



Original: English

**No. ICC-01/19
Date: 27 October 2020**

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
with Confidential Annex A**
Corrected version of
“Decision on Victims’ joint request concerning hearings outside the host State”
(26 October 2020, ICC-01/19-38)

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Defence Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Philipp Ambach

Other

Megan Hirst
Kate Gibson
Peter Haynes

PRE-TRIAL CHAMBER III of the International Criminal Court (‘Court’) issues this ‘Decision on Victims’ joint request concerning hearings outside the host State’.

I. Procedural history

1. On 4 August 2019, the Office of the Prosecutor (the ‘Prosecution’) requested the Pre-Trial Chamber for authorisation to commence an investigation into crimes allegedly committed partially on the territory of Myanmar, partially on the territory of States Parties, including Bangladesh.¹

2. On 14 November 2019, the Pre-Trial Chamber authorised the investigation.² In its closing remarks, the Pre-Trial Chamber indicated that it was advisable for the Prosecutor to use the dispositions of Article 56 of the Rome Statute (‘Statute’) to preserve evidence which may not be available for the purposes of a potential future trial or whose reliability may be undermined by lapse of time.³

3. On 7 July 2020, the ‘Registry’s First Report on Information and Outreach Activities’ was transmitted to the Chamber (the ‘Registry Outreach Report’).⁴

4. On 4 August 2020, three legal teams representing groups of approximately 650 alleged victims of the situation (the ‘Applicants’) filed a request concerning hearings outside the host State (the ‘Request’).⁵ Specifically, the Request seeks a ‘Registry assessment of potential venues for the holding of proceedings in a State other than the host State within reasonable physical proximity of the affected population’.⁶

¹ ICC-01/19-7.

² Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27.

³ ICC-01/19-27, para. 134.

⁴ Registry Report, ICC-01/19-33-Conf. A public redacted version was filed on that same date.

⁵ Victims’ joint request concerning hearings outside the host State, ICC-01/19-34.

⁶ Request, ICC-01/19-34, para. 56.

5. On 17 August 2020, the Prosecution responded to the Request, opposing it and seeking its dismissal (the ‘Response’).⁷

6. On 20 August 2020, the Chamber invited the Registry to submit observations in relation to the Request.⁸

7. On 21 September 2020, the Registry filed observations in relation to the Request (Registry Observations).⁹ In the Registry Observations, the Registry considered five scenarios of the type of proceedings that could take place at the pre-trial stage. For each of these scenarios, the Registry provided information on the preparatory work, the extent of the Registry’s support and, to the extent possible, the related time required to facilitate the holding of proceedings in Bangladesh.

II. Submissions

8. The Applicants submit that pursuant to Article 68(3) of the Rome Statute (the ‘Statute’) and Rule 93 of the Rules of Procedure and Evidence (the ‘Rules’), they are allowed to file the Request and that the submission of application forms to participate in the proceedings is not required.¹⁰ The Applicants claim the Request is warranted since they have a great personal interest in the location of where proceedings will occur.¹¹

9. The Applicants submit that although ‘arrest warrants and summonses will not be requested or issued for some time’, the Request is timely.¹² They further argue that holding hearings outside the host State is appropriate, as it will facilitate the presentation of evidence and may enhance the perceived legitimacy of the

⁷ Prosecution’s Response to the Victims’ joint request concerning hearings outside the host State, ICC-01/19-35.

⁸ Order inviting the Registry to submit observations on the Victims’ joint request concerning hearings outside the host State, ICC-01/19-36.

⁹ Registry’s Observations on the Victims’ Joint Request Concerning Hearings outside the host State (ICC-01/19-34), ICC-01/19-37.

¹⁰ Request, ICC-01/19-34, paras 25-33.

¹¹ Request, ICC-01/19-34, para. 26.

¹² Request, ICC-01/19-34, paras 40-43

proceedings.¹³ The Applicants also submit this reflects the will of the alleged victims they represent.¹⁴

10. The measure requested by the Applicants is limited to the initiation of an assessment process. In particular, the Request asks the Chamber to direct the Registry to prepare an assessment of potential venues for the holding of proceedings in a State other than the host State within reasonable physical proximity of the affected population. The Applicants do not ask the Chamber to make an actual recommendation to the Presidency pursuant to Rule 100(2) of the Rules.¹⁵

11. The Applicants argue that while the establishment of an ICC Field Office is necessary in order to ensure effective communication with victims in the Cox's Bazar camps, this is insufficient to ensure that victims are able to meaningfully access ICC proceedings when they occur. They claim that access would be significantly increased by holding hearings proximate to the affected community, located in the different refugee camps in Bangladesh.¹⁶

12. The Applicants argue that their Request is timely, because if the Court were to wait for the issuance of a warrant of arrest or summons to appear before initiating the Registry assessment process that is required under Rule 100(2), this would likely preclude the possibility of a confirmation hearing in a State other than The Netherlands.¹⁷

13. The Applicants claim that holding proceedings locally would mitigate the difficulties that would arise from having to transport witnesses to The Hague, a process that is said to be stressful and sometimes traumatising for the witnesses, many of whom are alleged to be stateless.¹⁸ They also argue that holding proceedings locally would enhance their legitimacy.¹⁹

¹³ Request, ICC-01/19-34, paras 45-51.

¹⁴ Request, ICC-01/19-34, paras 52-53.

¹⁵ Request, ICC-01/19-34, para. 27.

¹⁶ Request, ICC-01/19-34, para. 39.

¹⁷ Request, ICC-01/19-34, para. 43.

¹⁸ Request, ICC-01/19-34, paras 46-47.

¹⁹ Request, ICC-01/19-34, paras 48-51.

14. The Prosecution does not deny that the Applicants have standing to make applications at the investigation stage, but it is argued that Rule 100(2) of the Rules does not provide for the victims to “initiate” a “process” under Rule 100(2). The Prosecution further claims that the victims at this stage cannot “trigger” the exercise of the Chamber’s *proprio motu* power to make a recommendation to change the seat of the Court.²⁰ The Prosecution also submits that Rule 100(2) of the Rules is applicable to the stage where there is a particular case, as opposed to a situation. It also submits that there are no ongoing judicial proceedings before the Chamber that could justify changing the seat of the Court.²¹ It also argues that victims do not have a general right to participate in the Prosecution’s investigation and that participation under Article 68(3) of the Statute can only take place in the context of judicial proceedings or pursuant to Rule 93 of the Rules, when the Chamber has solicited such views.²² The Prosecution also submits that Rule 100(2) provides that a request under this provision can be made by the parties, and thus cannot be triggered by the victims.²³

15. The Prosecution also opposes the Request from a substantial point of view.²⁴ In its view, the Request is premature and, considering the early stages of the investigation, could unduly raise victim’s expectations.²⁵ The Prosecution further argues that embarking in a Registry assessment at this stage would waste the Court’s resources, as it is unlikely that there will be any hearings at this stage and also in light of the uncertainties related to the corona virus pandemic, as underscored in the Registry Report.²⁶ It also argues that the Request could risk the integrity and independence of the Prosecution investigations.²⁷

²⁰ Response, ICC-01/19035, para. 19.

²¹ Response, ICC-01/19-35, paras 16-16.

²² Response, ICC-01/19-35, paras 17-18.

²³ Response, ICC-01/19-35, paras 19-20.

²⁴ Response, ICC-01/19-35, paras 3-9.

²⁵ Response, ICC-01/19-35, paras 9-15.

²⁶ Response, ICC-01/19-35, para. 21.

²⁷ Response, ICC-01/19-35, paras 22-23.

III. Analysis

16. The applicants indicate that pursuant to Article 68(3) of the Statute and Rule 93 of the Rules they wish to make a timely request of the Court to initiate an assessment of suitable venues to conduct hearings in close proximity to the victims.

17. Article 68 (3) states, in relevant part:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and evidence.

18. Rule 93 states in relevant part;

A Chamber may seek the views of victims or legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107,109,125,128,136,139 and 191. In addition the Chamber may seek the views of the victim as appropriate.

19. On the plain reading of article 68(3) it is clear that the Court maintains wide powers to consider the interests of victims through their legal representatives, at stages of the proceedings the Court determines are appropriate, provided that this is done in manner that is not prejudicial or inconsistent with the rights of an accused to a fair trial.

20. The Applicants seek an order from the Chamber pursuant to rule 100(2) of the Rules instructing the Registry to make an assessment on the feasibility of changing the location where the Court sits from The Netherlands to another State party, presumably Bangladesh.

21. Rule 100 states, in relevant part:

1. In 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.

2. The 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. [...]

22. As a preliminary matter, the Chamber notes that, whereas Rule 100(1) refers to ‘a particular case’, Rule 100(2) states plainly that the Chamber may recommend sitting away from the seat of the Court ‘any time after the initiation of an investigation’. In other words, although the actual hearing can only take place in the context of a case, *i.e.* after the issuance of a warrant of arrest or summons to appear, the preparation for such hearing can commence prior to that. On that basis the Chamber does not accept arguments from the Prosecutor, that the victims at this stage cannot “trigger” the exercise of the Chamber’s *proprio motu* power to make a recommendation to change the seat of the Court.²⁸

23. Requesting that the court sit at a different location is not an intrusion into the investigative role demarcated for the Prosecutor under the Statute. Victims can express views on matters that address their personal interests under Article 68(3) of the Statute. It cannot be denied that the venue of the proceedings may, in certain circumstances, be something that touches upon the personal interests of the victims.

24. The Chamber also observes that it is important to distinguish between proceedings which may require changing the place where the Chamber sits (*e.g.* opening and closing statements, formal evidentiary hearings, public rendering of judgments and decisions, status conferences, etc.) and the Chamber’s ability to operate at locations away from The Hague. For example, there is no need to change the place where the Chamber sits in the context of Article 56 or 57(3)(c) of the Statute. There is also no need to go through the process of Rule 100 for Chambers to conduct site visits. The Chamber further notes that when proceedings take place via video link, with the Chamber remaining in The Hague, there is no change of venue. Accordingly, a number of the scenarios discussed in the Registry Observations are irrelevant for the purposes of Rule 100.

25. On the merits, the Chamber stresses the importance of preserving evidence pursuant to Article 56 of the Statute and it also recognises the importance of bringing justice closer to the location of the alleged crimes as well as to the victims and witnesses.

²⁸ Response, ICC-01/19035, para. 19.

26. Nevertheless, as the Request recognises, it would be premature for the Chamber to consider making a recommendation pursuant to Rule 100(2) at this stage of the proceedings. Indeed, the Chamber is currently not seized of any matter requiring a hearing. Although it is reasonable to expect that the need to hold hearings may arise in the future, it is not possible to predict, at this stage, when this may occur or what the nature of such hearings will be. That being the case, there is currently nothing before the Chamber that could warrant changing the place where the Chamber sits.

27. As regards the victims' request to direct the Registry to prepare an assessment of potential venues for the holding of proceedings in a State within reasonable physical proximity of the affected population, the Chamber believes that it is sufficiently informed by the information contained in the Registry Report. The Chamber notes, in this regard, that as long as COVID-19 related restrictions remain in place, the Registry's ability to operate in Bangladesh remains limited. The influence of the pandemic on the Court's ability to conduct proceedings in Bangladesh is also exceedingly difficult to predict. Under these circumstances, it would be unproductive to request the Registry to conduct a more extensive assessment of the possibilities of holding hearings in Bangladesh or other locations in the region. Nevertheless, the Chamber will keep the possibility of conducting certain procedural steps *in situ* under review.

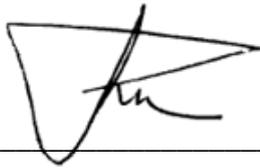
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Request.

Done in English, a translation into French will follow.



Judge Olga Herrera Carbuccia
Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 27 October 2020

At The Hague, the Netherlands