

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-RoC46(3)-01/18

Date: 24 May 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou

**REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE
COURT**

Public Document

**Request for Leave to Submit Amicus Curiae Observations by the International
Commission of Jurists (pursuant to Rule 103 of the Rules)**

Source: International Commission of Jurists

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

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**
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Mr Xavier-Jean Keita

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the “Rules”), the International Commission of Jurists (“ICJ”) requests Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) leave to submit *amicus curiae* observations in the form of a written brief on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (the “Request”).¹

2. The ICJ is a non-governmental organization established in 1952 and has its headquarters in Geneva, Switzerland. The ICJ is composed of 60 eminent jurists representing different justice systems worldwide and has 90 national sections and affiliated justice organisations. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. It endeavors to promote States’ compliance with their international human rights legal obligations; to support efforts to combat impunity; to ensure legal accountability for human rights violations and access to effective remedies and reparations for victims. The ICJ has consultative status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the Council of Europe and the African Union. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. The ICJ intervenes regularly in judicial proceedings in domestic and international jurisdictions in an *amicus curiae* or other third party capacity.² From its regional headquarters in Bangkok, the ICJ has

¹ ICC-RoC46(3)-01/18-1.

² For example, the ICJ has intervened at the European Court of Human Rights (*Suso Musa v Malta* App No 42337/12; *Del Rio Prada v Spain* (No 42750/09); *F.G. v. Sweden* (No. 43611/11); *A.T. v. Sweden* (No. 78701/14)) and in the Inter-American Court of Human Rights (*Murillo et al. v Costa Rica* [2012] IACHR Case No. 12.361). Domestic interventions include those at the Pattani Provincial Court of Thailand (*Case of the Petitioner Ms. Rorheemah Useng, Black Case Number, Tor Por 1/2557 (2014)*); the Bangkok South Criminal Court of Thailand (*Case of the Defendant Andy Hall, Black Case Number A 517/2556 (2013)*); the High Court of Singapore (*Lee Hsien Loong v. Roy Ngerng Yi Ling* [2015] SGHC 320); the Supreme Court of the Philippines (*Ang Ladlad v Commission on Elections* [2010]); the Constitutional Court of Korea (*Cases No. 2013 HunGa5, 2014 HunGa8, 2012 HunGa17, 2013 HunGa23, 2013 HunGa 27,*

been working to improve the rule of law and respect for human rights in Asia, including in Myanmar and Bangladesh.

II. Procedural Background

3. On 9 April 2018, the Prosecutor submitted a Request pursuant to regulation 46(3) of the Regulations of the Court and article 19(3) of the Rome Statute (the “Statute”). The Prosecutor seeks a ruling from the Chamber on the question whether the Court may exercise jurisdiction in respect of the alleged deportation of more than 670,000 members of the Rohingya people from Myanmar into Bangladesh.

4. On 11 April 2018, the President of the Pre-Trial Division assigned the Prosecutor’s Request to the Chamber.³

5. On 7 May 2018, pursuant to Rule 103(1) of the Rules, the Chamber invited the competent authorities of the People’s Republic of Bangladesh to submit observations on the Request by no later than 11 June 2018. The specific legal matter arising from the Request is whether the Court may exercise jurisdiction over alleged acts of deportation of persons from the territory of Myanmar (a State not party to the Statute) into the territory of Bangladesh (a State party to the Statute) on the basis of articles 7(1)(d) and 12(2)(a) of the Statute.⁴

6. The Chamber will convene a status conference on 20 June 2018 to address issues raised in the Request.⁵

2013 HunGa 13); the Supreme Court of the United Kingdom (*Belhaj & Anor v Straw & Ors* [2017] UKSC 3); the High Court of Ireland (*Foy v Ireland* [2007] IEHC 470); the Court of Appeal of Victoria (*Australia Christian Youth Camps Ltd & Anor v Cobaw Community Health Services Ltd & Ors* [2014] VSCA 75); and the United States Court of Appeals for the District of Columbia (*ACLU v. DOJ* [2013] 923 F.Supp.2d 310).

³ President of the Pre-Trial Division, “Decision assigning the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’ to Pre-Trial Chamber I”, ICC-RoC46(3)-01/18-2, 11 April 2018.

⁴ Decision Inviting the Competent Authorities of the People’s Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 7 May 2018, ICC-RoC46(3)-01/18-3, paras 3, 6-7.

⁵ Order Convening a Status Conference, ICC-RoC46(3)-01/18-4, 11 May 2018.

III. Applicable Law

7. Rule 103(1) of the Rules provides that, “[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”.

8. *Amicus curiae* interventions are also foreseen before other international criminal courts and tribunals, particularly the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”) and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).⁶

9. The decision to invite or to receive an *amicus* intervention is a matter within the discretion of the Chamber.⁷

10. The Court recently invited *amicus curiae* submissions in connection to legal issues that may have implications beyond a specific case.⁸ The Court also previously held that the core rationale underlying an *amicus curiae* submission is that the Chamber be assisted in the determination of the case by an independent intervener having no other standing in the proceedings.⁹

⁶ See Rule 74, Rules of Procedure and Evidence of the ICTY; Rule 74, Rules of Procedure and Evidence of the ICTR; Rule 74, Rules of Procedure and Evidence of the SCSL; Rule 33, Internal Rules of the ECCC. See also, for example, ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-AR98bis.I, Decision on Application for Leave to Submit an *Amicus Curiae* Brief, 21 September 2012; ICTR, *Prosecutor v. Bagosora*, ICTR-96-7-T, Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998; ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, 002/19-09-2007-ECCC/TC, Decision on Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, 13 September 2016 (“ECCC *Amicus Curiae* Decision”). See also Articles 34(2) and 66(4) of the Statute of the International Court of Justice.

⁷ *Prosecutor v. Gbagbo*, Decision on the ‘Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence’, Appeals Chamber, ICC-02/11-01/11-517, 1 October 2013, para. 9; *Prosecutor v. Bemba Gombo*, Decision on the Application of 14 September 2009 for Participation as an *Amicus Curiae*, Appeals Chamber, ICC-01/05-01/08-602, 9 November 2009, para. 10.

⁸ *Prosecutor v. Al-Bashir*, Order Inviting Expressions of Interest as *Amici Curiae* in Judicial Proceedings (Pursuant to Rule 103 of the Rules of Procedure and Evidence), Appeals Chamber, ICC-02/05-01/09-330, 29 March 2018, para. 1.

⁹ *Situation in the Republic of Kenya*, Decision on Application for Leave to Submit *Amicus Curiae* Observations, Pre-Trial Chamber II, ICC-01/09-35, 18 January 2011, para. 6. See also ECCC *Amicus Curiae* Decision, para. 7.

IV. Request to Intervene as *Amicus Curiae*

11. In the Prosecutor's Request, it was submitted that the Chamber "may invite organizations to request leave under rule 103 to file observations as *amicus curiae*", in accordance with Rules 58 and 59 of the Rules.¹⁰

12. The ICJ is qualified to offer assistance to the Chamber given its expertise in international law and its experience as independent third party intervener in domestic and international courts and quasi-judicial bodies around the world.

13. In light of the nature and current status of the Request, no adversarial proceedings are currently in place. This matter also raises legal issues which may have implications for the clarification of international law beyond the immediate case and which have not been previously litigated in other judicial settings. Allowing the ICJ leave to intervene as *amicus curiae* will, therefore, provide the Chamber with additional specific and independent information to help the Chamber in the determination of the Request.

14. The ICJ is mindful that proceedings before the Chamber must be conducted efficiently and expeditiously and will endeavor to submit its *amicus curiae* observations without undue delay.

15. The ICJ considers that the Request raises urgent and important legal questions about the scope of the Court's jurisdiction.

16. If granted permission to intervene, the ICJ would set out certain of the grounds which may provide the Court with a basis to assert jurisdiction over conduct relating to the alleged deportation of more than 670,000 members of the Rohingya people from Myanmar into Bangladesh, with reference to international law and, where appropriate, comparative law, particularly law applicable before the Court pursuant to article 21 of the Statute.

¹⁰ ICC-RoC46(3)-01/18-1, 9 April 2018, para. 61.

V. Conclusion and Relief Requested

17. The ICJ submits that the proposed *amicus curiae* observations will contribute to the proper determination of the Request. Pursuant to Rule 103(1) of the Rules, therefore, the ICJ requests the Chamber leave to submit *amicus curiae* observations in the form of a written brief.



Ian Seiderman, General Counsel
on behalf of
International Commission of Jurists

Dated this 24th day of May 2018

At Geneva, Switzerland