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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

Victims' joint request concerning hearings outside the host State

Source: Legal representatives of victims

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to:

The Office of the Prosecutor

Fatou Bensouda
 James Stewart

Counsel for the Defence

Legal Representatives of the Victims

The Office of Public Counsel for Victims

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

REGISTRY

Registrar

Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Philipp Ambach

Trust Fund for Victims

1 INTRODUCTION

1. These submissions are made on behalf of victims pursuant to Article 68(3) of the Rome Statute (“Statute”) and Rule 93 of the Rules of Procedure and Evidence (“RPE”). They are filed by three legal teams respectively representing three groups of victims of crimes committed in the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (“Situation in Bangladesh/ Myanmar”).
2. The first group of victims (“the Tula Toli Victims”, represented by Megan Hirst) comprises 10 individuals from the village of Tula Toli.
3. The second group of victims (“the Northern Rakhine Victims”, represented by Kate Gibson) is comprised of some of the members of eight civil society associations in Cox’s Bazar: the Arakan Rohingya Society for Peace and Human Rights (ARSPH), Rohingya Women Empowerment and Advocacy Network (RWEAN), Rohingya Refugee Committee (RRC), Rohingya Women for Justice and Peace (RWJP), Voice of Rohingya (VOR), Rohingya Youth for Legal Action (RYLA), Bangladesh Rohingya Student Union (BRSU) and Rohingya Peace Innovation Unity (RPIU).
4. The third group of victims (“the SGBV Victims”, represented by Peter Haynes, QC) is made up of 14 individuals, who are a representative sample of a larger group of (i) 151 individual survivors and witnesses of rape (including in some instances by multiple perpetrators) and other international crimes, and (ii) two civil society groups, Shanti Mohila (‘Peace Women’), a network of more than 400 women and girls located in the Rohingya refugee camps in Cox’s Bazar and a group of male Rohingya ‘survivor advocates,’ also located in the camps.
5. The three legal teams act separately, and the groups of victims they represent (“the Victims”) may have divergent interests on some issues. However, the Victims are in agreement on the issues addressed in these submissions, and accordingly those issues are raised jointly in the current filing.

2 BACKGROUND

6. On 14 November 2019, Pre-Trial Chamber III (“Chamber”) authorised an investigation into the Situation in Bangladesh/Myanmar.¹ This decision has been met with support, appreciation, and relief by the Victims.

¹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, [ICC-01/19-27](#), 14 November 2019 (“Article 15 Decision”).

7. The investigation by the ICC Office of the Prosecutor now joins efforts to prevent and punish atrocities committed against the Rohingya before the International Court of Justice in The Hague (“ICJ”), and the Independent Investigative Mechanism for Myanmar in Geneva (“IIMM”),² as part of a growing matrix of accountability which previously seemed out of reach. These accountability mechanisms are based and operational in Europe, thousands of kilometres from Myanmar and from the refugee camps located just outside the city of Cox’s Bazar, in Cox’s Bazar District, Bangladesh.

8. While the Court faces particular barriers to accessing and assisting victims who remain in Myanmar, in principle these problems should apply less to those now living in refugee camps in Cox’s Bazar District. Practically, however, the distance of victims from the Court makes it difficult for them to engage and communicate with it. This difficulty is magnified for the majority of Rohingya victims because they live in refugee camps in which their movement and activities are restricted. The September 2019 decision to block internet access within the camps in Cox’s Bazar District has left victims with very limited means of communicating about the progress of the accountability mechanisms.³ The Chamber’s acknowledgement that *“it would be appropriate for the victim communities to continue to be informed and, thereby, be able to effectively communicate with the Court and especially the Prosecutor”*⁴ is a welcome one; realistically, however, such communication is extremely difficult.

9. The ICC was designed to support rather than supplant domestic prosecution of international crimes; the exercise of its jurisdiction is therefore complementary to national trials.⁵ States Parties agreed that national trials should be given primacy for a host of reasons, including easier access to evidence and witnesses.⁶ Conducting trials near the affected communities is also consistent with a stated purpose of international criminal justice: to assist victims and survivors of mass atrocities by providing catharsis, recognition, the establishment of the truth, and other reparative results through criminal proceedings.

10. In the intervening two decades, the ICC has at times faced criticism for its delivery of “distant justice”, with its remoteness being linked to a perceived illegitimacy among victim communities. Many such criticisms focus on the disadvantages of the Court’s physical location, meaning that justice is neither accessible nor visible to victims. Even the Court’s

² A/HRC/39/L.22, 25 September 2018.

³ See, for example, Verena Hölzl, ‘[For Rohingya refugees, internet ban severs ties to the outside world](#)’, *The New Humanitarian*, 3 March 2020; ‘[BTRC suspends 3G, 4G Services in Rohingya camp areas](#)’, *Dhaka Tribune*, 11 September 2019.

⁴ [Article 15 Decision](#), para. 6.

⁵ Statute, Preamble, para. 10; articles 1, 17 .

⁶ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, General Assembly, Official Records, 50th session, Supplement No. 22 (A/50/22), para. 31.

supporters have warned that it “*runs the risk of seeming remote and of little consequence to the communities most affected.*”⁷

11. Hague-based trials are, however, not mandatory. Rule 100(1) of the RPE permits the Court, where it considers that to do so would be in the interests of justice, to decide to sit “*in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part*”.⁸ Moving the location of an ICC trial is not a novel concept: it has previously been contemplated in the *Bemba*,⁹ *Muthuara & Kenyatta*,¹⁰ *Ruto & Sang*,¹¹ *Gbagbo & Blé Goudé*,¹² *Ongwen*,¹³ and *Ntaganda*¹⁴ cases.

12. It is in this context that the Victims file the present submissions, seeking to close the gap between Cox’s Bazar and The Hague. While recognising that the Situation in Bangladesh/Myanmar is in its early stages, the present submissions seek to initiate the process, contemplated by the RPE, of assessing the feasibility of the Court sitting in a State other than The Netherlands to hear a case in whole or in part.¹⁵ Both the benefits of localised justice, and the logistical considerations associated with hearings outside The Hague, warrant consideration of this question at this early stage.

3 PROCEDURAL HISTORY

13. On 6 September 2018, Pre-Trial Chamber I issued the *Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*.¹⁶ The Pre-Trial

⁷ Human Rights Watch, [Courting History: The Landmark International Criminal Court’s First Years](#), 11 July 2008.

⁸ RPE, Rule 101(1).

⁹ *Prosecutor v Jean-Pierre Bemba Gombo*, Public redacted version of the “Decision on the “Third Defence Submissions on the Presentation of its Evidence” of 6 July 2012, [ICC-01/05-01/08-2242-Red](#), 28 September 2012, paras 29, 31(vi).

¹⁰ *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on “Defence Application for a change of place where the Court shall sit for Trial”, [ICC-01/09-02/11-581](#), 21 December 2012.

¹¹ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Recommendation to the Presidency on where the Court shall sit for trial, [ICC-01/09-01/11-763](#), 3 June 2013; *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [ICC-01/09-01/11-875-Anx](#), 26 August 2013.

¹² *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha, [ICC-02/11-01/15-316](#), 26 October 2015.

¹³ *Prosecutor v Dominic Ongwen*, Decision Concerning the Requests to Recommend Holding Proceedings *In Situ* and to Conduct a Judicial Site Visit in Northern Uganda, [ICC-02/04-01/15-499](#), 18 July 2016. Later in the proceedings, the Trial Chamber conducted a judicial site visit to Uganda. See, *Prosecutor v Dominic Ongwen*, Decision on Judicial Site Visit to the Republic of Uganda, [ICC-02/04-01/15-1020](#), 13 October 2017.

¹⁴ *Prosecutor v Bosco Ntaganda*, Recommendation to the Presidency on holding part of the trial in the State concerned, [ICC-01/04-02/06-526](#), 19 March 2015; *Prosecutor v Bosco Ntaganda*, Decision on the recommendation to the Presidency on holding part of the trial in the State concerned, [ICC-01/04-02/06-645-Red](#), 15 June 2015.

¹⁵ RPE, Rule 100(1).

¹⁶ *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, [ICC-RoC46\(3\)-01/18-37](#), 6 September 2018.

Chamber found that the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such crime is committed on the territory of a State Party to the Statute.

14. On 12 June 2019, the Prosecutor informed the Presidency pursuant to regulation 45 of the Regulations of Court (“RoC”) of her intention to file a request for judicial authorisation to commence an investigation into the Situation in Bangladesh/ Myanmar pursuant to article 15(3) of the Statute.¹⁷

15. On 25 June 2019, the Presidency constituted the Chamber, to which it assigned the Situation in Bangladesh/Myanmar.¹⁸

16. On 4 July 2019, the Prosecutor requested the Chamber “*to authorise the commencement of an investigation into the Situation in Bangladesh/Myanmar in the period since 9 October 2016 and continuing*”.¹⁹

17. On 14 November 2019, the Chamber issued its *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*,²⁰ in which it authorised the commencement of an investigation into the Situation in Bangladesh/Myanmar, and ordered the Victims Participation and Reparations Section (“VPRS”) to communicate the decision to the organisations and individuals who had submitted victims’ representations to the Chamber in relation to the Situation.

18. On 20 January 2020, the Chamber issued its *Order on Information and Outreach for the Victims of the Situation*, in which it recalled VPRS’s interaction with victims prior to the decision authorising an investigation, emphasised that “[t]his two-way communication must continue”, and ordered the Registry “*to establish, as soon as practical, and in consultation and collaboration with the Prosecutor, a system of public information and outreach activities with the affected communities and particularly with the victims of the Bangladesh/Myanmar Situation.*”²¹

19. In April 2020, the undersigned legal representatives initiated discussions with the ICC Registrar as to the intentions of the Registry as regards a Field Office in Bangladesh, and the

¹⁷ Notice pursuant to regulation 45 of the Regulations of the Court, [ICC-01/19-1-Anx](#), 12 June 2019.

¹⁸ *Decision on the constitution of Pre-Trial Chamber III and on the assignment of the situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, [ICC-01/19-1](#), 25 June 2019.

¹⁹ *Request for authorisation of an investigation pursuant to article 15*, [ICC-01/19-7](#), 4 July 2019.

²⁰ [Article 15 Decision](#).

²¹ *Order on Information and Outreach for the Victims of the Situation*, [ICC-01/19-28](#), para. 9.

state of the Registry's discussions with the Government of Bangladesh as regards a Memorandum of Understanding or other agreement(s) with the Court.

4 APPLICABLE LAW

20. Article 3(1) of the Statute provides that the seat of the Court "*shall be established at The Hague*", and article 3(3) states that the Court "*may sit elsewhere, whenever it considers it desirable, as provided in this Statute.*" Article 62 then states that "*[u]nless otherwise decided, the place of the trial shall be the seat of the Court.*"

21. Under rule 100(1) of the RPE, where the Court "*considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.*" Since an amendment to the RPE in 2013 a decision for the Court to sit outside the host State is made by the Presidency,²² but rule 100(2) empowers the Chamber seized of the proceedings as follows: "*The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits.*" This recommendation "*shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency*". The assessment "*shall be made in writing and specify in which State the Chamber would sit.*"

5 THE VICTIMS

5.1 General information about the Victims

22. The Tula Toli Victims are ten individuals who previously lived in the village of Tula Toli in Myanmar. All were forcibly deported into Bangladesh by acts of extreme violence in 2017, including the killing of family members, acts of physical and/or sexual violence, the destruction and theft of property (including homes), and threats of further violence. These acts were the culmination of an extended pattern of persecution over many years. As a result of these events the Tula Toli Victims have all suffered multiple forms of harm. Their citizenship and ethnic identity have been denied and they have been forced from their homes and country and now live in inhumane conditions in refugee camps in Cox's Bazar District. They have also suffered other forms of harm, including the deaths of family members, physical injuries and psychological trauma. In June 2018, in the context of jurisdictional proceedings initiated by the Prosecutor, victim application forms and powers of attorney were submitted to the

²² Resolution [ICC-ASP/12/Res.7](#), adopted on 27 November 2013. Previously Rule 100(3) required such decisions to be taken by the plenary of judges.

Registry.²³ Submissions were then made on behalf of the Tula Toli victims in the proceedings on jurisdiction and in the article 15 proceedings.²⁴

23. The Northern Rakhine Victims are 68 Rohingya persons. The group is comprised of 50 men and 18 women. All were forcibly deported from Myanmar into Bangladesh as a result of the Tatmadaw operations in 2017, fleeing acts of violence directed against themselves and their families. They now live in refugee camps in Cox's Bazar District, in difficult and degrading conditions. All have suffered forms of harm including physical injury, psychological trauma, and the death of family members. Their legal representatives have deposited their respective powers of attorney with the ICC Registry, and they consent to these submissions being made on their behalf.

24. The 14 SGBV Victims are a representative sample of a larger group of approximately 570 persons comprised of (i) 151 Rohingya individuals and (ii) two Rohingya civil society groups. The majority of the SGBV Victims were displaced from northern Rakhine state, Myanmar, following so-called 'clearance operations' by the Myanmar military in 2017, though a small number were displaced prior to this. They are survivors or witnesses of murder; extermination; deportation; imprisonment; torture; rape, gang rape and other forms of sexual violence; persecution on cultural, racial or religious grounds; arson and the destruction of property and assault to the person. Members of the wider group, of which the SGBV victims are a representative sample, have twice before made submissions to the Court. In May 2018, submissions were made on behalf of Shanti Mohila in the proceedings on jurisdiction.²⁵ A further victim submission by Shanti Mohila, the Male Survivor Advocates and 81 of 151 individuals mentioned above, was made and annexed to the Registry's observations to Pre-Trial Chamber I²⁶ in respect of article 15 proceedings initiated by the Prosecutor, in October 2019.²⁷

²³ The following reference numbers were assigned to them: a/60011/18, a/60012/18, a/60013/18, a/60014/18, a/60015/18, a/60016/18, a/60017/18, a/60018/18, a/60019/18, a/60020/18.

²⁴ *Observations on behalf of the victims of Tula Toli*, [ICC-RoC46\(3\)-01/18-26](#), 18 June 2018; Representations of victims from Tula Toli, [ICC-01/19-19](#), 23 October 2019.

²⁵ *Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute* [ICC-RoC46\(3\)-01/18](#), 31 May 2018.

²⁶ Included in confidential annex to the final *Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 28 June 2019*, [ICC-01/19-22](#), 31 October 2019.

²⁷ Powers of attorney for the SGBV Victims will be deposited with the Registry contemporaneously with the filling of these observations.

5.2 Standing of the Victims to file the present submissions

25. Article 68(3) of the Statute allows victims' views and concerns to be heard at any stage of ICC proceedings in which their personal interests are affected, so long as this is not prejudicial to, or inconsistent with, the rights of the accused or a fair and impartial trial.

26. For the reasons articulated below,²⁸ victims' proximity to the Court, and the related question of where ICC proceedings occur, are matters of great personal interest to the Victims. These matters will impact on how readily the Victims can access information about the Court's work and how easily they can engage with officials of the Court; these matters will also therefore have a significant bearing on the extent to which the Victims can exercise all of their participatory rights. It is noteworthy that in all previous instances where the use of rule 100 of the RPE has been contemplated, victims have been given the opportunity to be heard on the subject,²⁹ demonstrating the recognised interest that victims may have in this issue.

27. Moreover consideration of the present submissions is in no way detrimental to the interests of a potential future suspect, or prejudicial to the fairness and impartiality of proceedings. The measure requested is limited: merely the initiation of an assessment process, which would in itself also take into account questions relating to the fairness of any future trials and defence rights.

28. The final issue which may arise under article 68(3) is whether the Tula Toli Victims, the Northern Rakhine Victims, and the SGBV Victims are in fact "victims". That term is defined in rule 85 of the RPE as including "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.*" Based on the Victims' identities and their experiences as set out above,³⁰ it is submitted that the Victims all meet the rule 85 definition.

²⁸ See paras 50-51.

²⁹ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision shortening time for observations on the 'Registry report to the Chamber on the feasibility of the modalities of specific arrangements in relation to witness testimony', [ICC-01/05-01/08-2448](#), 30 November 2012, para. 5; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Order requesting observations in relation to the "Defence Application for change of place where the Court shall sit for Trial", [ICC-01/09-02/11-602](#), 17 January 2013, para. 6; *Prosecutor v Uhuru Muigai Kenyatta*, Order for further observations on where the Court shall sit for trial, [ICC-01/09-02/11-781](#), paras 8-9; *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Order requesting observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial", [ICC-01/09-01/11-580](#), 1 February 2013, para. 4; *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha, [ICC-02/11-01/15-316](#), 26 October 2015, para. 5; *Prosecutor v Dominic Ongwen*, Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda, [ICC-02/04-01/15-499](#), 18 July 2016, paras 2, 3; *Prosecutor v Bosco Ntaganda*, Recommendation to the Presidency on holding part of the trial in the State concerned, [ICC-01/04-02/06-526](#), 19 March 2015, paras 3, 7, 9, 17.

³⁰ See paras. 21-22.

29. However the question remains as to whether a formal adversarial procedure must be followed in order for the Chamber to make findings that each of the Victims meets the rule 85 definition.³¹ The RPE sets out such a procedure in rule 89(1), involving individual written applications, observations from parties, and individual judicial determinations for each application. However the RPE also permits a Chamber to dispense with those requirements and to hear the views and concerns of victims who have not been through a rule 89(1) procedure. It “allows [a] Chamber to seek the views of victims irrespective of whether they have made an application for participation in the proceedings before the Court or have been granted rights of participation ...”.³² The Court’s jurisprudence demonstrates that a Chamber has discretion regarding which of these procedural avenues to adopt in a given proceeding; however the emerging practice also demonstrates that the most relevant factor in the exercise of this discretion is likely to be the *stage* of proceedings.

30. Specifically, the procedure set out in rule 89(1) of the RPE is most useful in the context of a specific *active case* (that is, a case where the presence of a suspect at the Court permits proceedings to progress). In such instances, the use of the rule 89(1) process is appropriate: pre-trial and trial proceedings in an active case will provide numerous potential opportunities for victim participation. In this context the use of a time- and resource-intensive process for verifying victimhood (before permitting victims to be heard repeatedly) is proportionate and appropriate. Moreover the rule 89(1) process is intended to be adversarial in nature; it is therefore most useful where the proceedings include a suspect or accused. Use of a rule 89(1) procedure in some form has been almost universal in active cases.³³

31. In contrast, where proceedings occur at the investigation stage (or earlier) different factors apply. First, given the enormous number of victims who may be affected by proceedings which relate to an entire situation, undertaking a process for seeking, processing and determining victim applications at this stage is likely to be even more burdensome than the equivalent procedure in the context of a case. Secondly, judicial proceedings at the situation stage tend to be *ad hoc* and occur infrequently. Any benefit of undertaking the rule 89(1) process would therefore be outweighed by the time and resource burden of such

³¹ No such procedure has yet been undertaken in respect of any of the Victims. Although the Tula Toli Victims submitted application forms in June 2018 (see above at para. 21), determinations on those application forms have not been made.

³² *Prosecutor v Callixte Mbarushimana*, “Decision on ‘Proposal on victim participation in the confirmation hearing’”, [ICC-01/04-01/10-229](#), 10 June 2011, pp. 4-5.

³³ Only in the the two Kenya cases did the Court appear to diverge from this practice, albeit without expressly recognising that it was doing so: *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, [ICC-01/09-01/11-460](#), 3 October 2012; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Victims’ Representaiton and Participation, [ICC-01/09-02/11-498](#), 3 October 2012.

verification. Finally, there is no suspect in proceedings at the situation stage, such that an adversarial process for victim status determination is less appropriate.

32. Recently Pre-Trial Chamber I has permitted victims to participate in two judicial proceedings at the situation or pre-situation stage (Bangladesh/Myanmar and Palestine) without a requirement to undertake the rule 89(1) process.³⁴ The Appeals Chamber likewise recently permitted victims to participate in appeal proceedings in the *Afghanistan Situation* without a need to complete a rule 89(1) process.³⁵

33. In the present circumstances there are compelling reasons to take the same approach. The matter raised in these submissions is discrete and unlikely to lead to extensive ongoing litigation. Requiring the completion of application forms at this stage would likely signal to the wider population of over one million victims in Bangladesh that completing an application form is appropriate and necessary in order to be heard by the Court. Significant work would be generated for the Registry with questionable benefit to the fair or expeditious conduct of the proceedings, and it is likely that confusion would be generated among the victim population. Accordingly, it is submitted that the Chamber should receive the present submissions pursuant to rule 93 of the RPE, without a requirement for an individual application process to be undertaken.

6 SUBMISSIONS

6.1 Introduction: Request for an Assessment under Rule 100(2) RPE

34. Rule 100(1) of the RPE permits the Court, where it considers that to do so would be in the interests of justice, to decide to sit “*in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part*”.³⁶

35. Before a Chamber makes any recommendation to the Presidency as to a change in the place where the Court’s sits, rule 100(2) of the RPE requires “*an assessment*” by the Registry, which is to be annexed to the recommendation. By the present filing, the Victims ask that the

³⁴ *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution Request for a Ruling on Jurisdiction under Article 19(30) of the Statute”, [ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, para. 21; *Situation in the State of Palestine*, Order setting the procedure and the schedule for the submission of observations, [ICC-01/18-14](#), 28 January 2020, para. 13; See also *obiter* from the Chamber on the same question in: *Situation in the State of Palestine*, Decision on Information and Outreach for Victims of the Situation, [ICC-01/18-2](#), 13 July 2018, p. 6, n. 16.

³⁵ Although the Appeals Chamber held by majority that victims were not permitted to initiate the appeal under article 82(1) of the Statute, victims were heard by the Pre-Trial Chamber and were heard by the Appeals Chamber as participants in the Prosecutor’s appeal against the Impugned Decision: *Situation in the Islamic Republic of Afghanistan*, Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, [ICC-02/17-137](#), 4 March 2020, para. 23.

³⁶ Rule 101(1), ICC RPE.

Chamber order the Registry to conduct an assessment of the potential locations where the Court could sit outside the host State so as to bring about reasonable physical proximity to the affected population.

6.2 Context: the situation in Cox's Bazar

36. Approximately 1.1 million Rohingya refugees now live in camps in the Cox's Bazar District of Bangladesh. Their movements within the camps are restricted, and they are not permitted to leave their borders. Internet access has been blocked in the camps since September 2019.³⁷ As such, the ability of the Rohingya community to receive substantial or real-time information about the progress of the ICC investigation is limited.

37. Limited communication risks not only the creation of misunderstandings, but also the inability to correct them. In its July 2020 *Report on Information and Outreach Activities*, the ICC Registry reported “*massive confusion*” within the Rohingya community in Cox's Bazar District as between the different mechanisms and courts currently addressing the atrocities committed against them. The Registry reported that “*the overwhelming majority of people have very little information and understanding, if any, of these various justice initiatives and, importantly, their different mandates and functions.*”³⁸ Lack of information also impedes the process of managing expectations as to the Court's activities and progress, particularly in a situation where ICC staff have now visited the camps and spoken with the communities; expectations have already been significantly raised, undoubtedly despite the best efforts of ICC staff to manage them.³⁹

38. The Tula Toli Victims, the Northern Rakhine Victims and the SGBV Victims strongly support the establishment of an ICC presence close to the camps in order to address these problems and facilitate good communication. The establishment of a Field Office appears essential for compliance with the Chamber's order to the Registry “*to establish, as soon as practical ... a system of public information and outreach activities with the affected communities and particularly with the victims*”.⁴⁰ On 7 April 2020 the lawyers representing the Tula Toli Victims and the Northern Rakhine Victims wrote jointly to the ICC Registrar, pressing for the prompt opening of a Field Office in Cox's Bazar, and seeking information on

³⁷See, for example, Verena Hölzl, ‘[For Rohingya refugees, internet ban severs ties to the outside world](#)’, *The New Humanitarian*, 3 March 2020; ‘[BTRC suspends 3G, 4G Services in Rohingya camp areas](#)’, *Dhaka Tribune*, 11 September 2019.

³⁸ *Registry's First Report on Information and Outreach Activities*, [ICC-01/19-33-Red](#), 7 July 2020, para. 14.

³⁹ *Ibid*, para. 14: “...Other key findings from the December 2019 mission include the following: i) Rohingya's expectations with respect to expediency of proceedings are high in light of the fact that the Decision Authorizing the Investigation was issued very fast...”

⁴⁰ *Order on Information and Outreach for the Victims of the Situation*, [ICC-01/19-28](#), 20 January 2020, para. 9.

progress toward that goal. On 15 June 2020, the lawyers representing the Northern Rakhine Victims, working in coordination with other Rohingya victims in Cox’s Bazar District, presented the Registrar with a petition from nearly 12,000 signatories asking for an ICC presence to facilitate exchanges and communication between their community and the Court. The ICC Registry has provided reassurance that consideration is being given to this matter, but it appears likely that even if it is decided to establish a Field Office, the process for doing so may take considerable time.

39. However, while the establishment of an ICC Field Office is necessary in order to ensure effective communication with victims in the Cox’s Bazar camps, this step alone will be insufficient to ensure that victims are able to meaningfully access ICC proceedings when they occur. Access would be significantly increased by holding hearings proximate to the affected community. And although the establishment of a Field Office is a matter within the core mandate of the Registry, the same is not true of steps towards the organisation of hearings away from the seat of the Court, which require judicial intervention.

6.3 The request for an assessment of alternative locations is timely

40. The Situation in Bangladesh/Myanmar is in its early stages. The investigation was authorised in November 2019,⁴¹ and arrest warrants or summonses will not be requested or issued for some time. Nonetheless, for the reasons set out below, the present application is timely.

41. First, the RPE envisage the issue becoming live at this stage: the Chamber is empowered under rule 100(2) of the RPE to decide to recommend that the Court sit in a State other than the host State “*at any time after the initiation of an investigation.*”⁴² This early trigger is likely a recognition of the substantial amount of time required for the logistical, financial, and security analyses that must precede a change in venue. Following a recommendation of the Chamber, rule 100(3) of the RPE also requires the Presidency (using the mandatory language “shall”) to consult with the State where the Chamber intends to sit. These consultations, even if being conducted with a State Party, will also take time.

42. A request for the Court to sit outside the host State in the *Gbagbo & Blé Goudé* case was criticized on the basis that it was filed “*too late to allow the Registry to conduct a feasibility assessment and for the Chamber to decide on whether or not to recommend to the*

⁴¹ [Article 15 Decision](#).

⁴² Emphasis added.

*Presidency the holding of the opening statements in situ.*⁴³ The Chamber noted that it “*could and should have been brought at an earlier juncture*”⁴⁴ (it was filed 45 days before the scheduled start date for trial). Through the present submissions the Victims seek to avoid a similar situation, or indeed any potential delays which could arise out of a request under rule 100 of the RPE.

43. Waiting for the issuance of a warrant of arrest or summons before a Registry assessment under rule 100 would likely preclude the possibility of a confirmation hearing being held in a State other than The Netherlands. Article 61(1) of the Statute requires a confirmation of charges hearing “*within a reasonable time*” after surrender or voluntary appearance before the Court. The Chambers Practice Manual (2019) cites “*around four to six months from the first appearance*” as a target date, but notes that “*efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.*”⁴⁵ The requisite logistical, financial, and security analyses may be difficult to start and complete within a four to six month time period. As such, a Registry assessment at this early stage would ensure that the Chamber can be presented with all available options for closing the gap between the ICC proceedings and the affected community.

6.4 The benefits of local trials justify an assessment under Rule 100(2)

44. Holding ICC proceedings outside the host State has been contemplated in the *Bemba*,⁴⁶ *Muthuara & Kenyatta*,⁴⁷ *Ruto & Sang*,⁴⁸ *Gbagbo & Blé Goudé*,⁴⁹ *Ongwen*,⁵⁰ and *Ntaganda*⁵¹ cases. In all but two of these cases (*Ruto* and *Ongwen*) the proposed relocation of the proceedings was rejected by the Chamber without reaching a recommendation to the

⁴³ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Consolidated Response to Mr Gbagbo’s Requests for in situ proceedings and for site visits (ICC-02/11-01/15-241 and ICC-02/11-01/15-255-Red) and to the Prosecution’s Submissions on site visits (ICC-02/11-01/15-268), [ICC-02/11-01/15-273](#), para. 13.

⁴⁴ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha, [ICC-02/11-01/15-316](#), 26 October 2015, para. 14.

⁴⁵ [Chambers Practice Manual](#) (2019), para.32.

⁴⁶ *Prosecutor v Jean-Pierre Bemba Gombo*, Public redacted version of the “Decision on the “Third Defence Submissions on the Presentation of its Evidence” of 6 July 2012, [ICC-01/05-01/08-2242-Red](#), 28 September 2012, paras 29, 31(vi).

⁴⁷ *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on “Defence Application for a change of place where the Court shall sit for Trial”, [ICC-01/09-02/11-581](#), 21 December 2012.

⁴⁸ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Recommendation to the Presidency on where the Court shall sit for trial, [ICC-01/09-01/11-763](#), 3 June 2013; *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [ICC-01/09-01/11-875-Anx](#), 26 August 2013.

⁴⁹ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha, [ICC-02/11-01/15-316](#), 26 October 2015.

⁵⁰ *Prosecutor v Dominic Ongwen*, Decision Concerning the Requests to Recommend Holding Proceedings *In Situ* and to Conduct a Judicial Site Visit in Northern Uganda, [ICC-02/04-01/15-499](#), 18 July 2016.

⁵¹ *Prosecutor v Bosco Ntaganda*, Recommendation to the Presidency on holding part of the trial in the State concerned, [ICC-01/04-02/06-526](#), 19 March 2015.

Presidency because of concerns surrounding timing, logistics, and/or security. Significantly, in deciding these requests, the various Chambers and the Presidency have acknowledged “*the importance of bringing justice closer to the affected community*”⁵² and “*the importance and benefit of bringing the work of the Court closer to those affected by the case*”,⁵³ and recognised that local proceedings “*contribute to a better perception of the Court and bring[ing] the proceedings closer to the affected communities*”.⁵⁴ These benefits are discussed in more detail below.

6.4.1 Holding hearings outside the host State will facilitate the presentation of evidence

45. The ICC’s evidentiary regime “*makes in-court personal testimony the rule, giving effect to the principle of orality*”.⁵⁵ Article 69(2) of the Statute provides that, subject to certain exceptions, “*the testimony of a witness at trial shall be given in person*”. According to the Appeals Chamber, hearing directly from the witness in the court means that the Chamber “*is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness’ testimony that may be unclear so that it may be accurately recorded*”.⁵⁶ As such, it is likely that victims living in Cox’s Bazar District will be called to give live evidence in any ICC proceedings.

46. Despite the best efforts of the ICC Victims and Witnesses Section, appearing as a witness in international criminal proceedings can be, for some, a traumatic and distressing experience.⁵⁷ Having to recount often extremely difficult experiences in a foreign and unfamiliar context is certainly not made easier by victims and witnesses being required to travel thousands of kilometres from their homes and support systems. Holding proceedings locally would mitigate these difficulties. It would also make the process easier for disabled or injured victims, or those for whom it is difficult to travel.

47. Moreover, the great majority of those who were victims of the crimes under investigation are stateless refugees, without access to passports or papers or any kind of travel documents. The administrative hurdles involved in facilitating their transport to and entry into

⁵² *Prosecutor v Dominic Ongwen*, Decision Concerning the Requests to Recommend Holding Proceedings *In Situ* and to Conduct a Judicial Site Visit in Northern Uganda, [ICC-02/04-01/15-499](#), 18 July 2016, para. 3.

⁵³ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha, [ICC-02/11-01/15-316](#), 26 October 2015, para. 15.

⁵⁴ *Prosecutor v Dominic Ongwen*, Decision on the recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda, [ICC-02/04-01/15-330](#), para. 22.

⁵⁵ *Prosecutor v Jean Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence” [ICC-01/05-01/08-1386](#), 3 May 2011, para. 76.

⁵⁶ *Ibid.*

⁵⁷ M. B. Dembour and E. Haslam, ‘Silencing Hearings? Victim-witnesses at Work Crimes Trials’, 15 *European Journal of International Law* (2004) 151 – 177.

The Netherlands will be significant. Challenges in arranging travel for witnesses – including those without ready access to travel documents – is not a novel problem, and it has previously been recognised that conducting proceedings locally would mitigate obstacles of this kind.⁵⁸ This would be the case even more so where the potential witnesses are stateless.

6.4.2 *Holding hearings outside the host State may enhance the perceived legitimacy of the proceedings*

48. Visible and accessible proceedings are more likely to be seen as legitimate by the affected communities. Involvement in a criminal trial, whether as an observer in the public gallery or a participating victim in the proceedings, has been recognised as having the potential to contribute to victim empowerment, validation, and a sense of recognition by the Court and the international community. Justice that can be “seen” is more likely to be considered beneficial by victim communities.

49. When considering whether to move the opening statements in the *Ntaganda* case to Bunia, in the Democratic Republic of Congo, for example, the ICC Registrar reported that “*the perception of the Court and its profile would greatly benefit*”⁵⁹ from changing the location of the proceedings, even just temporarily. Indeed, the criticism of the ICC that it delivers “distant justice”, with little measurable impact on the lives of the victims, focuses on the physical distance between the the ICC premises in The Hague and the sites of the alleged crimes or the places where the victims now live.⁶⁰

50. By contrast, the prosecution of former Chadian President Hissan Habré before the Extraordinary African Chambers in Dakar, Senegal has been lauded for its proximity to the affected population of victims in Chad.⁶¹ Described as departing from the “*distant, alienating trend of symbolic justice*”, the trial was recognised for having “*pursued, performed and profited by those indirectly and directly victimised by the accused*”.⁶²

51. Similarly, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) were established just outside the capital of the country in which the crimes occurred, Phnom Penh.

⁵⁸ *Prosecutor v Jean-Pierre Bemba Gombo*, Public redacted version of the “Decision on the “Third Defence Submissions on the Presentation of its Evidence” of 6 July 2012, [ICC-01/05-01/08-2242-Red](#), 28 September 2012, paras 29, 31(vi).

⁵⁹ *Prosecutor v Bosco Ntaganda*, Decision on the recommendation to the Presidency on holding part of the trial in the State concerned, [ICC-01/04-02/06-645-Red](#), 15 June 2015, para. 12.

⁶⁰ See, e.g. ICTJ, [Sensibilisation à la CPI en RDC : Sortir du «Profil Bas»](#), March 2007, p. 4, in which the ICTJ urged the Court to hold trials in the DRC itself, in order to improve its profile in the communities for whom it seeks to render justice given that, in its view, the support of the international community will not last if the Court fails to convince these actors of its legitimacy.

⁶¹ Hippolyte Marboua, ‘*Central Africa Republic wants to learn lessons from Habré Trial*’, 27 May 2015.

⁶² Thijs B. Bouwknegt, ‘*Beyond ‘African Solutions to African Problems’ at the Extraordinary African Chambers and ‘Distant Justice’ at the International Criminal Court*’, JICJ 5 November 2019.

With a public gallery with the capacity for 500 observers, over 160,000 Cambodians attended and watched proceedings during the Case 001 and Case 002 trials.⁶³ The ECCC’s location in Cambodia also facilitated the presence of local journalists in the public gallery with the result that, for a time, details of the daily proceedings were a regular feature in local and national newspapers. Physical proximity undoubtedly made it easier to circulate information about the ECCC’s mandate and activities, thus increasing understanding and acceptance of the process among the Cambodian population, even for those who did not directly participate or attend hearings.

6.5 An assessment under Rule 100(2) reflects the will of the Victims

52. The importance of the ICC proceedings to the Victims is difficult to overestimate. Statements like “*even if it takes 100 years, we are ready to keep fighting with this case*” are not uncommon among the Northern Rakhine Victims. The Tula Toli victims have supported the ICC process in similarly emphatic terms: “*Please let the world know that they need to arrest those people*”; “*All I want is justice for the killings of my mother, my sister, my brothers; I want justice for that*”; “*I know it will take a long time to make justice for us but I will wait*”.⁶⁴ Holding ICC proceedings in a location that victims are physically unable to reach will reduce not only their participation but also their ability to be kept informed about them.

53. The desire to participate and be informed is at the heart of the Victims’ preference for eventual ICC proceedings to be held locally. Limiting proceedings to the The Hague would necessarily limit the potential for victim involvement, whether as participants or observers. Local ICC proceedings are viewed as allowing for greater participation of the victim community as a whole, and as giving more opportunity for their voices to be heard.

7 CONCLUSION

54. The Court’s constitutive documents expressly envisage that the ICC will hold proceedings in states other than the host State. Meaningful and timely engagement with this prospect is in the interests of the community in whose name the proceedings are being brought, would increase the legitimacy of the proceedings, and would assist in addressing criticism levelled at the ICC as an “eurocentric” institution divorced from the realities of the affected communities. A Plenary of 14 ICC Judges, convened to consider whether to move the proceedings in the *Ruto & Sang* case to Kenya, were “*in principle in favour of bringing the*

⁶³ Viviane E. Dittrich ‘The Legacy of the ECCC’ in Simon M. Meisenberg, Ignaz Stegmiller (eds) *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (2016) TM Asser Press, p. 134.

⁶⁴ See further: *Representations of victims from Tula Toli*, [ICC-01/19-19](#), 23 October 2019, para.19.

proceedings of the Court closer to the affected communities and to where the alleged events occurred”,⁶⁵ and nine of the Judges “observed that it was not extraordinary to hold proceedings nearer the affected communities and that life should be given to rule 100; it should not be defeated by factors which would often be at play.”⁶⁶

55. By directing the Registrar to perform an assessment under rule 100(2) of the RPE, the Pre-Trial Chamber would in due course receive relevant information and have options available to it. Rule 100 contemplates the involvement of victims in the process, and the consideration of their views. The Victims remain ready and would welcome the opportunity to participate in the assessment process, and further share with the Registry the reasons why localised justice is a priority.

56. As such, the Victims hereby request that the Pre-Trial Chamber:

DIRECT the Registry to prepare an assessment of potential venues for the holding of proceedings in a State other than the host State within reasonable physical proximity of the affected population.

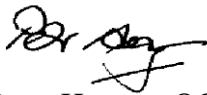
Respectfully submitted,



Megan Hirst



Kate Gibson



Peter Haynes, QC

Dated this 4 August 2020.

Done in London and Bangkok.

⁶⁵ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, [ICC-01/09-01/11-875-Anx](#), 26 August 2013, para. 10.

⁶⁶ *Ibid*, para. 20.