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The determination of the Office of the Prosecutor on the communication received in relation to Egypt

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Following recent media reports and enquiries from the public, the Office of the Prosecutor of the International Criminal Court provides the following clarifying information on its determination regarding a communication received in relation to the situation in Egypt.

On 13 December 2013, lawyers acting on behalf of, among others, the Freedom and Justice Party (“the applicants”), submitted to the Registrar of the ICC (“ICC” or the “Court”) documents seeking to accept the exercise of jurisdiction by the ICC pursuant to article 12(3) of the Rome Statute (“Statute”) with respect to alleged crimes committed on the territory of the State of Egypt from 1 June 2013. The Registrar subsequently transmitted these documents to the Office of the Prosecutor. The Office also received additional information from and held meetings with the applicants’ lawyers.

After a rigorous factual and legal analysis of the communication and additional information received from the applicants, the Office of the Prosecutor determined that the purported declaration submitted to the Registrar on 13 December 2013, was not submitted, as a matter of international law, by any person 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. In short, the applicants lacked locus standi to seize the Court’s jurisdiction pursuant to article 12(3) of the Rome Statute.

Therefore, the Office determined that the documents submitted should rather be treated as a communication pursuant to article 15 of the Rome Statute. However, as the allegations contained in the communication fell outside of the territorial and personal jurisdiction of the Court, the Office additionally determined that it cannot proceed any further with the complaint of the applicants or to examine the alleged crimes committed in the country.

This assessment by the Office of the Prosecutor should in no way be construed as a determination on the nature of any alleged crimes committed in Egypt or on the merits of any evidence presented.

The Office of the Prosecutor acts strictly and, at all times, in accordance with the legal framework of the Rome Statute, the Court’s founding treaty. Politics and political considerations have no place and play

no part in the decisions taken by the Office and in the execution of its independent and impartial mandate.

Further analysis leading to the Office's determination is provided below.

1. Under the Rome Statute, only the United Nations Security Council (article 13(b)) or a State (article 12) can provide jurisdiction to the Court. Under article 12 of the Statute, States can confer jurisdiction to the Court by becoming a Party to the Statute (article 12(1)) or by lodging an ad hoc declaration accepting the Court's jurisdiction (article 12(3)). As the Office has previously indicated, the Statute provides no authority for it to adopt a method to define the term "State" under article 12(3), which would be at variance with that established for the purpose of article 12(1).

2. The submitted documents dated 10 August 2013, purported to be signed on behalf of the Government of Egypt. After careful consideration of all the facts, the Office concluded that as a matter of international law, the applicants neither exercised the requisite authority, nor were they in possession of "full powers,"^[1] 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.

3. The UN Protocol List indicates that a new Head of State (Mr Adly Mansour), Head of Government (Mr Hazem El Beblawi) and Minister of Foreign Affairs (Mr Nabil Fahmy) were appointed in July 2013.^[2] Furthermore, on 5 December 2013, the UN General Assembly accepted without a vote, the credentials of the Egyptian delegation,^[3] led by current Foreign Minister, Mr Nabil Fahmy. This is a clear indication that none of the UN Member States considered representatives of Dr Mohamed Morsi to be the representatives of the State of Egypt at the UN in lieu of the delegation whose credentials were recognized. Because the UN Secretary-General acts as depositary of the Statute, this also means that, from July 2013 onwards, Dr Morsi would not have been able to deposit an instrument of accession to the Statute on behalf of the State of Egypt, had he sought to do so. Although, the lawyers for the applicants argued that the African Union's decision to suspend Egypt's participation in its activities indicates that there has been a collective refusal of recognition of the new government, which took power on 3 July 2013, the Office concluded that this does not equate to continued recognition of Dr Morsi as the Egyptian Head of State.

4. In accordance with the legal test of "effective control," 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. Application of that test, on both the date that the purported declaration was signed and the date it was submitted, lead to the conclusion that Dr Morsi was no longer the governmental authority with the legal capacity to incur new international legal obligations on behalf of the State of Egypt. The information available indicates that, at all material times, the applicants did not exercise effective control over any part of Egyptian territory, including on the date the declaration was signed. Nor would it be consistent with the "effective control" test to have one putative authority exercising effective control over the territory of a State, and the other competing authority retaining international treaty-making capacity.

5. Based on these considerations, the Office has determined that the purported declaration submitted to the Registrar on 13 December 2013, was not submitted, as a matter of international law, by any person 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. The Office's determination was shared with the Registrar who informed the applicants accordingly.

6. The communication and additional information submitted by the applicants will be maintained in the Office's archives and the decision not to proceed with further analysis may be reconsidered if new facts or evidence suggest that the allegations do not manifestly fall outside the jurisdiction of the Court.
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[1] See the Vienna Convention on the Law of Treaties (1969), articles 2.1(c) and 7.1; UN Legal Counsel, "Full Powers Guidelines," LA41TRI22 11Full Powers Guidelines1201 0.

[2] United Nations Protocol and Liaison Service, "Heads of State, Heads of Government, Ministers for Foreign Affairs," at: <http://www.un.int/protocol/documents/Hspmfm.pdf>.

[3] General Assembly Resolution 68/22, "Credentials of representatives to the sixty-eighth session of the General Assembly," 5 December 2013, U.N. Doc. A/RES/68/22.

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