

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

**Date: 25 May 2018**

**PRE-TRIAL CHAMBER I**

**Before:**

Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Adélaïde Sophie Alapini-Gansou

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

**Public**

Request for leave to submit an *Amicus Curiae* brief 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”

**Source: Members of the Canadian Partnership for International Justice**

**Document 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

**States Representatives**

Competent Authorities of the  
People's Republic of  
Bangladesh

**REGISTRY**

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**The Registrar**

Mr. Peter Lewis

## **I. Introduction**

1. The Applicants, who are members of the Canadian Partnership for International Justice (“CPIJ”), request leave to submit *amici curiae* observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence (“the Rules”) on legal issues raised by the *Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*,<sup>1</sup> which are currently under consideration by Pre-Trial Chamber I (“the Chamber”).<sup>2</sup>
2. The Applicants will provide submissions that can assist the Chamber in the proper determination of issues that have not been previously litigated before this Court. Although they support the Office of the Prosecutor’s (“the Prosecutor”) conclusions, they will not repeat the submissions already made. They will directly address the issues raised in the Prosecutor’s request with distinct or complementary perspectives.

## **II. Procedural History**

3. On 9 April 2018, the Prosecutor submitted a request for a ruling under Article 19(3) on whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.<sup>3</sup>
4. On 11 April 2018, the President of the Pre-Trial Division assigned the Prosecutor’s request to the Chamber.<sup>4</sup>
5. On 7 May 2018, the Chamber invited the competent authorities of Bangladesh to submit written observations, either publicly or confidentially, on the Prosecutor’s request.<sup>5</sup>
6. On 11 May 2018, the Chamber convened a status conference for 20 June 2018, to be held in closed session, only in the presence of the Prosecutor.<sup>6</sup>

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<sup>1</sup> Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018 [Prosecution’s Request].

<sup>2</sup> 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 [Decision Assigning Request].

<sup>3</sup> Prosecution’s Request, *supra* note 1.

<sup>4</sup> Decision Assigning Request, *supra* note 2.

<sup>5</sup> 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”, ICC-RoC46(3)-01/18-3, 7 May 2018 [Decision Inviting Bangladesh to Submit Observations].

<sup>6</sup> Order Convening a Status Conference, ICC-RoC46(3)-01/18-4, 11 May 2018.

### **III. Admissibility of the Request**

7. Rule 103(1) of the Rules provides a Chamber with the authority to accept *amicus curiae* observations on any issue the Chamber deems appropriate. It is in the Chamber’s discretion to grant leave if it “considers it desirable for the proper determination of the case.”<sup>7</sup> Pursuant to Rule 103, unprompted applications can be submitted either by States, organisations, or individuals interested in addressing issues of relevance to the proceedings.
8. This rule stems from customary international law and is found in the statutes of other international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone (“SCSL”), and the Extraordinary Chambers in the Courts of Cambodia have provisions equivalent to article 103(1) and have permitted third party interventions using a rationale similar to this Court.<sup>8</sup> In their determinations, these tribunals considered whether *amicus curiae* submissions would assist the court in achieving “the end of justice,” and “get[ting] the law right.”<sup>9</sup>
9. The Appeals Chamber of this Court has previously allowed *amicus curiae* submissions when they were “*desirable* for the proper determination of the case” [emphasis added] and in cases where the novelty of the issues raised could benefit from *amicus curiae* submissions.<sup>10</sup> The SCSL has further expounded and distinguished the term “desirable” from “essential,” concluding that the latter would be over-restrictive.<sup>11</sup>
10. The current Chamber thereby has the discretion to grant *amicus curiae* observations where there is reason to believe that such submissions will help the Chamber reach the right decision on the issues before it.

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<sup>7</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06 (OA11), Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence,” 22 April 2008, para. 8.

<sup>8</sup> ICTY Rules of Procedure and Evidence, Rule 74; ICTR Rules of Procedure and Evidence, Rule 74; SCSL Rules of Procedure and Evidence, Rule 74; ECCC Internal Rules, Rule 33.

<sup>9</sup> See for example *Prosecutor v. Prlić et al.*, IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, “Order Granting Leave for Amicus Curiae to Appear”, 12 February 1998.

<sup>10</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11 (OA 5), Decision on the “Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence” 13 September 2013, para.10.

<sup>11</sup> *Prosecutor v. Kallon*, SCSL-2003-07, “Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments,” 1 November 2003.

#### **IV. Specific Issues to be Addressed**

11. The Applicants respectfully request to submit observations on the following issues:
- a. Whether Article 19(3) of the Rome Statute (“the Statute”) allows the Office of the Prosecutor to request a ruling on jurisdiction;
  - b. The scope of territorial jurisdiction under Article 12(2); and
  - c. The nature and definition of the crime of deportation under Article 7(1)(d).
12. On Article 19(3), the Applicants support the view that the Prosecutor is entitled to request a ruling on jurisdiction under article 19(3), even when a situation has not yet been assigned to a Pre-Trial Chamber. The Applicants will:
- a. Provide the Chamber with an informed analysis of the scope of Article 19(3) based on in-depth insight from general public international law on treaty interpretation, using *inter alia* the *travaux préparatoires* of the Rome Statute to assist the Chamber in its determination of this novel issue;
  - b. Offer an analysis of the general principle of *compétence de la compétence* based on the legal practice of other international tribunals as well as a comparative analysis of the principle as it is applied in different national jurisdictions;
  - c. Address the Prosecutor’s request for a ruling on jurisdiction on the grounds of “exceptional circumstances”. The Applicants will present submissions on how the Court could interpret its legal framework so as to limit burdensome and frivolous requests under Article 19(3), while also encouraging transparency in the Prosecutor’s decision-making.
13. On Article 12(2), the Applicants will provide analysis on the scope of territorial jurisdiction under this provision. They will:
- a. Provide insight on the scope of territorial jurisdiction under the Rome Statute in light of principles of public international law on treaty interpretation;
  - b. Examine the principle of qualified territorial jurisdiction as a matter of customary international law, providing insight on the principle of systemic integration<sup>12</sup> as it

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<sup>12</sup> Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*.

applies to the facts giving rise to the Prosecutor’s request, the ‘substantial and bona fide connection test’ for international territorial jurisdiction, and territorial jurisdiction as anticipated in many international treaties;

- c. Provide supplementary comparative analysis on the national exercise of territorial jurisdiction;
- d. Offer inter-systemic analysis of extraterritorial jurisdiction as interpreted in international human rights law.

14. On the nature and definition of the crime of deportation, the Applicants will provide informed analysis on the interpretation of the elements of deportation provided for in the Statute, based on principles of public international law on treaty interpretation and a survey of international border laws and treaties. Specifically, the Applicants will demonstrate that the crime of deportation is completed upon a victim’s entry into “another location” as an essential aspect of crossing an international border, making the ultimate location an indispensable part of the commission of the crime. In the alternative, should the Chamber deem the essential element of the crime of deportation as crossing an international border, without emphasis on the location where the victim crosses into, the Applicants will demonstrate that such conduct constitutes acts on the territory of both contiguous States at that given border.

#### **V. Expertise of the Applicants**

15. CPIJ is a pan-Canadian partnership that brings together leading Canadian academics and non-governmental actors who work on strengthening access to justice for victims of international crimes. Funded in 2016 by a 5-year grant from the Social Sciences and Humanities Research Council of Canada, CPIJ co-creates knowledge about more effective ways to fight impunity for the most serious international crimes through cutting-edge academic research, publications, casework, legal interventions, educational missions, conferences, expert meetings, and policy development.

16. CPIJ’s expertise rests on the strength and quality of the scholarship and activities of its individual members, who maintain rigorous academic posts across Canadian universities and senior professional roles within reputable non-governmental organisations. Signatories are among the leading commentators on the issues before the Court. The particular expertise also

lies in the unique interaction we create between disciplines (law, international relations, criminology, gender studies, for instance) and between academics and civil society.

17. Our members have extensive experience in the field of international criminal, human rights, refugee, migration and humanitarian law, and have previously made submissions before this Court. Most recently, our members Darryl Robinson, Valerie Oosterveld, and Fannie Lafontaine, together with other experts, were granted leave to submit *amici curiae* observations on the legal questions arising in the Hashemite Kingdom of Jordan's appeal<sup>13</sup> against the decision of Pre-Trial Chamber II on non-compliance with the Court's request for arrest and surrender of Omar Al-Bashir.<sup>14</sup>
18. In addition to submissions before this Court, our members have intervened individually or collectively in high-profile cases in courts around the world. To provide a few examples, Lawyers Without Borders Canada (LWBC) acted as *amicus* in approximately 15 landmark cases – several of which on international criminal law and Rome Statute matters – , mostly in Latin America and at the Inter-American Court for Human Rights, but also in other contexts. As an example of the latter, LWBC along with Fannie Lafontaine intervened at the Supreme Court of Canada in the child soldier case of Omar Khadr.<sup>15</sup> As another example, François Larocque and Penelope Simons filed an *amicus curiae* brief before the Supreme Court of the United States in the matter of *Jesner v Arab Bank, plc*, on the issue of civil jurisdiction over corporations that are alleged to have financed acts of terrorism.<sup>16</sup>
19. The present request for leave is signed individually by seventeen (17) of CPIJ's members. The proposed observations will be made as a collective but solely on behalf of the below signatories,

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<sup>13</sup> The Hashemite Kingdom of Jordan's appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir”, ICC-02/05-01/09, 12 March 2018.

<sup>14</sup> “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir”, ICC-02/05-01/09, 11 December 2017.

<sup>15</sup> *Khadr v Canada (Premier Ministre) et al.*, [2010] 1 SCR 44, “*Mémoire des intervenants Avocats sans frontières Canada, le Barreau du Québec et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval*”, online: [https://www.asfcanada.ca/uploads/publications/uploaded\\_memoire-des-intervenants-final-pdf-9.pdf](https://www.asfcanada.ca/uploads/publications/uploaded_memoire-des-intervenants-final-pdf-9.pdf).

<sup>16</sup> Brief of Canadian International and National Law Scholars, *Jesner v Arab Bank, PLC*, Supreme Court of the United States, Docket no. 16-499, 27 June 2017.

who will rely on their particular expertise to assist the Chamber in relation to the legal issues before it:

- a. **Jennifer Bond** is a professor at the University of Ottawa Faculty of Law. She is an authority on the intersection of criminal law and refugee law and has provided strategic advice to Canada's Ambassador to the United Nations and the UNHCR.
- b. **Robert J. Currie** is a professor at Dalhousie Schulich School of Law and a specialist in international and transnational criminal law, with a particular expertise on jurisdictional issues. His work is widely cited by Canadian courts.
- c. **Amanda Ghahremani** is an international human rights lawyer who specialises in redress for survivors of universal jurisdiction crimes as Legal Director of the Canadian Centre for International Justice.
- d. **Julia Grignon** is a professor at Université Laval Faculty of Law where she teaches international humanitarian law, refugee law, and human rights law.
- e. **Mark Kersten** is a fellow and lecturer in international law and international relations at the University of Toronto. His publications, including his blog *Justice in Conflict*, are widely cited by academics and tribunals around the world.
- f. **Fannie Lafontaine** is a professor at Université Laval, holder of the Canada Research Chair on International Criminal Justice and Human Rights, and the Director of the Canadian Partnership for International Justice. She also has wide professional experience at the United Nations and with non-governmental organisations.
- g. **François Larocque** is professor at the University of Ottawa and an expert on questions of jurisdiction for gross violations of human rights.
- h. **Frédéric Mégret** is a professor at McGill University Faculty of Law whose expertise lies in the theoretical dimensions of international criminal justice, international human rights law and international humanitarian law, in addition to general international law.
- i. **Valerie Oosterveld** is a professor at the University of Western Ontario Faculty of Law. She is an expert on gender issues in international criminal law and has served on the Canadian delegation to the Rome Conference, the subsequent Assembly of States Parties, and the Review Conference in Kampala.



- j. **Frederick John Packer** is professor of law and Director of the Human Rights Research and Education Centre at the University of Ottawa. As the inaugural Neuberger-Jesin Professor of International Conflict Resolution, he is an expert in the areas of international protection of human rights, minorities, inter-ethnic relations, conflict mediation, and global governance.
  - k. **Pascal Paradis** is the Executive Director and co-founder of Lawyers Without Borders Canada, a non-governmental international development organisation whose mission is to support the defence of human rights for the most vulnerable populations.
  - l. **Darryl Robinson** is a professor at Queens University who has previously served as a Canadian delegate at the Rome Conference and as an advisor within the Office of the Prosecutor of this Court.
  - m. **Penelope Simons** is a professor of law at the University of Ottawa whose research focuses on the intersections between transnational corporate activity and grave violations of human rights, including international crimes.
  - n. **Érick Sullivan** is a lawyer, CPIJ's coordinator and the Deputy Director of Laval University's International Criminal and Humanitarian Law Clinic.
  - o. **Alain-Guy Tachou Sipowo** is a former post-doctoral fellow at McGill University and an expert on the interaction between the rules of procedure and evidence and the fundamental rights of the accused.
  - p. **Mirja Trilsch** is a professor and the Director of the Université du Québec à Montréal's International Clinic for the Defence of Human Rights.
  - q. **Jo-Anne Wemmers** is a professor at Université de Montréal and a researcher at the International Centre for Comparative Criminology. She is an international expert on victimology and the former Secretary General of the World Society of Victimology.
20. The Applicants, as scholars and practitioners dedicated to ending impunity for international crimes, have a legitimate legal interest in the determination of the issues before the Chamber and are well placed to offer observations that would be of assistance to it.
21. The Prosecutor's request raises novel legal issues on the powers of the Chamber to issue a ruling on jurisdiction before a formal situation has been assigned to it, on the scope of territorial jurisdiction granted by the Statute, as well as the scope of the crime of deportation. The

assistance that the Applicants can provide to this live issue will be relevant and useful for the proper determination of the questions before the Chamber.

22. The Applicants' *amici curiae* submissions will not require any additional time before the Chamber deliberates on the matter. The Competent Authorities of Bangladesh have been asked by the Chamber to submit their observations by 11 June 2018.<sup>17</sup> The Applicants are prepared to submit their observations on the same date, if so required by the Chamber, so as not to delay the proceedings.
23. Rule 103(2) provides that parties have the right to respond to any *amicus curiae* observations submitted should the request be granted. Therefore, neither the Prosecutor nor the Competent Authorities of Bangladesh will be prejudiced by the filing of the Applicants' observations on these issues. Instead, the Applicants' brief will assist the Chamber in defining the scope and application of articles 19(3), 12(2), and the defining elements of article 7(1)(d).

## VI. Conclusion

24. For the reasons mentioned above, the Applicants respectfully request the Chamber to grant them leave to submit observations pursuant to Rule 103(1). They commit to filing such *amici curiae* observations in any timeframe decided by the Court so as not to delay the resolution of this important matter.




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Fannie Lafontaine

*On behalf of the aforementioned signatories*  
 Director of the Canadian Partnership for International Justice

Dated this 25<sup>th</sup> day of May 2018  
 At Quebec City, Canada

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<sup>17</sup> Decision Inviting Bangladesh to Submit Observations, *supra* note 5.