Cour Pénale Internationale

International Criminal Court

Original: **English**

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

Date: **29 October 2019**

PRE-TRIAL CHAMBER III

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

SITUATION IN THE PEOPLE'S REPUBLIC OF BANGLADESH/

REPUBLIC OF THE UNION OF MYANMAR

PUBLIC

Motion to Set Aside

Source: **Office of the Prosecutor**

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

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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

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

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I. INTRODUCTION

1. On 10, 16 and 21 October 2019 respectively, Professor Dr Tin Aung Aye,[1] the Confederation of Trade Unions Myanmar ("CTUM")[2] and the Alliance for Social Justice ("ASJM")[3] (collectively, "the Applicants") filed applications to present observations under rule 103(1) of the Rules of Procedure and Evidence ("Rules"), seeking to *challenge* the Prosecution factual and legal submissions (collectively, "Applications").[4]

2. The Applications should be set aside because the Applicants propose to act as a "counterpoint to the Prosecutor's"[5] legal and factual position by offering alternative narratives[6] that "will be of benefit to future suspects",[7] even though this is a stage of the proceedings that is not adversarial in nature.[8] Such alternatives are also irrelevant – and thus can never assist the

[1] ICC-01/19-13.
[2] ICC-01/19-16.
[3] ICC-01/19-18-Red.
[4] The Prosecution notes that in ICC-01/19-16, para. 2, CTUM "is aware of, supports and […] adopts the substance of" ICC-01/19-13 filed by Professor Dr Tin Aung Aye, while in ICC-01/19-18-Red, para. 2, ASJM "fully supports and adopts the contents of" ICC-01/19-13 and ICC-01/19-16, filed by Professor Dr Tin Aung Aye and CTUM, respectively.
[5] ICC-01/19-13, para. 4.
[6] *See* for instance ICC-01/19-13, para. 5 ("The need for submissions which challenge the Prosecutor's assumptions and her adopted narrative is 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."), para. 12 (the Applicant will submit "observations which will be of benefit to future suspects"); ICC-01/19-16, para. 3 ("[t]he Applicant agrees that the need for submissions which challenge the Prosecutor's assumptions and adopted narrative is imperative in an adversarial system of law and should not be viewed by the learned Pre-Trial Chamber as unnecessarily provocative."), para.8 ("[w]ith the benefit of historical and contemporary documentation acquired from State authorities and foreign archives, the Applicant will, in particular, elaborate on and challenge the following issues arising out of the Prosecutor's Request; a) The alleged intentional policy to deport 787,000 Rohingya people from Myanmar to Bangladesh in the context of two waves of violence; b) The "*Rohingya self-identity as a distinct ethnic group with their … long standing connection to Rakhine State*"; c) the creation of conditions and institution of policies to prevent the return of "*displaced Rohingya and failed agreements to repatriate them*", and; d) Myanmar's citizenship laws and other targeted policies which, according to the Prosecutor "*have been implemented in a discriminatory and arbitrary manner*""); ICC-01/19-18-Red, para. 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.")
[7] *See* ICC-01/19-13, para. 12.
[8] *See* article 15(3) and rule 50(1).

Pre-Trial Chamber—given the standard of proof that applies at this stage of the proceedings.

3. The Prosecution does not argue that a Pre-Trial Chamber may never invite or grant submissions by an *Amicus* on discrete, complex legal matters during the *ex parte* proceeding under article 15 of the Rome Statute ("Statute").

4. However, submissions which are expressly brought for the purpose of being "adversarial" should be set aside at this stage as a matter of principle.

5. The Prosecution acknowledges that under the applicable caselaw, the Prosecution is not entitled to respond to an application under rule 103(1) for leave to submit written observations under the rule, without leave.[9] However, in this situation, which is largely unprecedented, and in view of the nature of the applications made, the Prosecution considers it necessary and appropriate to request that the Applications as such are set aside by the Pre-Trial Chamber. The Prosecution is not engaging with the substance of the applications, as it would do in a response under rule 103(2), but seeking a specific relief based on the inadmissibility of the Applications at this stage.

[9] ICC-02/05-01/09-51, para. 8; ICC-01/05-01/08-602, para. 7. The Prosecution notes that under rule 103(2) of the Rules it is nevertheless entitled to respond to any observations submitted under rule 103(1).

II. PROCEDURAL BACKGROUND

6. By a memorandum dated 12 June 2019, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations of the Court ("Regulations"), of her intention to submit a request for authorisation of an investigation into the Situation in Bangladesh/Myanmar. On 25 June 2019, the Presidency of the Court assigned the Situation in Bangladesh/Myanmar to Pre-Trial Chamber III.[10] On 26 June 2019, the Prosecution submitted a request, pursuant to regulation 37(2) of the Regulations, for extension of the applicable page limit under regulation 38,[11] which was granted on 28 June 2019.[12] The Prosecution thereafter filed the Request for authorisation of an investigation pursuant to article 15 ("Article 15(3) Request") on 4 July 2019.[13]

7. Also on 26 June 2019, the Registry applied for an extension of time for victims to make representations under article 15(3) of the Statute and rule 50(3) of the Rules.[14] On 28 June 2019, the Chamber granted the Registry an extension of time limits for the transmission of victims' representations, as well as its Final Consolidated Report, until 31 October 2019, and, *inter alia*, ordered the Prosecution to inform victims pursuant to rule 50(1) of the Rules that they may submit their representations until 28 October 2019.[15]

8. On 30 August, 13 and 27 September and 11 October 2019, the Registry filed its first, second, third and fourth reports on victims' representations,

[10] ICC-01/19-1.
[11] ICC-01/19-2.
[12] ICC-01/19-5.
[13] ICC-01/19-7, ("Article 15(3) Request").
[14] ICC-01/19-3-Red.
[15] ICC-01/19-6, p. 8.

respectively,[16] and on 11 October 2019, filed its first transmission of victims' representations.[17]

9. On 18 October 2019, the Prosecution submitted for filing its "Supplementary Information for Request for authorisation of an investigation pursuant to article 15".[18]

10. On 10, 16 and 21 October 2019 respectively, the Applicants filed the Applications to present observations under rule 103(1) seeking to *challenge* the Prosecution factual and legal submissions.[19]

III. ARGUMENT

11. The procedure for authorisation of an investigation under article 15 of the Statute and rule 50 of the Rules is not adversarial but essentially *ex parte* in nature: it does not envisage the participation of any State, organisation or person other than the Prosecutor and the victims. To preserve the *ex parte* nature of this proceeding, *Amicus Curiae* submissions should be carefully

[16] ICC-01/19-10-Conf; ICC-01/19-11-Conf; ICC-01/19-12-Conf; ICC-01/19-15-Conf. *See also* public redacted versions, filed on 3 September 2019 (ICC-01/19-10-Red), 13 September 2019 (ICC-01/19-11-Red), 30 September 2019 (ICC-01/19-12-Red) and 17 October 2019 (ICC-01/19-15-Red), respectively.
[17] ICC-01/19-14.
[18] ICC-01/19-17 (notified on 21 October 2019).
[19] *See* for instance ICC-01/19-13, para. 5 ("The need for submissions which challenge the Prosecutor's assumptions and her adopted narrative is 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."), para. 12 (the Applicant will submit "observations which will be of benefit to future suspects"); ICC-01/19-16, para. 3 ("[t]he Applicant agrees that the need for submissions which challenge the Prosecutor's assumptions and adopted narrative is imperative in an adversarial system of law and should not be viewed by the learned Pre-Trial Chamber as unnecessarily provocative."), para. 8 ("[w]ith the benefit of historical and contemporary documentation acquired from State authorities and foreign archives, the Applicant will, in particular, elaborate on and challenge the following issues arising out of the Prosecutor's Request; a) The alleged intentional policy to deport 787,000 Rohingya people from Myanmar to Bangladesh in the context of two waves of violence; b) The "*Rohingya self-identity as a distinct ethnic group with their … long standing connection to Rakhine State*"; c) the creation of conditions and institution of policies to prevent the return of "*displaced Rohingya and failed agreements to repatriate them*", and; d) Myanmar's citizenship laws and other targeted policies which, according to the Prosecutor "*have been implemented in a discriminatory and arbitrary manner*""); ICC-01/19-18-Red, para. 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.")

scrutinised and set aside where brought for the expressed purpose of being "adversarial".

12. In this case, the Applicants' declared objective to challenge the Prosecutor's factual and legal submissions raises concerns about the Applicants' objectivity and, consequently, their ability to assist the Chamber, in any way, in its determination of this non-adversarial matter to the standard of proof required under article 15(3). The Applications should be set aside to preserve the non-adversarial nature of this proceeding.

A. The procedure under article 15 and rule 50 is non-adversarial

13. The Applications are based on the incorrect premise that article 15 of the Statute and rule 50 of the Rules envisage an *adversarial* procedure[20] requiring the Pre-Trial Chamber to receive an alternative narrative that "will be of benefit to future suspects".[21] To the contrary, the investigation authorisation procedure is essentially an *ex parte* procedure, open only to victims to make representations.[22]

14. Article 15 concerns the Prosecutor's power to open an investigation *proprio motu*. While in most domestic systems such power exists without the need for prior judicial scrutiny, the requirement under the Statute for authorisation by the Pre-Trial Chamber was introduced as a safeguard to reduce some States' concerns that the Prosecutor would have been otherwise unaccountable.[23] However, there is no suggestion in the Statute or the Rules that the Prosecution's conclusion on a preliminary examination—that there is a reasonable basis to believe that a sufficiently

[20] *See* ICC-01/19-13, para. 5; ICC-01/19-16, para. 3; ICC-01/19-18-Red, para. 7.
[21] *See* ICC-01/19-13, para. 12.
[22] *See* article 15(3) and rule 50.
[23] Triffterer/Ambos, The Rome Statute of the International Criminal Court, a Commentary, Third edition, pp.728 (n. 6), 730-731 (n. 11).

grave crime within the jurisdiction of the Court has been committed (and that a potential case would be admissible)[24]—and a request for authorisation to commence an investigation should also be litigated with any State, organisation or person who happens to be in disagreement.

15. The Appeals Chamber in the Situation in the Islamic Republic of Afghanistan ("Afghanistan Situation") confirmed the *ex parte* nature of the article 15 proceeding:

> "[t]he issues arising in these appeals concern the very preliminary question as to whether an investigation should be authorised under article 15 of the Statute and what factors should be taken into account for this decision. The Appeals Chamber notes that such proceedings are conducted on an *ex parte* basis, without the participation of potential suspects. In the present case, the Appeals Chamber is not persuaded that the rights of the defence could be prejudiced by the issues under appeal such the OPCD's intervention under regulation 77(4) of the Regulations or the appointment of a defence counsel under regulation 76 of the Regulations could be warranted."[25]

16. The Appeals Chamber in that situation did invite submissions that may assist the Chamber in its determination,[26] and granted the OPCD's participation as *Amicus* (because it has indicated an intention to present "a different perspective").[27] However, it did not seek to hear an alternative narrative — as proposed by the Applicants here — but to receive from professors of law and organisations with "specific legal expertise" observations on predetermined "distinct legal issues"[28] described by the Appeals Chamber. In the same situation, and in the context of the same appeal proceeding, the Pre-Trial Chamber similarly allowed *Amici* because

[24] *See further* articles 15(3) and 53(1) and rule 48.
[25] ICC-02/17-97, para. 48.
[26] ICC-02/17-72-Corr, para. 5.
[27] ICC-02/17-97, paras. 49-50.
[28] ICC-02/17-72-Corr, para. 5.

of the "nature and complexity of the issues at stake".[29] Contrary to the Applicants' suggestion then,[30] in the Afghanistan Situation, neither the Pre-Trial Chamber nor the Appeals Chamber considered it imperative to hear observations that may benefit future suspects in the framework of an adversarial proceeding.[31]

17. In fact, not even concerned States are permitted to participate in the article 15 proceeding, contrary to the suggestion made by the Applicant ASJM.[32] In the Situation in the Republic of Burundi, Pre-Trial Chamber III conducted the procedure under article 15 and rule 50 *ex parte* and confidentially, confirming 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."[33] There is no duty to notify and involve concerned States in the article 15 and rule 50 proceeding.[34]

18. The non-adversarial nature of this procedure follows from the very low *reasonable basis to believe* standard applicable at this stage (*before* the initiation of an investigation) under articles 15(3) and 53(1)(a).[35] The low

[29] ICC-02/17-43, para. 7.
[30] *See* ICC-01/19-13, para. 7; ICC-01/19-16, para. 5; ICC-01/19-18-Red, para. 4.
[31] Similarly, the Applicants' reliance on the Pre-Trial Chamber I decision ICC-02/05-10 to invite *Amici* in the Darfur situation is misplaced, as it refers to a different stage of the proceedings and simply stands for the obvious proposition that a Chamber may invite *Amicus Curiae*'s submissions (*See* ICC-01/19-13, para. 4; ICC-01/19-16, para. 3).
[32] *See* ICC-01/19-18-Red, paras. 9-10.
[33] ICC-01/17-9-Red, para. 8. *See also* para. 14.
[34] In fact authoritative academic professor William Schabas, on whom the ASJM relies for a different point (*see* ICC-01/19-18-Red, paras. 9-10), confirmed that the Prosecutor's formal notification to State Parties and non-State Parties under article 18(1) is required *after* — and *not before* — the Pre-Trial Chamber's authorisation under article 15(4) (Schabas, W.A, The International Criminal Court: A Commentary on the Rome Statute, Second Edition, pp. 477-478).
[35] "The test against which the Prosecutor must make his or her determination is one of 'reasonable basis' […] Paragraph 3 [of article 15], just as paragraph 4, aims in part at protecting the Court from frivolous or politically motivated charges. At the same time it is necessary to keep in mind that the

"evidentiary" threshold does not require the Prosecution — or the Pre-Trial Chamber — to discard every reasonable alternative narrative.[36] Contrary to the Applicants' submission, it is thus unnecessary and not "imperative"[37] to receive submissions challenging the Prosecutor's narrative at this stage. In fact, allowing adversarial litigation on allegedly competing narratives *before* the investigation is likely to result in a speculative and potentially misleading exercise.

19. This does not mean that the information in the Applicants' possession will necessarily be lost.[38] Under article 15, any person can provide *to the Prosecutor* any information on crimes within the jurisdiction of the Court. In any event, and in the interest of the completeness of its own analysis,[39] the Prosecution intends to seek from the Applicants, under article 15, all relevant information in their possession — including the information referred to in the Applications.

'reasonable basis' test is not one of beyond reasonable doubt, and all that is at stake in paragraphs 3 and 4 is whether the Prosecutor should be allowed to investigate a situation, not if one or more specific individuals should be liable to criminal responsibility and punishment. The test of a 'reasonable basis' does not rise to the level of 'reasonable grounds' in article 58 or 'substantial grounds' in article 61": Triffterer/Ambos, The Rome Statute of the International Criminal Court, a Commentary, Third edition, pp. 733-734 (nn. 21-22).

[36] ICC-01/13-34, para. 13 ("In the presence of several […] explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word 'shall' in the *chapeau* of that article, and of common sense, is that the Prosecutor investigates […] If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation.") *See* also Article 15(3) Request, para. 33 and authorities cited therein.

[37] *See* ICC-01/19-13, para. 5; ICC-01/19-16, para. 3; ICC-01/19-18-Red, para. 7.

[38] Nor does it mean that any potential suspect or accused would be prejudiced by not participating in this process. "The decision of the Pre-Trial Chamber to grant the authorization, under Article 15(4), is given 'without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case'. The meaning of this precautionary clause is clear: at this stage only a *prima facie* assessment might be possible on jurisdiction and the admissibility of the case, whereas the conclusive evaluation therein might require that an investigation be actually carried out, and a sufficient basis for a prosecution be actually found; on the other hand, the authorization granted under Article 15(4) cannot prevent the defence counsel from raising, and the Court from re-examining, issues of jurisdiction and admissibility in the trial proceedings" (The Rome Statute of the International Criminal Court, vol. 2, Antonio Cassese, Paola Gaeta, John R.W.D. Jones, p. 1161).

[39] *See* for e.g., as in the Prosecution's "Supplementary Information for Request for authorisation of an investigation pursuant to article 15" (ICC-01/19-17) relevant to the issue of admissibility under the complementarity criterion and submitted in the interest of completeness of analysis.

B. The Applicants' "adversarial" purpose cannot be reconciled with the non-adversarial nature of the article 15 proceeding

20. The Prosecution submits that the "adversarial" purpose of the Applications may potentially detract from the non-adversarial nature of the article 15 proceeding and cannot possibly assist the Pre-Trial Chamber in its determination. Contrary to the Applicants' premise, the process envisaged under article 15 for *proprio motu* investigations is essentially *ex parte* and non-adversarial. Against this background, the Pre-Trial Chamber should scrutinise the Applicants and their Applications very carefully.

21. Although offering a different perspective from the perspective adopted by the Prosecution on purely legal matters is not *per se* precluded to an *Amicus Curiae*,[40] CTUM's proposed alternative factual narrative[41] on alleged events that have yet to be investigated will not assist the Pre-Trial Chamber in any way, particularly in light of the low evidentiary threshold under article 15(3).[42]

22. For example, CTUM does not deny that satellite imagery portrays devastation and the destruction of homesteads, but suggests that "a substantial percentage of the population […] left […] out of subjective fear or expediency and not as a result of an intentional and organizational policy of expulsion".[43] This submission cannot assist the Pre-Trial Chamber

[40] *See* ICC-02/17-97, paras. 48-50.
[41] ICC-01/19-16.
[42] ICC-01/13-34, para. 13 ("In the presence of several […] explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word 'shall' in the *chapeau* of that article, and of common sense, is that the Prosecutor investigates […] If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation.")
[43] ICC-01/19-16, para. 10.

in its determination because it does not vitiate the reasonable ground to believe that the *remaining* percentage of those who fled (potentially well over 50% of those who left) did so as a result of the alleged deportation and persecution campaign. If anything, this information further shows the need for an investigation pursuant to article 54.

23. Similarly, ASJM's allegations that the Prosecution based its admissibility conclusions on information acquired by organisations and UN bodies "possessed of a biased agenda", resulting in "preconceived presumption[s]"[44] will also not objectively assist the Pre-Trial Chamber. Rather, the criticism of the Prosecution's alleged bias,[45] coupled with observations on the scope of the Prosecutor's activities thus far[46] — a matter which is immaterial to the determination the Pre-Trial Chamber is called to make under article 15 — would appear to further suggest an adversarial attitude that runs counter to the *ex parte* nature of the article 15 proceeding.[47]

24. Finally, the law surrounding the issue of jurisdiction has been extensively explored in the context of the jurisdiction litigation.[48] The Pre-Trial Chamber can be informed in its decision on the basis of the prior litigation, and will not be further assisted by additional mixed legal-factual observations as proposed by Professor Dr Tin Aung Aye.[49]

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[44] ICC-01/19-18-Red, para. 25.
[45] ICC-01/19-18-Red, para. 17.
[46] ICC-01/19-18-Red, para. 11.
[47] The Prosecution notes that on the issue of admissibility under the complementarity criterion, it has recently provided supplementary information to the Pre-Trial Chamber (*see* ICC-01/19-17).
[48] *See* ICC-RoC46(3)-01/18-37, paras. 50-79.
[49] ICC-01/19-13. Professor Dr Tin Aung Aye appears to challenge not only the Prosecutor's legal interpretation accepted by Pre-Trial Chamber I, but also its factual matrix (*see* for instance para. 26 where the applicant "totally denies" the commission of coercive measures in Myanmar) and "political" implications in Myanmar (*see* for instance para. 5 where the applicant submits that an exceptionally polarised environment can cement the risk of confirmation bias and weaken the recognition of the importance of making national investigations and prosecutions in Myanmar work).

IV. CONCLUSION

25. The three Applications should be set aside as a matter of principle because they are expressly brought for the purpose of being "adversarial", even though this is a stage of the proceedings that is not adversarial in nature.

Fatou Bensouda, Prosecutor

Dated this 29th day of October 2019

At The Hague, The Netherlands