

“EFFECTIVE CONTROL” , STATE COOPERATION, AND DECLARATIONS UNDER ARTICLE 12 (3) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Daley J. Birkett *

1. Introduction

According to the Rome Statute of the International Criminal Court (Rome Statute, ICC Statute), States can accept the ICC’s jurisdiction either by becoming Parties to the ICC Statute or by lodging a “declaration” over specific crimes with the Court’s Registrar in accordance with Article 12 (3) of the ICC Statute. Article 12 (3) further provides that any State making an *ad hoc* declaration “shall cooperate with the Court without any delay or exception in accordance with Part 9”,^[1] whose provisions govern the ICC’s international cooperation and judicial assistance regime in relation to investigations or prosecutions.

Since the Rome Statute entered into force in 2002, a series of *ad hoc* declarations have been lodged according to Article 12 (3): from Côte D’Ivoire in 2003 (confirmed in 2010 and 2011), from Palestine in 2009 and 2014, from Ukraine in 2014 and 2015, and from purported representatives of Egypt in 2013. In response to the latter declaration, lodged by representatives of the ousted Mohamed Morsi gov-

* Research Associate, Walther Schücking Institute for International Law, University of Kiel (email: dbirkett@wsi.uni-kiel.de). By way of disclosure, the author served as Intern to Judge Anita Ušacka in the Appeals Division of the International Criminal Court at the time she presided over the Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings. This chapter was completed on 31 January 2018. The websites cited herein were current as of this date.

[1] Rome Statute of the International Criminal Court (ICC Statute), 2187 UNTS 90, art. 12.

ernment in 2013, the ICC’s Office of the Prosecutor (OTP) referred to the ‘legal test of “effective control” ’ in determining that “the applicants did not exercise effective control over any part of Egyptian territory, including on the date the declaration was signed.” The OTP therefore concluded that the authority that lodged the declaration was not capable of expressing the consent of Egypt to the exercise of the Court’s jurisdiction under Article 12 (3) of the ICC Statute because it lacked “full powers”, citing the Vienna Convention on the Law of Treaties.

This chapter critically analyses the law and practice of the ICC in respect of declarations lodged pursuant to Article 12 (3). In particular, the chapter questions the application of the “effective control” test by the OTP in respect of the declaration submitted by purported representatives of Egypt in 2013. The chapter argues that the determination of the OTP in respect of Article 12 (3) declarations must be limited to whether the applicant is able to exercise “full powers” on behalf of the State and refrain from addressing the recognition of governments under international law. However, assuming that the OTP’s approach in response to the Egypt communication could be followed in its future practice, the chapter briefly discusses the relevance of the requirement that accepting States “shall cooperate with the Court” in accordance with Part IX of the ICC Statute. The chapter argues that the ability to provide cooperation is critical to the ICC’s capacity to successfully investigate and prosecute crimes under its jurisdiction. The chapter concludes that scenarios in which cooperation, and indeed “effective control”, might be absent include those where action by the Court could prove most crucial in ending impunity for international crimes. This, in turn, provides a further argument in support of the OTP limiting its determination in respect of Article 12 (3) declarations to whether the applicant possesses “full powers”.

2. (Preconditions to the) exercise of jurisdiction

Article 12 of the Rome Statute is titled “Preconditions to the exercise of juris-

diction”.^[2] According to Articles 12 and 13 of the Rome Statute, only a State or the United Nations Security Council (UNSC) is able to grant jurisdiction to the ICC. A State can accept the ICC’s jurisdiction either by becoming a State Party to the ICC Statute or by lodging an “*ad hoc* declaration” over particular crimes with the ICC’s Registrar in accordance with Article 12 (3) of the ICC Statute. Article 13 of the Rome Statute provide as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.^[3]

Although the Prosecutor may initiate an investigation in respect of the crimes under the Court’s subject–matter jurisdiction on her own initiative (or *proprio motu*), this power is subject to the precondition that a State has conferred jurisdiction to the Court by having either (i) ratified or acceded to the Rome Statute; or (ii) submitted an *ad hoc* declaration. The same precondition applies where a State Party refers the situation to the Prosecutor. However, this precondition need not be met if the situation is referred to the Prosecutor by the UNSC. As the title of the provision suggests, it is Article 12 of the Rome Statute that governs these preconditions.

[2] *Ibid.*

[3] ICC Statute, above n. 1, art. 13.

2. 1 The procedures

Article 12 of the Rome Statute provides as follows :

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c) , the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3 :

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft ;

(b) The State of which the person accused of the crime is a national.

3. 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 accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. ^[4]

Non-Party States to the Rome Statute may thus confer limited jurisdiction to the ICC by lodging a declaration with the Registrar under Article 12 (3) of the Rome Statute. Such a declaration may also serve to give the ICC retroactive jurisdiction. ^[5] The ICC's temporal jurisdiction is limited to crimes committed after the ICC Statute enters into force for the State ratifying or acceding thereto unless the State has sub-

[4] ICC Statute, above n. 1, art. 12.

[5] See 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, ICC-02/11-01/11-321 (12 Dec. 2012) (Gbagbo Jurisdiction Appeal Judgment) , paras. 83-84.

mitted an *ad hoc* declaration with the Court’s Registrar in accordance with Article 12 (3) of the Rome Statute. [6]

It is noteworthy that submitting an *ad hoc* declaration leads to the assumption of certain obligations on the part of the “lodging State”. Upon lodging a declaration under Article 12 (3), the “lodging State” is obligated to immediately and fully cooperate with the Court in accordance with Part IX of the Rome Statute.

2.2 The practice

Since the entry into force of the ICC Statute, the Court’s Registrar has received a series of declarations lodged pursuant to Article 12 (3): from Côte D’Ivoire in 2003 (confirmed in 2010 and again in 2011); from Palestine in 2009 and 2014; from Ukraine in 2014 and 2015; and from purported representatives of Egypt in 2013. In all four lodging States, it could be argued that effective control over the territory on which certain alleged crimes took place was at issue, if not explicitly disputed, during the lodging process. However, only with respect to the declaration lodged by self–professed representatives of the Arab Republic of Egypt was this factor taken into consideration by any organ of the ICC. The following section critically analyses the practice of the Court in respect of the foregoing four declarations (and confirmations) lodged under Article 12 (3) of the Rome Statute.

(1) Côte D’Ivoire

On 18 April 2003, the then Minister of Foreign Affairs of the Republic of Côte D’Ivoire, Mr Mamadou Bamba, lodged the following declaration with the Court’s Registrar:

Pursuant to article 12 (3) of the Statute of the International Criminal Court, the Government of Côte D’Ivoire accepts the jurisdiction of the Court for the purposes

[6] ICC Statute, above n. 1, art. 11 (“1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. 2. 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.”).

of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002.

Accordingly, Côte D’Ivoire undertakes to cooperate with the Court without delay or exception in accordance with Part IX of the Statute. This declaration shall be valid for an unspecified period of time and shall enter into effect on being signed. ^[7]

This declaration was submitted to the ICC at the time when Côte D’Ivoire was under the administration of a “government of national reconciliation” pursuant to the terms of the Linas–Marcoussis Agreement of 24 January 2003. ^[8] It was Mr Laurent Gbagbo who led this administration until disputed presidential elections took place in late 2010. Both Mr Gbagbo and his opponent, Mr Alassane Ouattara, claimed victory, with the Independent Electoral Commission announcing Mr Ouattara the victor on 2 December 2010 and the Constitutional Council declaring Mr Gbagbo the winner on the following day. ^[9] It was in this context that Mr Ouattara, on 14 December 2010, sent three near–identical letters to the Court’s President, Prosecutor, and Registrar, in which he confirmed the declaration lodged under Article 12 (3) of the Rome Statute by Côte D’Ivoire on 18 April 2003. ^[10] Mr Ouattara sent a further letter confirming the Article 12 (3) declaration on 3 May 2011. ^[11] On 4 May 2011, the Constitutional Council, which had previously declared Mr Gbagbo the victor, confirmed Mr Ouattara as the President of Côte d’Ivoire, declaring valid the decisions he had

[7] Prosecutor v. Laurent Koudou Gbagbo, Declaration Accepting the Jurisdiction of the International Criminal Court dated 18 April 2003, ICC–02/11–01/11–129–Anx16–tENG (6 Sep. 2012).

[8] Gbagbo Jurisdiction Appeal Judgment, above n. 5, paras. 48–49. For the text of the Linas–Marcoussis Agreement, see Prosecutor v. Laurent Koudou Gbagbo, Linas Marcoussis Agreement of 24 January 2003, ICC–02/11–01/11–129–Anx17–tENG (11 Oct. 2012).

[9] Gbagbo Jurisdiction Appeal Judgment, above n. 5, paras. 53–54.

[10] Prosecutor v. Laurent Koudou Gbagbo, Letter from Alassane Ouattara to the President of the ICC dated 14 December 2010, ICC–02/11–01/11–129–Anx14–tENG (9 Oct. 2012).

[11] Prosecutor v. Laurent Koudou Gbagbo, Letter from Alassane Ouattara to the Prosecutor of the ICC dated 3 May 2011, ICC–02/11–01/11–129–Anx15–tENG (10 Oct. 2012).

previously taken in this capacity.^[12]

On 3 October 2011, the Court’s Pre–Trial Chamber III authorised the commencement of an investigation into the Situation in the Republic of Côte D’Ivoire.^[13] Mr Gbagbo filed a challenge to the Court’s jurisdiction on 29 May 2012,^[14] in which he argued, *inter alia*, as follows with respect to the letters of 2 December 2010:

Article 12 (3) is clear; only a “State” can make a declaration accepting the jurisdiction of the Court. For such a declaration to have any legal effect, it must be made by an organ or person competent to bind the State. In this respect, there is no doubt that a Head of State is endowed with such capacity.

[...] The Defence argues, however that Alassane Ouattara could not be considered the legitimate Head of State of Côte D’Ivoire at the time of writing the said letter. The Defence submits that, if the authority of a State representative to bind the State internationally and hence *vis-à-vis* the Rome Statute is in dispute, the utmost attention must be paid to the legality of the act under domestic law, particularly the Constitution. An international organ such as the Court cannot vest with legal effect within the meaning of its Statute an act emanating from a person who is not *de facto* and *de jure* empowered to bind the State.

[...] Accordingly, the Defence simply moves the Chamber to find that at

[12] Gbagbo Jurisdiction Appeal Judgment, above n. 5, para. 57. For the Decision, see Prosecutor v. Laurent Koudou Gbagbo, Decision of the Constitutional Council No. CI-2011-EP-036/04-05/CC/SG proclaiming Alassane Ouattara President of Côte D’Ivoire, ICC-02/11-01/11-129-Anx3-tENG (18 Sep. 2009).

[13] 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, ICC-02/11-14 (3 Oct. 2011).

[14] Prosecutor v. Laurent Koudou Gbagbo, 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), ICC-02/11-01/11-129-Corr-tENG (29 May 2012) (Gbagbo Jurisdiction Challenge).

the time of writing the 14 December 2010 letter, Alassane Ouattara was not *de facto* and *de jure* President of the country within the meaning of the Ivorian constitution.^[15]

As to the letter of 3 May 2011, the Defence for Mr Gbagbo asked the Court to disregard it based in part on “Mr Ouattara’s lack of official capacity on 3 May 2011”,^[16] which the Defence argued deprived the letter of “any legal effect”.^[17]

On 15 August 2012, ICC Pre-Trial Chamber I dismissed the Defence’s challenge to the Court’s jurisdiction,^[18] finding it “unnecessary to address the validity of the letters of 14 December 2010 and 3 May 2011 or the question of the capacity of Mr Ouattara to bind Côte D’Ivoire on those particular dates.”^[19] In short, the Pre-Trial Chamber found that the ICC had jurisdiction over all alleged crimes committed since 19 September 2002 based on the declaration of 18 April 2003.^[20] Notably, however, Pre-Trial Chamber I opined as follows with respect to the subsequent letters confirming the Article 12 (3) declaration:

[...] while not necessary from a legal point of view, these letters, together with the subsequent statements and continuous cooperation of Côte D’Ivoire with the Court, are further evidence that Côte D’Ivoire has accepted the exercise of jurisdiction of the Court in relation to the situation [.]^[21]

[15] *Ibid.*, paras. 93–94, 98 (footnotes omitted).

[16] Gbagbo Jurisdiction Challenge, above n. 14, para. 101.

[17] *Ibid.*

[18] 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)”, ICC-02/11-01/11-212 (15 Aug. 2012) (Gbagbo Jurisdiction Decision).

[19] *Ibid.*, para. 66.

[20] Gbagbo Jurisdiction Decision, above n. 14, para. 65.

[21] Gbagbo Jurisdiction Decision, above n. 14, para. 66.

The Appeals Chamber did not address Pre–Trial Chamber I’s finding, which it found to be *obiter dicta*, on appeal.^[22] At no stage of the Article 12 (3) declaration process did any organ of the Court make a determination as to whether Mr Gbagbo or Mr Ouattara exercised “effective control” over the territory of Côte D’Ivoire, despite the supposedly disputed status of the presidency at the time the letters of 14 December 2010 and 3 May 2011 were sent. The Court avoided this issue by focusing on the earlier declaration.

(2) Palestine^[23]

On 21 January 2009, Mr Ali Khashan, the then Minister of Justice of the Government of Palestine, submitted a declaration to the ICC’s Registrar, which provides as follows, in relevant part:

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the

[22] Gbagbo Jurisdiction Appeal Judgment, above n. 5, paras. 91–92.

[23] For an engaging debate concerning the relationship between Palestine and the ICC, including discussion of its Article 12 (3) declarations, see, *inter alia*, Yaël Ronen, ICC Jurisdiction over Acts Committed in the Gaza Strip: Art. 12 (3) of the ICC Statute and Non–state Entities, 8 *Journal of International Criminal Justice* (2010), 3; Yuval Shany, In Defence of Functional Interpretation of Article 12 (3) of the Rome Statute: A Response to Yaël Ronen, 8 *Journal of International Criminal Justice* (2010), 329; Alain Pellet, The Palestinian Declaration and the Jurisdiction of the International Criminal Court, 8 *Journal of International Criminal Justice* (2010) 981; Malcolm N Shaw QC, The Article 12 (3) Declaration of the Palestinian Authority, the International Criminal Court and International Law, 9 *Journal of International Criminal Justice* (2011), 301; Andreas Zimmermann, Palestine and the International Criminal Court *Quo Vadis?* Reach and Limits of Declarations under Article 12 (3), 11 *Journal of International Criminal Justice* (2013), 303; Eugene Kontorovich, Israel/Palestine–The ICC’s Uncharted Territory, 11 *Journal of International Criminal Justice* (2013), 979; Yaël Ronen, Israel, Palestine and the ICC–Territory Uncharted but Not Unknown, 12 *Journal of International Criminal Justice* (2014), 7.

Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature. Material supplementary to and supporting this declaration will be provided shortly in a separate communication. ^[24]

On 3 April 2012, after having initiated a preliminary examination in order to determine whether there was a reasonable basis to proceed with an investigation, the Office of the Prosecutor (OTP) determined that the preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute had not been met. ^[25] The OTP reasoned as follows :

[...] competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112 (2)(g) of the Statute.

[...] In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12 (1). The Rome Statute provides no authority for the Office of the Prosecutor 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). ^[26]

[24] Declaration recognizing the Jurisdiction of the International Criminal Court (21 Jan. 2009) (www.legal-tools.org/doc/d9b1c6/).

[25] Office of the Prosecutor, Situation in Palestine (3 Apr. 2012) (www.legal-tools.org/doc/f5d6d7/) (OTP Palestine Determination).

[26] *Ibid.*, paras. 5–6.

The OTP did, however, explicitly accept the possibility that it could, in future, consider allegations of crimes within the Court’s jurisdiction committed in Palestine, should the United Nations or the Assembly of States Parties “resolve the legal issue” or should the Security Council confer it with jurisdiction under Article 13 of the Rome Statute.^[27]

On 1 January 2015, Palestine tendered a second declaration recognising the jurisdiction of the Court in accordance with Article 12 (3) of the Rome Statute, thereby affording the OTP the opportunity to further consider alleged crimes under the jurisdiction of the ICC committed on its territory.^[28] The second Palestinian declaration was signed and lodged with the Court’s Registrar by Palestinian President, Mr Mahmoud Abbas.^[29] Worded in similar terms to its earlier declaration, Palestine recognised the Court’s jurisdiction over alleged international crimes “committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”^[30] As with the first declaration, Palestine agreed to cooperate immediately and fully with the Court under Part IX of the Rome Statute and stated that the declaration was valid upon signature for an unspecified period of time.^[31] Notably, Palestine then acceded to the Rome Statute on 2 January 2015, with the treaty entering into force for Palestine on 1 April 2015.^[32]

On this occasion, the OTP determined that Palestine’s status before the United Nations rendered it competent to lodge a declaration under Article 12 (3) of the

[27] OTP Palestine Determination, above n. 25, para. 8.

[28] Declaration Accepting the Jurisdiction of the International Criminal Court (31 December 2014) (www.legal-tools.org/doc/60aff8/) (2015 Palestine Declaration).

[29] *Ibid.*

[30] 2015 Palestine Declaration, above n. 28.

[31] *Ibid.*

[32] OTP, Report on Preliminary Examination Activities (2015) (12 Nov. 2015) (www.legal-tools.org/doc/ac0ed2/) (2015 OTP Report), para. 45.

Rome Statute.^[33] The OTP reasoned, in relevant part, as follows:

The Office considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a “State” for the purposes of accession to the Rome Statute (in accordance with the “all States” formula). Additionally, as the Office has previously stated publicly, the term “State” employed in article 12 (3) of the Rome Statute should be interpreted in the same manner as the term “State” used in article 12 (1). Thus, a State that may accede to the Rome Statute may also lodge a declaration under article 12 (3). [...] For the Office, the focus of the inquiry into Palestine’s ability to accede to the Rome Statute has consistently been the question of Palestine’s status at the UN. The UNGA Resolution 67/19 [granting Palestine “non–member observer State” status in the UN] is therefore determinative of Palestine’s ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12 (3) declaration.^[34]

As with Côte D’Ivoire, again the OTP did not enter into an analysis of ‘effective control’ over the territory on which the alleged crimes under the Court’s jurisdiction took place. Instead, the OTP refrained from undertaking such an analysis and, as is argued, properly limited its assessment to the question of statehood as determined by the United Nations.

(3) Ukraine^[35]

Ukraine has also lodged two declarations with the Registrar of the Court accep-

[33] *Ibid.*, paras. 52–53.

[34] 2015 OTP Report, above n. 32, paras. 52–53.

[35] For an excellent analysis of Ukraine’s relationship with the ICC, including declarations lodged thereby under Article 12 (3) of the Rome Statute, see Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 *Vanderbilt Journal of Transnational Law* (2016), 323.

ting ICC jurisdiction in accordance with Article 12 (3) of the Rome Statute. On 9 April 2014, the Embassy of Ukraine to the Kingdom of the Netherlands notified the ICC Registrar that such a declaration, made by the Parliament of Ukraine (*Verkhovna Rada*),^[36] had entered into force on 25 February 2014.^[37] According to the ambassadorial communiqué, by this declaration, “Ukraine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Ukraine within the period 21 November 2013–22 February 2014.”^[38]

On 8 September 2015, the Minister for Foreign Affairs of Ukraine, Mr Pavlo Klimkin, informed the ICC’s Registrar that the *Verkhovna Rada* of Ukraine had adopted a second Resolution, on 4 February 2017, granting jurisdiction to the Court under the auspices of Article 12 (3) of the Rome Statute.^[39] In accordance with the second declaration, Ukraine recognised the jurisdiction of the Court “for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since 20 February 2014.”^[40] The second declaration therefore served to extend the ICC’s temporal jurisdiction over alleged international crimes committed in Ukraine as the first declaration was confined to a limit-

[36] 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, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013–22 February 2014 (25 February 2014) (www.legal-tools.org/doc/1a65fa/) (2014 Ukraine Declaration).

[37] Embassy of Ukraine to the Kingdom of the Netherlands, Letter dated 9 April 2014 (9 April 2014) (www.legal-tools.org/doc/eec0cf/).

[38] *Ibid.*

[39] Declaration of the Verkhovna Rada of Ukraine on the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations “DNR” and “LNR,” which led to extremely grave consequences and mass murder of Ukrainian nationals (4 February 2015) (www.legal-tools.org/doc/b53005/) (2015 Ukraine Declaration).

[40] *Ibid.*

ed period (21 November 2013–22 February 2014).^[41] The reason for the second declaration was explained in the Declaration of the *Verkhovna Rada*, which is appended to the communiqué.^[42] According to the *Verkhovna Rada*:

Starting from 20 February 2014 there is an ongoing Russian Federation’s and Russia supported militant – terrorists’ armed aggression against Ukraine, during which a part of the territory of an independent and sovereign state of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – was annexed, parts of Donetsk and Luhansk regions of Ukraine were occupied, thousands of Ukrainian nationals, including children, were killed, thousands of people were injured, the infrastructure of the whole region was destroyed and hundreds of thousands of people were forced to flee from their homes.^[43]

Unlike the 2014 declaration, the 2015 Ukrainian declaration was made for an indefinite period of time. As with the first, Ukraine confirmed its obligation to cooperate with the Court under Part IX of the Rome Statute in its second declaration under Article 12 (3).^[44]

The analysis conducted by the OTP as to the capacity of the individuals who lodged the first and second declarations with the Court’s Registrar was brief and uncontroversial:

Ukraine is not a State Party to the Rome Statute. However, pursuant to the two article 12 (3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015, respectively, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine from 21 November 2013 onwards. Ukraine’s acceptance of the exercise of jurisdiction by the ICC was made, in both cases, on the basis of declarations of the *Verkhovna Rada* of Ukraine (the Par-

[41] 2014 Ukraine Declaration, above n. 36. See also 2015 OTP Report, above n. 32, paras. 107–108.

[42] 2015 Ukraine Declaration, above n. 39.

[43] *Ibid.*

[44] 2015 Ukraine Declaration, above n. 39.

liament of Ukraine), urging acceptance of the exercise of jurisdiction by the Court in respect of crimes allegedly committed during the relevant periods. ^[45]

Thus, although the territory on which some of the alleged crimes under ICC jurisdiction occurred was arguably beyond Ukraine’s effective control (to a lesser or greater extent, the Autonomous Republic of Crimea and parts of the Donetsk and Luhansk regions) on the dates on which the declarations were lodged, there was no dispute as to the capacity of the respective Ukrainian representatives to bind Ukraine under international law.

(4) Egypt

According to the determination by the OTP concerning the communication received in relation to 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. ^[46]

The analysis of the OTP was split into two parts, the latter labelled “further analysis”. ^[47] The first part of the OTP’s factual and legal analysis led it to determine 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

[45] 2015 OTP Report, above n. 32, para. 81.

[46] OTP, The determination of the Office of the Prosecutor on the communication received in relation to Egypt (8 May 2014) (www.legal-tools.org/doc/2945cd/) (OTP Egypt Determination).

[47] *Ibid.*

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. ^[48]

As to the further analysis, the OTP first affirmed that only the United Nations Security Council or a State can confer jurisdiction upon the Court and that “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).” ^[49] The OTP then confirmed its conclusion that the applicants lacked both the requisite authority and the full powers to represent Egypt both on the date on which the declaration was signed and on the date the applicants submitted the communication to the Court’s Registrar. ^[50] The third paragraph of the OTP’s further analysis turned to the representatives of Egypt before the United Nations, as follows:

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. Furthermore, on 5 December 2013, the UN General Assembly accepted without a vote, the credentials of the Egyptian delegation, 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

[48] OTP Egypt Determination, above n. 46.

[49] OTP Egypt Determination, above n. 46, para. 1.

[50] OTP Egypt Determination, above n. 46, para. 2.

in its activities indicated 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 did not equate to continued recognition of Dr Morsi as the Egyptian Head of State. ^[51]

The OTP could have opted to end its analysis at that stage, leaving the determination to the United Nations General Assembly, as it did in respect of the declarations lodged by Palestine under Article 12 (3) of the Rome Statute. However, the fourth paragraph of the OTP’s further analysis continued as follows:

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. ^[52]

In the fifth and final paragraph of its further analysis with respect to the communication received in relation to Egypt, the OTP concluded as follows:

Based on these considerations, the Office has determined that the purported declaration submitted to the Registrar on 13 December 2013, was not sub-

[51] OTP Egypt Determination, above n. 46, para. 3 (footnotes omitted).

[52] OTP Egypt Determination, above n. 46, para. 4.

mitted, 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. ^[53]

3. The “effective control” test and Article 12 (3) declarations

The OTP did not enter into an effective control analysis with respect to the declarations lodged in accordance with Article 12 (3) of the Rome Statute by Côte D’Ivoire, Palestine, or Ukraine. Nor did the respective Pre–Trial Chambers and Appeals Chamber regarding Côte D’Ivoire’s declaration and communiqués confirming acceptance of the jurisdiction of the Court. It was therefore only as regards the communication received from alleged representatives of the Arab Republic of Egypt that the OTP discussed whether the party lodging such a declaration exercised effective control over the State territory on which crimes under ICC jurisdiction were alleged to have taken place. This is despite the fact that, in respect of Côte D’Ivoire, effective control over the State’s territory was arguably contested at the time of the letters sent by Mr Alessane Ouattara to ICC officials on 14 December 2010 and 4 May 2011. As regards Palestine, when its representatives lodged its two declarations under Article 12 (3), effective control over the territory on which the crimes were alleged to have occurred was also arguably disputed. Finally, in respect of Ukraine, as noted above, the Ukrainian Parliament acknowledged that Crimea and parts of parts of the Donetsk and Luhansk regions were occupied at the time it transmitted its second declaration to the Court.

This is not to say that the OTP ought to have entered into such an analysis in respect of the respective declarations lodged by Côte D’Ivoire, Palestine, and Ukraine. Rather, it is argued that the OTP correctly limited its analysis in these in-

[53] OTP Egypt Determination, above n. 46, para. 5.

stances to the determination of the United Nations General Assembly and to whether the lodging party possessed the requisite “full powers” to bind the lodging State under international law.

3. 1 Application of the test by the OTP in relation to the Egypt communication

Michael Kearney has argued, replying to discussion of the OTP’s application of the test of effective control by Eugene Kontorovich that an effective control test “does not exist as a matter of international law” as regards the recognition of governments.^[54] Rather, in Kearney’s opinion, government recognition is better viewed a political process and the OTP’s application of an effective control test was misplaced.^[55]

When lawyers acting on behalf of, among others, the Freedom and Justice Party of Dr Mohamed Morsi attempted to lodge a declaration with the ICC, the question of Egypt’s statehood was not at issue. The OTP therefore need not have made recourse to a test of effective control, which has been explicitly considered by some States in the context of their recognition of States. For example, in 1976, the United States Department of State wrote as follows: “In [reaching its judgment as to whether to recognise another an entity as a State], the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory [...] ”.^[56]

Kearney proposes that the OTP might have based its reference to “effective con-

[54] Eugene Kontorovich, Guest Post: Effective Control and Accepting ICC Jurisdiction (4 August 2014), response by Michael Kearney dated 8. 04. 2014 at 12: 19 pm EST (www.opiniojuris.org/2014/08/04/guest-post-effective-control-accepting-icc-jurisdiction/). The author has verified that this response was authored by Dr Michael Kearney, who is, at the time of writing, Senior Lecturer in Law at the University of Sussex.

[55] *Ibid.*

[56] Eleanor C. McDowell, Contemporary Practice of the United States Relating to International Law, 71 AJIL (1977), 337, citing Notice posted in Dept. of State Press Relations Office on Nov. 1, 1976, in response to a question raised in a news briefing of Oct. 22, 1976. See also Thomas D. Grant, The Recognition of States: Law and Practice in Debate and Evolution (2007), 6

trol” in this context on a 1980 decision by the Government of the United Kingdom to no longer recognise governments.^[57] Instead, such status was to be inferred from relations between the UK Government and the new regime.^[58] According to Colin Warbrick, quoting Lord Carrington, the then UK Secretary of State for Foreign and Commonwealth Affairs:

Among the factors that would influence the quality of the relations with the new authority would be the British Government’s assessment of: “Whether they are able of themselves to exercise effective control of the territory of the State concerned and seem likely to do so”. The thrust of the statement was that effectiveness would generally be a necessary precondition for governmental status, but it would not necessarily be a guarantee of ‘normal Government to Government’ relations.^[59]

Articles 2 (1) (c) and 7 (1) of the Vienna Convention on the Law of Treaties, to which the OTP refers in its consideration of the purported Article 12 (3) declaration lodged by Dr Morsi’s representatives, provide as follows:

Article 2 [...]

1. For the purposes of the present Convention: [...]

(c) “Full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty; [...]

Article 7 [...]

1. A person is considered as representing a State for the purpose of adop-

[57] Kearney, above n. 54, referring to Colin Warbrick, *Recognition of Governments*, 56 *Modern LR* (1993), 92.

[58] Warbrick, above n. 57, 92.

[59] Warbrick, above n. 57, 92, citing *HL Deb* vol 408, cols 1121–1122, 28 April 1980 (Lord Carrington).

ting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) He produces appropriate full powers; or

(b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.^[60]

Having concluded that, under international law, the applicants were not in possession of the requisite “full powers” to act 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”,^[61] the OTP was not required to enter into an effective control analysis. Indeed, by applying this test to a situation in which statehood was by no means contested, the OTP’s analysis introduces uncertainty into the Article 12 (3) declaration process. Instead, it is argued that the OTP ought to limit its consideration in this context to determination by the United Nations.

The present author finds it difficult to disagree with Michael Kearney, who, contrasting the response of the OTP to the declarations from representatives of Palestine and Egypt, doubts how “on the one hand the OTP is adamant that under the law of the Rome Statute it cannot establish the existence of a state, while on the other hand it is fully capable of engaging with the far murkier question of establishing the existence of a government”.^[62]

3.2 State cooperation and Article 12 (3) declarations

Notwithstanding, should the OTP follow a similar approach to that adopted with respect to the Egypt communication in its future practice, the requirement that accepting States “shall cooperate with the Court” in accordance with Part IX of the

[60] Vienna Convention on the Law of Treaties, 888 UNTS 999.

[61] OTP Egypt Determination, above n. 46, para. 2.

[62] Kearney, above n. 54.

ICC Statute must be taken into consideration. The capacity to provide cooperation is essential to the Court’s ability to effectively investigate and prosecute the crimes under its jurisdiction, whether conferred under Article 12 (3) of the ICC Statute or otherwise. Without cooperation, the Court is unable to, among other things, preserve and collect evidence, question persons under investigation, and protect victims and witnesses. [63] The ability to cooperate ought therefore to be factored into any effective control analysis, should the OTP continue to follow such an approach in the future. However, this is not to say that the OTP should persist with an effective control analysis. As argued above, the OTP ought to leave such questions to determination by the United Nations.

Further, when taking into account the lodging State’s ability to cooperate, it ought to be borne in mind that situations in which cooperation (and indeed effective control) might be lacking include those where action by the Court could prove vital in ending impunity for crimes under its jurisdiction. It is argued that this consideration, in turn, provides an additional argument for the OTP to limit its determination with respect to future Article 12 (3) declarations to whether the applicant possesses “full powers” to bind the lodging State, as evidenced by the determination of the United Nations General Assembly.

4. Conclusion

This chapter has sought to argue that the OTP, when considering declarations lodged with the Court’s Registrar according to Article 12 (3) of the Rome Statute, ought not to enter into an analysis of whether the lodging entity exercises “effective control” over territory. Rather, the Court should leave any determination of competing governmental claims to the United Nations General Assembly. This body is a much more suitable entity than a criminal court for the resolution of such claims. The OTP should limit its assessment to whether the applicants possess the requisite “full

[63] On which, see Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016).

powers” to bind the State they seek to represent in lodging the *ad hoc* declaration. If, however, the OTP continues to apply the effective control test, consideration should be paid to the ability of the lodging party to cooperate with the Court, a crucial requirement enabling the fulfilment of its mandate.