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PRE-TRIAL CHAMBER I

Before: Judge Joyce Alouch, 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 Document

**Application for Leave to Reply to “Prosecution Response to the Application for
Review of its Determination under article 53(1)(b) of the Rome Statute”**

Source: Sir Geoffrey Nice QC, Rodney Dixon QC, and Stoke & White LLP
(London) on behalf of the Government of the Union of the
Comoros

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

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I. INTRODUCTION

1. Counsel for the Government of the Union of the Comoros (“the Applicant State Party” or “Applicant”) submit this request for leave to file a reply to the “Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute” of 30 March 2015.¹
2. The Applicant files this request pursuant to Regulations 24(5), 31(1) and 34(c) of the Regulations of the Court.
3. The Applicant submits that good cause exists to grant leave to reply on account of certain key issues which should be addressed in reply to the Prosecution’s Response, to assist the Chamber in determining the instant Review by provision of all relevant information and submissions. Further - and critically - this is the first Review Application pursuant to Article 53² that any State Party has initiated. The applicable standard of review will be defined by the Pre-Trial Chamber and then applied for the first time. In these circumstances a reply is essential given the importance of the issues raised, and the seminal consequences this decision will have for the present case and for exercise of the Article 53 powers in future investigations in other Situations.
4. In particular, the Government of the Comoros submits that it should be given the opportunity to file submissions in reply in respect of the following issues (each of which will be explained further hereunder):
 - *First*, essential aspects of the Prosecution’s position have shifted in its Response when compared with its Decision of 6 November 2014.³ The Government of the Comoros should be permitted to reply to these modifications, additions and clarifications by the Prosecution. For

¹ Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, ICC-01/13-14-Red, 30 March 2015 (hereinafter “Prosecution Response”).

² Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation, ICC-01/13-3-Red, 29 January 2015 (hereinafter “Request for Review”).

³ Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014 (hereinafter “The Decision”).

instance, the Prosecution has modified its original decision on refusing to take into account the wider context of the armed conflict and the circumstances beyond the vessels over which the Prosecution has territorial jurisdiction, and the connection of those circumstances to the crimes committed on board these vessels, when considering the nature and gravity of these crimes. The OTP now accepts that the wider context may be relevant.

- *Second*, the OTP has adopted an ambivalent stance on the standard to be applied by the Chamber when reviewing the Prosecution's Decision not to initiate an investigation. The Prosecution's submissions have left it unclear exactly what test should be applied by the Chamber. As the standard of review is fundamental to how the Review Application will be determined, it is critical that the Applicant State Party should reply on this issue to assist the Chamber in its task of establishing the correct standard.
- *Third*, the Prosecution's Response has placed great emphasis on its wholly incorrect assertion that the Government of the Comoros is merely disagreeing with the OTP's reasoning in the Decision of 6 November 2014 without showing any errors in the Prosecution's approach. This main argument - often repeated - may be a tactic to avoid and even to still the heart of the Applicant's argument. It is essential that the Applicant should correct this misleading assertion by the OTP that has misinterpreted the Applicant's substantive arguments and the facts in questions. The OTP claims that all it has done is reach reasonable conclusions based on the evidence (itself an assertion with which the Applicant fundamentally disagrees) *appropriate to this stage of the Prosecutor's discharge of her duties*. In fact, the Prosecution has in effect reached *final* conclusions as if a trial had already taken place. This is not the proper standard to be applied at the very first stage of the proceedings in this (or any) Preliminary Examination and shows the OTP to have been acting as if *ultra vires*. When contested facts (on

which there may be more than one reasonable view) still need to be investigated - and should be explored through the initiation of an investigation - there is no proper scope for the OTP to make the sort of assertions it has made.

- *Fourth*, the Prosecution has made certain inaccurate submissions that should be corrected in a Reply to ensure that the Chamber's decision is not insecurely based on erroneous information.

II. APPLICABLE LAW

5. This Application is made pursuant to Regulation 24(5) which provides that:

“Participants may only reply to a response with the leave of the Chamber unless otherwise provided in these Regulations.”

6. Furthermore, Regulation 34(c) states that:

“Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.”

7. The Court's jurisprudence establishes that leave to reply may be granted when the applicant has shown good cause.⁴ The Court has held that good cause is shown, and leave to reply may be granted, for reasons including that the response “raise[s] new and distinct issues of law and fact” which the applicant has “not had an opportunity to address”⁵; the response “misinterpreted the substantive arguments set forth” by the applicant⁶; the “facts have been misrepresented”⁷; a

⁴ See for example, Prosecutor v. Bemba, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, ICC-01/05-01/08-294, 27 November 2008, para. 3 states “Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response.”

⁵ Prosecutor v. Mbarushimana, Decision on the Prosecution's request for leave to reply to the ‘Defence Response to Prosecution's Request for the Review of Potentially Privileged Material’, ICC-01/04-01/10-61, 24 February 2011, p. 3-4.

⁶ Prosecutor v. Katanga, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the Regulations of the Court), ICC-01/04-01/07-1004-tENG, 27 March 2009, para. 3.

reply should be allowed given the “importance and potential effect of the issues raised in the” response;⁸ and when the Chamber “may benefit from receiving further observations ... concerning the issues raised.”⁹

8. The Applicant State Party submits that each of these reasons justify granting leave to reply in the present case in light of the grounds that are set out below.

III. SUBMISSIONS

i. The Prosecution has modified, adapted and supplemented its position

9. The Government of the Comoros seeks leave to reply to key aspects of the Prosecution’s Response in which it has shifted from, and added to, its original position in the Decision of 6 November 2014. These changes include the following issues.
10. *First*, the Prosecution stated in its Decision in definitive terms that “the Court’s jurisdiction does not extend to other alleged crimes committed in the context of the conflict between Israel and Hamas nor in the broader context of any conflict between Israel and Palestine” and therefore that “the Office is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Mavi Marmara* in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC.”¹⁰ This view on the law and facts is strictly applied throughout the Decision without any exceptions or caveats.
11. However, the Prosecution has argued in its Response that it “*recognises that there may be aspects of its analysis where it is appropriate to consider extra-*

⁷ Prosecutor v. Banda and Jerbo, Redacted Order on the defence Application for Leave to Reply to the ‘Prosecution’s Response to the ‘Defence Request for a Temporary Stay of Proceedings’ and to the ‘Defence Request for a n Oral Hearing’, ICC-02/05-03/09-294-Red, 16 February 2012, para. 6.

⁸ Prosecutor v. Mbarushimana, Decision on the Prosecution’s request for leave to reply to the ‘Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material’, ICC-01/04-01/10-61, 24 February 2011, p. 4. See also, Prosecutor v. Katanga, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the Regulations of the Court), ICC-01/04-01/07-1004-tENG, 27 March 2009, para. 3.

⁹ Prosecutor v. Kenyatta et al., Decision on Defence requests for leave to reply, ICC-01/09-02/11-679, 7 March 2013, para. 9.

¹⁰ The Decision, para. 137.

*jurisdictional circumstances, and does so when the facts of the situation show a rational link with those broader circumstances.”*¹¹ The OTP goes on to explain these potential links in detail. This test was never expressed or relied on in the original Decision.

12. Although the Prosecution attempts to make it seem as though its Decision always provided that the OTP could if necessary take into consideration the wider context during the Preliminary Examination by asserting that it “intended [such a] common sense proposition”¹², the Prosecution’s clear and express language in its Decision is to the contrary.¹³ And the OTP strictly applied its (own) rule against any consideration of the wider context throughout the Decision. The OTP never claimed in its Decision that the facts in the present case did not meet the test that is now set out in the Response. No such test was identified in its Decision. It can only be concluded that this was because the OTP did not envisage such a test at the time, and has since changed its position in light of the Applicant’s Review.
13. The Prosecution now admits that its original position required ‘clarification’ in its Response.¹⁴ The Applicant, unable to know from the OTP’s self-acknowledged lack of clarity in drafting, could not address whatever argument the OTP originally intended but failed to explain, or the argument it has come since to prefer. It is hard to think of a clearer breach of *audi alteram partem* that demands a right to reply that the Applicant must be afforded in order to demonstrate the extent to which the requisite gravity threshold is satisfied.
14. *Second*, in its Decision of 6 November 2014,¹⁵ the Prosecution stated that “none of the information available suggests that the intended object of the attack was the civilian passengers on board these vessels” and that when “viewed in the context of the interception operation, such an attack (i.e., the forcible boarding)

¹¹ Prosecution Response, para. 53.

¹² Prosecution Response, para. 53.

¹³ The Decision, para. 137.

¹⁴ Prosecution Response, para. 55.

¹⁵ See, The Decision, paras. 90-99.

appears to have been solely directed at the vessels.”¹⁶ This whole issue was dealt with in only a few paragraphs in the Decision.¹⁷

15. However, in its Response, the Prosecution has added substantially to its original position in an attempt to bolster it in light of the Applicant’s Review. The OTP *now* suggests - *never* before - that the reason that the attack on the civilian passengers was not unlawful is because they were not attacked “*for the purpose of enforcing the blockade*”¹⁸, nor were these crimes “linked other than causally to the blockade”¹⁹, and nor were they “closely linked to the conduct of hostilities by the IDF for the purpose of article 8(2)(b)(i) (unlawful attacks against civilians).”²⁰
16. Even though the OTP declined to decide whether the blockade itself could be unlawful (at the very least to determine whether it should open an investigation into this issue), the OTP has nevertheless now concluded in its Response that the attacks on the civilians were not linked to the blockade or the armed hostilities, and were somehow “incidental” to the context in which they occurred.
17. The Applicant State Party should be permitted to reply to this surprising argument to show that it is demonstrably wrong for the OTP to decide, as if it were a final conclusion requiring no investigation, that the attack on the passengers was a separate “incident” unconnected to the very reason for the Flotilla’s voyage, namely to seek to end the blockade that violates basic humanitarian principles, and the hostilities in which so many civilians have suffered.

¹⁶ The Decision, para. 99.

¹⁷ The Decision, paras 97-99.

¹⁸ Prosecution Response, para. 39.

¹⁹ Prosecution Response, para. 45(ii).

²⁰ Prosecution Response, para. 32.

ii. The OTP has submitted an ambivalent and unclear standard of review

18. The Government of the Comoros seeks leave to reply to the Prosecution's submissions on the applicable standard of review given that they are not clear and, in their present form, are unhelpful to the Chamber.
19. The Prosecution states that the Chamber must review the OTP's Decision to determine if it is "irrational, absurd, or so unreasonable that no reasonable person could have made it."²¹ The Prosecution accepts that its Decision should be made in "a rational, fair, and reasonable way."²² However, the Prosecution at the same time submits that a "deferential standard of review" should be adopted that leans in favour of not disturbing the Prosecution's exercise of its discretion.²³ The OTP cites to jurisprudence from the ICTY²⁴ that concerns a review of an administrative decision by the Registrar on the granting of legal aid and related matters. The Applicant should be allowed to reply on this matter (with relevant supporting case law); the case relied on by the OTP has *nothing* to say about the circumstances of the present case that involves a review of the Prosecution's conduct in not opening an investigation on the ground of a lack of gravity, and how this threshold should be interpreted at the very early stage of a Preliminary Examination.
20. Further, the Applicant seeks leave in order to reply to the Prosecution's submission that the Chamber "should be reluctant to engage in its own comparisons of different situations before the Court in conducting any review",²⁵ particularly considering that the Prosecution has extensively relied on comparisons and contrasts of different Situations at the ICC to support its Decision in the present Situation.²⁶

²¹ Prosecution Response, para. 5. See also, para. 15.

²² Prosecution Response, para. 15.

²³ Prosecution Response, paras. 13-16.

²⁴ Prosecution Response, para. 14 citing ICTY, Prosecutor v. Karadžić, IT-95-5/18-AR73.13, Public Redacted Version of the 25 July 2014 Decision on Appeal from Decision on Indigence, 2 December 2014, paras.4-5. See also ICTY, Prosecutor v. Karadžić, IT- 95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para.10.

²⁵ Prosecution Response, para. 15.

²⁶ See for example, The Decision, para. 144-146.

21. Given that ‘good cause’, as noted above, can be established when the Chamber “may benefit from receiving further observations ... concerning the issues raised”²⁷, and taking into account the importance of the issues raised²⁸, the Applicant submits that it is appropriate to grant leave for submissions in reply on the applicable standard of review to be received to assist the Chamber with defining the correct test and criteria. This is a matter of first instance in which the standard of review is being considered for the very first time – all relevant submissions should thus be filed for the Chamber’s consideration.

iii. The Prosecution has misinterpreted central arguments of the Comoros

22. The Prosecution’s Response relies heavily on the claim that the Applicant has “merely” disagreed with the OTP’s reasoning, without showing “any error.”²⁹ Nothing could be further from the truth. The Government of the Comoros seeks leave to reply to make clear that the Review Application is based squarely on the OTP having acted unreasonably, irrationally and unfairly, all of which necessitate the Chamber to direct the OTP to reconsider its decision not to investigate the case.
23. This point is substantiated in several of the OTP’s false claims in its Response, in particular the OTP’s argument that the Applicant “merely disagrees with its conclusion” on the issue of the firing of live ammunition from the helicopters before the vessels were boarded and during their boarding³⁰ (a vital issue in assessing the gravity of the allegations). The Prosecution admits that “the evidence [on this matter] was highly contested”³¹ but nevertheless concludes that no reasonable basis exists to investigate this matter given that “the information available makes it difficult to establish the exact chain of events in light of the

²⁷ Prosecutor v. Kenyatta et al., Decision on Defence requests for leave to reply, ICC-01/09-02/11-679, 7 March 2013, para. 9.

²⁸ Prosecutor v. Mbarushimana, Decision on the Prosecution’s request for leave to reply to the ‘Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material’, ICC-01/04-01/10-61, 24 February 2011, p. 4. See also, Prosecutor v. Katanga, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the Regulations of the Court), ICC-01/04-01/07-1004-tENG, 27 March 2009, para. 3.

²⁹ Prosecution Response, para. 52.

³⁰ Prosecution Response, para. 81.

³¹ Prosecution Response, para. 81.

significantly conflicting accounts of when live ammunition was first used and from where it emanated.”³²

24. The Applicant seeks leave to reply to show that on this and other key issues the Prosecution has effectively decided not to investigate the case because there is conflicting evidence of which it seems afraid (or differing views on the evidence) when it is precisely these circumstances - of having differing accounts - that require an investigation to be opened. It is thus *not* a question of the Applicant merely disagreeing with the OTP’s view of the facts, but rather highlighting that the Prosecution acted unreasonably and irrationally in deciding to shut down the case merely because of conflicting accounts when this is exactly the point at which a reasonable prosecutor would seek to inquire further. The Applicant’s Reply needs to address the fact that the OTP’s approach in the present Situation is in complete contradiction to the Appeals Chamber’s finding in the Sudan Situation that at the even later stage of determining whether to issue an arrest warrant, there is no need for all competing accounts and conclusions on the facts to be discounted as these are matters to be determined at trial.³³ The Reply should also be permitted so that the Applicant can highlight that the role of the diligent and skillful prosecutor is to examine what may appear to be difficult evidence and to explore where it leads.

25. The OTP, by acting as it has done in the present Situation, has - improperly - made final conclusions, however disguised, about facts. The Applicant needs to explain in a Reply that there is clearly a reasonable basis on the available information to open an investigation. This does not mean that any conclusion should be reached on the facts at this stage, only that a reasonable prosecutor would recognise that there is an evidential basis that demands that the OTP should inquire further into the allegations. It will be emphasised that the Prosecution’s error is rightly the subject of review and the Chamber should direct the Prosecution to reconsider its Decision.

³² The Decision, para. 41. See also, Prosecution Response, para. 81.

³³ Prosecutor v. Bashir, Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, ICC-02/05-01/09-73, 3 February 2010, para. 31.

26. This error is repeated by the OTP throughout the Response. Another instance which needs to be responded to in a Reply is the Prosecution's finding that "Comoros' logic appears to presuppose that the Identified Crimes could only have been committed pursuant to a pre-existing plan, and therefore that all evidence of criminality is also evidence of a plan."³⁴ The OTP has taken the view that there is no evidence that the attack on the civilian passengers was committed pursuant to a plan or policy, and is thus not serious enough to warrant further investigation. Again, the OTP has failed to recognise, as any reasonable prosecutor would acknowledge, that there is a reasonable basis to investigate this matter on account of the available information (even if contested). The OTP has made a final conclusion without even conducting an investigation. The Applicant seeks to reply in order to highlight that there is clear evidence of the attack being conducted in a systematic and planned manner³⁵, and that at this stage of the proceedings the existence of such evidence (despite differing views on this evidence) should lead to an investigation.
27. The same point applies to the OTP's findings in respect of the attacks on the civilian passengers not amounting to deliberate attacks or even disproportionate attacks, as well as its findings in respect of the nature of the other crimes (the OTP having wrongly concluded without any investigation that the treatment of the passengers did not amount to inhumane treatment or torture).³⁶ All of these findings directly concern the gravity assessment. The Prosecution again states in the Response that the Applicant simply "disagrees with these conclusions but does not show them to be unreasonable."³⁷ A Reply is required to show that the OTP has missed the crux of the Applicant's argument. There is clearly a reasonable evidential basis taking into account the gravity of the allegations to commence an investigation. Even if there are contested issues of fact (particularly given that the suspects deny any criminal responsibility), these need

³⁴ Prosecution Response, para. 85.

³⁵ See, Prosecution Response, para. 85. For example, the Prosecution itself admits in its Response that there was evidence "that some of the IDF troops aboard the *Mavi Marmara* may have acted in a violent, criminal or otherwise suspicious fashion" and evidence of "disabling of CCTV cameras aboard the *Mavi Marmara* [which] may have been consistent with such behaviour" but refuses to investigate this evidence any further.

³⁶ See, for example, Prosecution Response, paras. 36-40, 42, 43, 48-50, 56, 57, 65, 66, 74-78.

³⁷ See, for example, Prosecution Response, paras. 44, 47, 49, 52, 55, 58, 64, 66, 74, 75, 78.

to be investigated. No case could ever be investigated if the existence of differing views on the facts was a proper reason to refuse to initiate an investigation. It is this irrationality in the OTP's approach which the Applicant seeks leave to address in a Reply.

iv. The Prosecution relies on inaccurate submissions

28. The Applicant State Party also seeks leave to reply to inaccuracies in submissions made by the Prosecution so that the Chamber is in possession of the correct information to render its determination. This is of course most important for the integrity of the Chamber's decision itself.
29. For example, it is inaccurate for the Prosecution to state that its Decision did consider potential perpetrators of the crimes and "key indicators in this regard in its gravity analysis."³⁸ The Prosecution did not identify a single potential perpetrator or category of perpetrators, even in general terms, in its Decision. It is only now in its Response that the OTP states that "the potential perpetrators of the Identified Crimes were among those who carried out the boarding of the *Mavi Marmara*, and subsequent operations aboard, but not necessarily other persons further up the chain of command."³⁹ The Applicant should be permitted to respond to these submissions that never appeared in the original Decision. Further, a Reply should address how the Prosecution can already now exclude persons "up the chain of command" without investigating this matter, including by requesting and reviewing the relevant orders, reports and other documents produced within the command structure.
30. Similarly, the Prosecution has wrongly stated that "it does not presently have in its possession 'over 230 victim applications that have been filed with VPRS.'"⁴⁰ These applications contain evidence of the crimes committed and are relevant to the gravity of the case. The Applicant seeks leave to reply on this subject to show that the Prosecution was in fact informed of these applications and that they

³⁸ Prosecution Response, para. 60.

³⁹ Prosecution Response, para. 60.

⁴⁰ Prosecution Response, para. 22.

“should be consulted as material relevant to deciding whether to open an investigation.”⁴¹ The Applicant should be given a chance to explain that as early as 9 May 2014 the Prosecution was informed that the applications should be obtained from VPRS or from the Applicant.⁴² In addition, the Prosecution was provided with victim applications by IHH on 19 August 2014, and the Applicant thereafter confirmed to the Prosecution that these materials contained victim applications previously submitted to the VPRS by IHH.⁴³

IV. CONCLUSION

31. For all of the reasons set out herein, it is submitted that the Government of the Comoros has shown good cause to reply to the specific issues identified above. The Chamber is thus respectfully requested to grant leave to reply to the Prosecution’s Response of 30 March 2015.
32. Given the scope and nature of the matters raised in the Prosecution’s Response, as well as the importance of the issues in the present Review, the Applicant respectfully requests a deadline for a reply that is appropriate taking into account the complexity of the questions to be addressed and the fact that 60 days was granted to the Prosecution for its response. The Applicant thus asks the Pre-Trial Chamber to permit a Reply to be filed by no later than 30 April 2015.



Sir Geoffrey Nice QC
Rodney Dixon QC

⁴¹ Supplemental Submissions on the Referral of the Government of the Comoros, filed with the Prosecution on 19 May 2014, Annex 1, para. 6.

⁴² Supplemental Submissions on the Referral of the Government of the Comoros, filed with the Prosecution on 19 May 2014, Annex 1, para. 6.

⁴³ See, Letter from Elmadag to the Prosecution, 4 September 2014.

Counsel on behalf of the Government of the Union of the Comoros

Dated 9 April 2015

London