

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/13
Date: 16 July 2015

PRE-TRIAL CHAMBER I

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

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

Public

**Request to dismiss *in limine* the “Prosecution’s Consolidated Response to the
Observations of the Victims (ICC-01/13-27 and ICC-01/13-28) and the “Response
by the Government of the Comoros to Victim Observations filed on 22 June 2015”
and in the alternative Request to Reply**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Mr Geoffrey Nice

Mr Rodney Dixon

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

**States' Representatives
of the Union of the Comoros**

Mr Geoffrey Nice

Mr Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 14 July 2015, without prior seeking leave of the Pre-Trial Chamber (the “Chamber”), the Office of the Prosecutor filed a 75-page document in “response” to the observations submitted by the Victims in the context of the proceedings under article 53 of the Rome Statute and challenging the Prosecutor’s decision not to open an investigation (the “Prosecution Response”). The same day, the Government of the Union of the Comoros also filed a response to the Victims’ observations (the “Government Response”).

2. The Principal Counsel of the Office of Public Counsel for Victims, acting as legal representative of unrepresented victims in the proceedings (the “Legal Representative”), submits that both Responses should be dismissed *in limine* because they were filed without proper legal basis and without prior authorisation of the Chamber. In this regard, the Prosecution’s reliance on rule 91(2) of the Rules of Procedure and Evidence (the “Rules”) and regulation 24(1) of the Regulations of the Court (the “Regulations”) is misplaced, and derives from an incorrect reading of the applicable law. Indeed, as explained *infra*, no provision in the legal texts of the Court provides the Prosecution or the State with an automatic right of response to the Victims’ observations in the context of article 53 proceedings.

3. The conduct of the present proceedings is subject to procedural rulings issued by the Chamber. In said rulings, the Chamber did not indicate that the Prosecution and/or the State were entitled to file responses or replies to their respective submissions, and did not set any time limits for the filing of said submissions. To allow the Prosecution and the State to circumvent those orders and to file a “Response” exceeding, in the first instance, in length the initial filing clearly prejudices the fairness of the proceedings.

4. Therefore, the Legal Representative respectfully requests the Chamber to dismiss the Prosecution and the Government Responses *in limine*. In the alternative, should the Chamber be minded to consider the merits of the Responses, the Legal Representative respectfully requests to be granted leave to reply within a time limit to be determined by the Chamber.

II. SUBMISSIONS

A. *The Responses lack proper legal basis*

5. In paragraph 7 of its Response, the Prosecution submits that it is entitled to file a response to the Victims' observations "*consistent with rule 91(2) of the Rules of Procedure and Evidence and regulation 24(1) of the Regulations of the Court*".¹

6. The Legal Representative contends that rule 91(2) of the Rules and regulation 24(1) of the Regulations do not apply to the present proceedings. Indeed, rule 91(2) of the Rules provides the possibility for the parties to respond to oral or written submissions made by the legal representatives of victims when victims have been authorised to participate following a decision by the relevant Chamber on their applications for participation.

7. This argument is also supported by the Decision on the Victims' Participation in which the Chamber, in recalling the applicable law, made reference, *inter alia*, to article 19(3) of the Rome Statute and rule 59 of the Rules. These references clearly indicate that because the matter at stake relates to the gravity issue, the proceedings concern admissibility. Consequently, the practice adopted so far by Chambers in similar proceedings should apply *mutatis mutandis*. In particular, in said proceedings,

¹ See the "Prosecution's Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28)", No. ICC-01/13-29-Conf, 14 July 2015, para. 7. A public redacted version was filed the same day, see the "Public Redacted Version of Prosecution's Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28)", No. ICC-01/13-29-Red, 14 July 2015, para. 7 (the "Prosecution Response").

the relevant Chamber always specified whether the Prosecution or the State could respond to the victims' observations.² Since this was not the case in the present proceedings, the right course of events should have been for the Prosecution and the State to file a request to reply to the Victims' observations.

8. Incidentally, the Legal Representative notes that, ironically, the Prosecution acknowledges this practice and interpretation, stating expressly that *"no replies have been authorised in these proceedings to date, and therefore does not consider it appropriate to address any matter of substance without authorisation. It also considers such an approach applicable in principle to any extent the Comoros' Response to Victims addresses matters not raised by the victims"*.³

9. Likewise, the Legal Representative submits that regulation 24(1) of the Regulations cannot serve as a valid legal basis for a response to the Victims' observations filed in the context of article 53 proceedings. Indeed, as it is clear from the plain language of the provision, the Prosecution and the Defence may file a response *"to any document [...] in the case"*. The explicit reference to a concrete *"case"*, as well as to *"the Prosecutor and the Defence"*, leaves no doubt as to the fact that this provision does not apply to review proceedings under article 53 of the Statute in which no case has yet been open before the Court.

10. The Legal Representative further notes that the Prosecution refers to document No. ICC-01/13-20 in support of its contention that regulation 24(1) of the

² See for instance the "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-01/11-31, 4 April 2011, p. 7; see also the "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-02/11-40, 4 April 2011, p. 7; and the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, p. 7; the "Decision on the conduct of the proceedings following Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (Pre-Trial Chamber I), No. ICC-02/11-01/12-15, 15 November 2013, p. 9.

³ See the "Prosecution's Procedural Clarification concerning New Information presented by the Government of the Union of the Comoros (ICC-01/13-30)", No. ICC-01/13-31, 16 July 2015, footnote 4, p. 3.

Regulations applies in the instant proceedings.⁴ The document referred to is the response filed the Prosecution seeking dismissal of the Government's application for an oral hearing.⁵ This issue is still pending before the Chamber and the admissibility of said document has not yet been considered by the Chamber. It may not therefore serve as a precedent or basis for the filing of a response to the Victims' observations. Incidentally, the Legal Representative observes that said response was also filed without a proper legal basis and should also be dismissed.

11. For the same reasons, the Legal Representative submits that the Government of the Union of Comoros has failed to articulate a valid legal basis for the submission of a response to the Victim's observations. In addition to the applicability of regulation 24 of the Regulations, addressed *supra*, the Government also relies on regulation 34(b) and 33(1)(b) of the Regulations. However, none of the last two provisions provide for an automatic right to respond to the Victims' observations. Rather, said provisions exclusively regulate the calculation of time limits.

B. The Prosecution Response causes prejudice to the fairness of the proceedings

12. Given the lengthy nature of the Prosecution Response, the Legal Representative wishes to highlight the impact of these particular submissions on the fair and expeditious conduct of the present proceedings.

13. At the outset, the Legal Representative notes that the Prosecution could have filed a response not exceeding 100 pages to the Application for Review submitted by the Government of the Comoros, in accordance with regulation 38(1)(d) of the Regulations.⁶ The Prosecution plainly availed itself of this opportunity, filing a 53-

⁴ See the "Prosecution Response", note *supra* 1, footnote 8.

⁵ See the "Prosecution's response to the Government of the Union of the Comoros' request for an oral hearing", No. ICC-01/13-20, 7 May 2015.

⁶ See the "Decision on the 'Prosecution Request concerning its Response to the Government of the Union of the Comoros' Application under article 53(3)(a) of the Rome Statute, and the applicable time limit'" (Pre-Trial Chamber I), No. ICC-01/13-5, 4 February 2015, para. 6.

page submission addressing the issues raised by the Government of the Union of the Comoros in its Application for review.⁷ In said submission, the Prosecution had an ample opportunity to supplement its arguments, clarify its position and provide justification for the legal and factual findings made in the Report on the closing of the preliminary examination. In these circumstances, the Prosecution submission of an additional 75-page document would appear highly inconsistent with the principles of judicial economy and with the requirements of fair and expeditious judicial proceedings. The Prosecution does not even seek to clarify why these additional submissions are necessary, even though they tend to repeat the position already expressed in the Report and in the Response to the Application for review.

14. Moreover, it is significant to note that the conduct of the present proceedings is considerably altered by the filing of the Responses. Indeed, allowing the Prosecution and the State to file additional submissions as and when they see fit would leave them with an unregulated discretion, and may open an endless stream of replies and counter-replies.

15. Lastly, if the Chamber were minded to consider the Responses, the Legal Representative respectfully requests to be granted leave to reply to the Prosecution's Response within a time limit to be determined by the Chamber. Indeed, said Response raises additional arguments which could not be developed in the Victims' observations filed on 22 June 2015.

16. In the circumstances, authorising victims to reply to the Prosecution's Response is the only way of fully enable them to be heard on such an important matter impacting on their personal interests.

⁷ See the "Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute", No. ICC-01/13-14-Red, 30 March 2015.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Pre-Trial Chamber to dismiss the Prosecution and the Government Responses *in limine*. In the alternative, if the Chamber were minded to consider the Responses, the Legal Representative respectfully requests to be granted leave to reply to the Prosecution's Response within a time limit to be determined by the Chamber.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 16th day of July 2015

At The Hague, The Netherlands