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PRE-TRIAL CHAMBER III

Before: Judge Olga Herrera Carbuccion, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

**SITUATION IN THE PEOPLE'S REPUBLIC OF BANGLADESH / REPUBLIC OF
THE UNION OF MYANMAR**

Public

**Prosecution's Response to the Victims' joint request concerning hearings outside
the host State**

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I. INTRODUCTION

1. The Prosecution hereby responds to a request¹ filed on 4 August 2020 on behalf of three victim groups, known respectively as “the Tula Toli Victims”, “the Northern Rakhine Victims” and “the SGBV Victims”.² These groups (together, “the Applicants”) file their submissions under article 68(3) of the Rome Statute (“Statute”) and rule 93 of the Rules of Procedure and Evidence (“Rules”);³ and request that the Pre-Trial Chamber (“Chamber”) direct the Registry to “prepare an assessment of potential venues of the holding of proceedings in a State other than the host State within reasonable physical proximity of the affected population”.⁴ The Applicants thereby seek to “initiate the process contemplated by the [Rules]”, in particular under rule 100(2), of “assessing the feasibility of the Court sitting in a State other than The Netherlands to hear a case in whole or in part”.⁵
2. The Prosecution recognises – as the Chamber has recalled – that pursuant to article 68(3) of the Statute, the Court has an obligation to permit victims’ views and concerns to be presented and considered at stages of the proceedings determined to be appropriate.⁶
3. However, the Request is opposed for the following reasons. First, the Request is premature, as would be any application or *proprio motu* recommendation under rule 100(2) of the Rules to change the place where the Chamber sits. In this respect the Prosecutor submits, *inter alia*, that there is no generalised right on the part of victims to participate in respect of the Prosecution’s investigation into the

¹ ICC-01/19-34 (“Request”).

² Request, paras. 2-4.

³ Request, para. 1.

⁴ Request, para. 53.

⁵ Request, para. 12.

⁶ ICC-01/19-28, para. 7. *See also* ICC-01/18-2, para. 8.

situation.⁷ Moreover, as the Appeals Chamber has held, “[i]nitiative for soliciting the views of victims under [rule 93] rests entirely with a Chamber. Victims may express their views on any given subject identified by the Chamber”.⁸ Second, the Prosecution should be permitted to conduct its investigations confidentially and independently, whilst respecting the interests and personal circumstances of victims and witnesses pursuant to article 54(1)(b) of the Statute. The Request, as presented at this stage, risks the integrity and independence of the ongoing investigations.

II. SUBMISSIONS

4. The Applicants request that the Chamber “order the Registry to conduct an assessment of the potential locations where the Court could sit outside the host State so as to bring about reasonable physical proximity to the affected population”.⁹ They thereby seek to “initiate the process [...] of assessing the feasibility of the Court sitting in a State other than The Netherlands to hear a case in whole or in part”.¹⁰
5. The Applicants file their submissions pursuant to article 68(3) of the Statute and rule 93 of the Rules,¹¹ and request that the Chamber direct the Registry “to perform an assessment under rule 100(2) of the RPE”.¹²
6. The Applicants submit that they are “victims” within the meaning of rule 85 of the Rules,¹³ but that the formal procedure under rule 89(1) of the Rules need not be followed for the Chamber to make findings in this respect.¹⁴ Accordingly, they

⁷ ICC-01/04-556, para. 45.

⁸ ICC-01/04-556, para. 48.

⁹ Request, para. 35. *See also* paras. 55-56.

¹⁰ Request, para. 12.

¹¹ It is assumed as “other victims” since none of the groups can be characterised as “participating pursuant to rules 89 to 91”: *see* rule 93.

¹² Request, para. 55. *See also* paras. 12, 35, 56.

¹³ Request, para. 28.

¹⁴ Request, paras. 29-33.

argue, “the Chamber should receive the [...] submissions pursuant to rule 93 of the [Rules], without a requirement for an individual application process to be undertaken”.¹⁵

7. The Request does not specify in respect of which State it is requested an assessment be made. However, given that the members of each of the three groups currently live in refugee camps in Cox’s Bazar District, in Bangladesh,¹⁶ it may be assumed that Bangladesh, amongst other locations in the Asia region, are expected to at least form part of any assessment as requested.¹⁷
8. The Prosecution recognises – as the Chamber has recalled – that pursuant to article 68(3) of the Statute, the Court has an obligation to permit victims’ views and concerns to be presented and considered at stages of the proceedings determined to be appropriate.¹⁸ In addition, the Prosecution recognises that rule 93 gives the Chamber discretion to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate.¹⁹
9. However, the Request is opposed for the following reasons. First, the Request is premature, as would be any application or *proprio motu* recommendation under rule 100(2) of the Rules to change the place where the Chamber sits. Second, the Prosecution should be permitted to conduct its investigations confidentially and independently, whilst respecting the interests and personal circumstances of victims and witnesses pursuant to article 54(1)(b) of the Statute. The Request, as presented at this stage, risks the integrity and independence of the ongoing investigations.

¹⁵ Request, para. 33

¹⁶ Request, paras. 22-24.

¹⁷ See <https://twitter.com/kkategibson/status/1290661685968216069>, last accessed on 14 August 2020.

¹⁸ See ICC-01/19-28, para. 7. ICC-01/18-2, para. 8.

¹⁹ ICC-RoC46(3)-01/18-37, para. 21.

A. The Request is premature

10. The Applicants argue that, whilst “the establishment of an ICC Field Office is necessary [...], this step alone will be insufficient to ensure that victims are able to meaningfully access ICC proceedings when they occur”,²⁰ that “[w]aiting for the issuance of a warrant of arrest or summons before a Registry assessment under rule 100 would likely preclude the possibility of a confirmation hearing being held in a State other than The Netherlands”,²¹ and that the request is timely because “a Registry assessment at this early stage would ensure that the Chamber can be presented with all available options for closing the gap between the ICC proceedings and the affected community”.²²
11. Rule 100(1) provides that “[i]n a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.” Rule 100(2) provides that “[t]he Chamber, at any time after the initiation of an investigation, may *proprio motu* or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits.” A recommendation must “take account of the views of the parties, of the victims and an assessment prepared by the Registry”.²³
12. The Prosecution submits that the Request is premature, and that any request or *proprio motu* recommendation under rule 100(2) to change the place where the Chamber sits is or would be premature, for the reasons set out below.

²⁰ Request, para 39.

²¹ Request, para. 43.

²² Request, para. 43.

²³ See also the following provisions of the Statute: article 3(1), which provides that the Court may sit “elsewhere [i.e. not at the seat of the Court in The Hague], whenever it considers it desirable, as provided in th[e] Statute.” Article 62, which provides that “[u]nless otherwise decided, the place of the trial shall be the seat of the Court”.

13. First, the investigation, having been authorised by the Chamber in November 2019,²⁴ is in its early stages. The Request is not “timely”, if made – as appears to be the case – in consideration of venues for a confirmation of charges hearing²⁵ or trial.²⁶
14. The Prosecution further notes that to suggest the comparative imminence of the issuance of a warrant of arrest or summons – as the Request might be read by some as appearing to do²⁷ – risks raising expectations on the part of victims as to the speed with which this investigation may be conducted – and as to its outcome.
15. In this respect, the Prosecution notes that the Registry’s First Report on Information and Outreach Activities²⁸ has highlighted that “Rohingya’s expectations with respect to expediency of proceedings are high in light of the fact that the Decision Authorizing the Investigation was issued very fast”,²⁹ and that “information about the ICC process and the next procedural steps need to be circulated as widely as possible in order to ensure that misconceptions and rumours are addressed in a timely manner.”³⁰
16. Second, even if rule 100(2) allows a request by the Parties, or a *proprio motu* recommendation to be made “at any time after the initiation of an investigation”, rule 100(1) would appear to limit the application of rule 100 to the “case” (i.e. once an arrest warrant has been issued³¹) as opposed to “situation” stage. Indeed, in all of the cases cited to by the Applicants, consideration was given to holding

²⁴ ICC-01/19-27.

²⁵ See e.g. Request, para. 43.

²⁶ See e.g. Request, section 6.4 entitled “The benefits of local trials justify an assessment under Rule 100(2)”, para. 45 (citing to article 69(2)).

²⁷ See Request, para. 45.

²⁸ See ICC-01/19-33-Red, (“Registry First Report”).

²⁹ Registry First Report, para. 14.

³⁰ Registry First Report, para. 15.

³¹ There is a “case” when a summons to appear or arrest warrant have been issued: ICC-01/04-93, p. 4; ICC-01/09-01/11-307, para. 40.

proceedings outside the host State at the “case” as opposed to “situation” stage, either for purposes of the confirmation of charges hearing³² or opening statements³³/trial.³⁴ Even if assuming, *arguendo*, rule 100 were applicable to the “situation” stage, the Applicants do not refer to any ongoing judicial proceeding before the Chamber that could justify a change of the seat of the Court for its holding.

17. Third, consistent with the provisions of article 42 of the Statute, there is no generalised right on the part of victims to participate in respect of the Prosecution’s investigation into the situation. Participation pursuant to article 68(3) of the Statute can take place only within the context of “judicial proceedings”.³⁵ As has been found by the Appeals Chamber, “proceedings” for the purposes of article 68(3) denotes “a judicial cause before a Chamber”.³⁶ An investigation is “not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible”.³⁷

18. Of course the general principle does not preclude victims from seeking participation in judicial proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.³⁸ However, the Applicants do not refer to any judicial proceeding. Moreover, as the Appeals Chamber has held, “[i]nitiative for soliciting the views of victims under [rule 93] rests entirely with a Chamber. Victims may express their views on any given

³² ICC-02/04-01/15-330.

³³ ICC-02/04-01/15-499; ICC-02/11-01/15-316; ICC-01/04-02/06-526; ICC-01/04-02/06-645-Red.

³⁴ ICC-01/09-02/11-581; ICC-01/09-01/11-763, p. 8 (“commencement of trial and other portions thereof”); ICC-01/09-01/11-875-Anx, para. 3 (“commencement of trial and other portions thereof”); ICC-01/05-01/08-2242-Red, paras. 29 and 31(vi).

³⁵ ICC-01/04-556, para. 45.

³⁶ ICC-01/04-556, para. 45.

³⁷ ICC-01/04-556, para. 45. The Appeals Chamber further held that “[m]anifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit”. See para. 52.

³⁸ ICC-01/04-556, para. 56.

subject identified by the Chamber”.³⁹ The Pre-Trial Chamber has not identified any such subject.

19. Further, a request under rule 100(2) to change the place where the Chamber sits may be made by the Parties – that is, the Prosecution or Defence, or the Chamber may *proprio motu* decide to make a recommendation under this rule. Whilst provision is made for the views of victims to be taken into account by the Chamber in the exercise of its discretion, participating and other victims have no power to make a request under the rule – even if now were the appropriate time to do so (which it is not). There is no provision made under rule 100(2) for the victims to otherwise “initiate” a “process” under rule 100(2). Nor can the victims at this stage “trigger” the exercise of the Chamber’s *proprio motu* power to make a recommendation to change the seat of the Court. As noted, there is no “case” nor do the Applicants refer to any “judicial proceeding” or “specific issue affecting the victims’ personal interests” apart from their desired proximity with respect to hypothetical Court proceedings.⁴⁰

20. The Applicants should not be permitted – at a very early stage in the investigation – to rely upon article 68(3) in combination with rule 93 to seek to *initiate* a process or proceeding under rule 100(2) upon which they wish to express their views.⁴¹

21. Fourth, and in any event, embarking upon a Registry assessment at this stage to inform a *proprio motu* recommendation or request under rule 100(2) risks wasting the Court’s resources. First, it appears unlikely, given the early stage of the investigation, that any public hearings – including in any *case* – will take place in at least the near future. Second, the uncertainties surrounding the ongoing

³⁹ ICC-01/04-556, para. 48.

⁴⁰ Request, para. 28. The Prosecution considers that the present Request is distinguishable from the victims’ request in *Kenyatta* since the victims seek to trigger a process in the event that there is ever a case or judicial proceeding before the Court. *See* ICC-01/09-159, para. 7 (“the Chamber considers that one of the valid forms of victims’ participation in the proceedings of a situation is to prompt the Chamber to consider exercising its *proprio motu* powers with respect to a specific issue affecting the victims’ personal interests”).

⁴¹ *See* Request, para. 55.

coronavirus pandemic are likely to make it extremely difficult, if not impossible, to assess or predict what measures will be logistically possible in any State, including Bangladesh, in the months ahead. The difficulties in conducting any planning in this regard is underscored in the Registry First Report, where it is noted that the plans for a new mission to Bangladesh had to be suspended as a result of travel and other restrictions imposed after the outbreak of the pandemic,⁴² that “COVID-19 [has been] the main focus and priority in the Cox’s Bazar camps for the last months”,⁴³ and that “[t]he Registry will closely monitor the developments related to the Covid-19 pandemic and resume the planning of a potential subsequent mission to Cox’s Bazar as soon as feasible considering all circumstances. The safety and security of victims, interlocutors and staff members and the duty of care will be at the core of planning of missions and any other activities.”⁴⁴

B. The Request risks the integrity and independence of ongoing investigations

22. The Request is opposed on the additional basis that it risks, as presented at this stage, the integrity and independence of the ongoing investigations. The Prosecution should be permitted to conduct its investigations confidentially and independently, whilst respecting the interests and personal circumstances of victims and witnesses pursuant to article 54(1)(b) of the Statute.

23. During the investigation stage, as the Chamber has noted, the Prosecutor has the primary obligation to ensure the investigation and prosecution of crimes, pursuant to article 54 of the Statute.⁴⁵ The investigation is necessarily confidential and the Prosecution must conduct its work independently.⁴⁶ Permitting the victims to trigger a process upon which a Chamber may recommend a change on

⁴² Registry First Report, para. 18.

⁴³ Registry First Report, para. 23.

⁴⁴ Registry, First Report, para. 27.

⁴⁵ ICC-01/19-28, para. 8.

⁴⁶ Rome Statute, article 42.

the seat of the Court would be a risk to the independence and integrity of the ongoing investigations.

III. CONCLUSION

24. In all of the circumstances, the Prosecution asks that the Chamber dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 17th day of August 2020

At The Hague, The Netherlands