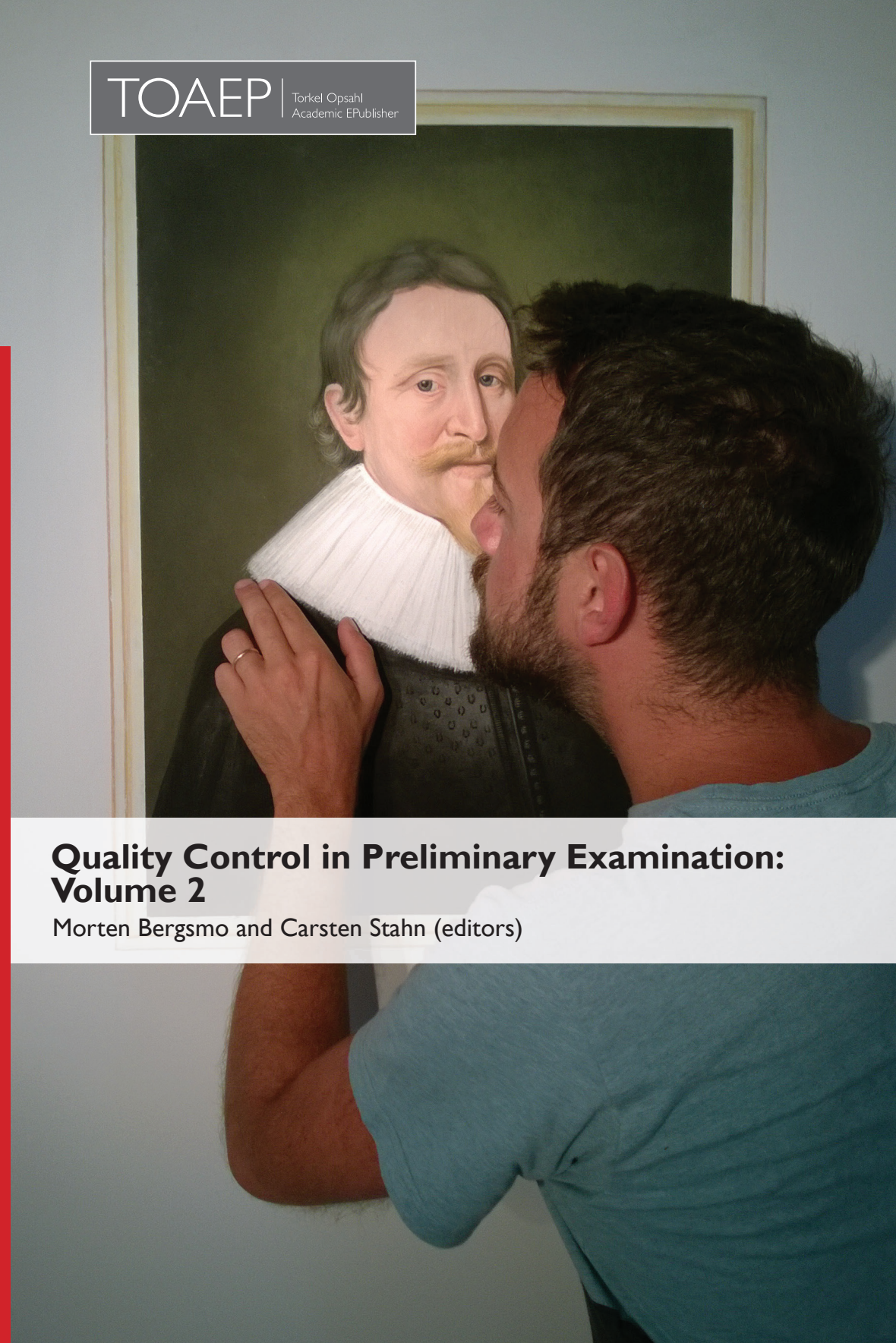


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A photograph of a man with a beard and dark hair, wearing a light blue t-shirt, looking intently at a framed portrait. The portrait depicts a man with a mustache and a large white ruff collar, wearing a dark garment. The man's hand is resting on the portrait. The background is a plain wall.

Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with ‘sampietrini’ cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

Non-States Parties and the Preliminary Examination of Article 12(3) Declarations

LING Yan*

27.1. Introduction

27.1.1. The Preliminary Examination of Situations

The duty of the Prosecutor of the International Criminal Court ('ICC') is different from that of national prosecutors and *ad hoc* tribunals. Prosecutors in national systems are responsible for investigating and prosecuting all crimes within national jurisdictions.¹ The jurisdiction of the two UN *ad hoc* tribunals (and the Residual Mechanism succeeding them) is limited to specific situations, namely, the former Yugoslavia and Rwanda. The Prosecutors there have no power to select situations other than cases to investigate. In contrast, the ICC is a permanent global criminal court facing situations and core international crimes which may be committed anywhere. Therefore, the Prosecutor of the ICC has broader powers to investigate both situations and cases.

The exercise of the ICC's jurisdiction may be triggered in three ways: (i) referral of a situation either by a State Party or (ii) by the UN Security Council, or (iii) by a decision of the Prosecutor to initiate an investigation *proprio motu*. In the last case, authorization by a Pre-Trial Chamber is required. Due to limited resources, the Prosecutor is unable to investigate and prosecute all crimes within the jurisdiction of the Court. The Prosecutor must select some situations for investigation and prosecu-

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¹ William Schabas, "'O New World': The Role of the Prosecutor of the International Criminal Court", in *Die Friedens-Warte: Blätter für internationale Verständigung und zwischenstaatliche Organisation*, 2008, vol. 83, no. 4, p. 29.

tion. Article 15 of the Rome Statute provides that the Prosecutor is vested with the primary responsibility to determine whether there are reasonable grounds for initiating an investigation. In doing so, the Office of the Prosecutor ('OTP') should analyse the seriousness of the information it has obtained from various sources to ensure that they are reliable. Rule 48 of the Rules of Procedure and Evidence further states that "in determining whether there is a reasonable basis to proceed with an investigation under Article 15, paragraph 3, the Prosecutor shall consider the factors set out in Article 53, paragraphs 1(a) to (c)", including the jurisdiction of the Court, the admissibility and the interests of justice.

In short, the preliminary examination is a stage in which the Prosecutor identifies situations that meet the requirements of the Statute before proceeding with an investigation. Although Article 15 seems only to require a preliminary examination when the Prosecutor exercises its *proprio motu* power, reading Article 15 in conjunction with Article 53 and according to the Regulations of the OTP, the Prosecutor may initiate preliminary examinations on the basis of any information on crimes, a referral from a State Party or the Security Council. Even a declaration under Article 12(3) lodged by a non-State Party accepting the jurisdiction of the Court may also lead to a preliminary examination.²

27.1.2. Declarations under Article 12(3) of the Rome Statute

As a permanent international criminal institution established by an international treaty, the ICC has a mandate to complement national jurisdictions to effectively punish those responsible for the most serious international crimes so as to put an end to the culture of impunity and "thus to contribute to the prevention of such crimes".³

The jurisdiction of the ICC rests primarily on the consent of States Parties and on the basis of the principle of territorial and personal jurisdic-

² Office of the Prosecutor ('OTP'), *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 35 (<http://www.legal-tools.org/doc/acb906/>); International Criminal Court ('ICC'), Regulations of the Office of the Prosecutor, 23 April 2009, Regulation 25, para. 1 (<http://www.legal-tools.org/doc/a97226/>).

³ Statute of the International Criminal Court, 17 July 1998, Preamble ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

tions recognized in criminal law,⁴ that is, when the “State on the territory of which the conduct in question occurred” or “the State of which the person accused of the crime is a national” is a party to the Rome Statute. A State Party *ipso facto* expresses its consent to accept the ICC’s jurisdiction with respect to the core international crimes committed on its territory or committed by its nationals. As a result, the ICC also has jurisdiction over international crimes committed by nationals of a non-State Party to the Rome Statute on the territory of a State Party⁵ (although countries like China and the United States have strongly objected to the exercise of such jurisdiction).⁶ The ICC does not have jurisdiction over the situations in which a crime has been committed on the territory of a non-State Party unless the UN Security Council refers the situation to the ICC.⁷

Nevertheless, Article 12(3) provides opportunities for non-States Parties to use the ICC to punish perpetrators of core international crimes committed on their territories “without putting the States under pressures to accede to the Statute” themselves.⁸ It provides that: “if the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question”.

The provision existed as early as in the 1994 draft Statute of the International Law Commission.⁹ There was no dispute when drafting the Statute on giving non-States Parties the opportunity to use the Court.¹⁰ In

⁴ Young Sok Kim, “The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute”, in *Journal of International Law and Practice*, 1999, vol. 8, no. 1, p. 78.

⁵ ICC Statute, Article 12(1) and (2), see *supra* note 3.

⁶ “Guangya Wang talks about the Rome Statute of the ICC”, in *Legal Daily* (《王光亚谈国际刑事法院罗马规约》, 法制日报), 29 July 1998, p. 4; David Scheffer, “How to Turn the Tide Using the Rome Statute’s Temporal Jurisdiction”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 28.

⁷ ICC Statute, Article 12(3), see *supra* note 3.

⁸ Carsten Stahn, Mohamed M. El Zeidy, and Hdctor Olasolo, “The International Criminal Court’s and *ad hoc* Jurisdiction Revisited”, in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 422.

⁹ International Law Commission, Draft Statute for an International Criminal Court with Commentaries 1994, Article 22(4) (<http://www.legal-tools.org/doc/390052/>).

¹⁰ Hans-Peter Kaul, “Preconditions to the Exercise of Jurisdiction”, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, vol. I, p. 610.

the discussions of the Bureau of Whole Committee at the Rome Conference, there was no substantive objection to this provision either. Views were positive as this provision would expand the scope of the ICC's jurisdiction.¹¹ The United States delegation also considered it a "useful and necessary provision".¹²

27.1.3. Declarations Lodged by Non-States Parties Accepting the Jurisdiction of the ICC

The Rome Statute entered into force on 1 July 2002. By the end of 2016, Uganda, Côte d'Ivoire, Palestine, Ukraine and Egypt had lodged Article 12(3) declarations.

27.1.3.1. Uganda

Uganda ratified the Rome Statute on 14 July 2002, which entered into force on 1 September 2002. Thus, Uganda was a non-State Party for a two-month period. On 16 December 2003, the President of Uganda referred the situation concerning the Uganda's LRA to the ICC.¹³ On 17 June 2004, the Prosecutor informed the President of the Court of Uganda's self-referral and the declaration of provisional acceptance of the Court's jurisdiction over the two-month period.¹⁴

27.1.3.2. Côte d'Ivoire

Côte d'Ivoire signed the Rome Statute on 3 November 1998, but it had not ratified the Statute afterwards. It lodged a declaration in 2003 accepting the jurisdiction of the Court over the crimes committed on its territory since 19 September 2002 when a military coup occurred leading to a civil war, with no end date.¹⁵ The Prosecutor did not take any immediate action

¹¹ Carsten Stahn *et al.*, 2005, p. 423, see *supra* note 8.

¹² William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 288.

¹³ ICC, Situation in Uganda, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, ICC-02/04-01/05-53, p. 9 (<http://www.legal-tools.org/doc/b1010a/>).

¹⁴ ICC, Situation in Uganda, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04-1, Annex (<http://www.legal-tools.org/doc/b904bb/>).

¹⁵ Côte d'Ivoire, *Déclaration de Reconnaissance de la Compétence de la Cour Pénale Internationale* [Declaration recognizing the Jurisdiction of the International Criminal Court], 18 April 2003 (<http://www.legal-tools.org/doc/036bd2/>).

on this declaration until 2006. He said a working group would be sent to Côte d'Ivoire when security condition allowed.¹⁶ The President of the ICC reported in 2006 to the United Nations General Assembly that five situations, including Côte d'Ivoire, had been under analysis.¹⁷ By 2010, the Prosecutor had not yet announced a conclusion after seven years of preliminary examination.

In October and November 2010, Côte d'Ivoire held a presidential election, in which two candidates, Mr. Gbagbo and Mr. Ouattara, were announced to be elected by different authorities, leading to a nationwide armed conflict. On 14 December 2010, Mr. Ouattara, who was announced President-elect by the Independent Electoral Commission, sent a letter to the President, the Registrar and the Prosecutor of the ICC respectively confirming Côte d'Ivoire's acceptance of the Court's jurisdiction.¹⁸ On 3 May 2011, when the Constitutional Council also announced his election, Mr. Ouattara sent another letter to the Prosecutor reiterating that Côte d'Ivoire had accepted the jurisdiction of the Court.¹⁹ The Prosecutor then requested a Pre-Trial Chamber to authorize an investigation into the situation in Côte d'Ivoire on 23 June 2011,²⁰ which was approved on 3 October 2011.²¹

27.1.3.3. Palestine

Between December 2008 and January 2009, Israel carried out a three-week military operation against Hamas in the Gaza Strip in response to rocket and mortar attacks launched by Hamas against Israeli civilians. The

¹⁶ Sixth Diplomatic Briefing of the International Criminal Court, Compilation of Statements, 23 March 2006, p. 7 (<http://www.legal-tools.org/doc/b65c5d/>).

¹⁷ Report of the International Criminal Court for 2005–2006, UN Doc. A/61/217, 3 August 2006, para. 32 (<http://www.legal-tools.org/doc/11ef2c/>).

¹⁸ ICC, *The Prosecutor v. Laurent Koudou Gbagbo*, Judgment on the Appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, 12 December 2012, ICC-02/11-01/11-321, para. 55 (Judgment on the Appeal) (<http://www.legal-tools.org/doc/649ff5/>).

¹⁹ *Ibid.*, para. 56.

²⁰ ICC, Situation in the Republic of Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, para. 2 (<http://www.legal-tools.org/doc/7a6c19/>).

²¹ *Ibid.*

international community has condemned the violation of the law of armed conflict by both parties of the conflict, including States, non-State entities and individuals.²² The United Nations Human Rights Council established a UN Truth Commission led by Justice Richard J. Goldstone, the former Prosecutor of the ICTY, to carry out investigations into the event.²³

Before the ‘Goldstone Report’ was released, the Minister of Justice of Palestine lodged on 22 January 2009 a declaration with the Registrar of the ICC accepting the jurisdiction of the Court over crimes committed on the territory of Palestine since 1 July 2002.²⁴ Since neither Palestine nor Israel was a party to the Rome Statute, it would only be possible for the Court to exercise jurisdiction if Palestine lodged an Article 12(3) declaration, or if the UN Security Council referred the situation to the ICC.

It took three years for the Prosecutor to decide not to consider the declaration on the ground that he had no authority to determine whether Palestine was a “State” within the meaning of Article 12(3) that could accept the *ad hoc* jurisdiction of the Court.²⁵ Even when a majority resolution of the United Nations General Assembly granted Palestine the status of an observer State to the United Nations on 29 November 2012,²⁶ the Prosecutor insisted that the change in Palestine’s status in the United Nations could not be applied retroactively and it cannot make the declaration valid because at the time when Palestine had lodged the declaration in 2009, it had no statehood.²⁷ On 31 December 2014, Mohammed Abbas, the President of the State of Palestine, lodged another Article 12(3) declaration with the Registrar of the ICC accepting the Court’s jurisdiction

²² Yaël Ronen, “ICC Jurisdiction over Acts Committed in Gaza Strip”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, p. 4.

²³ UN Fact Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights Council, UN Doc A/HRC/12/48, 25 September 2009 (<http://www.legal-tools.org/doc/ca9992/>).

²⁴ Palestine, Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009 (<http://www.legal-tools.org/doc/d9b1c6/>).

²⁵ ICC, Situation in Palestine, 3 April 2012 (<http://www.legal-tools.org/doc/f5d6d7/>).

²⁶ Status of Palestine in the United Nations, UN Doc. A/RES/67/19, December 2012 (<http://www.legal-tools.org/doc/3a1916/>).

²⁷ ICC, The State of Palestine accedes to the Rome Statute, 7 January 2015 (<http://www.legal-tools.org/doc/59dd45/>).

since 13 June 2014,²⁸ and deposited with the Secretary-General of the United Nations the instrument of accession to the Rome Statute on 2 January 2015.²⁹ Only on 16 January 2015 did the Prosecutor announce the start of a preliminary examination on Palestine.³⁰

27.1.3.4. Ukraine

Ukraine signed the Rome Statute on 20 January 2000. The Government had not ratified the Rome Statute because the Constitutional Court of Ukraine declared that the Rome Statute was incompatible with the Constitution. From the end of 2013 to early 2014, anti-government demonstration took place in the Ukrainian capital, Kiev, and a fierce conflict occurred between the demonstrators and the riot police maintaining the order as well as internal security force soldiers, causing hundreds of casualties. On 25 February 2014, the Ukrainian Parliament passed a resolution declaring, in accordance with Article 11(1) and Article 12(2) and (3) of the Rome Statute, acceptance of the Court's jurisdiction over the crimes against humanity committed by senior Ukrainian national officials against Ukrainian nationals during their peaceful demonstrations between 21 November 2013 and 22 February 2014. The declaration also named the former President, the former Attorney General and the former Minister of the Interior of Ukraine to be held criminally responsible for the crimes.³¹ On 17 April 2014, following the receipt of the declaration, the Prosecutor opened a preliminary examination of the situation with a view to ascertaining whether the criteria set out in the Rome Statute for initiating investigations had been met.³² Further, on 8 September 2015, the Government of Ukraine lodged a second declaration accepting the Court's jurisdiction

²⁸ ICC Registry, Letter from ICC Registrar to President Mahmoud Abbas, 7 February 2015, 2015/IOR/3496/HvH (<http://www.legal-tools.org/doc/3bea2d/>).

²⁹ The State of Palestine Accedes to the Rome Statute, see *supra* note 27.

³⁰ ICC, "The Prosecutor of the International Criminal Court Fatou Bensouda opens a preliminary examination of the situation in Palestine", 16 January 2015 (<http://www.legal-tools.org/doc/1dcbe5/>).

³¹ Ukraine, Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity, committed by senior officials of the state, 25 February 2014 (<http://www.legal-tools.org/doc/1a65fa/>).

³² ICC, "The Prosecutor of the International Criminal Court, Fatou Bensouda open up a preliminary investigation in Ukraine", 25 April 2014 (<http://www.legal-tools.org/doc/8d811f/>).

in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date.³³ Consequently, the Prosecutor decided to extend the temporal scope of the existing preliminary examination to include alleged crimes occurring after 20 February 2014.³⁴

27.1.3.5. Egypt

In July 2013, after some large-scale protests, the Egyptian government of the first elected president, Morsi, was overthrown by the former Egyptian military leader and current incumbent President, Abdel Fattah al Sisi. Egypt is not a party to the Rome Statute. On 13 December 2013, an Egyptian lawyer representing the Liberty and Justice Party and others submitted a document signed on 13 August 2013 to the Registrar of the Court seeking to accept jurisdiction since 1 June 2013. However, the OTP concluded that the document was not submitted by the authorities with “full power” on behalf of the State of Egypt,³⁵ and therefore treated it as a ‘communication’ rather than an Article 12(3) declaration.

27.1.4. Purposes of Article 12(3) Declarations

Article 12(3) declarations have two main purposes. First, it allows the ICC to exercise jurisdiction over a non-State Party that may want to obtain the ICC Prosecutor’s assistance in the investigation and prosecution of core international crimes in its territory. The declarations of Côte d’Ivoire and Ukraine as well as the unsuccessful declaration of Egypt fall into this type, sharing the same purpose as self-referrals by States Parties.³⁶

The Palestinian declarations of 2009 and 2014 were slightly different, intending to enable the Court to investigate and prosecute crimes committed by Israeli nationals on its territory, including the Gaza Strip,

³³ Ukraine, Declaration by Ukraine lodged under Article 12(3) of the Rome Statute, 8 September 2015 (<http://www.legal-tools.org/doc/b53005/>).

³⁴ OTP, *Report on Preliminary Examination Activities 2015*, 12 November 2015, para. 80 (<http://www.legal-tools.org/doc/ac0ed2/>).

³⁵ ICC, The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt, 8 May 2014 (<http://www.legal-tools.org/doc/2945cd/>).

³⁶ They are self-referral of situations in Uganda, Democratic Republic of Congo, the Central Africa Republic, Mali and Gabon.

although the declaration did not explicitly say so. Their purpose is similar to the referral by Comoros, a State Party.³⁷

Another purpose is to extend the Court's temporal jurisdiction over a situation. This can be seen from the Palestine's declaration of 31 December 2014. Palestine deposited a document of accession with the Secretary-General of the United Nations on 2 January 2015. Pursuant to Article 126(2), the Rome Statute will enter into force on the first day of the month 60 days after the deposit of the instrument of ratification. Accordingly, the Rome Statute began to take effect in respect of Palestine on 1 April 2015. The Palestinian declaration extends the Court's temporal jurisdiction over the alleged crimes to 13 June 2014. Meanwhile, Uganda's declaration was lodged when Uganda was already a State Party. The declaration was merely for filling the temporal gap pursuant to Article 11(2), which states that:

If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Although there were discussions among scholars about whether a non-State Party can make an Article 12(3) declaration accepting the exercise of the Court's jurisdiction retroactively,³⁸ this has been confirmed by the Court.³⁹

In addition to those purposes, however, some commentators considered that Article 12(3) is designed for the Prosecutor to promote the Court and the Rome Statute,⁴⁰ in light of the reference to "request of the Prosecutor" in Rule 44(1) of the Rules of Procedure and Evidence. This may happen where, having received information, "the Prosecutor invites or encourages a non-State Party to lodge a declaration so as to allow for a

³⁷ The situation in Registered Vessels of Comoros, Greece and Cambodia was referred by Comoros.

³⁸ Kevin Jon Heller, "Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively", in *Opinio Juris*, 29 November 2012; Alexander Wills, "The ICC's Retroactive Jurisdiction, Revisited", in *Opinio Juris*, 29 January 2013.

³⁹ Judgment on the appeal, para. 83, see *supra* note 18.

⁴⁰ Carsten Stahn *et al.*, 2005, pp. 421–431 and 423, see *supra* note 8.

possible investigation and prosecution by the Prosecutor”.⁴¹ According to one commentator, an Article 12(3) declaration is required when a situation concerning a non-State Party has been referred to the ICC or investigation has been initiated by the Prosecutor.⁴² The non-State Party may then make a declaration to accept the jurisdiction of the Court.

Nevertheless, while the original idea of Rule 44(1) may be specifically for this type of declaration, this has not happened in practice. So far, all declarations have been made on the States’ own initiative without the Prosecutor’s involvement. This type of declaration is certainly allowed by the Rome Statute. It has been well recognized that Article 12(3) is designed to extend the scope of the Statute’s application by offering non-States Parties the opportunity to accept the Court’s jurisdiction on an *ad hoc* basis when the crimes in question have been committed on its territory or by its nationals⁴³ and the situation has not been referred to or investigated by the ICC Prosecutor. To require that the Prosecutor must already have initiated an investigation with respect to a situation before a non-State Party lodged a declaration to accept the Court’s jurisdiction will restrict the scope of Article 12(3)’s application.⁴⁴ It would also be illogical if the Prosecutor could take investigative steps *proprio motu* with regard to a situation in which crimes have been committed by nationals of a non-State Party on a territory of another non-State Party before the latter has accepted the jurisdiction of the Court.⁴⁵

⁴¹ Steven Freeland, “How Open Should the Door Be? Declarations by Non-States Parties Under Article 12(3) of the Rome Statute of the International Criminal Court”, in *Nordic Journal of International Law*, 2006, vol. 75, no. 2, p. 222.

⁴² Sharon A. Williams and William A. Schabas, “Article 12 Precondition to the exercise of jurisdiction”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, 2nd edition, C.M. Beck, 2008, p. 559.

⁴³ Carsten Stahn *et al.*, 2005, p. 423, see *supra* note 8.

⁴⁴ Carsten Stahn *et al.*, 2005, p. 425, see *supra* note 8.

⁴⁵ *Ibid.*, p. 426.

27.2. Procedure Applicable to Article 12(3) Declarations in the Preliminary Examination Stage

27.2.1. Applying the Same Procedure to Article 12(3) Declarations as the Procedure Applied to the Prosecutor’s *Proprio Motu* Proceedings

Neither the Rome Statute nor the Rules of Procedure and Evidence expressly provide for the procedure following an Article 12(3) declaration. Carsten Stahn and others opine that the declaration may be treated “either as analogous to a state referral under Article 14 or as a *proprio motu* proceeding of the prosecutor under Article 15”.⁴⁶ At first glance, they seem to favour the second procedural option because in the negotiation of the Rome Statute, it was considered that non-States Parties should not be entitled to refer a situation. To treat a declaration as a self-referral will entitle the non-State Party the privilege that a State Party enjoys.⁴⁷ In their view, an Article 12(3) declaration requires neither actions to be taken by the Prosecutor, nor the judicial review by the Court.⁴⁸

The Appeals Chamber supported the above approach. It ruled in the *Gbagbo* case that as a member of the Assembly of States Parties, a State Party enjoys numerous rights including the right to refer situations,⁴⁹ while a non-State Party accepting the jurisdiction of the Court by lodging an Article 12(3) declaration is obliged to co-operate with the Court, but does not have all the rights or obligations of a State Party.⁵⁰

Further, States’ acceptance of the Court’s jurisdiction is only a precondition for the Court to exercise its jurisdiction. In this regard, an Article 12(3) declaration is said to be similar to the practice of the International Court of Justice, which allows a State to accept the jurisdiction of the Court on an *ad hoc* basis in response to the allegation made by another State.⁵¹ Therefore, an Article 12(3) declaration is only a precondition for

⁴⁶ *Ibid.*, p. 424.

⁴⁷ *Ibid.*, p. 425.

⁴⁸ *Ibid.*, p. 423.

⁴⁹ Judgment on the appeal, para. 72, see *supra* note 18.

⁵⁰ *Ibid.*, para. 74.

⁵¹ Schabas, 2010, p. 289, see *supra* note 12.

the Court to exercise jurisdiction and it neither refers a situation, nor triggers the exercise of the Court's jurisdiction.⁵²

The Pre-Trial Chamber and the Appeals Chamber have endorsed this view by ruling that an Article 12(3) declaration “could not be mistaken for a referral”.⁵³ The Court indicated a distinction between Article 12 and Articles 13–15 of the Statute. The former sets out the preconditions for the exercise of jurisdiction, while the latter specify the trigger mechanism for such exercise.⁵⁴ The Appeals Chamber acknowledged that a declaration could involve in a specific situation, but “the question of whether a ‘situation’ exists becomes relevant only once the Court considers whether it may exercise its jurisdiction under Article 13 of the Statute”.⁵⁵ Consequently, with the exception of Uganda's declaration as mentioned before, the rest of the declarations lodged by non-States Parties have been treated as *proprio motu* proceedings of the Prosecutor under Article 15.

In fact, the term “situation” appears throughout the Rome Statute and Rules of Procedure and Evidence without a definition therein. Articles 13 and 14 merely refer to a “situation in which one or more crimes appear to have been committed”. Pre-Trial Chamber I has elaborated that situations are “generally defined in terms of temporal, territorial and in some cases personal parameters”.⁵⁶ Therefore, a situation contains “broader parameters than that of a case and denotes the confines within which the Prosecutor is to determine whether there is a reasonable basis to initiate an investigation”.⁵⁷

⁵² *Ibid.*, p. 289.

⁵³ ICC, *Prosecutor v. Laurent Koudou Gbagbo*, Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, 15 August 2012, ICC-02/11-01/11-212, para. 57 (Decision on the Jurisdiction) (<http://www.legal-tools.org/doc/0d14c3/>); Judgment on the Appeal, para. 58, see *supra* note 18.

⁵⁴ Decision on the Jurisdiction, para.57, see *supra* note 53.

⁵⁵ Judgment on the Appeal, paras. 81–82, see *supra* note 18.

⁵⁶ ICC, Situation in the Democratic Republic of the Congo, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 65 (<http://www.legal-tools.org/doc/2fe2fc/>).

⁵⁷ Rod Rastan, “What Is a Case for the Purpose of the Rome Statute?”, in *Criminal Law Forum*, 2008, vol. 19 (3–4), p. 435.

Whereas the Rome Statute does not prevent a non-State Party from making an Article 12(3) declaration with a view to becoming a State Party in the future,⁵⁸ in reality, non-States Parties do so only to accept the exercise of the Court's jurisdiction over specific situations, for example, the Palestinian and the Ukrainian declarations. Having "temporal, territorial and in some cases personal parameters" contained in the Article 12(3) declarations, those non-States Parties have combined two steps: to express their consent to accept the jurisdiction of the Court and to refer their own situations to the Prosecutor.

So far, almost all situations referred by States Parties have concerned themselves.⁵⁹ This is likely because States rarely accuse foreign officials or nationals of serious international crimes.⁶⁰ By analogy, a non-State Party accepting the Court's *ad hoc* jurisdiction always with crimes committed on its territory or by its nationals in mind (not just to support the Court).

As mentioned, such a non-State Party will not "have all the rights or obligations of a State Party".⁶¹ A State Party may involve in the decision on the "budget of the Court", "management oversight to the organs of the Court", and "matters relating to non-cooperation by States". In addition, it has "the right to refer situations to the Court" and "the right to nominate candidates for the elected offices of the Court". It may also propose amendments to the Statute and the Rules of the Court and has the right to vote on the amendments.⁶²

In contrast, a non-State Party lodging an Article 12(3) declaration has none of those rights – not even the right to refer its own situation. On the other hand, the Rome Statute imposes obligations on the non-State Party to co-operate with the Court without any delay and exception in accordance with Part 9 just as a State Party. Does the phrase "without any delay and

⁵⁸ Freeland, 2006, p. 223, see *supra* note 41.

⁵⁹ Here, 'self-referral' is used to mean that a State Party refers a situation in which one or more crimes have been committed in its territory by its nationals. According to Darryl Robison, 'self-referral' is the term used "when a state party refers a situation on its own territory". See Darryl Robison, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 2, p. 357.

⁶⁰ Antonio Cassese, *International Criminal Law*, Oxford University Press, 2008, p. 396.

⁶¹ Judgment on the Appeal, para. 74, see *supra* note 18.

⁶² *Ibid.*, para. 72.

exception” mean that such a State has to co-operate even on matters unrelated to the crimes on their territories – for example, to arrest and transfer a foreign national who was found in their country? If this is the case, the rights and obligations for an accepting State appear to be unbalanced.

It is argued that it is inappropriate to treat situations arising out of Article 12(3) declarations as the Prosecutor’s preliminary examinations, because they are not the same. First, the situation was brought to the Prosecutor by a State publicly and formally, unlike information on crimes received from various undisclosed sources. In the latter case, the Prosecutor has discretion to decide whether to initiate a preliminary examination or not, as well as whether to make the situation arising out of the information public or not. In addition, Regulation 25 of the Regulations of the OTP also makes distinction between the two by listing “any information on crimes” in sub-paragraph (a) and an Article 12(3) declaration in sub-paragraph (c). To treat them with the same procedure applicable to the Prosecutor’s *proprio motu* proceedings makes such separate categorization redundant.

Second, the wording of Articles 12 and 13 makes it clear that by becoming a State Party, the State only accepts the jurisdiction of the Court (Article 12(1)), which may exercise its jurisdiction if a criminal situation is referred by a State Party (Article 13(1)). Article 12(3) states that by lodging a declaration, a non-State Party accepts “the exercise of jurisdiction by the Court” rather than accepts the jurisdiction of the Court. Consequently, an Article 12(3) declaration has two implications. The accepting State accepts the *ad hoc* jurisdiction of the Court over the situation it may refer to the Court and the Court can exercise its jurisdiction with respect to the situation arising out of the declaration.

27.2.2. Application of the Procedure to Article 12(3) Declarations and Its Consequence

27.2.2.1. The Procedure Applied to Article 12(3) Declarations

While the OTP may initiate preliminary examinations on a referral by a State Party or the Security Council, any information on crimes or an Article 12(3) declaration, they are treated in two different ways. Regulation 45 of the Regulations of the Court requires the Prosecutor to “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, sub-paragraph (b)”. In contrast, this is not required for any information on

crimes and an Article 12(3) declaration. The Registrar need not inform the Presidency of the declaration either, but shall merely inform the accepting State of the declaration's consequence.⁶³ Accordingly, whereas the Presidency shall assign a situation referred by a State Party or the Security Council to a Pre-Trial Chamber, which shall be responsible for any matters arising out of it, the Presidency can do nothing for an Article 12(3) declaration and must leave all matters arising from it to the Prosecutor.

Further, whereas the Prosecutor can directly investigate a situation referred by a State Party or the Security Council after preliminary examination, for an Article 12(3) declaration, he or she shall request the Pre-Trial Chamber's authorization if there is a reasonable basis to proceed with an investigation. It is only then and for that purpose that the Prosecutor will inform the Presidency of the situation concerned with the declaration.

27.2.2.2. Lack of Judicial Oversight as a Consequence of the Application

Due to the different procedures, while the Pre-Trial Chambers take charge of situations referred by States Parties,⁶⁴ there is little judicial oversight for preliminary examinations of the situations arising out of Article 12(3) declarations. The Prosecutor may protract or even terminate those preliminary examinations, which may not be challenged by the lodging State.⁶⁵

⁶³ ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 44(2).

⁶⁴ ICC, Situation in the Democratic Republic of Congo, Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04-01/06-10 (<http://www.legal-tools.org/doc/65a7bb/>); Situation in Uganda, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, see *supra* note 14; ICC, Situation in the Central African Republic, Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, 20 January 2005, ICC-01/05 (<http://www.legal-tools.org/doc/5532e5/>); ICC, Situation in Mali, Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II, 19 July 2012, ICC-01/12-1 (<http://www.legal-tools.org/doc/f0774d/>); ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, 5 July 2013, ICC-01/13-1 (<http://www.legal-tools.org/doc/8e4e80/>); ICC, Situation in the Central African Republic II, Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, 18 June 2014, ICC-01/14-1 (<http://www.legal-tools.org/doc/1cfbfe/>); ICC, Situation in the Gabonese Republic, Decision assigning the Situation in the Gabonese Republic to Pre-Trial Chamber II, 4 October 2016, ICC-01/16-1, 4 October 2016 (<http://www.legal-tools.org/doc/e5c5f8/>).

⁶⁵ Freeland, 2005, p. 227, see *supra* note 41.

This can be observed from the treatment of Egypt's declaration. On 5 September 2014, Morsi and the Liberal Party requested the Court to review the Prosecutor's decision not to act upon the declaration. Pre-Trial Chamber II determined that the Prosecutor could take the initiative to deal with the information he or she had obtained and make the decision to initiate the investigation in accordance with Article 15 of the Rome Statute. The conditions for judicial review of the Prosecutor's decision vary depending on the triggering mechanism or the basis for Prosecutor's decision. The Pre-Trial Chamber may only review the decision only if its basis is solely that the investigation does not serve the interests of justice. Since the Prosecutor's refusal to open preliminary examination in Egypt was not on that basis, the Chamber could not review it.⁶⁶

For a situation referred by a State Party, the assigned Pre-Trial Chamber can consider relevant matters very quickly. The referring State may also request the Pre-Trial Chamber to reconsider the decision of the Prosecutor not to proceed with an investigation. For example, in the Gaza Freedom Flotilla situation referred by Comoros on 14 May 2013,⁶⁷ following preliminary examination, the Prosecutor publicly announced her determination that there was no reasonable basis to proceed with an investigation.⁶⁸ Comoros applied to review that decision.⁶⁹ On 16 July 2015, Pre-Trial Chamber I decided on the request.⁷⁰ This is a safeguard against

⁶⁶ ICC, 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', 22 September 2014, ICC-RoC46(3)-01/14, paras. 6–9 (<http://www.legal-tools.org/doc/7ced5a/>).

⁶⁷ ICC, Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, 14 May 2013 (<http://www.legal-tools.org/doc/93705a/>).

⁶⁸ ICC, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014 (<http://www.legal-tools.org/doc/43e636/>).

⁶⁹ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Public redacted version of application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation, 29 January 2015, ICC-01/13-3-Red (<http://www.legal-tools.org/doc/b60981/>).

⁷⁰ ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34 (<http://www.legal-tools.org/doc/2f876c/>).

the abuse of power or inappropriate exercise of power by the Prosecutor.⁷¹ The same safeguard should be provided to non-States Parties who have made declarations to accept the exercise of the jurisdiction of the Court.

27.2.2.3. Lack of Time Limits

Neither the Statute nor the Rules and Procedures of Evidence of the Court provide time limits for the Prosecutor to make a decision on preliminary examinations. The Prosecutor has also made similar statements.⁷²

Schabas considers it “an entirely reasonable position”,⁷³ because the Prosecutor needs time to evaluate the issue of complementarity that depends upon the conduct of the national justice system.⁷⁴ However, some commentators have noted that the Prosecutor has progressed with preliminary examination quickly in some situations, while “drawing out his analysis in others”,⁷⁵ which may lead to an impression that the Prosecutor does not allocate time and resources evenly among preliminary examinations. It may also make the Prosecutor’s work appear less credible.

In practice, preliminary examinations initiated *proprio motu* have generally taken a long time. The preliminary examination of the situation in Kenya that took about two years (from December 2007 to November 2009) was both fast and unique. The conclusion of the preliminary examination of the situation in Republic of Korea took three years and a half (December 2010–June 2014), Honduras five years (November 2010–October 2015), Georgia seven years (August 2008–October 2015) and Afghanistan nine years (2007–2016). The ongoing preliminary examination of the situations in Colombia, Guinea and Nigeria (opened in 2006, 2009 and 2010 respectively) have not yet been completed.

In contrast, preliminary examinations in situations referred by States Parties have been processed quickly. The shortest preliminary examination was that of the situation in the Democratic Republic of the

⁷¹ Freeland, 2005, p. 228, see *supra* note 41.

⁷² OTP, Report on preliminary examination, para. 13, see *supra* note 32.

⁷³ Williams A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2017, p. 238.

⁷⁴ *Ibid.*; “Updates from the International and Internationalized Criminal Courts”, in *Human Rights Brief*, vol. 19, no. 2, 2012, p. 49 (on the International Criminal Court).

⁷⁵ *Ibid.*

Congo, which took only two months from April to June 2004.⁷⁶ The longest one took two years and a half in the situation of the Central African Republic I from December 2004 to May 2007.⁷⁷ Even in the Gaza Flotilla situation referred by Comoros on 14 May 2013, it only took the Prosecutor about one year and a half to announce the conclusion of the preliminary examination on 6 November 2014.⁷⁸ This is partly because the Pre-Trial Chambers have overseen the situations.⁷⁹ For instance, Pre-Trial Chamber III said in the situation in Central African Republic:

[T]he preliminary examination of a situation pursuant to article 53(1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13(a) and 14 of the Statute, regardless of its complexity.

Having noted that the preliminary examinations of the situations in the Democratic Republic of the Congo and Northern Uganda were completed within two to six months, the Chamber requested the Prosecutor to provide the Chamber and the Government of the Central African Republic with a report on the status of the preliminary examination on a certain date.⁸⁰

Since situations specified in Article 12(3) declarations have been treated as Prosecutor's *proprio motu* proceedings, their preliminary examinations also took much longer. For example, after the government of Côte d'Ivoire made a declaration in 2003, it was only at the end of 2010 that the Prosecutor resumed analysing the situation. It concluded that the statutory criteria established by the Rome Statute for the opening of an investigation were met on 19 May 2011.⁸¹ Also, more than three years

⁷⁶ Situation in the Democratic Republic of Congo (available on the Court's web site).

⁷⁷ Situation in the Central African Republic (available on the Court's web site).

⁷⁸ ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met", 6 November 2014 (<http://www.legal-tools.org/doc/e745a0/>).

⁷⁹ William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2007, p. 246.

⁸⁰ ICC, Situation in the Central African Republic, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 1 December 2006, ICC-01/05-6, pp. 4–5 (<http://www.legal-tools.org/doc/76e607/>).

⁸¹ ICC, Situation in the Republic of Côte d'Ivoire, Decision Assigning the Situation in the Republic of Côte d'Ivoire to Pre-Trial Chamber II, 20 May 2011, ICC-02/11-1 (<http://www.legal-tools.org/doc/aa6613/>).

(from January 2009 to April 2012) had passed after the Palestinian authority made a declaration accepting the Court's jurisdiction before the Prosecutor decided that he could not determine whether Palestine had the right to lodge such a declaration.

27.3. Determination of the Validity of Article 12(3) Declarations

In preliminary examinations, according to Article 53 of the Rome Statute, the Prosecutor shall consider whether a crime within the jurisdiction of the Court has been or is being committed, the admissibility, gravity and the interests of justice. The Statute, Rules and jurisprudence of the Court have never envisaged that the Prosecutor shall determine whether a declaration is valid or not in the first place.

Nevertheless, the Prosecutor has examined the validity of the declarations made by Palestine and Egypt. In contrast, some scholars have questioned the validity of the Ukraine's declaration, which was neglected by the Prosecutor.

27.3.1. Authority to Determine Whether Palestine is Qualified as a State Capable to Make a Declaration

After receiving the declaration lodged by the Palestinian authority, the Prosecutor identified that the first step in the determination of jurisdiction was to ascertain whether the declaration meets statutory requirements,⁸² namely the preconditions to the exercise of jurisdiction under Article 12. In other words, although the determination of jurisdiction involves analysing whether the situation fulfils the “temporal requirements; meets territorial or personal jurisdiction, and falls within the subject-matter jurisdiction of the Court”,⁸³ the Prosecutor added one more step.⁸⁴ Between 2009 and 2012, the Prosecutor focused on the issue of whether Palestine was a “State” and thus entitled to make an Article 12(3) declaration at all. The Prosecutor endeavoured to collect opinions and views “from the Palestinian National Authority, the Israeli authorities, as well as from a variety of

⁸² ICC, Situation in Palestine, Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements, 3 May 2010, para.2 (Summary of Submissions) (<http://www.legal-tools.org/doc/af5abf/>).

⁸³ OTP, *Draft Policy Paper on Preliminary Examinations*, 4 October 2010, para. 46 (<http://www.legal-tools.org/doc/bd172c/>).

⁸⁴ Situation in Palestine, para. 3, see *supra* note 26.

experts, academics, international organizations and non-governmental organizations”.⁸⁵ In the autumn of 2009, the Prosecutor suggested that Palestine should be accepted as a State if Palestine had the ability to enter into international agreements and to exercise criminal jurisdiction over Israeli nationals.⁸⁶ It gave an impression that his Office should address the issue.

However, whether Palestine qualified as a “State” for the purpose of the Rome Statute is controversial. After three years of consideration, the Prosecutor suddenly announced that he had no authority to make that determination,⁸⁷ because “the status granted to Palestine by the United Nations General Assembly is that of an observer, not as a non-member State”.⁸⁸ It meant that Palestine could not sign the Rome Statute and could not declare its acceptance of the Court’s jurisdiction.⁸⁹ He decided to leave the issue whether Palestine was a State to be resolved by competent organs of the United Nations or the Assembly of States Parties.⁹⁰

Although the Prosecutor correctly acknowledged that he had no authority to define “State”,⁹¹ the solution of the legal issue by relying on the United Nations is questionable. The Prosecutor supported his conclusion by observing that States must deposit with the Secretary-General of the United Nations instruments of accession to the Statute under Article 125.⁹² In case the statehood of the depositor is controversial or unclear to the Secretary-General, he will follow or seek directives from the UN General Assembly on the matter.⁹³ The Prosecutor therefore considered competent organs of United Nations had authority to determine whether Palestine is qualified as a “State” under Article 12(3) of the Statute.

However, the “Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties” reveals that the Secretary-General

⁸⁵ Summary of Submissions, para. 16, see *supra* note 83.

⁸⁶ Michael Kearney, “The Situation in Palestine”, in *Opinio Juris*, 5 April 2012.

⁸⁷ Situation on Palestine, see *supra* note 26.

⁸⁸ *Ibid.*, para. 7.

⁸⁹ ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: “The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine”, 2 September 2014 (<http://www.legal-tools.org/doc/e3fe6c/>).

⁹⁰ Situation on Palestine, para. 8, see *supra* note 26.

⁹¹ *Ibid.*, para.6.

⁹² The State of Palestine accedes to the Rome statute, see *supra* note 27.

⁹³ Situation in Palestine, paras. 5–6, see *supra* note 26.

will need a complete list of the States provided by the General Assembly to implement the deposition only when the status of a State was controversial or unclear where “treaties adopted by the General Assembly were open to participation by ‘all States’ without further specifications”.⁹⁴ There are multilateral treaties not adopted within the framework of the United Nations. The Rome Statute is one not adopted by the United Nations General Assembly, although it was adopted at a conference convened by the United Nations. It is doubtful if the Secretary-General would seek the General Assembly’s directives if Palestine deposited the instrument of accession at the time it lodged the Article 12(3) declaration. In any event, since Palestine was admitted by UNESCO as a Member State on 30 October 2011, even if Palestine had deposited its instrument of accession to the Rome Statute with the Secretary-General in April 2012, the Secretary-General would not likely object.

Furthermore, the Prosecutor wrongfully confused the existence of a State with the recognition of a State and the admission of a State membership in an international organization. The United Nations has made its position very clear that:

[T]he recognition of a new State or Government is an act that only other States and Governments may grant or withhold [...] The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government.⁹⁵

The conditions for the admission of any States to membership in the United Nations are that they are “peace-loving states which accept the obligations” contained in the Charter and are “able and willing to carry out these obligations”.⁹⁶ Obviously, neither the General Assembly nor the Security Council has the authority to determine whether an entity is a State. Also, because of the veto power of the five permanent member States in the Security Council and for political reasons, some States had been excluded from the UN membership or had chosen not to join the UN.

⁹⁴ Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs, UN doc. ST/LEG/7/Rev.1, 19 July 1994, para. 81 (<http://www.legal-tools.org/doc/7749a6/>).

⁹⁵ “About UN Membership” (available on the UN’s web site).

⁹⁶ Charter of the United Nation, 26 June 1945, Article 4 (UN Charter) (<http://www.legal-tools.org/doc/6b3cd5/>).

It does not necessarily mean that they are not States. In short, the Prosecutor made a mistake to refer the legal issue to the United Nations, which is a political organization and does not possess an authority to determine whether Palestine is a State.

Instead, it is argued that the Chambers of the ICC have the authority to make an authentic interpretation of the term “State” in Article 12(3). The authentic interpretation is an “interpretation made by a body authorized to apply the law”,⁹⁷ namely the Chambers.

Furthermore, according to the doctrine of competence-competence, each Court has “jurisdiction to determine its own jurisdiction”,⁹⁸ which has been confirmed by the jurisprudence of the ICJ, the ICTY and the ICC itself.⁹⁹ Article 12(3) declarations concern the exercise of the jurisdiction of the Court. The judges of the Court shall therefore have authority to deal with the issue. Moreover, statehood is a legal issue with theories and criteria under international law. The Prosecutor should seek a legal resolution on this issue instead of relying on a resolution for an administrative matter from the Secretary-General and General Assembly of the United Nations.

That a Pre-Trial Chamber has not been assigned to deal with the issue does not excuse the Prosecutor from seeking the Chambers’ determination. Article 19(3) of the Statute provides that “the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction”. Even if Article 19(3) does not apply to the stage of preliminary examination, the Regulations of the Court require the Prosecutor to “provide the Presidency with any other information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber”.¹⁰⁰ The Presidency shall assign a situation to a Pre-Trial Chamber or pass the information on to the President of the Pre-Trial Division, who could direct the situation to a Pre-Trial Cham-

⁹⁷ Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, Martinus Nijhoff Publishers, 2012, p. 115.

⁹⁸ ICC, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para.18 (<http://www.legal-tools.org/doc/866e17/>).

⁹⁹ Carsten Stahn, *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 189.

¹⁰⁰ Regulations of the Court, 26 May 2004, Regulation 45, see *supra* note 2 (<http://www.legal-tools.org/doc/2988d1/>).

ber to deal with “any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber”.¹⁰¹ Regrettably, the Prosecutor did not consider bringing the matter to the attention of the judges at all. Indeed, after receiving the declaration made by the Palestinian authority, the Registrar predicted that it was ultimately possible for the judges to resolve the issue.¹⁰²

Alternatively, as the Prosecutor stated, the interpretation of the term “State” can be referred to the Assembly of States Parties. The Rome Statute being a treaty, “[i]t is for the power that imposed the law to interpret the law”.¹⁰³ Article 31(2) and (3)(a)–(b) of the Vienna Convention on the Law of Treaties refer to “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” or “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and so on for the interpretation of treaties, which “represent forms of authentic interpretation whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are extrinsic to the treaty”.¹⁰⁴ Therefore, the Assembly of States Parties may reach such an agreement on the interpretation of the term “State”, though it may take a long time. Indeed, on 7 August 2009, a group of eminent international law scholars jointly wrote to the President of the Assembly of States Parties urging the inclusion of the issue on statehood of Palestine in the agenda of the eleventh annual conference of the Assembly (November 2012) to achieve international criminal justice and to maintain the Court’s reputation.¹⁰⁵

27.3.2. Authority to Determine a Government of a State

On 8 May 2014, the OTP rejected an Article 12(3) declaration made by Egyptian lawyers on behalf of the government of Egypt because they

¹⁰¹ *Ibid.*, Regulation 46.

¹⁰² Questions and Answers. para. 1 (<http://www.legal-tools.org/doc/8cb916/>).

¹⁰³ Seymour S. Peloubet, *A Collection of Legal Maxims in Law and Equity: With English Translations*, George S. Diossy, 1880, p.65; Gaetano Arangio Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law*, Brill, 1979, pp. 81–83.

¹⁰⁴ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, 2009, p. 429.

¹⁰⁵ Dapo Akande, “ICC Assembly of States Parties Urged to Decide on Status of Palestine”, in *EJIL: Talk!*, 24 September 2012.

lacked the requisite authority and full powers on behalf of Egypt.¹⁰⁶ First, the Prosecutor referred to the UN Protocol List to determine Dr. Mohamed Morsi was not the head of Egypt. Therefore, he could not deposit an instrument of accession on behalf of Egypt.¹⁰⁷ Second, under the ‘effective control’ test, Dr. Morsi no longer had the governmental authority with the legal capacity to incur new international legal obligations on behalf of Egypt.¹⁰⁸

The Prosecutor’s positions are controversial. In contrast to the statehood of Palestine, the Prosecutor believed that she was fully competent to determine the legitimacy of a government. The two tests that the Prosecutor adopted were also debatable. The first referred again to the views of the UN and depository of the Rome Statute. As for the second test of ‘effective control’, scholars disagreed on whether it is the only criterion on which recognition can be based.¹⁰⁹ Popular support, ability and will to fulfil international obligations, and legitimacy have been proposed additional criteria for recognition as a government. Legal scholars and policy-makers have also considered non-dependence on foreign support in the exercise of control and respect for human rights as additional criteria.¹¹⁰

Bearing in mind that the General Assembly and the Security Council are political organs, several cases reveal that effective control has been irrelevant in terms of the governmental representative accepted by the United Nations. For instance, the People’s Republic of China was not awarded a seat in the United Nations until 1971 in spite of her effective control over most of China’s territory since 1949. Also, Cambodia’s contested seat in the United Nations was awarded to the Khmer Rouge throughout 1980s after it was overthrown in 1979, rather than to the People’s Republic of Kampuchea, which gained *de facto* control of the country.¹¹¹ As has been observed: “although the new regime may be all too

¹⁰⁶ The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt, see *supra* note 35.

¹⁰⁷ *Ibid.*, Point 3.

¹⁰⁸ *Ibid.*, Point 4.

¹⁰⁹ M.J. Peterson, *Recognition of Governments, Legal Doctrine and State Practice, 1815–1995*, Macmillan Press Ltd., p. 33.

¹¹⁰ *Ibid.*, p. 77.

¹¹¹ Benny Widoyo, “The Spectre of the Khmer Rouge over Cambodia”, in *UN Chronicle*, April 2008, vol. 45, nos. 2 and 3.

clearly in effective control of the territory”, “recognition may be withheld as a sign of political displeasure”.¹¹² In short, determination of a government is a complicated issue. The ‘effective control’ test may not fully reflect the theory and practice of recognition of governments in international law. Some scholars have pointed out that ICC’s jurisdiction might be most needed when a democratically elected president was ousted by a military coup.¹¹³

27.3.3. Representative to Sign the Declaration on Behalf of the State

A valid declaration must be signed and lodged by a person who is considered as representing his/her State. In view of their functions, Heads of State, Heads of Government and Ministers for Foreign Affairs are considered representing their State.¹¹⁴ Although the Prosecutor mentioned “full power” when he determined the declaration made by Egyptian lawyers, he never questioned whether the declarations of Palestine and the Ukraine had been signed and lodged by the persons representing their States with “full power”. Unlike Palestine’s 2014 declaration, which was signed by the President of the State of Palestine, the 2004 declaration of Palestine was signed by the Minister of Justice for the Palestinian authority. Both the first and second declarations of Ukraine were signed by the chairperson of the Ukrainian parliament, although Article 106 of the Constitution of Ukraine conferring upon the Ukrainian President the power to represent the State in international relations and to conclude international treaties.¹¹⁵ The first declaration can be explained on the ground that the chairperson of the parliament was also in his capacity as *ex officio* Head of State under Article 112 of the Constitution of Ukraine because the then President of Ukraine fled the country.¹¹⁶ It is, however, questionable why the second declaration was not signed by the incumbent President.¹¹⁷

¹¹² Anthony Aust, *Handbook of International Law*, Cambridge University Press, 2005, p. 25.

¹¹³ Eugene Kontorovich, Effective Control and Accepting ICC Jurisdiction, in *Opinio Juris*, 4 August 2014.

¹¹⁴ Vienna Convention on the Law of Treaties, 23 May 1969, Article 7(2)(a) (<http://www.legal-tools.org/doc/6bfcd4/>). Stahn, 2015, pp. 201–202, see *supra* note 100.

¹¹⁵ Iryna Marchuk, “Ukraine and the International Criminal Court: Implications of the *Ad Hoc* Jurisdiction Acceptance and Beyond”, in *Vanderbilt Journal of Transnational Law*, 2016, vol. 49, no. 4, p. 362.

¹¹⁶ *Ibid.*, p. 341.

¹¹⁷ *Ibid.*, p. 362.

Determination on issues relevant to validity of Article 12(3) declarations involves several legal issues such as the criteria for statehood, legitimacy of government, persons representing States and so on, which should be resolved on a case-by-case basis. A declaration may be in conflict with a fundamental domestic law of the accepting State,¹¹⁸ which may also affect the validity of the declaration in accordance with Article 46 of the Vienna Convention on the Law of Treaties. Present practice shows that leaving these issues in the hands of the Prosecutor without judicial oversight can be troublesome. While the Prosecutor is certainly “highly competent in and have extensive practical experience in the prosecution or trial of criminal cases”,¹¹⁹ he or she does not necessarily possess the requisite competence in international law. That is why the determination of the Prosecutor on validity of Article 12(3) declarations has some obvious flaws and has been challenged and criticized. As discussed above, in dealing with the 2004 declaration of Palestine, the Prosecutor not only wrongfully disregarded the ability of the Palestinian government in foreign relations with more than 130 States and international organizations, but also referred the issue to the United Nations, an international political body, rather than seeking the judicial resolution in the first place. That had inevitably damaged his image of independence.

Again, the issues on the validity of the declarations should be determined by Chambers because judges have competence in “relevant areas of international law”.¹²⁰ They can decide the criteria for statehood, choose a proper approach to determining the legitimacy of governments and consider other legal obstacles in accordance with international law. As similar issues concerning the validity of Article 12(3) declarations may occur again, there should be a separate procedure regarding the validity of Article 12(3) declarations to be determined by a Pre-Trial Chamber when necessary, leaving other issues concerning the jurisdiction of the Court in the preliminary examination to be conducted by the Prosecutor.

¹¹⁸ Ukraine did not ratify the Rome Statute because the Constitutional Court had decided that its Constitution would not allow its judicial functions to be delegated to other institutions or officials.

¹¹⁹ ICC Statute, Article 42, see *supra* note 3.

¹²⁰ ICC Statute, Article 36, paragraph 3(b)(ii), see *supra* note 3.

27.4. Conclusion and Suggestions

So far, the Court and the Prosecutor has considered the Article 12(3) declaration as only a precondition for the exercise of jurisdiction and applied the same procedure as the Prosecutor's exercise of his/her *proprio motu* power in preliminary examinations. However, in reality, most Article 12(3) declarations are a combination of acceptance of jurisdiction and self-referrals of their own situations by non-States Parties. In so far as there were worries that an accepting State might intend to use the Court unilaterally against other States, the Pre-Trial Chamber's authorization understandably plays the necessary role of a gatekeeper. Nevertheless, one should not overlook the downside of this treatment. It took a longer time to process the preliminary examination of the situation arising out of the declaration, which made the results uncertain. In addition, the whole period of preliminary examination lacks judicial oversight, which is unfair to accepting States.

This chapter argues that the Article 12(3) declaration is different from communications and information obtained by the Prosecutor from undisclosed sources. A declaration is formally lodged by a non-State Party. The Prosecutor should inform the accepting State his conclusion on the relevant preliminary examination within a reasonable time as he does to the referrals of States Parties. In so doing, there needs to be "clear guidelines" and "a general timeline"¹²¹ for the Prosecutor to conduct preliminary examination. The Prosecutor needs longer time for situations arising from received communications partly because he/she must determine whether there are already national proceedings covering the same conduct that would likely be the focus of an ICC investigation. This is usually not the case for Article 12(3) declarations if the situations merely involve their own nationals and territories. The preliminary examination of the situation in the Central African Republic that took two years and a half is the longest one among situations referred by States Parties. The preliminary examination of situations related to the Article 12(3) declaration should also take a similar time.

In the situation in Côte d'Ivoire, it seemed that the Prosecutor could not conclude that there was a reasonable basis to proceed with an investigation after two to three years of preliminary examination, but he did not

¹²¹ "Updates from the International and Internationalized Criminal Courts", 2012, see *supra* note 74.

inform Côte d’Ivoire any conclusion. A declaration without an end-date does not mean that the Prosecutor should continue examining the situation until crimes are eventually committed many years in the future. For the purpose of saving resources, focusing on graver situations and enhancing efficiency, the Prosecutor should conclude the examination of a situation that does not meet the requirements to proceed with an investigation. The Prosecutor could reserve the right to reopen the preliminary examination later if necessary. By doing so, it can at least release the Chamber’s burden to determine that the events occurred many years later in 2010-2011 and the previous mentioned events of 19 September 2002 in the 2003 declaration of Côte d’Ivoire is one and the same situation.¹²²

Scholars have stressed that the treatment of the declarations require judicial involvement or monitor. Freeland points out that it would be of concern if a decision not to proceed with an investigation into a situation that a non-State Party cries for help by lodging the declaration “could be taken by the Prosecutor without recourse to judicial scrutiny under any circumstances”.¹²³ CHAN James suggests “placing incoming declarations under preliminary oversight by the Pre-Trial Division” to ensure that “declarations are valid and sets guidelines for the OTP”.¹²⁴ This chapter suggests that it should consider a separate procedure of determination of the validity of the declaration when such issues arise. The following provisions should be added to the Regulations of the Court:

Upon receipt of a declaration under article 12(3), either the Prosecutor or the Registrar shall inform the Presidency the declaration. The Presidency shall assign a Pre-Trial Chamber to consider any issues with respect to the validity of the declaration at the request of the Prosecutor or when the Presidency considers necessary.

¹²² Decision on the Jurisdiction, paras. 63–64, see *supra* note 53.

¹²³ Freeland, 2006, p. 231, see *supra* note 41.

¹²⁴ CHAN James, “Judicial Oversight over Article 12(3) of the ICC Statute”, FICHL Policy Brief Series No. 11 (2013), Torkel Opsahl Academic EPublisher, Brussels, 2013, pp. 3–4 (<http://www.legal-tools.org/doc/bc46c4/>).

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