

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

With two Confidential *EX PARTE* Annexes only available to the Registry

**Registry's Observations on the Victims' Joint Request Concerning Hearings
outside the host State (ICC-01/19-34)**

Source: Registry

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

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I. Introduction

1. Pursuant to the order issued by Pre Trial Chamber III (“Chamber”) on 20 August 2020 (“Order”),¹ in the situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (“Situation” and “Bangladesh”, respectively), the Registry hereby provides information on the “Victims’ joint request concerning hearings outside the host State” (“Request”).²
2. As per the Order, the Registry submits its observations on matters regarding “the holding of proceedings in a State other than the host State within reasonable physical proximity of the affected population”. In this respect, the Registry has considered five scenarios as further detailed below. For each of these scenarios, the Registry provides information on the preparatory work, the extent of the Registry’s support and, to the extent possible, the related time required to facilitate the holding of proceedings in Bangladesh.

II. Classification

3. In accordance with regulation 23 *bis*(1) of the Regulations of the Court (“RoC”), Annexes I and II to the present observations are classified as confidential *ex parte* only available to the Registry as they provide respectively a security analysis of the current situation in Bangladesh³ and information about the security aspects to be considered for victims and potential witnesses to be heard, the threat actors and the methodology of the operational procedures internal to the Victims and Witness Unit (“VWU”).⁴

¹ Pre-Trial Chamber III, “Order inviting the Registry to submit observations on the Victims’ joint request concerning hearings outside the host State” (“Order”), ICC-01/19-36, 20 August 2020.

² Legal Representatives of Victims, “Victims’ joint request concerning hearings outside the host State”, ICC-01/19-34, 4 August 2020.

³ Annex I.

⁴ Annex II.

III. Submissions

4. In order to enable the Chamber to take an informed decision on the Request and based on indications given in the Order,⁵ the Registry has envisaged the following five scenarios corresponding to different types of proceedings at different stages: (1) a Chamber or an appointed Single Judge, as the case may be, conducts a judicial visit to a refugee camp in Cox's Bazar, Bangladesh ("Scenario 1"); (2) a testimony via video-link under article 56 of the Rome Statute ("Article 56 Testimony") is organized with a witness being based in Bangladesh whilst the Chamber or a Single Judge remains in The Hague ("Scenario 2"); (3) a Chamber or an appointed Single Judge, as the case may be, explains a decision on victims' participation to the victims based in Bangladesh ("Scenario 3"); (4) a full confirmation of charges hearing is held in Bangladesh ("Scenario 4"); (5) the decision on the confirmation of charges hearing is rendered in Bangladesh ("Scenario 5").
5. The Registry submits the following preliminary observations (A) and elaborates thereafter on the five envisaged scenarios (B).

A. Preliminary observations

6. Given the volatile nature of the current situation in Bangladesh, including the COVID-19 pandemic, the Registry has identified general parameters for the Chamber's consideration. Details for each parameter (including precise time lines or resources) can only be further elaborated following further assessment and/or preparatory missions, as explained in each scenario below. The Registry underlines that the present observations are made bearing in mind that the prospective proceedings would potentially take place in Bangladesh, a State where, to date there is no Country Office of the International Criminal Court ("Court").

⁵ See for example, Order, para. 2.

1. Medical Situation

7. The Registry through its Occupational Health Unit, has undertaken a mission to Bangladesh, Dhaka and Cox's Bazar including the major refugee camps. Under normal circumstances Bangladesh has a high medical risk rating. In the context of the COVID-19 situation, the risks are even greater.⁶ The already limited local medical resources are stretched with the COVID-19 demands. The local government is taking measures to contain the virus, physical distancing is in place but difficult to maintain. As a consequence, the number of new cases continues to increase and is reaching more than 20 per 100.000 inhabitants (i.e. threshold applicable for a classification in "orange zone"). However, not all statistics are reliable due to lack of testing, surveillance contact tracing, containment, treatment and reporting.
8. Regardless of the scenarios envisaged, a medical clearance⁷ for all travellers will be required at least 4 weeks in advance of any mission to Bangladesh. Medical support will have to be deployed in the field.
9. Access to medical facilities and/or cooperation with the United Nations ("UN") for access to the UN medical services, including assistance with medical evacuation if necessary, will have to be secured well in advance. In this regard, the Registry will endeavour to take advantage of its existing contacts in the field to expedite such access, if need be.

2. Weather conditions

10. As to the most appropriate timing for the holding of *in situ* proceedings, the Registry considers that the optimal period would appear to be from October to March. Considering the typhoon season along the coast, this period may be

⁶ The pandemic is still extremely high in Bangladesh and the Dhaka district (Dhaka city) has the highest rate of COVID-19 cases with the district of Chattogram, which includes Cox's Bazaar, being the second highest.

⁷ COVID-19 testing is required 72 hours prior to departure.

further reduced from December to March. Any *in situ* activities must also take into account the air travel restrictions to and from Bangladesh,⁸ the reduction of in-country travels and the implementation of related health protocols due to the COVID-19 situation.⁹

3. Identified locations for the holding of proceedings, related security requirements and impact on the affected population

11. As to the place of the proceedings, the locations identified so far for the purpose of the five scenarios described below are either a refugee camp in Cox's Bazar (Bangladesh) or a UN compound or similar infrastructure in Cox's Bazar. From a security risk assessment, without having conducted prior on-site assessment, both locations are *a priori* considered suitable provided that the following conditions are fulfilled: (i) Bangladesh agrees to ensure general and security support, (ii) the cooperation of the international organisation running the refugee camp is secured and (iii) adequate human and financial resources are provided. However, the Registry will be in a position to make a final and meaningful recommendation to the Chamber as to the exact prospective location only after an on-site security assessment is completed.

12. As to the impact of the proceedings on the affected population, the Registry draws the Chamber's attention as to the importance to identify the most appropriate location to hold proceedings, as for each of the two locations identified above, there may be associated challenges to bear in mind (e.g. poor internet/phone connectivity in the refugee camps, interactions between the UN agencies and the Rohingya interlocutors, etc.). Accordingly, upon the

⁸ At the time of the present observations, only flights to and from China, Malaysia, Maldives, Qatar, Sri Lanka, Turkey, UAE and the UK are allowed.

⁹ Negative COVID-19 certificate (proof of testing) is required for all travellers arriving in Dhaka (no more than 72hrs before arrival in Dhaka); travellers must respect a 14 days quarantine upon arrival in Bangladesh and a 10 days Quarantine upon return to the Netherlands. If staff is unable to adhere to the 10 day quarantine guidelines upon return to the Netherlands (family household situation may not allow for this) temporary accommodation may be required (10 days).

Chamber's request, a further assessment may need to be carried out as to the actual impact on the affected population of any judicial activity outside or inside the refugee camp in Cox's Bazar.

4. Languages of the proceedings

13. To ensure proximity with the affected population, the usual interpretation of the proceedings in the two working languages of the Court (English and French) will need to be complemented, as the case may be, by interpretation services in the three situation languages such as Rohingya, Burmese and Bangla.

5. Information Technology ("IT") infrastructure

14. The Registry submits that the setup of any in-situ hearing consists of (i) a basic microphone system with audio and video recording, and on-site interpretation, (ii) a "public gallery" (or equivalent public space) with guests who could listen to the proceedings in the language of their choice, and (iii) a basic presentation set up in the "courtroom" for evidence display. Further, a maximum of three languages can be technically accommodated for the streaming of the hearing. In addition, contrary to proceedings taking place at the seat of the Court and given the technical challenges for the successful holding of *in situ* hearings, the Registry suggests that no "media centre" is required and no live transcript is to be provided.
15. Based on these parameters, from an IT infrastructure perspective, the Chamber's determination on the type of proceedings and the choice of the appropriate place of these proceedings is of crucial importance. Indeed, for example, should the Chamber decide to hold a video teleconferencing

("VTC") hearing or an *in situ* hearing in a refugee camp, minimum technical standards¹⁰ will need to be met.

6. State cooperation

16. In order to facilitate the work of the Court on the territory of Bangladesh, the Registry is in the process of finalising the requisite legal arrangements for the Court's cooperation with the Bangladesh authorities, which will be shared with these authorities in the coming weeks. According to the Registry's past experience, the adoption of such legal arrangements may take a few months. Pending the conclusion of such legal arrangements with the national competent Bangladesh authorities, given that Bangladesh has not signed the Agreement on the Privileges and Immunities of the Court ("APIC"), the Registry currently requests privileges and immunities ("P&I") for all the Court's staff and personnel that will go on mission to Bangladesh. Based on past practice, a response by the Bangladeshi authorities is usually obtained within one to two weeks on the provision of P&I to the Court's staff and personnel.

17. In addition, any cooperation work requires (1) advance communication between the Registry's External Operations and Support Section ("EOSS") and Bangladesh and (2) further communication within the international organisations for the access and coordination of activities. The time line for securing the cooperation under (2) is difficult to evaluate as it depends on the assistance requested. It is anticipated though that it may take approximately two weeks to international organisations to respond to a Court's request for assistance.

¹⁰ These technical requirements are the following: a good internet connection (with public IP address and minimum bandwidth of 2MB uplink and 2MB downlink), minimum noise levels, light proof curtains, a source of stable electricity.

B. Five envisaged scenarios

Scenario 1: A judicial visit to a refugee camp in Cox's Bazar, Bangladesh

18. In this scenario at the situation stage, the visit would possibly take a maximum of two days and no IT services would be required. Interpretation as required will be provided.

Preparatory work

19. Should the publicity of the visit be considered and to make sure that the purpose of the visit will be understood by the affected population, the Registry's Public Information and Outreach Section ("PIOS") recommends conducting a preparatory mission. This mission will be required to, *inter alia*, devise communication plans in view of the judicial visit. It should entail the possibility of transport to the camps and access to facilities to hold outreach activities. The preparatory mission could be a joint mission where both the PIOS and VPRS would reach out to existing contact networks and collect input from key interlocutors, groups of victims and legal representatives of victims. Preparing the terrain for the judicial visit would ensure providing accurate information disseminated effectively.¹¹ In addition, because of the low internet connectivity in the camps, physical meetings may be the only means to disseminate information.

Registry support

20. An Associate Legal Officer/Court Officer ("ALO/CO") from the Court Management Section ("CMS") will be required to accompany the delegation and prepare the *Procès Verbal* of the visit.¹² The equipment necessary would be

¹¹ This would entail contact network of interlocutors to spread the information and potentially schedule virtual information meetings (refresher) on the ICC, mandate, scope of investigation, etc.

¹² See in the case *The Prosecutor vs. Germain Katanga*, Registry, "Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo", ICC-01/04-01/07-3234, 6 February 2012.

minimal.¹³ As to the security aspects of this site visit, this scenario also requires the deployment of a Court's close-protection team and putting in place security and logistical measures. Although possible, such a deployment will be financially challenging.

21. For the visit to be relayed in the victims' community, the three situation languages (Rohingya, Burmese and Bangla) may have to be provided to meet communication needs. Sourcing, recruitment and accreditation including security clearance of freelance field interpreters for these languages may take 6 months. The Registry Language Services Section ("LSS") draws the Chamber's attention to the possible lack of suitable field interpreter candidates or field interpreters not security cleared, leading to unavailability of field interpretation services. Although this risk could be mitigated, further delay in identifying field interpreters may occur.

22. Finally, in this scenario, the Registry anticipates that legal representatives of victims ("LRVs") and potentially one duty counsel to represent the general rights of the defence may wish to be present during the visit.

Scenario 2: An Article 56 Testimony via video-link is organized with a witness being based in Bangladesh whilst the Chamber or an appointed Single Judge remains in The Hague

23. This scenario will be at the situation stage. The assumption is that the testimony may take approximately three days.

Preparatory work

24. The Registry, via its External Relations and State Cooperation Unit ("ERSCU"), will have to inform the Bangladeshi authorities of the video-link

¹³ IT equipment would consist of a laptop and voice recorder to facilitate (where allowed) minute taking.

testimony. The discussions to be held to secure this specific assistance can take two to three weeks. In addition, the Registry might need to request cooperation from other international organizations operating in Bangladesh.

25. Subject to a final advice on the witness security aspects to be carried out by the VWU, this scenario is considered feasible in terms of general security.
26. In this scenario, the Registry assumes that only the witness will be testifying remotely and *in situ*, whilst all participants, including interpreters, will be in The Hague. A VTC would be utilised.
27. The preparation needs and timeline for providing interpretation services in the three different situation languages (and associated risks for identifying these interpreters) are the same as those described under Scenario 1. If some of the interpreters are themselves not in The Hague, an additional VTC would need to be provided and a minimum of two days' mission for field interpreters prior to the testimony must be envisaged.
28. If the required equipment is not available *in situ* or if travel is not permitted, the IT equipment will need to be shipped in advance of the vide-link testimony. In such a case, a minimum of one month would have to be taken into account for the said shipment. Local resource would be required to assist in the setup. If travel is permitted, the setup, testing and hearing would require a mission for one person for five days.

Registry support

29. Under this scenario, the normal CMS support needs to be provided from the courtroom in the Court premises but a Registry representative must be present in Bangladesh for the duration of the video link testimony. A Registry

representative¹⁴ will need to travel and assist for the period of the video link testimony.

30. In addition to potential remote consecutive interpretation in the situation languages, simultaneous interpretation in English and French would be provided by staff interpreters in court.
31. In this scenario, if the witness is also a victim (i.e. dual status), the VPRS could liaise with both the VWU, where relevant, and the Office of the Prosecutor, if need be, in order to provide the witness with information about victim participation, if so ordered by the Chamber.
32. Similarly to Scenario 1, one may envisage the presence - during the video-link testimony - of LRVs and duty counsel to represent the general rights of the defence either in Bangladesh or remotely from The Hague. Both options may be technically envisaged although the former would be more costly than the latter. In addition, should the witness heard be a witness in the situation envisaged under article 55(2) of the Rome Statute, a duty counsel to assist the said witness may potentially be present *in situ*. In case legal assistance is provided remotely, secure communications between the article 55(2) witness and the duty counsel will have to be provided.

Scenario 3: A Chamber or an appointed Single Judge explains a decision on victims' participation to the victims based in Bangladesh

33. In this scenario, the Chamber or an appointed Single Judge would possibly explain a judicial decision to the affected population in Bangladesh. The purpose would be to directly explain to the victims the usual content of, for example, a decision on victims' participation or on confirmation of charges. This scenario would be at the situation stage and the duration of the visit may

¹⁴ Usually an ALO/Court Officer.

be one day at a minimum. It is assumed that this will be a public hearing in presence of, *inter alia*, the victims or their representatives.

Preparatory work

34. Provided that the overall cooperation agreement is adopted, the Registry refers to Scenario 2 for the anticipated required time for the information and cooperation with the Bangladeshi authorities and, if required, international organizations present or operating in Bangladesh.
35. With regards to IT infrastructure and equipment, assuming that only a Judge would be located remotely, a VTC would be put in place for the Judge travelling to the location. It is therefore assumed that travel is permitted. In advance of the event, a Registry staff will then be in a position to setup and test the equipment during a three-day mission. Interpretation services if interpreters are also remote could be technically accommodated.
36. As far as field interpretation is concerned, the needs for preparation (and associated risks) are the same as those described under Scenario 1.
37. As explained in Scenario 1, a preparatory joint mission (i.e. VPRS and PIOS) will be required prior to the event. In addition to the field activities explained above, it would also allow for (1) scheduling virtual information meetings on the Court, its mandate, the scope of investigation, etc. and (2) ensuring that information about this visit and the explanations provided by the Judge during the visit are widely disseminated in all the camps in Cox's Bazar (not only before but also during and after the Judge's intervention).
38. From an outreach perspective, given the preparatory work needed and the staff to be involved, the Registry draws the Chamber's attention to the fact that a one day visit may only allow a handful of victims to engage with the Judge, potentially leaving frustration among many others and leading to a

negative impact on the image of the Court. Accordingly, subject to available funding, the Registry would recommend considering having a longer visit should this scenario be retained by the Chamber. This would enhance the positive impact on outreach efforts and contribute to make the mission meaningful for victims and affected communities.

Registry support

39. The Registry's support for this judicial activity would be similar to the one described under Scenario 1. Similarly to Scenarios 1 and 2, the presence of LRVs and potentially a duty counsel to represent the general rights of the defence must be foreseen.

Scenario 4: A full confirmation of charges hearing is held in Bangladesh

40. This scenario will be related to a specific case and the hearing foreseen under article 61 of the Rome Statute may last approximately five days. Based on past confirmation hearings, it is anticipated that one witness may be called to testify and there would be one arrested person and at least twenty five staff in support of the Judiciary.

Preparatory work

41. From a security and safety perspective this scenario is feasible, provided that there is ample time and sufficient resources available. This scenario would require advance communication with Bangladesh for the provision of extensive security and safety support and availability of appropriate safe locations for the accommodations of members of the Court's delegation, for the holding of the hearings and for the detention facility, as further detailed below. A Court's security team¹⁵ and close-protection team would have to be deployed.

¹⁵ This team would be composed of ten to fifteen security officers.

42. In this scenario, should the physical presence of the suspect be required at the place of the proceedings, the Registry suggests establishing as Detention Centre a secure compound or premise. This may be either a UN compound or a permanent establishment with a secure outer perimeter guarded and manned 24/7 by – preferably – Court’s security officers, acting as “custody officers”.¹⁶
43. The Registry, through its Security and Safety Section (“SSS”), would thus need to carry out an assessment mission to the proposed area, in order to find a suitable premise serving as a safe and secure detention environment, or to possibly identify the modifications required to create one. In identifying this suitable premise, considerations will be given to the entitlements of the detained persons according to regulation 99 of the RoC.
44. In addition, should a suspect be subject to a judicial order restricting contacts and communications, the Registry will need to find a way to implement those restrictions while *in situ*.
45. Should the Chamber further decide that the proceedings may be conducted in presence of the suspect from the Court’s detention centre (as opposed to *in situ*), a secure communication link between the suspect and counsel in the field, as well as a video link set up from The Hague to the field will have to be provided.
46. For this scenario, a full initial assessment mission must be planned with an IT technician. The purpose of this mission will be to, *inter alia*, see the layout of the proposed site of the courtroom, public gallery, and area for media, the placement of conference system units¹⁷ and interpretation equipment, and

¹⁶ This “detention centre” should also contain suitable areas for these officers and for a suspect.

¹⁷ Also called “courtroom” delegate units, this is the piece of equipment that controls the conferencing system (i.e. microphones and headphones).

how the media area will be assembled. All of the equipment for the *in situ* hearing will have to be transported in the chosen location with a view to being installed and tested at least five days before the start of the hearing and remain there until the equipment is securely packed and flown back to The Hague.¹⁸

47. In terms of preparatory steps for the provision of interpretation services of the full hearing, in addition to the needs and risks described in Scenario 1, available field interpreters require a minimum of two weeks training prior to the hearing. Paraprofessional interpreters, speaking the language of the arrested person, will have to be recruited to allow for simultaneous interpretation in English/French/language of the arrested person. This process can take up to six months.
48. In terms of outreach activities, a preparatory mission would take place,¹⁹ which would be followed by a detailed outreach action plan exploring notably the possibilities to provide timely information worldwide through web streaming or equivalent. The deployment of sufficient staff in the field and the shipping of specialist equipment and materials, as well as the time and cost required to ensure this undertaking will have to be considered.
49. The PIOS anticipates a good impact on the image of the Court should the required conditions be met. There is however a real risk of negative impact if conditions to ensure publicity and access of public, victims, journalists and victims are not good.

¹⁸ The costs of this mission for IMSS only are estimated to a total of 46,000 euros (27,000 for the estimated equipment costs and 18,000 for the mission costs).

¹⁹ For this mission, good Internet or at least good phone coverage, web-streaming will be required. The preparatory mission is required to device communication plans, to identify facilities for journalists to cover the hearings, public gallery and access to the victims, diplomats, journalists and NGOs and to make sure that the transport to the UN compound from refugee camps is possible. A recommended suitable room for this hearing would have at least a capacity for 200 people.

50. Finally, together with the PIOS, the VPRS would also ensure that accurate information is widely disseminated in all the camps in Cox's Bazar.

Registry support

51. Under this scenario, the normal CMS support needs to be provided at the remote location. The assistance would require an ALO/CO, a Court Clerk and an Audio Visual Production Assistant travelling. The provision of real time transcription as well as presentation of evidence if so required, would have to be anticipated and tested from the remote location. It must be noted that the software used during the Court's hearing,²⁰ are remotely accessible and can therefore be used in any location. Two Registry representatives²¹ would be present in the remote location for the appropriate set up and perform all Registry's tasks during the hearing. An "augmented" set up with real-time transcript may also be envisaged if need be, with an impact on the number of staff resources to be deployed on site.²² During a hearing of confirmation of charges, consecutive interpretation in the situation languages will be provided. Simultaneous interpretation for English/French can be provided by court staff.

52. Like in the previous scenarios envisaged, the presence of victims Legal representatives as well as counsel for the suspect and their respective support team must be foreseen. Potentially, a duty counsel to assist a person in the situation of rule 74(10) of the Rules of Procedure and Evidence may have to be included as well in this scenario.

²⁰ Transcend software and e-Court Ringtail.

²¹ An ALO/CO and a Court Clerk.

²² One E-court support assistant, two French court reporters, two English court reporters.

Scenario 5: The decision on the confirmation of charges hearing is rendered in Bangladesh.

53. In this last scenario, the decision on the confirmation of charges hearing would be rendered in Bangladesh. This scenario would be related to a specific case and will take place over the course of one day.

Preparatory work

54. In terms of preparation to secure the cooperation of Bangladesh, the Registry's observations are the same as in Scenarios 2 and 3 above.

55. Should it be envisaged that the decision is rendered in presence of the suspect *in situ*, all conditions considered under Scenario 4 regarding the "detention centre" would have to be taken into account.

56. In terms of IT infrastructure and equipment, the impact is the same as Scenario 4 if this involves multiple participants. The difference with Scenario 4 is the duration of the hearing and, consequently, shorter preparatory missions would be needed. If a Single Judge is to issue the decision, the preparatory work is anticipated to be the same as Scenario 3. In particular, from an outreach perspective, the PIOS anticipates that three months would be required to facilitate this event, with the deployment of staff in the field. The estimated impact on the image of the Court is good provided that the required facilities are given to ensure timely publicity and engagement with affected communities. The risks of a negative impact if conditions to ensure publicity and access of public, victims, journalists and victims are not good must also be taken into account.

57. Both the PIOS and VPRS would in any event ensure that accurate information is widely disseminated in all the camps in Cox's Bazar through best channels

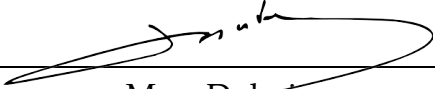
both virtually and, if need be, through a brief joint field mission just before the judges' intervention.²³

Registry support

58. The requirements for CMS are the same as under Scenario 4 although, due to its limited duration, it could be considered to have only one ALO/CO present. Interpretation services in situation languages and simultaneous interpretation in English and French would have to be provided respectively, by field interpreters and by staff interpreters. Again, in this scenario, the presence - either *in situ* or remotely - of LRVs and counsel for the suspect and their respective support teams must be taken into account.

IV - Conclusion

59. The Registry stands ready to accommodate any of the proposed scenarios even if the operational aspects - in terms of time and resources - for some of them may be more challenging than for others. Regardless of the scenarios described above, given rule 100(3) of the Rules of Procedure and Evidence, the holding of proceedings *in situ* will be in any event subject to the agreement and cooperation of Bangladesh. Following consideration by the Chamber of the five scenarios proposed above, and should the Chamber so require, further in-depth feasibility assessments (including preparatory missions) may be provided by the Registry.



 Marc Dubuisson
 Director Division of Judicial Services
 on behalf of Peter Lewis, Registrar

Dated this 21 September 2020

At The Hague, The Netherlands

²³ As previously mentioned, internet connectivity in the camps is still low and physical meetings may be the only means to disseminate information.