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

Date: **01/11/2019**

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

Response to the Prosecutor's Motion to Set Aside

Source: Professor Dr. Tin Aung Aye

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****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

In light of the Prosecutor's extraordinary and unprecedented - "Motion to Set Aside",¹ Professor Dr. Tin Aung Aye ("the Applicant") submits as follows:

1. As the Prosecutor herself admits, there is absolutely no statutory basis whatsoever for her motion to set aside nor is there any statutory basis to reply to an *amicus curiae* request prior to leave being accorded to the Applicant pursuant to Rule 103(1) of the Rules of Procedure and Evidence.²

2. The Prosecutor mischaracterizes the purpose of the Applicant's intervention and, so it would appear, the purpose of the observations proposed by the other Myanmar-based applicants. The Applicant submits that the Pre-Trial Chamber can only make an informed decision whether or not to open an investigation on the basis of a comprehensive and unbiased presentation of views and observations. The fact that such observations may invariably challenge the narrative presented by the Prosecutor (and the civil society organizations which have supplied her with information) should not act as an impediment to their receipt by the Pre-Trial Chamber. Indeed, if the Pre-Trial Chamber were to refuse to consider these submissions, on the basis of an irregularly filed preliminary objection alone, it may appear to be endorsing a policy which allows the Prosecutor to seek the opening of an investigation (with all the resulting costs to the Court's limited budget) on the basis of selective, objectively biased and misleading information. The learned Pre-Trial Chamber will effectively be denying itself the receipt of vital information which only the Applicants can supply and to which the Prosecutor either has no access or has submitted partially and, elsewhere, on the basis of press-releases.³ The Applicant respectfully submits that the learned Pre-Trial Chamber has a duty to avail itself of a fully comprehensive range of

¹ ICC-01/19-20.

² ICC-01/19-20 at para. 5.

³ ICC-01/19-7 at paras. 28, 198 and 230 by way of example.

information - even when considering an application to investigate and particularly when the Prosecutor has admitted that her access to highly relevant information is “limited”.⁴

3. Recent precedent has shown the increasing supervisory influence of the Court judiciary over the Prosecutor even at the pre-investigation stage of article 15 proceedings. This is quite appropriate when the Prosecutor is seeking to exercise her *proprio motu* powers. Rightfully, the Prosecutor cites to the Afghanistan Situation where OPCD has been invited to submit observations pursuant to Rule 103⁵ in order “to present a different perspective”.⁶ The Appeals Chamber surely did not intend such a different perspective to be confined to supporting the Prosecutor’s views that an investigation should be opened.

4. Only by allowing this Applicant and the other Myanmar-based applicants to submit information, unencumbered by restrictions dictated by the Prosecutor, can the learned Pre-Trial Chamber properly exercise its powers of supervision. The Prosecutor’s stated intention to reach out and to obtain the information proffered by the Applicants⁷ is to be expected under the Rome Statute. It would, in fact, be her statutory obligation once an investigation is opened. The question at hand, however, is whether such an investigation should even be opened. Accordingly, the Prosecutor’s aforementioned intention “to seek to receive” information from the Applicants should not induce the Pre-Trial Chamber to ignore the proposed interventions which address not just factual issues but also legal issues which, as argued, may be presented afresh.

5. To conclude, the Pre-Trial Chamber is requested to reject the Prosecutor’s “Motion to Set Aside” for lack of a procedural basis and on its merits. As the Prosecutor

⁴ ICC-01/19-7 at para.232.

⁵ ICC-02/17-50.

⁶ ICC-02/17-49.

⁷ ICC-01/19-17 at para. 6.

herself states, “[t]he 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”.⁸ All of the matters identified by the Applicant and the Myanmar NGOs, by their very nature, touch on the complex legal issues pertinent to the request for authorization to investigate.⁹



Professor Dr. Tin Aung Aye

Done this 1st day of November, 2019.

Yangon, Republic of the Union of Myanmar

⁸ ICC-01/19-20 at para. 3.

⁹ Rule 103(1) does not confine a request to submit amicus curiae observations to “*complex legal matters*”. The Rule states quite clearly that the Chamber is entitled to receive submissions on “*any issue which the Chamber deems appropriate*” [emphasis added]. See for example, ICC-01/11-01/11-153 at para. 4, where Pre-Trial Chamber I allowed amicus curiae submissions on purely factual issues: “*The Chamber notes that the Applicants state that they “have been following and closely monitoring the institutional developments that have been taking place pursuant to the end of the revolution in Libya” as well as that they “have conducted training and are working closely with the legal community in Libya”.*”