

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/19**

Date: **13 November 2023**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács, Presiding  
Judge Reine Adélaïde Sophie Alapini-Gansou  
Judge María del Socorro Flores Liera

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

*Public*

**OPCD Request for leave to make submissions regarding the LRVs request for  
the adoption of a protocol and for access to the confidential record**

**Source:** Office of Public Counsel for the Defence

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan KC  
Mr Essa Faal  
Ms Melissa Pack

**Counsel for the Defence**

**Legal Representatives of the Victims**

**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**

Mr Xavier-Jean Keïta  
Ms Marie O'Leary

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Unit**

**Victims Participation and Reparations Section**

Mr Philipp Ambach

**Trust Fund for Victims**

**Other**

Ms Meghan Hirst  
Ms Kate Gibson  
Ms Clare Brown  
Mr Nicholas Leddy

## I. INTRODUCTION

1. The Legal Representatives for the Victims (LRVs) seek the adoption of a protocol which would govern “the handling of confidential information and/or material and contact with witnesses and represented victims” as early as the initial stages of an investigation including when a suspect has yet to be identified.<sup>1</sup> Taking a holistic approach, the LRVs consulted other actors and requested the Chamber to invite submissions from, *inter alia*, the Office of Public Counsel for the Defence (OPCD) on the said protocol.<sup>2</sup> The OPCD welcomes this initiative and shares the belief that “establishing relevant protocols at an earlier stage [than the existing protocols] would serve to ensure good practice and protect the integrity of the investigation”,<sup>3</sup> and that such measure can contribute to fairness and to protecting the rights of potential defendants in the proceedings.<sup>4</sup> As any resultant protocol employed will have “significant consequences”,<sup>5</sup> the OPCD seeks leave to make submissions in order to ensure that Defence rights are safeguarded.

## II. OPCD REQUEST FOR LEAVE TO APPEAR

2. The OPCD mandate is directly implicated, and requested, by the LRVs’ submission. Through Regulation of the Court (RoC) 77(4)(a), the OPCD is tasked with “[r]epresenting and protecting the rights of the defence during the initial stages of the investigation”, including in the application of Article 56, and in ensuring that defence rights are protected. Thus, the OPCD seeks leave

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<sup>1</sup> *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Request for the adoption of a protocol and for access to the confidential record, ICC-01/19-52-Anx1-Red, 25 October 2023, paras 3, 4, 18 (LRVs Request); “Proposed Protocol on the Handling of Confidential Information during Investigations and Contact with Witnesses of Opposing Parties and Participants, or with Represented Victims”, ICC-01/19-52-Anx2.

<sup>2</sup> LRVs Request, paras 48, 55.

<sup>3</sup> LRVs Request, para. 3.

<sup>4</sup> LRVs Request, para. 11.

<sup>5</sup> *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Prosecution’s Request pursuant to regulation 35 for an extension of the time limit to respond to the Submission for the Adoption of a Protocol and for Access to the Confidential Record, ICC-01/19-53, 9 November 2023, para. 7.

to intervene pursuant to the aforementioned Regulation which provides that “[w]hen a conflict of interest does not arise” the OPCD “may, on the instruction or with leave of the Chamber, make submissions concerning the need of defence rights in ongoing proceedings”.

### **III. OPCD PROPOSED SUBMISSIONS**

3. If granted leave, the OPCD would make submissions in relation to the proposed protocol itself; specifically, where it raises implications for unrepresented defendants and how the rights of the defence should be safeguarded by the protocol.
4. Secondly, the OPCD would make submissions on the LRVs’ proposals in relation to access to confidential information in Situation-level proceedings. Given the increased Situation-level litigation before the ICC, which impacts defendants before they are even named, the OPCD would highlight the *sui generis* protections of the Rome Statute system afforded to them. To the LRVs’ point, the OPCD would submit on such specific needs arising in the proliferation of early-stage investigations, especially in Article 56 proceedings which are another enumerated aspect of the OPCD mandate as enshrined in RoC 77(4)(a). The OPCD submissions would support the designation of a representative or representatives of each party and participant at the Situation-level to receive confidential access, thereby preserving the full rights of defendants and victims in these significant investigatory stages. Such provision would also create litigation-readiness on issues as they arise and can be exercised while adopting more restrictive RoC 23bis classifications where appropriate.

**IV. RELIEF REQUESTED**

5. For the foregoing, the OPCD respectfully requests that the Pre-Trial Chamber grant it leave to file submissions as outlined above in accordance with RoC 77(4)(a).



Xavier-Jean Keïta  
Principal Counsel of the OPCD

Dated this 13th Day of November 2023  
at The Hague, The Netherlands