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No.: **ICC-01/13**
Date: **7 May 2015**

PRE-TRIAL CHAMBER I

Before: Judge Joyce Aluoch, Presiding Judge
Judge Cuno Tarfusser
Judge Péter Kovács

**SITUATION ON REGISTERED VESSELS OF THE UNION OF THE
COMOROS, THE HELLENIC REPUBLIC OF GREECE AND THE KINGDOM OF
CAMBODIA**

Public

**Prosecution's response to the Government of the Union of the Comoros' request
for an oral hearing**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Although the Prosecution generally supports the role of oral argument in prosecuting criminal cases against individual accused, the circumstances of these particular proceedings do not demonstrate that any additional submissions, whether oral or written, will be required by the Pre-Trial Chamber. To the contrary, once the extensive written briefing process is complete, these proceedings will be ripe for determination. The dispute between the Parties is clear. The Pre-Trial Chamber is fully equipped to decide it justly. The motion for an oral hearing should thus be rejected.¹

Submissions

2. The Government of Comoros seeks review, under article 53(3) of the Statute, of the Prosecution's determination not to initiate an investigation on the basis of its reasoned view that any potential case would be inadmissible before this Court due to its lack of gravity.²

3. In considering and deciding upon the Comoros' request, the Pre-Trial Chamber will, at minimum, have the assistance of the following public submissions:

- the Comoros' reasoned application (61 pages in length);³
- the Prosecution's reasoned response (53 pages in length);⁴ and
- the observations of participating victims on any issues "deemed relevant" to these review proceedings.⁵

¹ *Contra* ICC-01/13-19 ("Request"), para.12.

² *See* ICC-01/13-6-AnxA. The Prosecution's reasons for this conclusion are set out in this 61-page report.

³ ICC-01/13-3.

⁴ ICC-01/13-14 ("Prosecution's Response").

4. In addition to this briefing, the Prosecution anticipates that the Parties may be afforded the opportunity to respond further in writing to the victims' observations, by analogy with rule 91(2) of the Rules of Procedure and Evidence.⁶ The Pre-Trial Chamber will also determine whether it will be assisted by ordering the Comoros to file a reply in support of its original application.⁷

5. Once this comprehensive briefing is completed, to the extent deemed necessary by the Pre-Trial Chamber, the Parties and participants will have enjoyed ample opportunity to argue their cases publicly and the issues at stake will be ripe for determination by the Pre-Trial Chamber.⁸ Those issues are already clear.⁹

6. The Prosecution agrees that the Pre-Trial Chamber has a general discretion to seek yet further observations from the Parties in the course of proceedings under article 53(3).¹⁰ In appropriate circumstances, such as at each of the major procedural stages of a criminal trial (*i.e.*, sentencing and appeal proceedings in addition to trial), the Prosecution also favours the use of oral hearings.¹¹ Yet, given the extensive opportunity for argument in these proceedings, past and future, there is no good cause on this occasion for the Pre-Trial Chamber to seek further observations under rule 107(4), whether written or oral.

7. The Comoros' ability to present its argument before this Court is not impeded by the absence of an oral hearing. Oral hearings should not be an end in themselves

⁵ See ICC-01/13-18 (ordering any participating victims to file their observations by 5 June 2015).

⁶ See also Regulations of the Court, regulation 24(1).

⁷ See ICC-01/13-15 (seeking leave to reply); ICC-01/13-17 (opposing leave to reply).

⁸ *Contra* Request, para.10.

⁹ *Contra* Request, para.7.

¹⁰ See Rules, rule 107(4) ("When a State [...] makes a request referred to in sub-rule 1, the Pre-Trial Chamber may seek further observations from them").

¹¹ This is a consequence of the long duration of trials before this Court, the potential imposition of criminal sanctions, the potential use of interim detention, the complex procedural history, the multiplicity of judicial Chambers involved, the evolving nature of the legal and factual issues, and so on.

but a means to a better judicial understanding of the case.¹² Neither the complexity nor novelty of the issues at stake calls for an oral hearing in these proceedings, where those issues are relatively discrete in their scope and the Parties have already addressed them adequately in writing.¹³ It is well established that the quality and effectiveness of a Party's submissions depend not upon their length or volume but upon the clarity and cogency of the arguments presented.¹⁴

8. Not only has the Comoros made extensive arguments in its original application, but the procedure of this Court enables it to make further written submissions if the Pre-Trial Chamber deems necessary. Indeed, to the extent any new issue arose in the Prosecution's Response, the Comoros has already sought the necessary relief in the form of its request for reply.¹⁵ Any reply ordered by the Pre-Trial Chamber provides the Comoros, by definition, with sufficient opportunity to supplement its arguments—and requires no reinforcement with oral submissions, much less justifies them.¹⁶

9. In the particular circumstances of these proceedings under article 53(3), there is no basis to believe that an oral hearing will illuminate matters more effectively than

¹² See ICC-01/04-02/12-199, para.13 (in the context of deciding whether to hold an oral hearing in the *Ngudjolo* appeal proceedings against a final judgement, reasoning that such a decision “is discretionary and made on a case-by-case basis. Such decisions should be based primarily on the potential utility of an oral hearing, namely whether it would assist [...] in clarifying and resolving the issues raised”). See also below fn.16.

¹³ See ICC-01/09-01/11-271 OA, paras.10-14 (rejecting a request for an oral hearing of an admissibility appeal in *Ruto et al* on the basis of the “norm that proceedings on appeal such as the present should be conducted by way of written submissions” notwithstanding the Appeals Chamber's discretion to order otherwise, and reasoning that it should only order a hearing under such circumstances where “cogent reasons” are shown; concluding that the novelty or complexity of the issues does not itself warrant an oral hearing when the Parties and participants have had sufficient opportunity and have in fact “addressed the issues comprehensively and exhaustively in their written submissions”; observing that, should the Appeals Chamber wish for further clarification of a topic, it also retained the option to order further written submissions). *Contra* Request, para.5.

¹⁴ See e.g. ICTY, *Prosecutor v. Prlić et al*, IT-04-74-A, Decision on Requests for Extension of Word Limit for Respondent's Briefs and Reply Briefs and for Time Limit for Reply Briefs, 9 April 2015, p.5. Available at: <http://www.icty.org/x/cases/prlic/acdec/en/150409.pdf>.

¹⁵ *Contra* Request, para.7. See also above fn.7. As set out in its response to the Comoros' request for leave to reply, the Prosecution does not consider that any new issue arose from the Prosecution Response.

¹⁶ See ICC-01/05-01/08-3233, paras.10-13 (the *Bemba* Trial Chamber finding it unnecessary to order an oral hearing on a “complex” matter, concerning the alleged abuse of process during the trial, for which leave to reply had been granted).

the multiple rounds of written submissions.¹⁷ The Comoros is not assisted by its reference to the admissibility proceedings in *Gaddafi and Al-Senussi*, where both the procedural history and the evolving factual circumstances contrast with the basis for this review under article 53(3) of the Statute.¹⁸ In that case, a status conference was ordered not only as a consequence of counsel's difficulty in receiving instructions from the Libyan authorities—which led them to miss deadlines to file written submissions—but also to update the Pre-Trial Chamber with new information and submissions concerning the “development” of domestic proceedings.¹⁹ In distinction, in these proceedings, the Comoros has availed itself of every opportunity to make detailed written submissions, and the material facts remain the same.

10. Nor are the Comoros' policy arguments convincing. The integrity of these proceedings—which is the basis of public confidence in the Court—will be demonstrated by the reasoned nature of the Pre-Trial Chamber's decision.²⁰ The Pre-Trial Chamber's independent exercise of discretion in controlling the relevant legal procedure neither reflects adversely upon its integrity, nor upon the “respect and deference” afforded by the Court to one of its States Parties.²¹

¹⁷ *Contra* Request, paras.5 (asserting that the Pre-Trial Chamber “should not make any determination without [...] an oral hearing [...] particularly in the event that the Chamber is not minded to direct that the Prosecutor reconsider her Decision”, and that it is “vital that all available procedures [...] are used to air and explore the subject matter”), 6 (submitting that there is “no convincing reason to refuse an oral hearing”).

¹⁸ *Contra* Request, para.8 (citing *inter alia* ICC-01/11-01/11-207).

¹⁹ See ICC-01/11-01/11-207, paras.12-15. See also *e.g.* ICC-01/11-01/11-217, paras.8, 15.

²⁰ *Contra* Request, para.6 (“There is in the Applicant's submission no convincing reason to refuse an oral hearing when it can only assist the Chamber in its deliberations and engender public confidence in the Court's approach to dealing with the present Review”).

²¹ *Contra* Request, para.9.

Conclusion

11. For all these reasons, the Request should be dismissed.

A handwritten signature in blue ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 7th day of May 2015

At The Hague, The Netherlands