

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

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

*Date: 7 June 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**

**Joint Request for Leave to Submit Amicus Curiae Observations pursuant to Rule  
103 of the Rules**

**Source: Naripokkho; Women's Initiatives for Gender Justice; Ms. Sara  
Hossain; and European Center for Constitutional and Human Rights**

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)**

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

Mr. Xavier-Jean Keita

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Women’s Initiatives for Gender Justice (“WI”), Naripokkho, Ms. Sara Hossain, Advocate, Supreme Court of Bangladesh, and the European Center for Constitutional and Human Rights (“ECCHR”) (together “Applicants”) pursuant to Rule 103 of the Rules of Procedure and Evidence (“Rules”), jointly respectfully request Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) leave to submit *amicus curiae* observations on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (“Request”)<sup>1</sup> in the form of a written brief.

## II. Procedural background

2. On 9 April 2018, the Office of the Prosecutor filed the Request seeking the Pre-Trial Division to determine whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.<sup>2</sup> In the Request, the Office of the Prosecutor submitted that the assigned Pre-Trial Chamber “may invite [...] organisations and other persons to request leave under rule 103 to file observations as *amicus curiae*”.<sup>3</sup>
3. On 11 April 2018, the President of the Pre-Trial Division assigned the Request to Pre-Trial Chamber I.<sup>4</sup>
4. On 7 May 2018, the Chamber, noting that Bangladesh was particularly affected by the alleged deportation of Rohingya, invited “the competent authorities of the People’s Republic of Bangladesh to submit written observations” on matters in connection with the Request that, in the opinion of the competent authorities of Bangladesh, would assist the Chamber in its determination of this Request.<sup>5</sup>

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<sup>1</sup> ICC-RoC46(3)-01/18-1.

<sup>2</sup> Request, para 1, 63.

<sup>3</sup> Request, para 61.

<sup>4</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.

<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 observations from the authorities of the People’s Republic of Bangladesh”), para 6-7.

5. The Chamber scheduled a status conference for 20 June 2018, to be held in closed session, only in the presence of the Prosecutor, to address certain issues raised in the Request.<sup>6</sup>

### III. Applicable law

6. Rule 103(1) of the Rules states 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, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”
7. The decision to invite or to receive an *amicus* intervention is a matter within the discretion of the Chamber.<sup>7</sup>
8. In deciding whether to grant leave to appear as *amicus curiae*, the Chamber takes into consideration the relevant factors which may assist the Court in the proper determination of the issues at stake and the appropriateness of the participation under the specific circumstances.
9. Moreover, as the case law of the Court shows, relevant for the Chamber is that the issue that the Applicants propose to address in their observations is related to the Prosecutor’s request.
10. In this regard the Applicants wish to note that their participation, if permitted, would be not only utmost relevant but also appropriate in order to provide the Chamber with a gendered perspective on the situation at stake, before reaching a legal determination on the Prosecutor’s request under Art. 19(3) of the Statute. In this sense the Applicants’ observations would be “desirable for the proper determination of the case”.
11. The applicants believe that their perspective and input would be perfectly complementary to what other parties and participants in the proceedings can

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

<sup>7</sup> See, *eg*, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on applications for leave to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/09-01/11-1987, 12 October 2015, para 15; Prosecutor v. Laurent Koudou Gbagbo, Decision on the ‘Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules of Procedure and Evidence’, ICC-02/11-01/11-517, 1 October 2013, para 9; Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, ICC-01/05-01/08-602, 9 November 2009, para. 10.

bring to the Chamber, and in particular to the Prosecutor's views. In this sense the proposed *amicus curiae* would by no means be just repetitive of arguments raised by other parties.

#### IV. Specific issues to be addressed

12. The Applicants jointly respectfully request leave to intervene as *amici curiae* to make observations on (i) how sexual and gender-based violence can be appraised within the crime of deportation or forcible transfer, and how this appraisal informs both the nature, and the commencement and completion of the crime of deportation or forcible transfer, and implications for the clarification of international law beyond the immediate case; and (ii) the questions posed to the authorities of the People's Republic of Bangladesh from a gendered perspective.
  - (i) *Observations on how sexual and gender-based violence can be appraised within the crime of deportation or forcible transfer, and how this appraisal informs both the nature, and the commencement and completion of the crime of deportation or forcible transfer, and implications for the clarification of international law beyond the immediate case*
13. The Applicants respectfully offer to provide the Chamber with information on the gender aspects of the crime of deportation or forcible transfer for purposes of assisting the Chamber in determining the nature of the crime of deportation or forcible transfer, and the elements commencing and completing it. The Applicants further respectfully propose to assist the Chamber in identifying the implications thereof for the clarification of international law beyond the immediate case.
14. In its Decision inviting observations from the authorities of the People's Republic of Bangladesh, the Chamber pointed out that "[t]he specific legal matter arising from this Request is whether the Court may exercise territorial 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."<sup>8</sup>

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<sup>8</sup> Decision inviting observations from the authorities of the People's Republic of Bangladesh, para 3.

15. The question whether the commission of part of the crime of deportation or forcible transfer on the territory of a State party, *ie* Bangladesh, suffices to establish the Court's territorial jurisdiction, only arises after establishing that a part of the crime of deportation or forcible transfer took place on the territory of Bangladesh at all. To determine that a part of the crime of deportation or forcible transfer took place on the territory of Bangladesh requires outlining how the crime of deportation or forcible transfer is composite in nature and to delineate the crime, *ie* to identify the elements of the crime that commence the crime, and those that complete it. The nature and delineation of the crime of deportation or forcible transfer is therefore relevant to the question *sub judice*.
16. The Applicants, based on their knowledge and extensive interactions with recently arrived Rohingya in Bangladesh, submit that sexual violence against Rohingya by persons attributable to the State of Myanmar has been rife, with the majority of victims being women and girls.<sup>9</sup> While the Court may not have jurisdiction to adjudicate sexual and gender-based crimes committed in their entirety on Myanmar territory, these crimes may constitute an element of the crime of deportation or forcible transfer, and, as such, inform nature and delineation thereof. Consequently, the alleged commission of sexual and gender-based crimes is relevant to the question before the Chamber.
17. If granted leave to intervene, the Applicants would set out (i) how sexual and gender-based violence is to be appraised within the crime of deportation or forcible transfer; (ii) how this appraisal informs the nature, commencement and completion of the crime of deportation or forcible transfer; and (iii) the implications for the clarification of international law beyond the immediate case.

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<sup>9</sup> See, *eg*, "Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar", 12 December 2017, available at <https://www.un.org/sexualviolenceinconflict/statement/statement-by-the-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-security-council-briefing-on-myanmar-12-december-2017/>; Human Rights Watch, "All of my body was in pain", 16 November 2017, available at <https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>; Human Rights Council, "Fact-finding Mission on Myanmar: concrete and overwhelming information points to international crimes", 12 March 2018, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22794&LangID=E> (websites last accessed 06 June 2018).

(ii) *Observations on the questions posed to the authorities of the People's Republic of Bangladesh from a gendered perspective*

18. The Applicants respectfully offer to provide the Chamber with a gendered perspective on the following matters: (i) the circumstances surrounding the presence of members of the Rohingya people from Myanmar on the territory of Bangladesh; and (ii) other matters in connection with the Prosecutor's Request that would assist the Chamber in its determination of the Request.
19. These matters, *mutatis mutandis*, reflect two of the three questions that formed the very essence of the Chamber's Decision inviting observations from the authorities of the People's Republic of Bangladesh.<sup>10</sup> Indeed, the Chamber noted that, in light of Bangladesh being particularly affected by the alleged deportation of Rohingya, clarifying these questions would assist in its determination of the Request.<sup>11</sup>
20. If granted leave to intervene, the Applicants will provide the Chamber with a gendered perspective on said matters, and particularly on circumstances surrounding the presence in Bangladesh of Rohingya women and survivors of sexual and gender-based violence. This would assist the Chamber in adjudicating the Request, as it would enable the Chamber to explore the issues raised in the aforementioned questions based on a spectrum of different perspectives.
21. The Applicants are qualified to offer assistance to the Chamber in relation to the above matters: WI has extensive experience and knowledge with respect to appraising crimes under the Court's jurisdiction emphasising gender considerations, general issues of public international law including treaty interpretation and customary international law, and intervening before the Court as *amicus curiae*.
22. Naripokkho is a membership-based Bangladeshi women's activist organisation, working for the advancement of women's rights and entitlements, and building resistance against violence, discrimination and injustice. Naripokkho's

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<sup>10</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 observations from the authorities of the People's Republic of Bangladesh"), para 7.

<sup>11</sup> Decision inviting observations from the authorities of the People's Republic of Bangladesh, para 6.

longstanding work in Bangladesh, and with the affected communities in Cox's Bazaar, the entry point into of Bangladesh of the Rohingya, has granted the organisation a unique insight into the situation Rohingya women and survivors of sexual and gender-based violence.

23. Ms. Sara Hossain, advocate before the Supreme Court of Bangladesh and honorary executive director of Bangladesh Legal Aid Service Trust (BLAST), has vast legal and practical knowledge of the Bangladeshi judicial system. An avid advocate of women's rights and equality, Ms. Hossain has provided litigation support in many landmark decisions on sexual violence, including *MC v. Bulgaria* before the European Court of Human Rights.
24. ECCHR as supporting organization adds to this the international legal expertise, involving both national and international proceedings regarding the commission of crimes under international law. ECCHR has a long history of engagement with the Court, in particular through the filing of communications and submission in several situations which are under preliminary examination at the ICC, including a comprehensive submission with regard to sexual and gender-based violence in the situation of Colombia in 2015.
25. Granting the Applicants leave to make observations will, therefore, provide the Chamber with additional specific and objective information to help the Chamber adjudicate the Request.

#### **V. Proposed timeframe**

26. The Applicants are cognisant that proceedings before the Court are to be conducted efficiently and expeditiously. In light hereof, and the status conference scheduled for 20 June 2018, the Applicants respectfully propose to submit observations, if granted leave to do so, by 18 June 2018.

#### **VI. Relief sought**

27. In light of the above, the Applicants respectfully **REQUEST** the Chamber to grant leave to make written observations.






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Shireen P Huq  
on behalf of  
Naripokkho



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Siobhan Hobbs  
on behalf of  
Women's Initiatives for Gender Justice



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Andreas Schüller  
on behalf of  
ECCHR



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Sara Hossain

Dated this 7th day of June 2018  
At The Hague, The Netherlands and  
Dhaka, Bangladesh