



Original: English

No. ICC-RoC46(3)-01/18

Date: 10 August 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE COURT

Public

**Decision on the Request of the Thayninga Institute for Strategic Studies for Leave
to Submit *Amicus Curiae* Observations**

Decision 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 Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

Thayninga Institute for Strategic Studies

REGISTRY

Registrar

Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I (the “Chamber”) of the International Criminal Court (the “Court”) issues this decision on the request of the Thayninga Institute for Strategic Studies (the “Applicant”) for leave to submit *amicus curiae* observations (the “Request”).¹

1. On 9 April 2018, the Prosecutor filed the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (the “Prosecutor’s Request”), pursuant to regulation 46(3) of the Regulations of the Court and article 19(3) of the Rome Statute (the “Statute”).²

2. On 11 April 2018, the President of the Pre-Trial Division assigned the Prosecutor’s Request to the Chamber.³

3. On 7 May 2018, the Chamber invited the competent authorities of the People’s Republic of Bangladesh (“Bangladesh”) to submit observations on the Prosecutor’s Request pursuant to rule 103(1) of the Rules of Procedure and Evidence (the “Rules”).⁴ Bangladesh submitted confidentially its observations on 11 June 2018.⁵

4. Between 29 May 2018 and 14 June 2018, the Chamber granted leave to the following organizations and persons to submit *amici curiae* observations on the Prosecutor’s Request: the International Commission of Jurists;⁶ members of the

¹ ICC-RoC46(3)-01/18-34, with public annexes I to IX .

² ICC-RoC46(3)-01/18-1.

³ President of the Pre-Trial Division, “Decision assigning the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’ to Pre-Trial Chamber I”, 11 April 2018, ICC-RoC46(3)-01/18-2.

⁴ Pre-Trial Chamber I, “Decision Inviting the Competent Authorities of the People’s Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’”, 7 May 2018, ICC-RoC(3)-01/18-3.

⁵ ICC-RoC46(3)-01/18-14-Conf, with one confidential annex.

⁶ Pre-Trial Chamber I, “Decision on the ‘Request for Leave to Submit Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules)’”, 29 May 2018, ICC-RoC46(3)-01/18-7.

Canadian Partnership for International Justice;⁷ the Women’s Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights (who requested leave to submit observations jointly);⁸ Guernica 37 International Justice Chambers;⁹ and the Bangladeshi Non-Governmental Representatives.¹⁰ The Chamber received their written observations on 18 June 2018.¹¹

5. On 21 June 2018, the Chamber invited the competent authorities of the Republic of the Union of Myanmar (“Myanmar”) to submit observations on the Prosecutor’s Request pursuant to rule 103(1) of the Rules by 27 July 2018.¹²

6. On 5 July 2018, the Registry informed the Chamber that the Embassy of Myanmar to the Kingdom of Belgium did not accept the delivery of either the Chamber’s decision inviting Myanmar to submit observations or the Prosecutor’s Request, which were returned to the Court.¹³

⁷ Pre-Trial Chamber I, “Decision on the ‘Request for leave to submit an *Amicus Curiae* brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the *Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*”, 29 May 2018, ICC-RoC46(3)-01/18-8.

⁸ Pre-Trial Chamber I, “Decision on the ‘Joint Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules”, 11 June 2018, ICC-RoC46(3)-01/18-15.

⁹ Pre-Trial Chamber I, “Decision on the ‘Request for Leave to Submit *Amicus Curiae* Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)”, 14 June 2018, ICC-RoC46(3)-01/18-17.

¹⁰ Pre-Trial Chamber I, “Decision on the ‘Request for Leave to Submit *Amicus Curiae* Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules)”, 14 June 2018, ICC-RoC46(3)-01/18-18.

¹¹ **International Commission of Jurists:** ICC-RoC46(3)-01/18-20; **Bangladeshi Non-Governmental Representatives:** ICC-RoC46(3)-01/18-21, with three public annexes; **Women’s Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Center for Constitutional and Human Rights:** ICC-RoC46(3)-01/18-22; **members of the Canadian Partnership for International Justice:** the Chamber observes that the members of the Canadian Partnership for International Justice submitted their observations twice: ICC-RoC46(3)-01/18-23 and ICC-RoC46(3)-01/18-25, with one public annex; and **Guernica 37 International Justice Chambers:** ICC-RoC46(3)-01/18-24.

¹² Pre-Trial Chamber I, “Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’”, 21 June 2018, ICC-RoC46(3)-01/18-28.

¹³ ICC-RoC46(3)-01/18-31, para. 4.

7. On 11 July 2018, the Prosecutor filed a consolidated response to, *inter alia*, the five *amici curiae* submissions received by the Chamber on 18 June 2018 and mentioned in paragraph 4 above.¹⁴

8. On 6 August 2018, the Chamber received the Request, where the Applicant seeks leave to submit *amicus curiae* observations pursuant to rule 103(1) of the Rules.¹⁵

9. The Chamber notes article 21(1)(a) of the Statute and rule 103 of the Rules. The Chamber recalls in particular rule 103(1) of the Rules, according to which the Chamber may, at any stage of the proceedings, “if it considers it desirable for the proper determination of the case, [...] grant leave to a State, organization or person to submit [...] any observation on any issue that the Chamber deems appropriate”.

10. The Chamber recalls that the Appeals Chamber has underlined that, when acting within the parameters of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it “in the proper determination of the case”.¹⁶

11. The Chamber notes that the Applicant seeks to submit observations on the following issues: (i) the migration of Bengali people to the Rakhine state between 1839 and 2005; (ii) outbreaks of violence in the Rakhine state between 1942 and 2017, including attacks allegedly carried out by “Bengali terrorists”; (iii) actions taken by

¹⁴ ICC-RoC46(3)-01/18-33.

¹⁵ ICC-RoC46(3)-01/18-34, with public annexes I to IX; *see*, in particular, ICC-RoC46(3)-01/18-34-AnxI, paras 7, 9-10.

¹⁶ Appeals Chamber, “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 22 April 2008, ICC-01/04-01/06-1289, para. 8.

the Government of Myanmar against terrorism; and (iv) humanitarian activities conducted by the Government of Myanmar.¹⁷

12. The Chamber observes that the Applicant's submissions do not concern the specific legal question that arises from the Prosecutor's Request, which is whether the Court can exercise jurisdiction under article 12(2)(a) of the Statute over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.¹⁸ The Chamber stresses that the issue *sub judice* is limited in scope and, as correctly stated by the Prosecutor, "confined to a pure question of law".¹⁹ In this regard, the Chamber notes that it is not called upon to make any findings of fact.

13. In addition, the Chamber highlights that when previously granting leave to the different organizations and persons who sought to make *amici curiae* submissions, it has instructed said organizations and persons to submit their observations no later than 18 June 2018.²⁰ The Chamber received all their submissions on that date and the Prosecutor filed her consolidated response to those submissions on 11 July 2018.²¹ The Chamber further recalls that Bangladesh had filed its observations on 11 June 2018.²² The Applicant's Request comes therefore at a time when the Chamber has already received submissions from several interested States,

¹⁷ ICC-RoC46(3)-01/18-34-AnxI, paras 20-63.

¹⁸ ICC-RoC46(3)-01/18-1, paras 1, 4 and 63.

¹⁹ ICC-RoC46(3)-01/18-T-1-Red-ENG, p. 8, line 21.

²⁰ Pre-Trial Chamber I, "Decision on the 'Request for Leave to Submit Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules)'", 29 May 2018, ICC-RoC46(3)-01/18-7, p. 4; "Decision on the 'Request for leave to submit an *Amicus Curiae* brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*'", 29 May 2018, ICC-RoC46(3)-01/18-8, p. 4; "Decision on the 'Joint Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules'", 11 June 2018, ICC-RoC46(3)-01/18-15, p. 5; "Decision on the 'Request for Leave to Submit Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)'", 14 June 2018, ICC-RoC46(3)-01/18-17, p. 5; "Decision on the 'Request for Leave to Submit Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules)'", 14 June 2018, ICC-RoC46(3)-01/18-18, p. 5.

²¹ See paragraphs 4 and 7 above.

²² See paragraph 3 above.

organizations or persons, as well as the Prosecutor's consolidated response, and was, as such, filed out of time. Finally, the Chamber observes that Myanmar was invited to submit its observations no later than 27 July 2018, but decided not to avail itself of that opportunity.²³

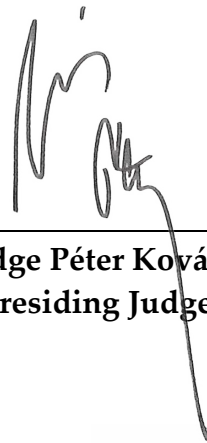
14. In the light of the above, the Chamber considers that the Applicant's observations are not desirable for the proper determination of the Prosecutor's Request, within the meaning of rule 103 of the Rules.

²³ Pre-Trial Chamber I, "Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'", 21 June 2018, ICC-RoC46(3)-01/18-28, p. 5.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Péter Kovács
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Reine Adélaïde Sophie
Alapini-Gansou

Dated this Friday, 10 August 2018

At The Hague, The Netherlands