. Counsel noted that "It seemed from our discussions at the meeting that you may be minded to deal with this issue by dismissing the Declaration summarily on the ground that President Morsi was no longer in power when the Declaration was signed" and "strongly urge[d] [the Prosecution] to reconsider this approach and to adopt a procedure which fully takes account of all of the relevant legal arguments with an open mind."²⁶ The Letter cited the Prosecution's explanation that a determination on jurisdictional issues "would need to be made *before* any Preliminary Examination could be opened." Counsel set out that "the most logical and correct approach would be to open a Preliminary Investigation immediately and then to consider the jurisdictional matters that arise as a result of the Declaration as part of 'Phase Two' of the Preliminary Examination" as was done when the Prosecution addressed the Palestine Situation.²⁷

²³ OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

²⁴ OTP, Policy Paper on Preliminary Examinations, November 2013, para. 80.

²⁵ Meeting with the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, 10 February 2013.

²⁶ Letter from Counsel of the Applicant to the Office of the Prosecutor, 12 February 2014, para. 5.

²⁷ Letter from Counsel of the Applicant to the Office of the Prosecutor, 12 February 2014, para. 2.

27. On 18 March 2014, Counsel sent a letter to the Office of the Prosecutor attaching further evidence and an expert legal opinion from Professor Vaughan Lowe QC on the validity of the Declaration as a matter of international law (Annex 2 hereto). As noted in the letter to the Prosecution, the additional evidence highlighted the “need for proper investigation of these crimes and for those who are responsible to be held to account” as the “present Egyptian military regime has taken no concrete steps to this end.” The letter emphasised the importance of acting on the basis of the Declaration immediately to open a preliminary examination.²⁸
28. On 26 March 2014, Counsel for the Applicant met with the Prosecutor and members of the Jurisdiction, Complementarity and Cooperation Division. Counsel emphasised that the Prosecution’s Policy Paper of November 2013, and the OTP’s previous practice, clearly demonstrated that a preliminary examination had to be opened upon the lodging of an Article 12(3) Declaration to consider all issues arising, including jurisdiction. Counsel noted the continuing large-scale crimes being committed against those who opposed the military regime, including the mass death sentences imposed on 529 defendants (including minors) following a trial that lasted less than an hour, and expressed concern that if the OTP dismissed the Complaint without even opening a preliminary examination it would undermine the deterrent effect that an investigation could have on the perpetration of international crimes in Egypt.²⁹
29. In this meeting the Prosecutor made it clear that the Complaint and the Declaration were being considered by her office on a strictly confidential basis, and that she would notify the Applicant once she had reached a decision and at this point revert to Counsel for the Applicant before any further steps were taken.
30. However, on 7 April 2014, less than two weeks later, the Prosecutor made a public statement concerning the Declaration and Complaint in an interview while the matter was still being considered confidentially by her office and before she had reverted to Counsel as she had undertaken to do. The Prosecutor stated in the public interview that “a 12(3) declaration can only be made by a government exercising effective control ... and that is not the Muslim Brotherhood, I don’t think at the moment.”³⁰

²⁸ Letter from Counsel of the Applicant to the Office of the Prosecutor, Ref No. TAL/C014156.001, 18 March 2014.

²⁹ Note of meeting with Counsel of the Applicant and the Office of the Prosecutor, 26 March 2014.

³⁰ <https://www.youtube.com/watch?v=MeBM09zFT7E&app=desktop>

31. On 9 April 2014, Counsel for the Applicant sent an email to the Prosecutor expressing “concern at recent media reports which contain comments you have publically made in respect of our submissions on the Egypt situation.” Counsel submitted that the Prosecutor’s statement “suggests that you have declared your position on our submission publicly, without having informed us” and “also betrays your express assurances to us that the matter would remain confidential until further consultation with us.”³¹ Counsel submitted that:

“[I]n going public on the matter, your statement has sent a clear message to the military regime that it need not be concerned about any ICC investigation. ... It appears to us that your office has been inclined to reject the potential of such an investigation from the outset and to avoid, at any cost, indicating publicly to the present regime that it may be subject to investigation. You have steadfastly refused to open a preliminary examination while insisting on the need to keep matters confidential at this stage. Making it known in your public statement that the declaration will not be recognised, when you should have explained that the matter is confidentially under consideration at the moment, serves to reassure the military regime that it need not be concerned about the ICC having any jurisdiction.”

32. On 10 April 2014, an email was received in response from the Office of the Prosecutor stating that the Prosecutor “disapproves of the tone” of Counsel’s email of 9 April 2013. The Prosecution asserted that “the media interest around this matter stems from your own decision to make the fact of your submission public. The Prosecutor then had to answer media queries. In the video excerpt that you sent, the Prosecutor did not express a final position or decision but merely explained that your submission was being examined and clarified the parameters for doing so.”³²

33. Counsel responded by stating that on any reasonable view, the Prosecutor’s public statements amounted to her making her position known on the validity of the Declaration. It was clear that the Prosecutor had decided to reject the Declaration and

³¹ Email from Legal Team of the Applicant to the Office of the Prosecutor, 9 April 2014.

³² Email from Member of the Jurisdiction, Complementarity and Cooperation Division to Legal Team of the Applicant, 10 April 2014.

the Complaint. No further explanation was received from the OTP concerning this matter.

34. On 25 April 2014, the Prosecutor issued a three page decision on the Declaration and Complaint, which was dated 23 April 2014. The Prosecution informed the Applicant that the Complaint and Declaration “lack *locus standi* to seize the Court’s jurisdiction”³³ relying on the ‘effective control’ test.
35. On 25 April 2014, Counsel also received a one page decision from the ICC Registrar stating that the Registrar “concluded that your communication cannot be treated as a declaration pursuant to Article 12(3) of the Rome Statute.”

Grounds of review

36. The Applicant has set out below the grounds of review in summary in order that the Presidency and the President of the Pre-Trial Division are informed of the grounds that would be relied on before a Chamber, once assigned. It is the Applicant’s submission that on the basis of these grounds the Chamber, having heard from the parties, should determine that the Prosecutor should be directed to reconsider her decision to refuse to open a preliminary examination.
37. In the course of reviewing the Prosecutor’s decision the Chamber should permit the Applicant to file full submissions on the grounds relied on, the supporting evidence, and the relief sought, and the Prosecution and the Registrar to file submissions and any evidence in response.

1.) The decision to refuse to open a preliminary examination is wrong under international law

38. The Prosecutor refused to open a preliminary examination on the basis that “as a matter of international law, your client neither exercised the requisite authority, nor was he in possession of ‘full powers,’ on behalf of the State of Egypt, either on the date the declaration was signed or on the date it was submitted to the Registrar of the Court.” The Prosecution relied squarely on the ‘effective control’ test, finding that

³³ Prosecutor’s Decision, p. 3.

“the entity which is in fact in control of a State’s territory, enjoys the habitual obedience of the bulk of the population, and has a reasonable expectancy of permanence, is recognized as the government of that State under international law”. The expert opinion of Prof. Lowe that the Morsi Government retained the power to make a valid and binding Declaration under Article 12(3) was summarily rejected on the basis that it was “incompatible” with this test, which the Prosecution incorrectly claimed was the test accepted by the Applicant as being applicable.

39. The Applicant specifically disputed that the ‘effective control’ test could be relied on to determine the validity of the Declaration. Prof Lowe’s expert opinion explained that ‘effective control’ was not determinative of whether the Declaration bestowed jurisdiction on the ICC as a matter of international law. The Prosecutor failed to address the legal arguments and authorities advanced by Prof. Lowe. Her decision does not give any reasons for rejecting the expert opinion. The Prosecution claims that it conducted a “thorough legal and factual analysis of the information available”, however, the decision shows the contrary. At no stage does the Prosecution deal with the substance of the legal arguments and authorities relied on by the Applicant.
40. It is imperative that the Chamber should review the legality of the Prosecutor’s decision and whether it is consistent with the applicable principles and rules of international law. As matters stand, no investigation of the international crimes committed in Egypt is being conducted solely on account of this decision. The Applicant and the victims on whose behalf it has submitted the Compliant would otherwise be left with no remedy at all. The ICC should not permit decisions which may be wrong in law to remain unchallenged.
41. In addition, the Applicant submits that the decision made by the Registrar to reject the Declaration must be reviewed. This is because the Registrar has no authority to make such a determination. The Applicant noted in its Compliant that in accordance with Article 12(3) and Rule 44(2), and the practice of the Court, the Registrar has no competency or authority to investigate the validity of a Declaration or make any decision in this regard. Even if the validity of the Declaration is in issue, the Registrar must only “acknowledge receipt” of the declaration pursuant to Rule 44(2) and convey to the State involved that the “Registrar’s acknowledgment of receipt and

provision of this information was without prejudice to the applicability of article 12(3).”³⁴

42. This is the procedure that the Registrar followed in the case of the Article 12(3) Declaration on behalf of Palestine. It was noted that the validity or applicability of an Article 12(3) declaration is not for the Registrar to decide but a “judicial” determination which must in the first instance be considered and decided by the Prosecution during its Preliminary Examination.³⁵ And yet, in the present case the Registrar did venture to make a determination about the validity of the Declaration. The Registrar based this finding *solely* on consultations with the military regime, despite the Applicant’s objections to this course of action, as outlined above, and without consulting the Morsi Government.

43. The powers of the Registrar to deal with declarations once submitted is clearly an important matter which should be reviewed by the Chamber in this case, but also for future cases in which declarations are filed.

2.) The Prosecutor contravened her own policy by refusing to open a preliminary examination to consider all jurisdictional matters

44. The Office of the Prosecutor’s “Policy Paper on Preliminary Examinations” of November 2013 states that:

- “Upon receipt of a referral or a declaration pursuant to article 12(3), the Office will open a preliminary examination of the situation at hand.”³⁶
- “Phase 2, which represents the formal commencement of a preliminary examination of a given situation, focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 2-analysis is conducted in respect of all article 15 communications that were not rejected in Phase 1, as well as of

³⁴ ICC Website, Declarations Art. 12(3) (http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/pages/declarations.aspx).

³⁵ ICC Website, Declarations Art. 12(3) (http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/pages/declarations.aspx).

³⁶ OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

information arising from referrals by a State Party or the Security Council, declarations lodged pursuant to article 12(3), open source information, and testimony received at the seat of the Court.”³⁷

45. The Complaint highlighted the Prosecutor’s policy that “pursuant to the lodging of a declaration under Article 12(3) it will conduct a thorough factual and legal assessment of the Court’s jurisdiction over the alleged crimes committed in the State as part of its Preliminary Examination.”³⁸ The Applicant emphasised that this policy was followed in the Prosecutor’s assessment of previous Complaints including the Article 12(3) Declaration from Palestine:

*“The determination as to the validity or applicability of an Article 12(3) declaration is a ‘judicial’ one, which must in the first instance be considered and decided by the Prosecution during its Preliminary Examination. As set out in the Prosecution’s policies on Preliminary Examinations, the determination of the applicability of a declaration is made during the Preliminary Examination when the Prosecution has to consider whether the requisite jurisdiction to initiate an investigation exists.” ... and ... “In the case of the Article 12(3) declaration submitted by the Palestinian National Authorities (PNA), the Prosecution stated that its Office would examine ‘whether the declaration meets statutory requirements.’ The Prosecution explained that ‘a fair process required that the PNA as well as other interested parties had the opportunity to be heard’ in order to ‘ensur[e] due process to all parties involved.’ In that case, the Prosecution allowed representatives of the PNA to present ‘oral and written arguments.’”*³⁹

46. The Prosecutor steadfastly refused to open a preliminary examination in accordance with her own policy and instead maintained that the policy should be read to permit her to decide on the validity of the Declaration outside of any preliminary examination. It was even stated by the OTP at one point that the policy may need to be amended.⁴⁰

47. The Chamber should review whether the Prosecution properly applied its own policy in the present case and in order to guarantee the consistent implementation of this policy in all cases.

³⁷ OTP, Policy Paper on Preliminary Examinations, November 2013, para. 80.

³⁸ Declaration and Complaint of 13 December 2013, para. 14 citing OTP, Policy Paper on Preliminary Examinations, November 2013, para. 81.

³⁹ Declaration and Complaint of 13 December 2013, paras. 38-40.

⁴⁰ Note of meeting with Counsel of the Applicant and the Jurisdiction, Complementarity and Cooperation Division, 10 February 2013; Note of meeting with Counsel of the Applicant and the Office of the Prosecutor, 26 March 2014.

3.) *The Prosecutor acted improperly by publicly announcing her decision not to recognise the Declaration while the Complaint was still confidentially under consideration*

48. As noted above, on 7 April 2014 the Prosecutor made her position public in an interview while the Complaint was still confidentially under consideration. She stated that “a 12(3) declaration can only be made by a government exercising effective control ... and that is not the Muslim Brotherhood, I don’t think at the moment.”⁴¹ The Applicant learnt of the Prosecutor’s position for the first time in this way in the media. The Prosecutor had specifically undertaken to treat the matter confidentially until she reverted to Counsel for the Applicant. The Applicant submits that this misconduct must be reviewed by the Chamber and taken into consideration when determining whether the Prosecutor should be directed to reconsider her decision.

49. The ICC’s case law has emphasised that the Prosecution has a duty to remain impartial during all stages of the proceedings.⁴² The Prosecutor’s code of conduct requires her to abide by strict standards of confidentiality.⁴³ Prosecutors in national jurisdictions would certainly be in breach of their duties if they made public statements about their decisions when cases were still under confidential consideration and *sub-judice*.

50. In the present case, the Prosecutor sought to excuse her conduct by asserting that the Prosecutor “merely explained that your submission was being examined and clarified the parameters for doing so.”⁴⁴ On the plain language of her statement to the media there can be no doubt that the Prosecutor did make her position on the outcome of the case known in the public statement.

51. The Prosecutor has sought to diminish the seriousness of the situation by claiming that “the media interest around this matter stems from your own decision to make the fact of your submission public.”⁴⁵ The Applicant cannot be blamed for making public the fact that a Complaint had been filed (which, as explained above, had been discussed

⁴¹ <https://www.youtube.com/watch?v=MeBM09zFT7E&app=desktop>

⁴² Prosecutor v. Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-51, 1 February 2011; Prosecutor v. Muthaura et al., Decision on the Defence ‘Application for Order to the Prosecutor regarding extra-judicial comments to the Press,’ ICC-01/09-02/11-83, 5 May 2011.

⁴³ See, Code of Conduct for the Office of the Prosecutor, 5 September 2013, Chapter 2, Sections 7, 8.

⁴⁴ Email from Member of the Jurisdiction, Complementarity and Cooperation Division to Legal Team of the Applicant, 10 April 2014.

⁴⁵ Email from Member of the Jurisdiction, Complementarity and Cooperation Division to Legal Team of the Applicant, 10 April 2014.

with the Registrar before any announcement was made). This certainly provides no justification for the Prosecutor to make her position on the Complaint public while the matter was still being considered confidentially by her office, especially when the Prosecutor had herself emphasised at a meeting with Counsel only a few days before that the matter should and would remain confidential until she communicated further with the Applicant's Counsel.⁴⁶

52. As the Applicant noted in response to the Prosecutor's statement to the media, "[t]he proper response when asked about our submission would have been to say that it is being considered as part of your preliminary examination and not to have pre-judged the issue by stating that the declaration cannot be recognised."⁴⁷

53. The Applicant will ask the Chamber, once constituted, to review the manner in which the Prosecutor dealt with the Complaint. Such a review will serve to ensure that the proper procedures are followed in accordance with the OTP's duties when considering this and any future Complaints.

Relief sought

54. For the reasons set out above, the Applicant respectfully requests the Presidency or the President of the Pre-Trial Division to assign a Pre-Trial Chamber (i) to hear full submissions from the parties on the power of the Chamber to review the Prosecutor's and the Registrar's decisions to refuse to open a preliminary examination and on the merits of the review application, and (ii) to determine these matters in accordance with the applicable provisions of the Statute, Rules and Regulations, and the inherent powers of the Court.

⁴⁶ Note of meeting with Counsel of the Applicant and the Office of the Prosecutor, 26 March 2014.

⁴⁷ Email from Legal Team of the Applicant to the Office of the Prosecutor, 9 April 2014.

Submitted on behalf of the Applicant by Counsel,

A handwritten signature in black ink, appearing to be 'Tayab Ali', with a long horizontal stroke extending to the right.

Lord Ken MacDonald QC

Prof. John Dugard SC

Michael Mansfield QC

Stephen Kamlish QC

Rodney Dixon QC

Tayab Ali

London, United Kingdom

23 May 2014