



Original: **English**

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

Date: **21/10/2019**

PRE-TRIAL CHAMBER III

**Before: Judge Olga Herrera Carbuccion, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson**

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

**PUBLIC REDACTED
with Public Annex A**

Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence

Source: Alliance for Social Justice, Maungdaw

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

Counsel for the Defence**Legal Representatives of the Victims****Legal Representatives of the Applicant**

[Name]

Unrepresented Victims**Unrepresented****Applicants****(Participation/Reparation)****The Office of Public Counsel for
Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Peter Lewis

Counsel Support Section**Deputy Registrar****Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations
Section**

Philipp Ambach

Other

Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, the Alliance for Social Justice, Maungdaw ("the Applicant") hereby seeks leave to present observations to assist Pre-Trial Chamber III of the International Criminal Court in the determination of issues arising out of the Prosecutor's "*Request for the authorisation of an investigation pursuant to article 15*"¹ ("the Prosecutor's Request").

The Applicant

1. The Applicant is a Myanmar non-governmental organization which was set up in February 2018 with a view to promoting diversity and harmonious co-existence in Rakhine State. Among its stated objectives are the prevention of conflict, the development of human resources and the pursuit of peace and stability².

2. The Applicant has taken note of the requests to submit observations filed by Professor Dr. Tin Aung Aye³ and the Confederation of Trade Unions, Myanmar⁴ on 10 October 2019 and 16 October 2019 respectively. The Applicant fully supports and adopts the contents of these petitions which it will seek to complement in the belief that a balanced presentation of views will serve the interests of justice. The Applicant also makes this petition in the full knowledge that the Government of the Republic of the Union of Myanmar has taken the principled decision not to engage with the International Criminal Court.⁵

¹ ICC-01/19-7.

² **Annex A.**

³ ICC-01/19-13.

⁴ ICC-01/19-16.

⁵Government of the Republic of the Union of Myanmar Ministry of the Office of the State Counsellor: Press Release dated 9 August 2018: "*The Request by the Prosecutor may be interpreted as an indirect attempt to acquire jurisdiction over Myanmar which is not a State Party to the Rome Statute. Myanmar, as a non-State Party, is under no obligation to enter into litigation with the Prosecutor at the ICC or even to accept notes verbales emanating from their Registry by reference to article 34 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). The actions of the Prosecutor, constitute an attempt to circumvent the spirit of article 34 of the Vienna Convention*". <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/08/09/id-8936>

Relevant Statutory Provision

3. Rule 103(1) of the Rules of Procedure and Evidence states as follows:

"At 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".

4. Although the rule provides for submissions to assist in the proper determination of "*the case*", practice at the International Criminal Court, both in the present situation and elsewhere, has shown that leave to submit amicus curiae submissions may be granted at any stage of the legal proceedings, including prior to the initiation of an investigation.⁶

5. Like the other two Myanmar-based petitioners who have sought to intervene in these proceedings, the Applicant is not affiliated with or funded by the Government of Myanmar. Being situated, however, in Myanmar, the Applicant is ideally placed to obtain information from Myanmar governmental agencies. Accordingly, the Applicant is aptly suited to act as an "*independent and impartial intervener having no other standing in the proceedings*"⁷ and its presentation of unique documentation obtained as a result of access to information petitions in Myanmar will be of "*indispensable assistance*"⁸ to the Court.

The Proposed Expertise

6. If given leave, the Applicant will present observations pertinent to Part VII, Section A of the Prosecutor's Request which concerns issues of admissibility. The Applicant notes the Prosecutor's concern that there exists "*limited open source*

⁶ *c.f.*; ICC-02/17-43 where Pre-Trial Chamber III granted leave to a collective of human rights organizations seeking to intervene in the proceedings arising out of the Prosecution's appeal against the decision to deny authorization to open an investigation in Afghanistan: "*At this stage, the Chamber does not take a position either on the views expressed in either the Amicus curiae's Request [...], or on the merits of the arguments elaborated by the applicants therein. However, in light of the nature and complexity of the issues at stake, it considers that receiving additional submissions may assist the Chamber in determining the Prosecutor's Request*".

⁷ ICC-01/09-35.

⁸ ICC-01/04-01/07-3003-tENG at para. 54.

information” available concerning “inquiries, investigations or prosecutions [which] may have been initiated at the national level that are potentially relevant to the admissibility assessment under the complementarity criterion”.⁹ Accordingly, as a result of formal and informal freedom of information requests, the Applicant will, if permitted, supply additional information and documentation concerning the various domestic initiatives adopted to examine the waves of violence in Rakhine State in 2016 and 2017. Some of this information will be obtained, at source, from various governmental and military authorities.

7. The need for submissions which challenge the Prosecutor’s argument is, of course, imperative in an adversarial system of law and should not be viewed by the learned Pre-Trial Chamber as unnecessarily provocative. This need is even more pronounced given the highly polarized and charged nature of the Myanmar debate. As the respected academic Morten Bergsmo has recently commented on the issue of complementarity:¹⁰

“It would seem particularly important in the Myanmar context to avoid a general externalization of accountability given the relative resourcefulness of its Office of the Judge Advocate (JAG)¹¹ as well as the security and constitutional realities of the country”¹²

Article 18 of the Rome Statute

8. In addition to offering information concerning the specific investigative and judicial mechanisms currently dealing with the situation in Rakhine State, the Applicant seeks leave to present observations on the timing of the mandatory notification requirement under article 18(1) of the Rome Statute. The Applicant will,

⁹ Prosecutor’s Request at para. 232.

¹⁰ Bergsmo, M; “Myanmar, Colonial Aftermath, and Access to International Law”, TOAEP Occasional Paper Series at p.3: <http://www.toaep.org/ops-pdf/9-bergsmo>.

¹¹ The JAG has more than 150 staff members (including representatives based in regional commands). The military investigation into Rakhine allegations announced on 18 March 2019 falls under JAG. (<http://www.legal-tools.org/doc/03cf51/>)

¹² There are four types of Court Martial in Myanmar’s Military Justice System: General Court-Martial, Summary General Court-Martial, District Court-Martial and Summary Court-Martial.

in particular, address the question of whether Myanmar should have been afforded the period of one month to seek deferral of the proposed investigation *before* the Prosecutor's Request was submitted to the Pre-Trial Chamber.¹³

9. Paragraph 277 of the Prosecutor's Request makes reference to information concerning national proceedings "*that may be provided by relevant States with jurisdiction at the article 18 stage*" suggesting that Prosecutor is yet to exercise her obligations under article 18.¹⁴ The Applicant is, furthermore, aware of the decision in the Burundi Situation in which Pre-Trial Chamber III ruled that "*article 15(3) of the Statute does not confer any rights of participation on the State(s) which would normally exercise jurisdiction over the alleged crimes. Pursuant to article 18 of the Statute, such a State acquires rights of participation only once the Prosecutor initiates an investigation following authorization by a Pre-Trial Chamber*".¹⁵ Notwithstanding, the aforementioned, the Applicant will seek to argue that not only does the Burundi decision lack judicial reasoning, but the language of article 18(2) of the Rome Statute *and* the legislative intent disclosed by the *travaux préparatoires*,¹⁶ would seem to require formal article 18 notification before "*the application of the Prosecutor*" to the Pre-Trial Chamber "*to authorize the investigation*". In the circumstances, therefore, it will be argued that the Prosecutor's Request should be deemed premature.

10. Certain commentators have, albeit, argued that there is no obligation on the Prosecutor to provide notification under article 18 to non-State Parties to the Rome Statute. The authoritative academic William Schabas, nonetheless, has termed such a view "*barely plausible*"¹⁷ given the mandatory language of the statutory provision

¹⁴ C.f. ICC-02/17-7-Red in the Afghanistan Situation where the Prosecutor, acting *proprio motu*, similarly reserved her Article 18 notification for the post-authorisation stage stating: "*If the Chamber authorises an investigation into the situation, the Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction pursuant to article 18 of the Statute*".

¹⁵ ICC-01/17-9-Red at para. 8.

¹⁶ A/CONF.183/C.1/L.59 at p.11: <https://www.legal-tools.org/doc/3a3c70/>.

¹⁷ Schabas, W.A, The International Criminal Court: A Commentary on the Rome Statute at p.478.

which directs the Prosecutor to notify “*all State Parties and those States....which would normally exercise jurisdiction*” [emphasis added]. Myanmar obviously falls into the latter category.

The Scope of the Prosecutor’s Activities

11. The Applicant will also seek leave to make observations on the permitted scope of the Prosecutor’s activities prior to the authorization of an investigation. In a letter dated 12 December 2018, which she attempted to deliver to the Myanmar Embassy in Belgium, the Prosecutor “*expressly*” invited Myanmar “*to provide any relevant information in relation to allegations that in the context of the 2017 wave of violence, “members of Myanmar’s armed forces, together with other security forces and groups of civilians, have committed a number of acts [...] ultimately leading to the forced displacement of hundreds of thousands members of the Rohingya people into Bangladesh”*”.¹⁸ The thrust of this letter, as detailed in the Prosecutor’s Request, was an evidence-gathering exercise and, as such, the Prosecutor preempted the authorization of an investigation (which could yet be denied) by soliciting evidence. Indeed, the fact that a “*preliminary list of persons/groups most responsible*”¹⁹ was set out in confidential *ex parte* annex 7 to the Prosecutor’s Request suggests that she has far exceeded the statutory powers afforded her at the present stage of the proceedings.

Investigative Mechanisms in Myanmar

(i) Military Investigative Mechanisms

12. It is important to note that Article 20(b) of the Constitution of Myanmar 2008 states that “[*t*]he Defence Services have the right to independently administer and adjudicate all affairs of the armed forces”. The Applicant has obtained a copy of the Defence Services Act 1959 and its accompanying rules which, together, set out the powers and

¹⁸ The Prosecutor also, reportedly, invited Myanmar to provide any information relevant to the admissibility assessment.

¹⁹ *ibid.*

procedure of courts-martial in Myanmar. With the leave of the Pre-Trial Chamber, the Applicant will tender these two statutory instruments. These documents will clearly demonstrate that the *Tatmadaw* has a fully functioning *and* effective system of justice which meets international standards.

13. Regarding the various mechanisms operated by the *Tatmadaw* to investigate alleged atrocities and to conduct criminal proceedings against military personnel, the Applicant has made a special request for the waiver of military secrecy in order to receive and, thereafter, share information with the learned Pre-Trial Chamber, which will be made available upon receipt. At this stage, the Applicant is able to inform the learned Pre-Trial Chamber that the Office of the *Tatmadaw's* Judge Advocate General has more than 150 staff members (including representatives based in regional commands). Furthermore, there are four types of tribunal in Myanmar's military justice system: General Court-Martial, Summary General Court-Martial, District Court-Martial and Summary Court-Martial. The Applicant will elaborate on the difference between these tribunals should leave be granted.

14. In October 2017, two months after the terrorist attacks on thirty police outposts and one military base, the *Tatmadaw* established an investigation team led by Inspector-General Lt. General Aye Win. This investigation team was tasked, inter alia, with examining the actions of the *Tatmadaw* and security forces in Rakhine State and the compliance of its personnel with orders and directives in the chain of command and with the rules of engagement. The investigation revealed shortcomings in the aforementioned areas and remedial action was taken against those responsible²⁰.

15. As the Prosecutor is aware, the Office of the Judge Advocate General has also established a Court of Inquiry pursuant to section 176 of the Defence Services Rules²¹ on March 18, 2019. The Court of Inquiry is supported by an advisory team. The Court

²⁰ <https://www.legal-tools.org/doc/tgh4xr>

²¹ <https://www.legal-tools.org/doc/x5nbs3>

of Inquiry has invited individuals, groups, witnesses or any other interested parties to submit information and evidence. Despite having to defend itself from attacks perpetrated by the Arakan Army (AA), the Court of Inquiry, headed by Major-General Myat Kyaw Oo, continues to gather evidence and will soon constitute a court-martial²² to address incidents in Gu Dar Pyin²³ where the rules of engagement were allegedly not followed.

(ii) *Civilian Investigative Mechanisms*

16. In its exposition of initiatives undertaken by the civilian arm of the Government, the Applicant will elaborate on the means by which the Attorney-General's office has been dealing with the phenomenon of hate-speech which has been identified by the Prosecutor as a primary cause of anti-Muslim sentiment and responsible for portraying the Rohingya as an "*existential threat to Myanmar and to Buddhism*".²⁴ In particular, the Myanmar Ministry of Culture and Religious Affairs has drafted a bill prohibiting hate speech which will soon be presented for parliamentary approval thereby supplementing Myanmar's existing legal apparatus for criminally sanctioning this phenomenon. In May 2019, a warrant was issued for the arrest of the ultra-nationalist Buddhist monk Ashin Wirathu – the most prominent face of such extremist venom – who is now a fugitive from justice.²⁵ It is worth noting that despite purporting to address all aspects of alleged criminal conduct in Myanmar and Bangladesh, the Prosecutor has confined her preliminary examination to hate speech emanating from Buddhist nationalists ignoring, in the process, equally poisonous hate-speech emanating from ARSA and affiliated entities towards the population in Rakhine State before and after the terrorist attacks of 25 August 2017.

²² <https://www.legal-tools.org/doc/zw2jho>

²³ 27 August 2017.

²⁴ Prosecutor's Request at para. 60..

²⁵ <https://gulfnnews.com/world/asia/wanted-myanmar-firebrand-monk-not-afraid-of-arrest-1.64264440>.

17. The Applicant notes the Prosecutor's comments that the Maungdaw Commission's mandate "*was to investigate whether existing laws ... were observed*" and that it is "*unclear whether and how these recommendations were designed to achieve accountability*". The tone of these comments become outrightly critical when discussing an incident of rape and a press-release emanating from the Office of the State Counsellor purportedly identifying the victim.²⁶ Such criticism is unwarranted and only serves to highlight the Prosecutor's apparent bias and unquestioning adoption of the conclusions of the United Nations Fact Finding Mission. This criticism, furthermore, distorts what was a genuine desire to inform the world that the alleged victim's complaint had been appropriately investigated and that action would be taken against any perpetrators of sexual and gender-based violence. Apart from unreasonably concluding that this leak was sanctioned by the State Counsellor or the Commission (and thus unfairly calling into question the entirety of that body's working methodology), the alleged victim's name had been broadcast much earlier to the whole world by way of an article published in the Guardian newspaper.²⁷

18. Special Rapporteur Yanghee Lee's observations that "*the interim report appears to contain blanket statements that do not seem to have been based on assessing available information and evidence*"²⁸ are egregiously false and not borne out by the findings contained in the final report of the Maungdaw Commission. Even in a redacted format acquired by the Applicant, this report will detail the skilled and genuine field-investigations which were carried out in 20 villages in Maungdaw including in all of the 8 villages mentioned in the OHCHR Flash Report as having suffered the worst of the alleged atrocity crimes.²⁹ The methodology employed, contrary to the Prosecutor's acquired assumptions, was not suspect but, rather, rigorous and designed to put the alleged victims at ease with a view to facilitating peace and reconciliation. Such methodology comprised, inter alia, rapid qualitative inquiry, team-based assessment, roundtable consultations with villagers and their representatives,

²⁶ Prosecutor's Request at para. 262.

²⁷ [REDACTED].

²⁸ Prosecutor's Request at para. 263.

²⁹ <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf> at p.37.

focus group discussions and, where appropriate, in-depth interviews with the victims themselves while respecting their right to privacy and voluntary cooperation³⁰. Information obtained from the interviews were recorded, collated, triangulated and verified as much as possible³¹. In cases where the crimes were substantiated, the necessary recommendations were made for the initiation of disciplinary or criminal proceedings.

19. The Applicant feels it necessary to mention that 204 persons were interviewed by the team which compiled the OHCHR Flash Report. In contrast, and from the information acquired by the Applicant so far, it appears that the Maungdaw Commission carried out a far more comprehensive fact-finding exercise having accomplished four field trips and the interviews of 2240 villagers, 10 detainees in Sittwe Prison and others in a total of 64 camps and villages.³² In the circumstances, therefore, it would be disingenuous to infer that Myanmar failed to respond appropriately to the allegations of atrocity crimes in the context of the 2016 wave of violence.

20. With respect to the criticism made of the Independent Commission of Enquiry (“ICOE”) established on 30 July 2018, the Applicant has sought access to documentation to clarify the workings of this body and the progress that it has made in the execution of its mandate. At the outset, it should be clarified that the ICOE’s mandate, as reported to the Applicant, was *“to investigate allegations of human rights violations and related issues following the terrorist attacks by the Arakan Rohingya Salvation Army in Rakhine State with a view to seeking accountability and formulating recommendations on steps to be taken to ensure peace and stability in Rakhine State”* [emphasis added].

³⁰ Paragraph 143, 144 of the Final Report of the Maungdaw Commission

³¹ Paragraph 146 of the Final Report of the Maungdaw Commission

³² Paragraph 130 of the Final Report of the Maungdaw Commission.

21. As the Prosecutor herself mentioned, the ICOE has been accorded the powers under the Investigation Committee Act 1950³³ which include the powers of a criminal court. The ICOE is entitled to collect evidence whether it be inviting or compelling testimony from witnesses or requiring the production of documentation. The Prosecutor appears to criticize the ability of the ICOE to secure accountability stating that *“the ICOE terms also prescribe that it shall submit its ‘reports with its recommendations’ to the President of Myanmar, but do not indicate what measures should follow from this”*. The Prosecutor further adds that *“it remains unclear if and how it is envisaged the ICOE’s investigation will lead to criminal proceedings”*.³⁴ The Applicant, however, will tender information, including the Investigation Committee Act 1950, which clearly indicates that the President of Myanmar is empowered to act on the findings of the ICOE and, where appropriate, to refer cases of suspected criminal conduct to the competent prosecuting authority; to the Attorney General or, should the matter concern the *Tatmadaw*, the Judge Advocate General.

22. By virtue of article 5 of the Investigation Committee Act 1950, the activity of the ICOE is to be deemed, for all intents and purposes, a criminal case proceeding in the context of Myanmar’s judicial system. In light of this, the Applicant will submit that the Prosecutor has failed to appreciate the true nature of the ICOE’s mandate and powers in the context of her admissibility assessment. Given the all-encompassing nature of the ICOE’s mandate as stated above and given its ongoing activities which are not expected to cease before the end of 2019, it is far too premature to conclude that the Myanmar *“is unwilling or unable genuinely to carry out [an] investigation or prosecution”*.³⁵

23. In the context of a case in the Kenya Situation, where suspects had already presented themselves before the Court, the Appeals Chamber ruled as follows:

³³ <https://www.legal-tools.org/doc/039bfb/>

³⁴ Prosecutor’s Request at para. 251.

³⁵ Article 17(1)(a) of the Rome Statute.

*“The words ‘is being investigated’ in this context, signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence or carrying out forensic analyses”.*³⁶

Despite being at the situational stage of proceedings, it is clear that the steps undertaken by Myanmar’s ICOE and the Military Court of Inquiry so far are exactly those identified in the Kenya decision as likely to render an ICC investigation inadmissible.

24. Although the Prosecutor alleges that *“there is insufficient indication that the ICOE has taken ‘tangible, concrete and progressive investigative steps’*,³⁷ she acknowledges that she does not have access to the necessary information and has had to rely on press releases. In light of this the Prosecutor asserts that her office will *“continue to review its assessment as new information becomes available”*. The Applicant finds this latter statement encouraging if it is to be interpreted as tacitly accepting that an investigation must not be opened should the Pre-Trial Chamber be satisfied that the ICOE is, indeed, pursuing a *“tangible, concrete and progressive”* investigation.

25. The Applicant will submit that the burden of proof is on the Prosecutor to satisfy the Pre-Trial Chamber that there is a reasonable basis to conclude that no true investigation is underway. At present, the Prosecutor has failed to satisfy that test and her admissibility conclusions appear to be based on a preconceived presumption (acquired from civil society organizations and UN bodies possessed of a biased agenda) that any steps taken by Myanmar are *a priori* designed to whitewash the situation and to absolve its civil and military hierarchy of any criminal responsibility.

26. It should be stressed that during the drafting of the Rome Statute, many delegations felt it undesirable to pass judgment on the performance of national justice systems. Although the Prosecutor has not explicitly challenged the

³⁶ ICC-01/09-02/11-274 at para. 40.

³⁷ Prosecutor’s Request at para. 247.

genuineness of Myanmar's ICOE, she has, nevertheless, denigrated, by implication, the good character and reputation of a member of the panel - one of Myanmar's leading intellectuals - quoting him, prior to his ICOE appointment, as having said that "*there is no such thing in our country, in our society, as ethnic cleansing and no genocide*".³⁸ In other words, the Prosecutor seems to be of the opinion that unless all panel members of ICOE are prepared to countenance the possibility that genocide *has* been committed in Rakhine State, then they are unsuitable to supervise an investigation capable of meeting the threshold required to render an ICC investigation inadmissible. In any event, it is sufficient to cite the dicta of the ICC plenary of judges in the recent decision on the *al-Hassan* Defence application to disqualify Judge Alapini-Gansou and to remark that the Prosecutor has failed to rebut the presumption that the member in question "*would be able to disabuse [himself] of any irrelevant personal beliefs or predispositions*".³⁹

Conclusion

27. The Applicant respectfully requests leave to present observations on the issues identified in this application and to make oral submissions, if necessary, through counsel who will represent it at any future hearing to be held on the Prosecutor's Request.



U Aung Kyaw Moe

Chairman, Alliance for Social Justice, Maungdaw

Done this 21 day of October, 2019.

Maungdaw, Republic of the Union of Myanmar

³⁸ Prosecutor's Request at para.

³⁹ ICC-01/12-01/18-458-AnxI-Red at para 40.