The Representation of Governments in the International Criminal Court – A Comparative Analysis of the Egypt Situation, the CAR Situation II and the Palestine Situation

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Abstract*: One distinguishing feature of the current international security situation is that conflicts shift from those between States to those within a State. This leads to a circumstance under which several authorities co-exist within a State. In the International Criminal Court, the recent situations in the Arab Republic of Egypt and in the Central African Republic II raised a difficult issue that the Court has never encountered: when several authorities co-existed within a State, which could represent the country to participate or apply to participate in a case before the Court? This is the issue of right to representation of governments in the Court. After a thorough analysis of the two situations, the author finds that the Prosecutor"s decisions on whether or not to initiate investigations, which seemingly gave an answer to the above question, did not yet provide a decent explanation for it. Hence the author indicates the problems in the Prosecutor"s decisions, and then puts forth that the core justification for the Prosecutor"s decisions lies in the position of the United Nations in this regard. As a comparison as well as verification, the author also examines the situation in Palestine. Although the Palestine situation was concerned about whether a State could join the Court, namely the eligibility of States, which differs from the issue in the situations in Egypt and the CAR II, the Prosecutor"s decision echoed the conjecture drawn from the other two situations. This tentative exploration on the two relevant issues may help us gain a better understanding of how the Court, in facing the changing circumstances of international peace and security, copes with the legal and political problems newly emerged.*

Keywords: International Criminal Court, Right to representation of

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governments, Eligibility of States.

I. INTRODUCTION

One distinguishing feature of the current international security situation is that conflicts shift from those between States to those within a State. This leads to a circumstance under which several authorities co-exist within a State. For example, beginning in the spring of 2011, the Syrian civil war broke out between the government of President Bashar al-Assad and armed rebellions. The armed rebellions established a National Coalition for Syrian Revolutionary and Opposition Forces in 2012 and later the Syrian Interim Government in 2013 which was recognized by the Arab League and the Organization of Islamic Cooperation as the legitimate representative of Syria. However, on the other hand, the Assad government still exited and was politically and militarily supported by Iran, Russia and Hezbollah. Another example was the Yemeni *coup d'etat* and civil war since the end of 2014. The Houthi insurgency attacked the President Abd Rabbuh Mansur Hadi‟s residence, pushed him from power, and announced to "officially" takeover the country. While on the side of government, President Hadi fled the Houthis‟ house arrest and traveled to Aden. He also "officially" declared Aden to be Yemen‟s temporary capital, which won support of the Gulf Co-operation Council countries. In such cases all existed several authorities within a State; these authorities either was the government of that State, or takes control of the territory, or is recognized by part of international community.

In the International Criminal Court, the recent situations in the Arab Republic of Egypt and in the Central African Republic II raised a complex issue that the Court has never encountered: when several authorities co-existed within a State, which could represent the country to participate or apply to participate in a case before the Court? This is the issue of right to representation of governments in the Court. The Prosecutor‟s decisions to initiate or not to initiate investigations in the two situations provide the first-hand materials for us to explore this issue. Existing literature has not taken a look at the two up-to-date situations, so the primary goal of this paper is to clear up the facts and proceedings of the cases and to make a careful and comprehensive analysis on them. Based on that, the author is to focus on the issue of right to representation of governments in the Court. The author will prove that the way the Court determines the right to representation of governments in the Court is substantially related to the position of the UN in this regard. This leads us to another subject of the relationship between the Court and the UN. However, current studies on this relationship are limited to matters explicitly stipulated by the Statute of the International Criminal Court, such as the crime of aggression, the referral of situations, and the deferral of investigation or prosecution. Unless having an in-depth look at the Court‟s practice, especially the most recent practice like the Egypt situation and the CAR II situation, we can hardly identify the correlation between the Court and the UN in this respect. So this is one of the innovations of the paper.

Through analysing the issue of right to representation of governments in the Court, we

may gain a better understanding of how the Court, facing the changing circumstances of international peace and security, copes with the legal and political problems newly emerged.

II. LITIGATION ACTIVITIES OF STATES IN THE INTERNATIONAL CRIMINAL COURT

Pursuant to the Statute of the International Criminal Court, the activities of States in the Court can be categorized into two types: one is directly associated with the proceedings of specific cases (referred to as "litigation activities"), including referring to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appears to have been committed (Articles 13(1) and 14), declaring by Non-States Parties to accept the jurisdiction of the Court (Article 12(3)), challenging to the jurisdiction of the Court or the admissibility of a case (Articles 18(4) and 19), taking steps to arrest the person in question (Article 59), voluntarily accepting sentenced persons and serving the sentence of imprisonment once designated (Article 103), giving effect to fines or forfeitures ordered by the Court (Article 109), and etc; the other type of activities is not directly associated with the proceedings of specific cases, including adopting instruments like Elements of Crimes and its amendments (Article 9), nominating and electing of Judges (Article 36), establishing and managing the Trust Fund (Article 79), and etc.

The issue of right to representation of governments and the related issue of eligibility of States are mainly concerned with two activities: States (represented by governments) accept the exercise of jurisdiction by the Court with respect to the crime in question, and States (represented by governments) refer to the Prosecutor a situation in which one or more crimes appears to have been committed. The former is the precondition for Non-States Parties to participate in a case before the Court. The latter is the start point for States Parties to present a case before the Court for further proceedings. The Court‟s decisions on these two matters would greatly influence the abilities of States or governments on their participation in the Court.

III. HOW THE COURT DETERMINES THE ISSUE OF RIGHT TO REPRESENTATION OF GOVERNMENTS: AN EXAMINATION OF THE SITUATIONS IN EGYPT AND THE CAR II

The situations in Egypt and in CAR II both happened in the context of internal armed conflicts and that several authorities co-exited within a State. They brought new challenges to the Court of how to decide which of the co-exiting authorities could represent the country to participate or apply to participate in a case. This is the issue

of right to representation of governments in the Court. Starting from the Egypt

situation, the author is to examine the position and jurisprudence of the Court in making a determination on this issue. On the basis of sorting out the case and analysing the Prosecutor‟s and the Chamber‟s decisions, the author is to indicate the problems in these decisions, and then to put forth the underlying core justification for the determination. The Egypt situation raised some issues which, because of their relatively remote relevance with the case, were not fully addressed. The author is to conduct a tentative analysis on them combined with the CAR II situation, the findings of which in turn strengthen the conjecture the author makes based on the Egypt situation about the core justification for the Prosecutor‟s decisions on the initiation of investigation.

A. The Egypt Situation

1. Situation in Egypt

On 30 June 2012, the first democratically elected President of Egypt Mohamed Morsi came to power. A year later, on 30 June 2013, mass demonstrations broke out in Egypt. People dissatisfied with the policies of Morsi government demanded the immediate resignation of President. On 4 July, the Egyptian Armed Forces deposed Morsi and replaced him with Adly Mansour, then head of the Constitutional Court, serving as interim President.

On 13 December 2013, Morsi and the Freedom and Justice Party (collectively referred to as “applicants”) submitted to the Registrar of the Court a declaration seeking to accept the exercise of jurisdiction by the Court pursuant to Article 12(3) of the Statute with respect to alleged crimes committed on the territory of Egypt from 1 June 2013.[1] After a rigorous factual and legal analysis of the information received from the applicants, the Prosecutor determined on 23 April 2014 that the purported declaration submitted to the Registrar was not submitted by any person with the requisite authority or bearing “full powers” to represent Egypt for the purpose of expressing the consent of that State to the exercise of jurisdiction by the Court. Therefore, the Prosecutor determined that it could not proceed any further with the compliant of the applicants or to examine the alleged crimes committed in the country.

In its decision on the Egypt‟s declaration under Article 12(3), the Prosecutor referred to the UN Protocol List which indicated that a new Head of State (Adly Mansour), Head of Government (Hazem El Beblawi) and Minister of Foreign Affairs (Nabil Fahmy) were appointed in July 2013, and the UN General Assembly‟s acceptance of the credentials of the Egyptian delegation led by current Foreign Minister Nabil Fahmy. The Prosecutor said this was a clear indication that none of the

[1] Egypt, “Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt”, 13 December 2013.

UN Member States considered representatives of Morsi to be the representatives of Egypt at the UN in lieu of the delegation whose credentials were recognized.

The third point the Prosecutor raised was related to the UN Secretary-General acting as depositary of the Statute. The Prosecutor provided that because the UN Secretary-General acted as depositary of the Statute, this also meant that, from July 2013 onwards, Morsi would not have been able to deposit an instrument of accession to the Statute on behalf of Egypt, had he sought to do so.

Finally, the Prosecutor discussed briefly the legal test of "effective control"[2]. Having applied the test on both the date that the purported declaration was signed and the date it was submitted, the Prosecutor found that the applicants did not exercise effective control at all material times over any part of Egyptian territory, which led to the conclusion that Morsi was no longer the governmental authority with the legal capacity to incur new international legal obligations on behalf of Egypt. The situation was not 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.[3]

On 23 May 2014, the applicants filed before the Presidency pursuant to Regulation 46(2) of the Regulations of the Court, and in addition or alternatively, submitted to the President of the Pre-Trial Division pursuant to Regulation 46(3), requesting that a Pre-Trial Chamber be assigned in order to review the Prosecutor‟s and the Registrar‟s decisions on the merits.[4] On 1 September, the applicants re-filed the Request on the ground that the original Request for Review was not considered and determined by the President of the Pre-Trial Division but the Presidency alone, which failed to address Regulation 46(3). [5] In response to it, the President of the Pre-Trial Division made a decision on 10 September assigning the Request for Review to Pre-Trial Chamber II.[6] On 12 September, the Pre-Trial Chamber II found given the

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[2] "Effective control" refers to 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. Egypt, "Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt", 13 December 2013.

[3] ICC, "Decision on the „Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt‟ ", ICC-OTP-CR-460/13, 23 April 2014.

[4] Egypt, "Request for review of the Prosecutor‟s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar‟s Decision of 25 April 2014", 23 May 2014.

[5] Egypt, "Re-filing before the President of the Pre-Trial Division of the „Request for review of the Prosecutor‟s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar‟s Decision of 25 April 2014‟ ", 1 September 2014.

[6] ICC, "Decision assigning the „Request for review of the Prosecution‟s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar‟s Decision of 25 April 2014‟ to Pre-Trial Chamber II", ICC-RoC46(3)-01/14-1, 10 September 2014.

decision of 23 April 2014 referred to in the Request was not a decision taken on the basis of Article 53(1)(c) of the Statute, but rather a decision grounded on the criteria embodied in Article 53(1)(a) of the Statute, the Chamber could not but dismissed *in limine* the Request.[7]

2. Primary Analysis

The situation in Egypt is mainly concerned about the issue of right to representation of governments. The relevant analyses all come from the Prosecutor‟s decision of 23 April 2014. Although the applicants filed to request a review of the Prosecutor‟s decision, the Pre-Trial Chamber did not comment on any substantial part of the decision but denied the applicants‟ request on the basis of procedural matters.

The Prosecutor‟s decision presented three reasons for her determination of which the author is going to have an examination one by one. The author will first clarify the Prosecutor‟s jurisprudence (some of which was unclear at the first sight), and then indicate the problems therein.

The first and foremost reason of the Prosecutor was the lack of requisite authority or full powers of Morsi government. When approaching the concept of "full powers", the Prosecutor made reference to Articles 2(1)(c) and 7(1) of the Vienna Convention on the Law of Treaties as well as the Full Powers Guidelines by the UN Legal Counsel[8]. According to these instruments, "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. We may find that the "full powers" test is built upon a pre-existing "competent authority of a State" and is aimed at deciding which person(s) (natural persons) can represent the State. The test does not provide us how to decide upon the competent authority which however constitutes the key question in the present case.

The Prosecutor‟s second consideration was the UN Protocol List which she held indicated none of the UN Member States considered Morsi could represent Egypt any more. The implication of the Prosecutor is that the Court would follow the practice of the UN. But from a legal point of view, is the representation of a government in the UN equivalent to the recognition of the government by the UN Member States? The Prosecutor seemed to have neglected the difference or to have confounded one with the other. State recognition and representation of governments in international

[7] 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‟ ", ICC-RoC46(3)-01/14-3, 12 September 2014.

[8] Legal Counsel of the UN, "Full Powers Guidelines", LA41TR/221/Full Powers Guidelines/2010.

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organizations are two matters; they have similarities yet also disparities. On one hand, they are both concerned about which authority within a State (within which several authorities co-exist) has competence to represent the State. On the other hand, State recognition refers to a State recognizing an authority in question, which concerns whether the State would carry out diplomatic activities with the authority; while representation of a government in an international organization refers to the international organization accepting the persons sent by an authority in question as the representatives of the State, which concerns whether the acts of the representatives of that authority equals to the acts of the State. On occasions, the acceptance by international organizations of an authority in dispute is called "collective recognition"[9] , but this should not be confused with State recognition. As the UN states itself, the UN is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government. [10] In the Memorandum on the Legal Aspects of the Problem of Representation in the United Nations Transmitted to the President of the Security Council, the Secretary-General, in dealing with the relationship between representation in the UN and recognition of a government, said that "[t]he practice as regards representation of Member States in the United Nations organs has […] been uniformly to the effect that representation is distinctly separate from the issue of recognition of a government", "[t]he Members have therefore made clear by an unbroken practice that (1) a Member could properly vote to accept a representative a government which it did not recognize, or with which it had no diplomatic relations, and (2) that such a vote did not imply recognition or readiness to assume diplomatic relations." [11] This explicitly illustrates that representation of a government in the UN is distinct from recognition of the government by the UN Member States. In this sense, that the Prosecutor in the Egypt situation provided "the UN Protocol List 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" is of some problems, but it does not undermine the Prosecutor‟s attitudes of respecting and following the practice of the UN in this regard.

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[9] *See e.g.* Hersch Lauterpacht, *Recognition in International Law* (New York: Cambridge University Press, 2012), p. 167; Malcolm N. Shaw, *International Law*, 6th edition (New York: Cambridge University Press, 1920), p. 465-466; Ti-Chiang Chen, *The International Law of Recognition*, ed. L. C. Green, (New York: Frederick A. Praeger, Inc., 1951), pp. 221-223.

[10] Member States of the UN, "About UN Membership", available at http://www.un.org/en/members/about.shtml/, last accessed at 20 October 2015.

[11] Secretariat of the UN, "Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, Transmitted to the President of the Security Council by the Secretary-General (Lie)", Security Council Document S/1466, 8 March 1950.

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Thirdly, the Prosecutor said because the UN Secretary-General acted as depositary of the Statute, this also meant that, from July 2013 onwards, 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. The jurisprudence here needs deliberation as well. For one thing, the accession to the Statute is distinct from the acceptance of the Court‟s jurisdiction. The former refers to the deposition of instruments of accessions with the Secretary-General[12], while the latter refers to the lodging of declaration with the Registrar [13] . The Egypt situation is related to the acceptance of the Court‟s jurisdiction, rather than the accession to the Statute as the Prosecutor directed to. For the other, however, these two true have relations: the "State" under Article 12(3) of the Statute should be interpreted in the same manner as the "State" under Article 12(1) of the Statute ("A State which becomes a Party to this Statute thereby accepts the jurisdiction by the Court with respect to the crimes referred to in article 5."), hence an entity that can be deemed as a State with the capacity to access to the Statute can also submit to accept the exercise of jurisdiction by the Court.[14] In accordance with the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, the Secretary-General, in discharging his functions as a depositary of a convention with an "all States" clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.[15] Therefore, in the Egypt situation, on the condition that the Morsi government was no longer admitted by the UN, the Morsi authority could neither sign to access to the Statute on behalf of Egypt, nor declare to accept the exercise of jurisdiction by the Court on behalf of Egypt. It is reasonable and practical for the Prosecutor to decline the right to representation of the Morsi government in the Court by referring to the Secretary-General acting as depositary of the Statute. But in the end, the Prosecutor directed the conclusion towards the absence of competence of the Morsi authority to represent Egypt in accession to the Statute rather than in acceptance of the jurisdiction of the Court, which is improper and misleading.

Other than the three reasons discussed above, the Prosecutor also touched upon the issue of effective control. After applying the test of "effective control", the Prosecutor found that the Morsi authority had not possessed effective control over the Egyptian territory neither on the date that the purported declaration was signed nor on

[12] Rome Statute, Article 125(3).
[13] Rome Statute, Article 12(3).
[14] ICC, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine", ICC-OTP-20150116-PR1083, 16 January 2015.
[15] Treaty Section of the Office of Legal Affairs of the UN, "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", ST/LEG/7/Rev.1, p. 23.

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the date it was submitted. Accordingly, she concluded that the situation was not that kind under which two authorities, with effective control and international treaty-making capacity, respectively, co-existed in a State, and thus, were the test of effective control applied to evaluate the situation in Egypt, no controversy would arise. However, despite the specific conditions in the Egypt situation, there are still two international legal issues of more generality worth discussing. First, when there co-exist two authorities in a State, one exercising effective control over the territory and the other being recognized by the international community, which would be regarded as the representative authority of the State in the Court? Second, in order to make an assessment on effective control, to which date should the test be applied, the one that the declaration is signed or the one it is submitted? The author is going to give a tentative analysis on the issues in combination with the situation in the CAR II.

Above all, the Prosecutor in the Egypt situation showed great respect to the position of the UN on the issue of right to representation of governments. Notwithstanding the Prosecutor did not explicitly say this issue was under estimation of the UN, the views of the UN underlay the substantial justifications for her decision.

B. The CAR II Situation

1. Situation in the CAR II

Central African Republic is a multiethnic country. Since 2001, turbulences and conflicts have been constantly disturbing the State. On 3 October 2001, the CAR became a party to the Statute. In August 2012, an armed, organized rebel movement Séléka emerged as a coalition of militant political and armed group representing Muslims in the north-east as well as other ethnic groups dissatisfied with the then-President Francois Bozizé Yangouvonda. In December, Séléka launched a military *coup d'etat* and soon seized control of almost half of the territory of the country. In March 2013, Séléka captured Bangui, capital of the CAR, and overthrew the Bozizé government. With the establishment of the National Transitional Council in April, Michel Djotodia, leader of Séléka, was appointed as interim President in August. He announced the dissolution of Séléka in September, and was to incorporate the former-Séléka members into the CAR Armed Force. However, the result was that only part of the members had been integrated into the CAR Armed Force, and Séléka continued to exist *de facto*. In January 2014, with the aim of winding up the conflicts as early as possible, the National Transitional Council dismissed Djotodia, and soon after, elected Catherine Samba-Panza, former mayor of Bangui, as the new interim President.[16]

Nevertheless, the violence among ethnic groups did not come to an end because of the resignation of Djotodia. In July 2014, Séléka appointed Djotodia as head of

[16] ICC, "Situation in the Central African Republic II Article 53(1) Report", 24 September 2014.

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Political Bureau of Séléka. By August 2014, the transitional government (namely the Panza authority) remained largely absent outside Bangui and Séléka remained in control of, and exercised State functions in, 8 of the 16 prefectures.[17]

On 30 May 2014, Panza authority (referred to as "applicant") referred to the Prosecutor, pursuant to Article 14 of the Statute, the situation on the territory of the CAR since 1 August 2012.[18] On 24 September, the Prosecutor determined to initiate an investigation.[19]

2. Primary Analysis

The Prosecutor examined the jurisdiction of the Court, admissibility of the case and interests of justice in the CAR II situation, and then come to a decision not to initiate an investigation. The Prosecutor had no discussion on the issues of right to representation of governments or of eligibility of States, which, however, to the author‟s mind, does not mean there is no controversy on these matters. As examples, the author would like to mention the following points in comparison with the Egypt situation.

One factual and legal dispute is whether the applicant had effective control over the territory of the CAR. As indicated in the Prosecutor‟s report of the Situation in the CAR, Panza authority possessed little control outside Bangui while Séléka led by Djotodia remained in control of, and exercised State functions in, 8 of the 16 prefectures. According to the test of effective control, the Panza authority neither had a reasonable expectancy of permanence nor was in fact in control of the State‟s territory, which therefore could hardly be considered as a government exercising effective control over the CAR. In this context, why could the Panza government be regarded as the competent authority to represent the CAR in the Court, rather than the Djotodia-led Séléka that exercised more control over the country?

One possible reason is: the Panza government was the one that had been recognized by the UN. Let‟s refer to the UN Protocol List as what the Prosecutor did in the Egypt situation. We may find since 18 July 2013, President of the CAR transitional government has been Catherine Samba-Panza.[20] From a strict logic point of view, we may not draw from the concurrent admission of the UN and the Court that the Court was following the position of the UN, but in combination with the situations in Egypt and in Palestine, we can make a sensible inference that the UN‟s

[17] *Ibid*, para. 31.
[18] Central African Republic, "Referral of the Central African Republic annexed to the Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II", ICC-01/14-1-Anx1, 18 June 2014.
[19] ICC, "Situation in the Central African Republic II Article 53(1) Report", 24 September 2014, para. 269.
[20] United Nations Protocol and Liaison Service, "Heads of State, Heads of Government, Ministers for Foreign Affairs", 22 September 2015, p. 11.

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views underlay the Prosecutor‟s decision in favour of the right to representation of the Panza authority.

Another possible reason, if it is the case, may respond to the question induced from the Egypt situation, namely which of the two co-existing authorities with effective control and international recognition, respectively, would be deemed as the one holding the right to representation in the Court. In order to answer this question, we must take note of the particularity of the CAR II situation in which the Panza authority was a transitional government. [21] Generally speaking, a transitional government is temporarily established as the product of compromise among political groups within a State at the time the formal government has not built up due to war or other special circumstances. Therefore, a transitional government tends to be premature and lack of effective control of the territory. In this sense, we should probably not apply the "effective control" test to assess the representativeness of a transitional government. There are other tools than the test of effective control, such as Tobar Doctrine/Doctrine of Legitimacy [22] and the Doctrine of Democratic Governance [23] , for the evaluation of an authority‟s representativeness. The UN‟s practice in this aspect has shown that effective control is not the sole determinant in deciding the issue of right to representation of governments. For instance, in the 1991 Haitian *coup d'état*, then-President Aristide, elected 8 months earlier in the Haitian general election, was deposed by the Haitian army. Albeit the army took control of Haiti completely, the international community had never recognized the *de facto* government but rendered support to the Aristide government all through till its return to power in 1994. [24] Another example is the Somalian Transitional Federal Government. Established in October 2004, the government only grasped control of the capital and surrounding areas two years later and remained largely absent in the

[21] On 23 March 2013, Michel Djotodia, as leader of Séléka, pushed Bozizéfrom power and recognized himself as President of the State. However, on 3 April 2013, African leaders meeting in Chad declared that they did not recognize Djotodia as President; instead, they proposed the formation of an inclusive transitional council. On 13 April 2013, Djotodia was elected as interim President. He was formally sworn in as interim President on 18 August. At present, the UN Protocol list shows that the President of the transitional government of the Central African Republic is Panza.

[22] Tobar Doctrine, also known as Doctrine of Legitimacy, refers to the political principle enunciated by C. R. Tobar, Minister of Foreign Affairs of Ecuador, in 1907 that "recognition of a government should only be granted if that administration came to power by legitimate democratic means."

[23] *E.g.* America opposed the Bashir authority on the ground that the governance of Bashir was illegitimate. *See* United States Department of State, "Country Reports on Terrorism 2013", April 2014, pp. 231-232; *see also* Victoria Nuland (Spokesperson of U.S. Department of State), "Daily Press Briefing of 11 December 2012", available at http://www.state.gov/r/pa/prs/dpb/2012/12/201811.htm/, last accessed at 20 October 2015.

[24] *See* Sean D. Murphy, "Democratic Legitimacy and the Recognition of States and Government", *The International and Comparative Law Quarterly*, Vol. 48, No. 3, 1999, pp. 564-565.

rest part of the State.[25] As for Libya, the UN General Assembly voted to award the Libya‟s UN seat to the National Transitional Council,[26] even though the latter had not acquire control of the country at that moment. In light of these, the author puts forth that in the context of a transitional government, the significance of the "effective control" test decreases. Even if considered as not exercising effective control over the CAR, the Panza authority would still be accepted as the representative of the CAR in the Court, given it has been recognized by the UN.

The above two justifications jointly give us a view on how to respond to the question induced from the Egypt situation: when two authorities co-exist within a State, one exercising effective control over the territory and the other recognized by the international community, the latter is which that holds the right to representation in the Court.

C. Brief Sum-up and Extended Discussion

The situations in Egypt and in the CAR have demonstrated that the Court basically follows the UN in determining whether an authority has the capacity to represent a State in litigation activities. Then the nest question we may ask is: is such compliance of the Court with the UN a result of the Court‟s discretion or is due to some obligation of the Court? What is the relationship between the Court and the UN?

The relationship between the Court and the UN reflects in Article 15 of the Statute and Preamble, Articles 3 and 5 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (hereafter referred to as "Negotiated Relationship Agreement"). On one hand, the Court is a permanent court independent from the UN. On the other, Article 15 of the Statute stipulates that in analysing the seriousness of the information received, the Prosecutor "may seek additional information from […] organs of the United Nations". Without further explanation, the "additional information" theoretically can include the UN documents concerning the representation of governments, such as the UN Protocol List. But in the meantime, the provision does not prescribe to what extent the Court should refer to and comply with the UN documents. Therefore, the way the Prosecutor did in the Egypt situation was mainly based on discretion rather than on legal requirement.

Article 3 of the Negotiated Relationship Agreement prescribes that with a view to facilitating the effective discharge of their respective responsibilities, the UN and the Court shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present

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[25] *See* Ken Menkhaus, "Governance without Governance in Somalia: Spoilers, State Building, and the Politics of Coping", *The International Security*, Vol. 31, No. 3, 2006, pp. 74-106.

[26] Security Council of the UN, "Resolution 2009 (2011) Adopted by the Security Council at its 6620th Meeting, on 16 September 2011", S/RES/2009 (2011), 16 September 2011.

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Agreement and in conformity with the respective provisions of the Charter and the Statute. Article 5 of the same Agreement further provides that the UN and the Court shall make every effort to achieve maximum cooperation with a view to avoiding undesirable duplication in the collection, analysis, publication and dissemination of information relating to matters of mutual interest; they shall strive, where appropriate, to combine their efforts to secure the greatest possible usefulness and utilization of such information. Here the "information relating to matters of mutual interest" mainly refers to the review conferences, pleading to the Court and matters of concern to the International Court of Justice, [27] but nothing in relation to the representation of governments. Moreover, even if the UN documents regarding the representation of governments belongs to the "information relating to matters of mutual interest", the Court only has duty to "consult each other" on the issue and "strive to secure the greatest possible usefulness and utilization" of the documents, but no obligation to strictly follow the UN.

Literally, the relationship between the Court and the UN is quite loose, but it does not prevent the Court to comply with the UN proactively. And in practice, such compliance is necessary and beneficial. To understand this, we should bear in mind that from its very birth, the Court has been facing a world featuring a UN-centred and the UN Charter-based international system. Within such "international constitutional order", should the Court move counter to the UN, then the Court might hardly win support of the international community, which would throw the decisions of the Court into nonsense. [28] The issue of representation of governments in international organizations is quite political; as a judicial organ, that the Court leaves the problem to the UN may be a wise choice of approach. Such cautious practice of courts in dealing with politics-involved matters can also be seen in well-developed constitutionalism, such as the US which develops doctrines of "act of State"[29] and "political questions" [30] in demarcating the respective purviews of government and courts.[31]

One the contrary, assuming the Court went in the opposite direction of the UN on the matter of representation of governments, even though the Court‟s decisions

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[27] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (New York: Oxford University Press, 2010), p. 77: "This general obligation ["exchange of information" as governed by Article 5] is followed by several specific formulations, concerning such issues as the review conferences, pleading of the Court and matters of concern to the International Court of Justice."

[28] *See* ICC, "Report of the Court on the Status of Ongoing Cooperation between the International Criminal Court and the United Nations, Including in the Field", ICC-ASP/12/42, 14 October 2013, para. 61.

[29] *E.g. Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964).

[30] *E.g. Baker v. Carr*, 369 U. S. 186 (1962).

[31] [美]W. 迈克尔·赖斯曼:《联合国的宪政危机》, 载《国际法:领悟与构建——W. 迈克尔·赖斯曼论 文集》, 万鄂湘、王贵国、冯华健主编, 法律出版社 2007 年版, 第 416 页。

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only defined the right to representation of governments in the Court, which was distinct from that in the UN, it might still give rise to substantial contradictions. To be specific, if the Court endorsed the right to representation of a government which was not accepted by the UN, it would endanger or at least impaired the decisions of the UN. Besides, a government not accepted by the UN yet seeking international recognition, could make use of the Court so as to gain some "representativeness". This might disturb the international political order now led by the UN.

In sum, the Court does not bear the obligation to follow the UN in determining the right to representation of governments in the Court. However, from practical considerations, what the Court has done may be the best way of addressing it.

IV. RE-EXAMINATION OF THE COURT'S ATTITUDE TOWARDS THE UN'S POSITION: A COMPARISON WITH AND VERIFICATION BY THE SITUATION IN PALESTINE

As a comparison as well as verification, the author is also to examine the situation in Palestine. Although the situation in Palestine was concerned about whether a State could join the Court, namely the eligibility of States, which differs from the key issue in the situations in Egypt and the CAR II, the Prosecutor"s decision echoed the conjecture drawn from the other two situations. However, the attitudes of the Court towards these two issues subtly differ from each other. To understand it, the author is to give her own ideas on this matter with a hope to inspire further discussion.

A. Situation in Palestine

Prior to the UN according to Palestine "Non-member Observer State" status in the UN on 29 November 2012[32], Palestine attended meetings and engaged in work within the UN system in a capacity of "Observer"[33]. On 22 January 2009, pursuant to Article 12(3) of the Statute, Ali Khashan, acting as Minister of Justice of the Government of Palestine (referred to as "applicant") lodged a declaration accepting the exercise of jurisdiction by the Court for "acts committed on the territory of Palestine since 1 July 2002."[34] On 3 April 2012, the Prosecutor provided in the report of the Situation in Palestine that in interpreting and applying Article 12 of the Statute, it was for the relevant bodies at the United Nations[35] or the Assembly of States

[32] General Assembly of the UN, "Status of Palestine in the United Nations", UN/A/RES/67/19, 4 December 2012.

[33] General Assembly of the UN, "Observer Status for the Palestine Liberation Organization", UN/A/RES/3237 (XXIX), 22 November 1974.

[34] Palestine, "Declaration Recognizing the Jurisdiction of the International Criminal Court", 21 January 2009.

[35] ICC, "Situation in Palestine", 3 April 2012, para. 5: "The competence for determining the term „State" within the meaning of Article 12 rests, in the first instance, with the UN Secretary-General who, in case of doubt, would defer to the guidance of General Assembly." "In instances where it was controversial or unclear whether an applicant

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Parties[36] to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Statute; the current status granted to Palestine by the UN General Assembly was that of "Observer", not as a "Non-member State"; albeit Palestine had been recognized as a State in bilateral relations by more than 130 governments and by certain international organizations, including UN bodies, it did not make a difference in ICC‟s assessment of the Palestine‟s status. Accordingly, the Prosecutor found herself should not proceed with an investigation.[37]

On 1 January 2015, Palestine, having been recognized as a State, submitted again a declaration recognizing the jurisdiction of the Court for the crimes committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.[38] A day later, Palestine deposited an instrument of accession to the Statute with the Secretary-General. [39] On 6 January, the Secretary-General informed the Court that the Palestine‟s action was effected on 2 January 2015 and the Statute would enter in force for Palestine on 1 April 2015.[40] On 7 January, the Registrar addressed a letter to Palestine accepting this declaration and transmitted it to the Prosecutor for her consideration. [41] On 16 January, the Prosecutor determined to initiate an investigation.[42] At present, the Palestine situation is under preliminary examination.[43]

2. Comparative Analysis among the Situations in Egypt, the CAR II and Palestine

Distinct from the issue of representation of governments in the situations of Egypt and the CAR II, the Palestine situation is concerned about the issue of eligibility of States in the Court. On this matter, the Prosecutor explicitly stated it was primarily for the UN to make a legal determination and the Prosecutor *per se* had no authority to adopt any method to define "State". This expression differs from that in the Egypt situation that the Court essentially followed the UN yet formally based her

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constitutes a „State‟, it was the practice of the Secretary-General to follow or seek the General Assembly‟s directives on the matter."

[36] Rome Statute,Article 112(2)(g); ICC, "Situation in Palestine", 3 April 2012, para. 5.

[37] ICC, "Situation in Palestine", 3 April 2012.

[38] Palestine, "Declaration Accepting the Jurisdiction of the International Criminal Court", 31 December 2014.

[39] ICC, "The State of Palestine accedes to the Rome Statute", ICC-ASP-20150107-PR1082, 7 January 2015.

[40] Secretary-General of the UN, "Depositary Notification of Accession to the Rome Statute by the State of Palestine", C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.

[41] ICC, "The State of Palestine accedes to the Rome Statute", ICC-ASP-20150107-PR1082, 7 January 2015.

[42] ICC, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine", ICC-OTP-20150116-PR1083, 16 January 2015.

[43] ICC, "Preliminary Examination", available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx/, last accessed at 12 October 2015.

decision on the test of "full powers" *with reference to the documents of the UN*. The author proposes that the differences in the Prosecutor‟s attitude towards the two issues may root in the following two considerations.

Firstly, from the perspective of the UN‟s competence, the Charter of the UN requires all members are States,[44] which implies that the UN shall hold the capacity to assess the eligibility of States. Once an entity is accepted by the UN as a member, it means the entity is considered as a State and unless special circumstances, the eligibility as a State of that entity lasts long. According to the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, the Secretary-General, in discharging his functions as depositary of the Statute, will follow the practice of the Assembly to determine the eligibility of States for joining the Court. This explains why the Court explicitly provided that the issue of eligibility of States is dependent on the UN‟s judgment. However, on the issue of right to representation of governments, first, the Charter of the UN contains no provision in this respect; second, every year, the UN mandates the Credentials Committee to examine the credentials of the representatives of Member States,[45] which suggests the limitation of the acceptance of a government‟s representativeness in time and in space. The Court was cautious to avoid confusion between the representation in the Court and that in the UN, so formally it only cited the UN‟s standpoint as supporting evidence to its decision.

Secondly, from the perspective of the Court‟s mandates, the Court can and need to find out which authority could represent a State in the Court, namely to decide on the issue of representation of governments. This is for the operation of, and within the system of, the Court. In accordance with the Prosecutor‟s decision in the Egypt situation, the standard proposed is "full powers". However, on the issue of eligibility of States, the Court does not possess the corresponding competence. This can be found through comparing the provisions concerned in the Charter of the United Nations and the Statute. Article 4(1) of the Charter of the United Nations prescribes "Membership in the United Nations is open to all other peace-loving states which […]" It can be seen that "State" is one of the elements of the UN membership; the UN is to have a substantial judgment on this matter. While in the Statute, Article 11(2) provides "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 […]" So being a State is a prerequisite of joining the Court; the Court has to decide whether an entity is a State, but when doubt arises, it does not make any substantial analysis. Such conclusion can also be drawn from Article 12(1) which reads "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the

[44] Charter of the United Nations, Article 4(1).
[45] General Assembly of the UN, "Credentials Committee", available at http://www.un.org/en/ga/credentials/credentials.shtml/, last accessed at 20 October 2015.

crimes […]" Here the eligibility of States is also a prerequisite. That‟s why the Court said in the Palestine situation that it had no authority to define the term "State" but it was the UN that might address this matter.

V. CONCLUSION

The issue of representation of governments in the Court is a legal as well as political issue which leaves ample room for activities of States Parties and authorities therein, lawyers,[46] scholars and the international community as a whole. The attitude of the Court is a mirror of today‟s UN-centred world order: the Court is not subsidiary to the UN and is not obliged to comply with the UN‟s positions or directions; however, this does not prevent the Court to follow the UN proactively; and indeed the Court‟s practice of following the UN is of necessity and advantage. This paper may serve as a start point of a grander project studying on the extent, basis and interrelations with other international organizations of the UN as the highest authority in international order. Continue to take the Court as an example: To what extent should the Court follow the UN? And to what extent has the Court followed the UN? In response to the first question, the matters involving the UN in the Court include: determining the existence of "an act of aggression" as one of the elements of the crime of aggression, referring a situation to the Prosecutor, and requesting the Court to defer investigation or prosecution. To be specific, in determining the existence of "an act of aggression", the Prosecutor, where concluding that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.[47] In referring a situation, the Security Council may, acting under Chapter VII of the Charter of the UN, refer a situation to the Prosecutor in which one or more of crimes appears to have been committed.[48] In requesting the deferral of investigation or prosecution, the Security Council may request the Court through a resolution adopted under Chapter VII of the Charter of the UN not to commence or proceed with investigation or prosecution for a period of 12 months thereafter.[49] We may find that as the organ with the primary responsibility for the maintenance of international peace and security,[50] the Security Council serves as

[46] For example, the 2015 International Criminal Court Moot Court Competition set a question with respect to the right to representation of a government which lacks effective control over the territory of the State at the time of submission of an Article 12(3) Declaration.

[47] Rome Statute, Articles 8 *bis* and 15 *bis* (6)-(7).

[48] Rome Statute, Article 13.

[49] Rome Statute, Article 16.

[50] Charter of the United Nations, Article 24(1).

the junction between the UN and the Court. This inevitably arouses concerns: What negative impacts the Security Council would bring to the Court given its lack of transparency and effectiveness and sometimes being driven by great powers as always condemned by the UN Member States[51]? Will the Security Council impair interests of States when referring a situation to the Prosecutor on the basis of a rather controversial resolution?

In response to the second question, the Court has virtually followed the UN, except for on the matters mentions above, also on the issues of right to representation of governments and of eligibility of States. Since these matters are not under clear prescription of the Statute, if we do not look into the practice of intercourses between the UN and the Court, we may not identify them. The relationships between the Court and the UN in respects of representation of governments and of eligibility of States are connected through the Secretary-General: the Secretary-General acts both as the chief administrative officer of the UN [52] and as the depositary of the Statute; in performing his duty as the depositary of the Statute, the Secretary-General would follow the practice of the General Assembly to provide possible interpretation of the "State" for the issue of eligibility of States and of the "competent authority" for the issue of right to representation of governments. Then, by analogy, all treaties that entrust the Secretary-General as the depositary body would have more or less connections with the UN, at least on the matter of eligibility of States. As at 14 April 2015, the number of treaties deposited with the Secretary-General reaches 338.[53] That the Secretary-General acts as the depositary of the 338 treaties strengthens the core status of the UN in establishing and maintaining international order. This point of view may provide us a new way of evaluating the function and value of the institution of treaty depositary.

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[51]The reforms of the Security Council has been on the agenda of the General Assembly since 1993. In June 1993, the Council established an Informal Working Group on Documentation and Other Procedural Questions to improve the process by which the Council addresses issues concerning its documentation and other procedural questions, with the aim of enhancing its effectiveness, transparency and interactivity. Recently, in October 2015, the Council held the sixth open debate on its working methods. Representatives from members and non-members of the Council proposed to reduce the use of close meetings but increase the use of public meetings, to expand the Council"s memberships, to allow all members of the Council to act as penholders, to restrict the use of veto, and etc. *See* 7539th Meeting of the Security Council, Implementation of the note by the President of the Security Council (S/2010/507), S/PV.7539, 20 October 2015.

[52]Charter of the United Nations, Article 97.

[53]UN Treaty Collection, "List of Multilateral Treaties deposited with the Secretary-General (as at 14 April 2015)", available at https://treaties.un.org/doc/source/events/2015/Treaties/list_english.pdf/, last accessed at 31 October 2015.