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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
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

**Prosecution's Response to Submission for the Adoption of a Protocol and for Access
to the Confidential Record**

Source: Office of the Prosecutor

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
 Ms Nazhat Shameem Khan
 Mr Essa M. Faal

Counsel for the Defence**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants for
Participation/Reparation****The Office of Public Counsel for Victims**

Ms Paolina Massida

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

Mr Xavier-Jean Keita

States' Representatives**Amicus Curiae****REGISTRY****Registrar**

Mr Osvaldo Zavala Giler

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section**Victims Participation and Reparations
Section**

Mr Philip Ambach

Other

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

I. INTRODUCTION

1. The Prosecution respectfully submits that the “Request for the adoption of a protocol and for access to the confidential record” (“Submission”)¹ from Megan Hirst, Kate Gibson, Clare Brown and Nicholas Leddy (“Submitters”) should be rejected. In substance, the Submitters request, first, to participate in the Office of the Prosecutor’s² investigation by attending confidential investigative interviews and other meetings with Prosecution witnesses, and by requiring the OTP to share material in its possession about a represented victim. They argue that this could best be achieved by adopting a “protocol to regulate the handling of confidential information and/or material and contact with witnesses and represented victims”.³ Second, they request access to confidential court records in this situation.⁴

2. The Submission should be dismissed *in limine* because the Submitters have no standing. If the Pre-Trial Chamber⁵ nevertheless entertains the merits of the Submission, it should be rejected for the following reasons: First, the Appeals Chamber has previously ruled that there is no right under the Rome Statute⁶ for victims to participate in an investigation carried out by the Prosecution. Second, the Submitters have failed to show that the personal interests of their clients are affected as required by article 68(3). Third, the Submitters’ arguments regarding challenges that they have faced are unfounded, and disregard the applicable legal framework and practical context in which the Prosecution conducts its investigation. Fourth, the Submitters’ requests and proposed protocol are contrary to the applicable statutory framework for victims’ participation. Fifth, granting the remedies requested by the Submitters would be prejudicial to the Prosecution’s investigation and inconsistent with a fair and impartial trial. Sixth, the proposed remedies are unnecessary, because the statutory arrangements adequately address the issues and the Office has public policies in place that regulate its cooperation and engagement with potential victims during an investigation.

II. ARGUMENTS

A. The Submission should be rejected *in limine*

3. The Submitters have no standing under article 68(3), rule 89 or rule 93 of the Rules of Procedure and Evidence⁷ to make the Submission. As the Appeals Chamber has held, rule 89

¹ [ICC-01/19-52-Anx1-Red](#) as transmitted by the Registry, see [ICC-01/19-52](#), together with annexes 2 and 3 (“Annex 2” and “Annex 3” respectively).

² “OTP”, “Prosecution” or “Office”.

³ Submission, para. 4, p. 22.

⁴ Submission, para. 4, p. 22.

⁵ “Chamber”.

⁶ “Statute”.

⁷ “Rules”. *Contra* Submission, para. 1.

“is specifically fashioned to the provisions of article 68 and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings”.⁸ Pursuant to rule 89(1) and regulation 86(5) of the Regulations of the Court,⁹ in order to present their views and concerns, victims must submit complete written applications to the Registrar, who shall transmit them, together with a report thereon, to the relevant Chamber so the Chamber can decide whether the criteria set forth in article 68(3) are fulfilled.¹⁰ Individuals who have not gone through this process, do not enjoy participatory rights.¹¹ They may nevertheless be permitted to present their views to the Chamber pursuant to rule 93.¹² However, as the Appeals Chamber has held, the “[i]nitiative for soliciting the views of victims under [rule 93] rests entirely with a Chamber”.¹³

4. The Submitters’ clients have not completed the rule 89 process. While ten of the Submitters’ 109 individual clients have reportedly submitted a written application,¹⁴ the Prosecution is not aware of any decision by the Chamber pursuant to rule 89 granting them participatory rights. Furthermore, the Chamber has not sought their views on any subject pursuant to the second sentence of rule 93. The Submitters therefore do not have standing to file their Submission and the Submission should thus be rejected *in limine*.

B. Victims cannot participate in the Prosecution’s investigation

5. There is no right under the Statute for victims to participate in an investigation carried out by the Prosecution. The Appeals Chamber has held that, under article 68(3), there can only be victims’ participation in the context of “proceedings” – a term “denoting a judicial cause pending before a Chamber. In contrast, 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”.¹⁵ The Appeals Chamber concluded that the “[a]cknowledgment 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.”¹⁶

⁸ [ICC-01/04-556 OA4 OA5 OA6](#), para. 46; [ICC-02/05-177 OA OA2 OA3](#), para. 46.

⁹ “RoC”.

¹⁰ [ICC-02/05-01/07-58](#), paras. 2-3; [ICC-02/05-02/09-121](#), para. 2.

¹¹ [ICC-01/04-556 OA4 OA5 OA6](#), paras. 46, 56-57; [ICC-02/05-177 OA OA2 OA3](#), paras. 46, 56-57; [ICC-02/17-196](#), para. 32.

¹² [ICC-01/04-556 OA4 OA5 OA6](#), para. 48; [ICC-02/05-177 OA OA2 OA3](#), para. 48. *See in particular* Rules, rule 93, second sentence.

¹³ [ICC-01/04-556 OA4 OA5 OA6](#), para. 48; [ICC-02/05-177 OA OA2 OA3](#), para. 48.

¹⁴ Submission, para. 6.

¹⁵ [ICC-01/04-556 OA4 OA5 OA6](#), para. 45; [ICC-02/05-177 OA OA2 OA3](#), para. 45.

¹⁶ [ICC-01/04-556 OA4 OA5 OA6](#), para. 52; [ICC-02/05-177 OA OA2 OA3](#), para. 52.

6. While the general principle does not preclude victims from seeking participation in judicial proceedings related to the investigation stage, this presupposes the existence of such proceedings.¹⁷ Victims also have an express right under the statutory framework to make representations under article 15(3) and submit observations under article 19(3),¹⁸ and have been permitted to present their views in proceedings under article 18.¹⁹ During an investigation, victims may also pass on relevant information and make representations to the Prosecution “on any matter pertaining to the investigations and to their interests”.²⁰ The Prosecution has the authority to receive and consider such information and representations during an investigation, under article 42(1) (and during a preliminary examination, under article 15(2)).²¹ This is consistent with the general statutory framework, according to which a criminal investigation is an inquiry conducted solely by the Prosecutor under strict conditions of confidentiality and guided by the principle of objectivity enshrined in article 54(1)(a).²²

7. The Submitters have not identified any judicial proceedings in relation to which they filed their Submission. Instead, they claim that “the submissions fall squarely within the matters on which victims *may* be heard by the Chamber” as “[t]hey are concerned with the protection of the Victims’ own interests during the *investigation* [...] and the ability of their LRVs to effectively represent them [...] during the *investigation*”.²³ As such, the Submitters link their Submission to the Prosecutor’s investigation into the *situation* as a whole, rather than a concrete judicial proceeding. This is further illustrated by the substance of the Submission seeking the adoption of a protocol to “regulate the investigation stage”²⁴ and for access to confidential filings “in the situation”.²⁵

C. The victims’ personal interests are not affected

8. Regardless of the absence of a judicial determination under rule 89,²⁶ the Submitters have not demonstrated that their clients’ personal interests are affected. Personal interests of victims, within the meaning of article 68(3), may only arise in relation to concrete judicial proceedings

¹⁷ [ICC-01/04-556 OA4 OA5 OA6](#), para. 56; [ICC-02/05-177 OA OA2 OA3](#), para. 56.

¹⁸ [ICC-01/04-556 OA4 OA5 OA6](#), para. 53; [ICC-02/05-177 OA OA2 OA3](#), para. 53.

¹⁹ See [ICC-02/18-60 OA](#), paras. 14-15; [ICC-01/21-66 OA](#), paras. 17-18; [ICC-02/17-200 OA5](#), para. 2; [ICC-02/18-21](#), paras. 10-11; [ICC-01/21-47](#), para. 14; [ICC-02/17-171](#), paras. 12-14.

²⁰ [ICC-01/04-556 OA4 OA5 OA6](#), para. 53; [ICC-02/05-177 OA OA2 OA3](#), para. 53.

²¹ [ICC-01/04-556 OA4 OA5 OA6](#), para. 53; [ICC-02/05-177 OA OA2 OA3](#), para. 53.

²² See e.g. [ICC-01/19-28](#), para. 8.

²³ Submission, para. 11, emphasis added.

²⁴ See e.g. Submission, paras. 3, 17-18, 21, 36, 42. See also e.g. Submission, Annex 2, paras. 8, 36.

²⁵ Submission, p. 22. The decisions on victims’ participation in this case cited by the Submitters have all strictly been limited to proceedings, consistent with the legal framework (see Submission, paras. 9-10, citing [ICC-01/19-38-Corr](#), paras. 16-19; [ICC-RoC46\(3\)-01/18-37](#), para. 21; [ICC-01/19-27](#), at paras. 8, 125-126, 133; [ICC-ROC85-01/23-1-Red](#)).

²⁶ See *supra* at para. 4.

pending before the Court. As the Appeals Chamber has held, article 68(3) requires that the “personal interests [of the victims] are affected by the proceedings in hand [...] i.e. by the issues, legal or factual, raised therein”.²⁷ While “the victims’ personal interests are not limited to reparation issues” and “participation by victims should encompass their personal interests in an appropriately broad sense”,²⁸ personal interests within the meaning of article 68(3) must be connected to the status of individuals and must be assessed on a case-by-case basis.²⁹ In this context, it should also be noted that the role of victims in judicial proceedings, and therefore also the personal interests of victims are different from those of the Prosecution.³⁰ The victims’ role is not to replicate the functions of the Prosecution.³¹ In any event, at any future trial, only victims whose personal interests are affected by confirmed charges would be permitted to participate in the proceedings.³²

9. The alleged interests referred to in the Submission are not personal interests of victims within the meaning of article 68(3). The Submitters argue that their clients’ interests in their own protection, including the protection of their confidential information, and their ability to be effectively represented during the investigations are affected.³³ These interests do not relate to concrete proceedings, and therefore fall outside the scope of article 68(3) and rule 89. In addition, the Submitters’ arguments are circular: The Court has a duty to protect victims and witnesses from any risk arising as a result of the activities of the Court, pursuant to article 68(1),³⁴ irrespective of whether or not the person is also a victim participating in any proceedings under article 68(3). The Court’s protection duty cannot be relied upon to justify by itself a victim’s participation. Rather, the Court’s protection duty is designed only to mitigate any impact that the Court’s activities may have on victims and witnesses. Finally, a victim’s interest in being effectively represented cannot constitute a legitimate personal interest where there is no right to participate in an investigation in the first place.

²⁷ [ICC-01/04-556 OA4 OA5 OA6](#), para. 45; [ICC-02/05-177 OA OA2 OA3](#), para. 45. *See also* [ICC-01/04-556 OA4 OA5 OA6](#), paras. 55-56; [ICC-02/05-177 OA OA2 OA3](#), paras. 55-56; [ICC-02/05-01/07-58](#), para. 2; [ICC-02/05-02/09-121](#), para. 2.

²⁸ [ICC-01/09-01/11-460](#), para. 10. *See also* [ICC-01/19-38-Corr](#), para. 19.

²⁹ [ICC-01/04-01/06-925 OA8](#), para. 28; [ICC-01/04-01/06-2205 OA15 OA16](#), paras. 35-36.

³⁰ [ICC-01/04-556 OA4 OA5 OA6](#), para. 55; [ICC-02/05-177 OA OA2 OA3](#), para. 55; [ICC-01/04-01/06-1432 OA9 OA10](#), para. 19. Diss. Op.

³¹ [ICC-01/04-556 OA4 OA5 OA6](#), para. 55; [ICC-02/05-177 OA OA2 OA3](#), para. 55; [ICC-01/04-01/06-1432 OA9 OA10](#), para. 19. Diss. Op.

³² [ICC-01/04-01/06-1432 OA9 OA10](#), paras. 2, 65.

³³ Submission, para. 11.

³⁴ [ICC-01/04-01/07-475 OA](#), para. 1; [ICC-01/04-01/07-521 OA5](#), para. 33.

10. In any event, the Submitters have failed to demonstrate that their clients' personal interests are affected by the Prosecution's open-ended investigation,³⁵ since it cannot be assumed that the investigation is focussing on the victimisation of the Submitters' clients.

D. The Submitters' arguments disregard the applicable legal framework

11. The Submitters' arguments regarding the challenges they have faced are unfounded. They also disregard the applicable legal framework and conflate the victims' qualified right to participate in concrete judicial proceedings,³⁶ with the Prosecutor's investigative powers.

1. Confidentiality during the investigation is sufficiently regulated

12. The Submitters allege that "it is insufficiently clear in these proceedings that (a) information relating to victims is considered confidential; and (b) how such information may be dealt with by the parties and participants".³⁷ These arguments are based on the misconception that the investigation is a "proceeding" with various "parties and participants".³⁸ The Prosecution is the sole entity conducting an investigation, with some oversight by the Pre-Trial Chamber.³⁹ During the investigation, there are no "other parties and participants".⁴⁰ There is no "case" at this stage for a "defendant" to "join [...] later".⁴¹ Thus, there is no need to regulate the sharing of information by adopting a protocol on the handling of confidential information during an investigation.⁴²

13. Moreover, the Statute adequately regulates the Court's duty to protect victims and witnesses and the Prosecution's authority to take measures to ensure the confidentiality of information, including during an investigation.⁴³ As noted by Pre-Trial Chamber II, the duties and obligations as regards victims should inform the Prosecution's investigative and prosecuting action at all stages.⁴⁴ The Appeals Chamber has also repeatedly underscored the Prosecution's duty to protect victims and witnesses, including by "keeping their identities

³⁵ *Contra* Submission, para. 11.

³⁶ *See supra* at paras. 5-6.

³⁷ Submission, para. 25.

³⁸ *See supra* at paras. 5-6.

³⁹ Statute, article 54.

⁴⁰ *Contra* Submission, paras. 24-26.

⁴¹ *See* Submission, para. 17.

⁴² *Contra* Submission, para. 27.

⁴³ Statute, articles 68(1) and 54(3)(f). *See also supra* at para. 9. *See further*, Regulations of the Office of the Prosecutor ("Regulations of the OTP"), regulations 21 and 45.

⁴⁴ [ICC-02/17-171](#), para. 15.

confidential”.⁴⁵ The Prosecutor’s own regulations⁴⁶ and the applicable codes of conduct⁴⁷ also ensure compliance with its duties of confidentiality.

2. *The Office’s approach to the presence of a lawyer in an investigative interview is in line with the Court’s legal framework and international good practices*

(i) *Applicable legal framework and the Office’s policy*

14. The Court’s legal framework does not generally entitle interviewees to be represented by a lawyer during an investigative interview. According to article 55(2)(d), an interviewee has the right to be questioned in the presence of counsel when there are grounds to believe that the person has committed a crime within the jurisdiction of the Court. This right is purposefully not included in article 55(1), which lists the general rights of all other interviewees.⁴⁸ This distinction is also reflected in the Rules, as explained by the Appeals Chamber,⁴⁹ and is consistent with their drafting history.⁵⁰

15. Thus, under rule 111(1), the possibility for the presence of counsel (“*if present*”) during an interview refers to the scenario set out in rule 112(1)(a), when “the person questioned [to whom article 55(2) applies] refuses to be audio- or video-recorded”, which then triggers the general procedure in rule 111. It does not mean that rule 111 foresees the presence of counsel in any “investigative interviews”.⁵¹ Furthermore, rule 111 refers only to the recording of “formal statements” and not to every Prosecution interaction with a witness.

⁴⁵ [ICC-01/04-01/07-776 OA7](#), para. 98.

⁴⁶ Regulations of the OTP, regulations 21 and 45.

⁴⁷ [Code of Conduct of the Office of the Prosecutor](#), 5 September 2013, paras. 8(d), 11, 20(c), 32-36, 66; [Code of Conduct for Investigators](#), 10 September 2008, sections 5 and 6.

⁴⁸ See also Cassese, Gaeta et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, p. 1200 (“The guarantees for individual rights in criminal proceedings before the ICC are built in a pyramidal way. Article 55(1) represents the first step: those rights are granted to anybody during an investigation by the organs of the ICC [...] Then paragraph 2 provides for an additional set of rights for those persons concerning whom there are grounds to believe that they have committed crimes within the jurisdiction of the Court and are about to be questioned.”).

⁴⁹ [ICC-02/05-03/09-295 OA2](#), para. 26.

⁵⁰ Rule 111 of the Rules is “based largely upon a French proposal that was modelled on Rule 43 of the ICTY Rules”. See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (Beck, 3rd ed., 2016), p. 1408. See also ICTY Rules of Procedure and Evidence, rule 43 (“Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure: (i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded; (ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded; (iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded; (iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes; (v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and (vi) the tape shall be transcribed if the suspect becomes an accused.”).

⁵¹ *Contra* Submission, para. 31(b).

16. While there is no general right for an interviewee to have a legal representative present during interviews with the Office, such presence may be considered by the Office on a case-by-case basis, taking into account all relevant factors for the specific interview, including the purpose for engaging with a person,⁵² and the personal circumstances of the interviewee. The Office's policy in this respect is publicly stated in the Regulations of the OTP,⁵³ which is in line with the Statute and Rules. It strikes a balance between the principle of keeping the number of persons in an interview to a minimum and ensuring the wellbeing of the interviewee.⁵⁴ As a matter of policy, the Office also ensures that an accompanying person may be present during an interview subject to the interviewee's agreement. In order to avoid any possibility that the interviewee may be coerced or influenced by a third party,⁵⁵ any discussion regarding the presence of an accompanying person during the interview is conducted without that person being present.

17. Considering that the presence of an accompanying person is for the benefit of the witness's wellbeing,⁵⁶ that person might, for example, be a "family member, counsellor, [or] victim assistant worker" and could include a legal representative. And even where the witness requests to have a legal representative present, that person is not limited to a specific category of lawyers, such as counsel or a legal representative practising at the ICC to whom the Code of Professional Conduct for Counsel applies.⁵⁷ Where a legal representative accompanies a witness in such an interview, the role of the legal representative is limited to providing mental support and does not extend to legal representation, as such, or in the manner contemplated by the Submitters.

⁵² For example, a meeting that is dedicated solely to confirming the identity of the interviewee, explaining the interview process, the interviewee's rights, and inquiring about their willingness to cooperate with the Office – without questioning the interviewee on his/her knowledge on the subject of the investigation – would be a factor against a third party being present during the discussion ([ICC-01/05-01/08-73](#), para. 45). Similarly, meeting with a person for the sole purpose of identifying new leads would militate against the presence of a third party, as this would increase the risk of interference with the Office's investigation as well as the risk to the potential leads. It should be noted that the record of such meetings is not shared with the interviewee and might not even be subject to disclosure at a later stage (*see, e.g.*, [ICC-01/04-02/06-1330 OA3](#), para. 16).

⁵³ Regulations of the OTP, regulations 39 and 40. *Contra* Submission, para. 28.

⁵⁴ *See further, infra* para. 22 ([Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations](#), p. 15 ("Question each person separately and individually and keep the number of people in the room to a minimum."); [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), article 20(b) ("the number of interviews of victims is kept to a minimum"))).

⁵⁵ Statute, article 55(1)(b).

⁵⁶ Regulations of the OTP, regulation 39(2) provides, *inter alia*: "The role of the accompanying person shall be limited to giving mental support to the witness."

⁵⁷ [Code of Professional Conduct for counsel](#), ICC-ASP/4/Res.1, 2011, article 1. *Contra* Submission, para. 32.

(ii) *The Office's approach in this investigation*

18. The Submitters do not argue that the Office's policy violates the Court's legal framework. Instead, they submit, incorrectly, that as a matter of fact there is a "consistent practice of excluding victims' counsel from interviews and preliminary meetings with represented victims"⁵⁸ and that the Office applies a "presumptive denial of legal representation in investigative interviews".⁵⁹ This argument is unfounded. Throughout the investigation in this situation, there has been only one occasion, to date, when a potential victim witness – through a legal representative – expressed a preference to have the legal representative present during a potential interview with the OTP. The Office screened the person (in a preliminary meeting), but, for reasons unrelated to the request, did not take a formal statement from the person.

19. The Office's approach in this investigation is consistent with prior ICC decisions.⁶⁰ The Submitters explain that "[v]arious ICC Chambers have established protocols which provide that dual status victims *are entitled* to have their lawyer present during meetings or investigative interviews with the OTP or defence."⁶¹ However, all the decisions and protocols referred to by the Submitters not only concerned dual status witnesses, but were adopted in the context of actual proceedings.⁶² The presence of a legal representative during an interview of a dual status witness is premised on the right of that person to participate as a victim during the proceedings stage, having been previously granted such status by the relevant Chamber pursuant to article 68(3) and rule 89.

(iii) *International best practice*

20. The Submitters refer to a list of sources to support their view that "international best practice is to *enable* represented victims to have a lawyer present in investigative interviews".⁶³ However, they fail to provide: (i) the legal basis showing the relevance of these documents to the statutory framework; (ii) a justification why the interpretation of article 21 would require a different approach; or (iii) the basis for stating that these documents establish "international best practice". The Submitters do not expressly argue that a victim has a *right* to have a legal counsel present during an interview according to "international best practice". Yet, they appear to conflate that question with the separate issue of whether a legal representative *may* be present during an investigative interview of a victim. The Office does not object to such a possibility

⁵⁸ Submission, para. 29.

⁵⁹ Submission, para. 32.

⁶⁰ *Contra* Submission, para. 31.

⁶¹ Submission, para. 31(a).

⁶² Submission, para. 31(a), fn. 28. *See also* [Chambers Practice Manual](#), 7th edition, 13 July 2023, para. 80.

⁶³ Submission, para. 31.

in general and argues that the presence of a legal representative is to be assessed on a case-by-case basis, as explained above.⁶⁴

21. Some of the authorities referred to by the Submitters – whether from civil law or common law systems⁶⁵ – state that it is for the interviewing national authority to decide whether a legal representative (or any accompanying person) will be present during the interview.⁶⁶ According to the practice in some national jurisdictions, the interviewer must provide a reasoned decision for refusing the presence of another person during the interview.⁶⁷

22. The Submission also refers to the “Guidelines for civil society organisations” (“Guidelines”),⁶⁸ which have been developed by the Office in cooperation with Eurojust, but it misinterprets the scope of these Guidelines. They are “specifically addressed to civil society organisations” and “have not been designed for competent investigative or prosecutorial authorities”.⁶⁹ The Submitters also fail to correctly appreciate the content of the Guidelines and that they are consistent with the Office’s policy as set out above, including with regulation 39 of the Regulations of the OTP.⁷⁰ The Guidelines also do not suggest that a witness might need a lawyer or that there is a right to one (“[i]f there is a need”). Rather, they refer to scenarios where normally the “person being questioned” would be entitled to have a lawyer present, such as in the case of a suspect; or when the presence of a “legal guardian” would normally be required (as in the case of child interviews).

⁶⁴ See *supra* at para. 16.

⁶⁵ See Submission, paras. 31(f), 31(g).

⁶⁶ See, e.g., [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), article 20(c). The guidance document accompanying the directive refers to confidentiality concerns as an example for refusing the presence of an accompanying person. See [DG Justice Guidance Document, related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), December 2013, p. 42. See also France, [Code de procédure pénale](#), article 10-4; Scotland, [Victims and Witnesses \(Scotland\) Act 2014](#), article 9A(1)(d); Ireland, [Criminal Justice \(Victims of Crime\) Act 2017](#), article 14(3); England and Wales, [Code of Practice for Victims of Crime in England and Wales](#), para. 2.5.

⁶⁷ [DG Justice Guidance Document, related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), December 2013, p. 42.

⁶⁸ Submission, para. 31(c).

⁶⁹ [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations](#), p. 3.

⁷⁰ See, e.g., Guidelines, p. 15: “Question each person separately and individually and *keep the number of people in the room to a minimum*. If there is a need for the presence of persons others than the person(s) doing the questioning, the person being questioned and the interpreter (e.g. a support person, lawyer or legal guardian), then inform those persons in advance that they are not to influence the account of the person being questioned in any way and should not speak during the person’s questioning.” (emphasis added).

23. The Submitters refer to the practice of the Kosovo Specialist Chambers (“KSC”).⁷¹ However, the KSC’s arrangements regarding the legal representation of dual status witnesses are confined to the *proceedings* and do not extend to interviews conducted by prosecution investigators during the investigation stage.⁷² The practice of other internationalised tribunals likewise does not support the proposition that a legal representative’s presence during an investigative interview of a witness is “international good practice”. Indeed, there is no evidence that at the Special Tribunal for Lebanon (“STL”), legal representatives of victims were present during the interviews of their clients at the investigation stage.⁷³ In fact, victims were “procedurally excluded from the investigative stage”.⁷⁴

24. The Submitters also erroneously compare the status of a victim within the Court’s legal framework to that of “*partie civile*”.⁷⁵ They mention, for example, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), where – derived from the Cambodian national system – the “*partie civile*” (i.e. the victim) is considered to be a “party” to the proceedings; which is not the case at the Court.⁷⁶ Although in some civil law systems victims function as a “*partie civile*” and have a confined role during an investigation led by an investigating magistrate,⁷⁷

⁷¹ Submission, para. 31(e).

⁷² The KSC decision relied on by the Submitters refers to ICC practice in this regard, as explained above. *See supra* paras. 16-19. By analogy, the KSC Trial Panel I rejected the Defence’s argument that, since the Specialist Prosecutor’s Office (“SPO”) had carried out its investigation for years without the presence of a Defence lawyer during interviews, allowing for an SPO representative to be present during the Defence interview of the SPO’s witnesses would breach the principle of equality of arms (*Prosecutor v. Shala, Decision on the Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, KSC-BC-2020-04/F00537, 8 June 2023, para. 39).

⁷³ *See, e.g.*, STL, Rules of Procedure and Evidence, rules 61(i), 65(B).

⁷⁴ Dov Jabobs, *The Unique Rules of Procedure of the STL*, in *The Special Tribunal for Lebanon Law and Practice*, Alanuddin et al. (eds.), (Oxford Uni. Press, 2014), 111-133, at 120. *See also, id.*, Howard Morrison and Emma Pountney, *Victim Participation at the Special Tribunal for Lebanon*, 153-176, at 164.

⁷⁵ Submission, para. 31(e), fn. 34.

⁷⁶ A scholar has commented that the “fundamental difference of victims joining as a party to the proceedings at the ECCC, as opposed to them being mere participants at the ICC, leads to various differences in specific procedural rights and modes of participation during the proceedings.” (B. Zhang, *Recognizing the Limits of Victims Participation: A Comparative Examination of the Victim Participation Scheme at the ECCC and ICC*, in Meisenberg et al. (eds.), *The Extraordinary Chambers in the Courts of Cambodia* (T.M.C Asser Press, The Hague, 2016) 515, at 519).

⁷⁷ *See, e.g.*, the Special Criminal Court in Central African Republic: [Loi n° 18.010 du 02 juillet 2018, portant règlement des procédure et preuve devant la cour penale spéciale de la république centrafricaine](#), article 76 (“[...] la partie civile peut participer à la procédure d’instruction. Par requête motivée, elle peut solliciter l’accomplissement de tous les actes d’instruction qu’elle juge utiles à la manifestation de la vérité, dont des auditions et confrontations, des expertises, des compléments d’expertise ou des contre-expertises. Dans les mêmes formes, la partie civile peut également demander à participer aux actes qu’elle a elle-même sollicités.”). [France: Code de procédure pénale](#), article 10-4: “Lorsque la victime est assistée par un avocat, celui-ci peut, à l’issue de chacune de ses auditions, poser des questions. Il peut également présenter des observations écrites. Celles-ci sont jointes à la procédure.” [République Islamique de Mauritanie: Ordonnance n° 83.163 du 9 juillet 1983 instituant un Code de Procédure pénale](#), article 107 (“Le Procureur de la République et les conseils de l’inculpé et de la partie civile ne peuvent prendre la parole que pour poser des questions après y avoir été autorisés par le juge d’instruction. Si cette autorisation leur est refusée, le texte des questions sera reproduit ou joint au procès-verbal.”).

the Court's legal framework is significantly different on this matter. Thus, any contrary domestic practice does not show that the Court's legal framework or its approach to the victims' role during an investigation is inconsistent with international good practice.

3. *Practical considerations do not justify or require legal representatives to be present during investigative interviews*

25. The Submitters argue that having legal representatives present during interviews would be beneficial for practical reasons. They submit that it would: (i) contribute to the interviewee's psychological comfort – thereby creating an atmosphere more conducive to the interviewee speaking openly, and reduce the risk of miscommunication;⁷⁸ (ii) avoid the need for the interviewee having to “recall and re-tell what was discussed” to the legal representative, which is necessary for the lawyer to provide effective representation;⁷⁹ (iii) protect the victim's legal rights;⁸⁰ and (iv) protect the interviewers from allegations of improper conduct.⁸¹

26. Irrespective of these arguments, practical considerations cannot override the applicable legal framework. As argued above, the Court's legal framework does not foresee any participation by victims in the Prosecution's investigations, and the presence of legal representatives during investigative interviews is not required as a matter of law. In any event, the Submitters' arguments should also be rejected on their merits.

27. To ensure that an interviewee is appropriately supported during an investigative interview (from a mental support point of view) in line with regulation 39, the Office relies on the advice of a psycho-social expert (“PSE”). Before conducting an investigative interview with a victim in this situation, the Office first conducts a psycho-social assessment with the assistance of a PSE.⁸² If the PSE, as part of the psycho-social pre-interview assessment, recommends that a support person or a PSE should be present during the interview, that recommendation is followed, as a matter of internal OTP practice. The Prosecution recognises that in certain circumstances, taking into account the wishes of the witness, a lawyer or legal representative may well be a suitable person to accompany the witness during an investigative interview and to cater for the wellbeing of the witness.

28. However, in these circumstances the conditions of presence during an investigative interview, as set out in regulation 39(2), would have to be respected. The role of the legal representative would be limited to giving mental support to the witness. The legal representative would not be allowed to participate in or otherwise interfere with the questioning

⁷⁸ Submission, paras. 33, 35.

⁷⁹ Submission, para. 35.

⁸⁰ Submission, para. 35.

⁸¹ Submission, para. 35.

⁸² See also Regulations of the OTP, regulation 36(3).

– even if he or she believes that there might be a misunderstanding or miscommunication.⁸³ In this regard, it should be noted that, in the OTP’s experience, most legal representatives of Rohingya people, if not all, communicate with their clients via interpreters.

29. The argument that the legal representative should be present during an investigative interview to avoid the interviewee having to repeat the account is equally problematic. It should be presumed that the legal representative is already familiar with the victim’s past and harms suffered, as the reason for their victim status.

30. It is also not clear why the presence of the legal representative during an investigative interview is necessary to provide effective representation in relation to an interviewee’s rights as a potential victim. As set out above, the participation of victims and their representatives is restricted to judicial proceedings in which the victims have been permitted to participate. This must relate to issues that affect their personal interests as a victim, and does not extend to the investigation as a whole.⁸⁴ Similarly, the argument that the rights of the victims might be in peril during an investigative interview with the Office is inapposite. The *raison d’être* of the Office’s work is to establish the truth, to investigate objectively and independently and to provide justice to victims.

31. Finally, the argument that the presence of the legal representative may protect the interviewers from allegations of improper conduct is equally unfounded. During its investigations, the Office follows the law, the Court’s relevant jurisprudence and its internal practice guidelines for investigations. There is no need for legal representatives of victims to monitor the investigation. Rather, it is the Pre-Trial Chamber’s role to exercise oversight of the investigation within the confines of article 54.

4. *The Court’s legal framework does not entitle victims or their representatives to be provided with confidential material during the investigation*
 (i) *Applicable legal framework and practice*

32. Victims and their representatives are not entitled to be provided with a copy of the record of the interview. As set out above, the Statute and Rules differentiate between the rights of interviewees concerning whom there are grounds to believe that they have committed crimes within the jurisdiction of the Court (article 55(2), rule 112) and those of all other interviewees (article 55(1), rule 111).⁸⁵ Only those interviewees to whom article 55(2) applies are entitled to be provided with a copy of a record of their interview, pursuant to rule 112(1)(e) or (3).

⁸³ See Regulations of the OTP, regulation 39(2), which provides, *inter alia*: “The accompanying person shall not be allowed to participate in or otherwise interfere with the questioning.” *Contra* Submission, para. 35.

⁸⁴ See *supra* at paras. 5-6, 8.

⁸⁵ See *supra* at paras. 14-15.

33. While there is no general right of an interviewee or their representatives to be provided with a copy of the record of the interview, and the Office applies an assumption against providing a copy in the interest of witness protection and the confidentiality of information, the Office will consider exceptions to this principle on a case-by-case basis.⁸⁶ Indeed, as a matter of practice, the Office will provide a copy of the statement given by the interviewee, if requested by the interviewee and providing a copy will not prejudice further ongoing investigations, the confidentiality of the information or the safety of witnesses, victims and members of their families, or where provision of a copy of the statement was a condition for giving the statement.

34. With regard to other confidential material related to represented victims, there are no provisions under the Court's legal framework that entitle victims, or their legal representative, to the provision of confidential material during the investigation. The Prosecution has a statutory duty to protect persons cooperating with the Office – including victims and witnesses - and to ensure the confidentiality of information.⁸⁷ It also has a duty to ensure the integrity, impartiality and objectivity of its investigations.⁸⁸ The Office will therefore not share any confidential material with victims or their representatives during the investigation. It should be noted that certain material requested by the Submitters, such as reports of meetings prepared by the Office,⁸⁹ may constitute internal work product which is exempt from disclosure even to the Defence during the proceedings.⁹⁰ Other material may be withheld even from the Defence subject to an order from the Chamber.⁹¹

(ii) *The Submitters' arguments lack merit*

35. The Submitters' arguments disregard the applicable legal framework for victims' participation during an investigation. They should be rejected on that basis alone.

36. The Submitters argue that they are hampered in the representation of their clients because they do not have accurate records of their clients' interaction with the Office.⁹² This argument disregards that the Submitters represent their clients in their capacity as a victim – or *potential* victim (within the meaning of article 68(3) – and not in their capacity as a (potential) Prosecution witness. As set out above,⁹³ the participation of victims and their representatives

⁸⁶ See Statute, articles 42(1), 54(1), 68(1).

⁸⁷ Statute, articles 54(3)(f) and 68(1).

⁸⁸ Statute, articles 54(1)(a) and 42(1).

⁸⁹ Submission, para. 37 (“records of meetings”); Submission, Annex 2, para. 59 (“notes made during the meeting”).

⁹⁰ See Rules, rule 81(1). Subject to the application of article 67(2) of the Statute and rule 77 of the Rules.

⁹¹ See Rules, rules 81(2) and 81(4).

⁹² Submission, para. 39.

⁹³ See *supra* at paras. 3, 5-6, 8.

is restricted to judicial proceedings in which the victims have been permitted to participate and in relation to issues that affect their personal interests as a victim, and does not extend to the investigation as a whole. Therefore, there is no need for the Submitters to have “accurate records of their clients’ interaction with the OTP” at the investigation stage. The Submitters further claim that seeking materials about their clients, which was provided to the Office by third parties, directly from those third parties “has the possibility of exposing [their clients] to an increased risk” as it would require that they disclose to the third parties that their clients are represented.⁹⁴ This argument does not explain why the legal representative would consider it necessary to expose their clients to additional risk, by requesting material from third parties. Additionally, this argument is premised on the misconception that there is a need for the Submitters to maintain an accurate record of material related to their clients at the investigation stage.⁹⁵ More significantly however, the Submitters’ argument seems to disregard the fact that the Office has an obligation to maintain confidentiality of its investigations and to respect conditions under which investigative materials and information were provided to it.

E. The requests and proposed protocol are contrary to the applicable Statutory framework for victims’ participation

37. The Submitters request the adoption of a protocol in this situation that regulates the handling of confidential information, entitles representatives of victims to be present in investigative meetings between their clients and “other parties or participants” and grants them access to confidential material related to their clients.⁹⁶ The Submitters further request to be provided with access to the confidential court records in this situation.⁹⁷

38. The Submitters’ requests are based on the fundamental misconception that victims may participate in the investigation.⁹⁸ Essentially, the Submitters are asking for a protocol memorialising a participatory right of *potential* victims as *potential* witnesses in (a) *potential* future case(s). Moreover, the proposed measures are not necessary to “protect” victims or the confidentiality of their information. As set out above,⁹⁹ the Court’s legal framework sufficiently provides for the protection of victims and witnesses and for the confidentiality of information during an investigation. The proposed measures are also not necessary for the effective representation of the Submitters’ clients as the statutory framework does not foresee

⁹⁴ Submission, para. 40.

⁹⁵ *See supra* at para. 36.

⁹⁶ Submission, paras. 4, 27, 32, 41-42, 46; Submission, Annex 2.

⁹⁷ Submission, paras. 49-54.

⁹⁸ *See supra* at paras. 5-6.

⁹⁹ *See supra* at paras. 9, 13.

such representation in the absence of concrete proceedings.¹⁰⁰ Moreover, their requests pose significant risks to the independence and the integrity of the investigation.¹⁰¹

39. The provisions of the Submitters' proposed protocol would not only expand the victims' role under the Statute, but also significantly increase the scope of corresponding provisions in existing protocols during proceedings. For instance, the proposed protocol provides for access to "materials concerning a represented victim which are held by a party or participant (including materials relating to the represented victim *or* materials produced with the involvement *or* assistance of the represented victim)".¹⁰² In contrast, the protocol upon which the Submitters claim to have based this provision only provides for access to "materials (which not only relate to specific participating victims with dual status but were also produced with their involvement *and* assistance)".¹⁰³ Similarly, the Submitters' proposed protocol expands the rights of (potential) victims to receive "a copy of the statement, transcript or recording made during the interview with the calling party" as contained in the standard protocol¹⁰⁴ to also include potentially non-disclosable internal work products such as "notes made during the meeting or interview".¹⁰⁵ The Submitters also request the presence of a legal representative "when a represented victim meets with a party or participant (including for the purpose of a screening or an interview)" and that, in such meetings, the representative "may be accompanied by his or her own interpreter".¹⁰⁶ In contrast, the standard protocol does not entitle representatives to be present during screenings, nor to bring their own interpreter.¹⁰⁷ The Submitters neither flag nor justify these expansions in their explanatory notes.¹⁰⁸

40. Moreover, access to the confidential court record for court-approved legal representatives of victims during the pre-trial and trial stage cannot be equated to open access to any lawyer of any potential victim during an investigation phase.¹⁰⁹ As detailed below,¹¹⁰ there are significant risks involved in granting such access. Furthermore, the Submitters' examples of confidential filings at the investigation stage which may affect the interests of potential victims do not justify granting them access to the confidential record of the investigation.¹¹¹ Article 56

¹⁰⁰ *See supra* at paras. 5-6, 30.

¹⁰¹ *See infra* at paras. 41, 44-47.

¹⁰² Submission, Annex 2, para. 60, emphasis added.

¹⁰³ [ICC-02/05-01/20-618-Anx](#), para. 7(b), emphasis added.

¹⁰⁴ [ICC-02/05-01/20-618-Anx](#), para. 7(a).

¹⁰⁵ Submission, Annex 2, para. 59.

¹⁰⁶ Submission, Annex 2, para. 56.

¹⁰⁷ [ICC-02/05-01/20-618-Anx](#), para. 9.

¹⁰⁸ *See* Submission, Annex 3, pp. 7-8.

¹⁰⁹ *Contra* Submission, paras. 49-50.

¹¹⁰ *See infra*, Section F.

¹¹¹ *Contra* Submission, paras. 51-52.

provides for the possibility of unique *investigative* opportunities and does not mention victims. Counsel may be present if an investigation presents a unique opportunity “to take testimony or a statement from a witness”¹¹² and the Pre-Trial Chamber takes measures, pursuant to articles 56(1)(b) and 56(2). However, counsel appointed under article 56(2)(d) represents the suspect or the accused – or the “interests of the defence” where, including during the *situation* stage as here, there has not yet been an arrest or appearance, or counsel has not been designated. There is no express provision made for counsel to be appointed to represent the witness to be interviewed under article 56, and much less a potential victim. Victims, as such, have no role to play in such an interview. If the evidence obtained through such an interview is later submitted or admitted in the proceedings, victims may be permitted to present their views and concerns, if their personal interests are affected. Similarly, rule 99(1) is irrelevant to the Submitters’ arguments as it only applies in the context of the Court’s mandate under articles 57(3)(e) and 75. The process can only be triggered by victims who have requested reparation or who have given a written undertaking to do so. Forfeiture under article 57(3)(e) applies only to the stage after a warrant has been issued – not during the investigation. Thus, it is limited to a particular case and victims will need to show that they are affected by that specific case and a specific forfeiture request to make an application under rule 99(1). Similarly, the Court’s reparation mandate under article 75 is triggered only by a conviction at the end of the proceedings. It does not apply during an investigation.

F. The proposed procedures are inconsistent with a fair and impartial trial

41. Even when the personal interests of victims are affected, a Chamber is still required to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹¹³ Allowing legal representatives of victims to attend confidential investigative interviews and other meetings with a witness or granting them access to confidential information or to the confidential court record of the situation would be inconsistent with a fair and impartial trial. Such access could pose significant risks to the security of Prosecution witnesses and other persons cooperating with the Prosecution, and thereby impact their cooperation with the Office and the content of their evidence. It may also create risks of undue interference with the Prosecution’s investigations, which affects their integrity.

¹¹² Statute, article 56(1)(a).

¹¹³ [ICC-01/04-01/06-925 OA8](#), para. 28.

42. The Appeals Chamber has held that the Court as a whole has a duty to ensure that persons are not unjustifiably exposed to risks through the activities of the Court.¹¹⁴ Among the measures taken by the Prosecution to that end is to “keep[...] [the witness’] identities confidential”.¹¹⁵ Such confidentiality could not be assured if the legal representatives of victims were to attend investigative interviews and other meetings with a witness or have access to confidential information, or to the confidential court record. The fact that legal representatives may be on the Registry’s list of counsel and are bound by the Code of Conduct for counsel,¹¹⁶ does not constitute sufficient safeguard. First, under the Submitters’ proposal, the Chamber would not exercise any control over who represents victims and who would therefore gain access to confidential information. Any person who fulfils the formal requirements to be admitted to the Registry’s list of counsel might seek access to confidential information by purporting to represent a victim in a situation. Second, the Submitters propose that those permitted to get access to confidential information would not only include the legal representatives of victims, but also “other persons properly designated as members of their teams”.¹¹⁷ The Submitters refer to authorities that regulate interviews of dual status victims during the trial stage of the proceedings, but those authorities are irrelevant in the context of an investigation. Even for interviews at the trial stage, Trial Chambers have found that there may be situations where a party may need to conduct an interview without the presence of the legal representative.¹¹⁸

43. In addition, confidential information discussed during an investigative interview or other meeting, or confidential information in the court record of a situation, may not only be limited to information relevant to the status of a person as a victim. It may extend to sensitive information about other witnesses, persons cooperating with the Prosecution or third persons. For example, during an investigative interview with a witness, the Prosecution may put to that witness confidential information provided by or referring to other persons. Such information should not be accessible to the legal representative of the victims. In addition, in certain circumstances, the Chamber may impose restrictions on access to certain confidential materials.

¹¹⁴ [ICC-01/04-01/07-475 OA](#), para. 54.

¹¹⁵ [ICC-01/04-01/07-776 OAJ](#), para. 98.

¹¹⁶ Submission, paras. 32, 53.

¹¹⁷ Submission, Annex 2, para. 4(b) – defining the notion of “participants”.

¹¹⁸ See Submission, paras. 31(a) and 32, referring to [ICC-01/12-01/18-674](#), paras. 20-21; [ICC-01/04-02/06-430-Anx1](#), para. 10(c); [ICC-01/04-01/07-2571-t-ENG](#), paras. 25-26.

44. Allowing legal representatives of victims to access confidential information in the record of a situation or to be present during the Prosecution’s investigative activities as suggested by the Submitters would also create risks to the integrity of the investigations. The Prosecution is mandated to establish the truth by investigating both incriminating and exonerating circumstances equally,¹¹⁹ and to act independently.¹²⁰ As held by the Appeals Chamber, participating victims are not equated to the parties to the proceedings and their role is not to replicate the functions of the Prosecution.¹²¹ Yet, if the Submitters’ remedies were to be granted, there is a risk that any person who fulfils the formal requirements to be admitted to the Registry’s list of counsel might gain access to confidential information, including bad faith actors. Such information could be used to negatively impact, and possibly influence the Prosecution’s investigation.

45. The Submitters erroneously argue that their presence during an investigative interview could “contribute to a more effective investigation”, including by reducing the “risk of miscommunication”.¹²² While this may make an investigation more effective from the Submitters’ subjective perspective, the Prosecution must protect the objectivity of its investigation and the quality of the evidence obtained during an investigation. It must therefore ensure that a witness’s account during an interview is not influenced in any way, including by a lawyer representing the witness in his/her separate and distinct capacity as a victim.

46. Furthermore, the fact that a legal representative may participate in trial proceedings when their client gives evidence cannot justify their involvement during the investigations.¹²³ At the trial, only victims whose personal interests are affected by the charges will be permitted to participate,¹²⁴ the Trial Chamber will have determined the appropriate stage and manner of participation and will ensure compliance with its order;¹²⁵ and the Chamber will have duly appointed qualified legal representatives to participate in the trial proceedings. None of these safeguards are in place during an investigation. Blurring the lines between an investigation and trial proceedings has the potential to impact on the integrity of the investigations and its outcome. This, in turn, is inconsistent with a fair and impartial trial.

¹¹⁹ See Statute, article 54.

¹²⁰ See Statute, article 42(1).

¹²¹ [ICC-01/04-556 OA4 OA5 OA6](#), para. 55; [ICC-02/05-177 OA OA2 OA3](#), para. 55; [ICC-01/04-01/06-1432-Anx OA9 OA10](#), para. 19. Diss. Op.

¹²² Submission, para. 35.

¹²³ *Contra* Submission, para. 36.

¹²⁴ [ICC-01/04-01/06-1432 OA9 OA10](#), paras. 2, 65.

¹²⁵ Statute, article 68(3); Rules, rule 89(1).

47. Finally, the statutory framework that grants the Prosecutor the power to solely and independently conduct and ensure the integrity of the investigations and protect the confidentiality of the information should not be compromised by giving the victims a permanent standing/role in the investigations. The role of victims and their legal representatives should not be upgraded to the status of a “party” to the investigation or the proceedings. An attempt to expand their role, in the manner envisaged by the Submitters, would radically alter the carefully constructed balance in the victim participation scheme established in the Statute.

G. The proposed remedies are unnecessary

48. The proposed remedies are unnecessary, because the Office has public policies in place that regulate its cooperation with victims during an investigation, beyond the statutory framework described above.

49. The Submitters allege that the Prosecution has not “adopted or publicized documents regarding its practice or guarantees for victim and witness interaction at [the investigation] stage” such that it is “difficult, if not impossible, for victims’ counsel to advise clients on how OTP interactions will proceed.”¹²⁶ This argument does not reflect the reality that the Office’s obligations and practice as regards victims and witnesses are regulated – and publicised – by the statutory framework established by the Statute and Rules.¹²⁷

50. Respect for and support of victims’ right to participate in proceedings is further embedded within the Regulations of the OTP. In addition to regulation 39 discussed above, regulation 16 requires the Office, in coordination with the VPRS, as appropriate, to “seek and receive the views of the victims at all stages of its work in order to be mindful of and to take into account their interests.” Regulation 37 requires that victims are informed, when questioned by the Office, “of the procedures for participation and access to reparations under the Statute, and of the existence and role of the [VPRS]”.¹²⁸ In addition, beyond the Court’s legal framework, the Office has established - and published - policies that regulate its cooperation with victims, including, most notably, its “Policy Paper on Victims’ Participation.”¹²⁹ Other relevant, published Office policies in this respect include the Policy Paper on Sexual and Gender-Based Crimes¹³⁰, and the Policy on Children.¹³¹ These policies are published in the

¹²⁶ Submission, para. 19.

¹²⁷ See *supra* at paras. 9, 13-15, 32-34.

¹²⁸ See also Regulations of the OTP, regulation 52, which requires that the Office “constructively engage with the legal representatives of victims in order to promote the efficient conduct of proceedings.”

¹²⁹ [Policy Paper on Victims’ Participation](#), April 2010.

¹³⁰ [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014, see paras. 48-70.

¹³¹ [Policy on Children](#), November 2016, see paras. 62-82.

interests of promoting transparency, clarity and predictability in the application of the ICC legal framework.¹³²

51. In this situation, the Prosecution has made every effort to ensure a sensitive and respectful dialogue with victims, including through its engagement with the Submitters. The Pre-Trial Chamber (as previously constituted) has found that a “meaningful exercise” of the Court’s obligation under article 68(3) is “premised on the victims having access to complete and accurate information about their role at the Court during the various stages of the proceedings”.¹³³ Towards this end, the Chamber ordered the Registry to establish “in consultation and collaboration with the Prosecutor, a system of public information and outreach activities with the affected communities and particularly with the victims of the Bangladesh/Myanmar Situation”, and to “periodically inform the Chamber about the progress of and challenges to its outreach and information activities in the Bangladesh/Myanmar Situation.”¹³⁴ The Registry has duly filed reports on its information and outreach activities since 6 July 2020.¹³⁵ These activities have included, most recently, efforts in coordination with the Office to address “common concerns about the Court, such as the length of the ICC proceedings, and to provide clarity on the different stages of the proceedings, on how investigations are conducted [...]”.¹³⁶

III. CONCLUSION

52. For the reasons set out above, the Prosecution respectfully requests that the Chamber reject the Submission.



Karim A.A. Khan KC, Prosecutor

Dated this 20th day of November 2023
At The Hague, The Netherlands

¹³² See, e.g., OTP [Policy on Children](#), p. 9, para. 10. See also OTP [Policy paper on case selection and prioritisation](#), 15 September 2016, p. 3, para. 3.

¹³³ [ICC-01/19-28](#), para. 7.

¹³⁴ [ICC-01/19-28](#), para. 12.

¹³⁵ [ICC-01/19-33-Red](#). See e.g., most recently, [ICC-01/19-51-Red](#).

¹³⁶ [ICC-01/19-51-Red](#), para. 7.