



**Original: English**

**No. ICC-01/19  
Date: 14 November 2019**

**PRE-TRIAL CHAMBER III**

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

**SITUATION IN THE PEOPLE'S REPUBLIC OF BANGLADESH/REPUBLIC  
OF THE UNION OF MYANMAR**

**Public**

Decision on requests 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*  
Dr Tin Aung Aye  
Confederation of Trade Unions of Myanmar  
Alliance for Social Justice, Maungdaw

**REGISTRY**

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**Registrar**  
Peter Lewis

**Defence Support Section**

**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER III** ('Chamber') of the International Criminal Court ('Court'), pursuant to Rule 103 of the Rules of Procedure and Evidence (the 'Rules'), issues this 'Decision on requests for leave to submit *amicus curiae* observations'.

## **I. Procedural history and submissions**

1. On 12 June 2019, the Prosecutor informed the Presidency, pursuant to Regulation 45 of the Regulations of the Court, of her intention, pursuant to Article 15(3) of the Rome Statute (the 'Statute'), to submit a request for judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar.<sup>1</sup>
2. On 25 June 2019, the Presidency constituted the Chamber, and assigned the Situation in Bangladesh/Myanmar to it, with immediate effect.<sup>2</sup>
3. On 27 June 2019, the judges of the Chamber designated Judge Olga Herrera Carbuccion as Presiding Judge.<sup>3</sup>
4. On 4 July 2019, the Prosecutor, after having been granted an extension of page limit,<sup>4</sup> 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' ('Article 15 Request').<sup>5</sup>
5. On 10, 16, and 21 October 2019, the Chamber received three requests in which, respectively, Dr. Tin Aung Aye,<sup>6</sup> the Confederation of Trade Unions Myanmar ('CTUM'),<sup>7</sup> and the Alliance for Social Justice, Maungdaw ('ASJ', together

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<sup>1</sup> ICC-01/19-1-Anx.

<sup>2</sup> Presidency, 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 (notified on 26 June 2019).

<sup>3</sup> Decision on the Election of the Presiding Judge, ICC-01/19-4.

<sup>4</sup> Decision on the Prosecutor's Request for an Extension of the Page Limit, 28 June 2019, ICC-01/19-5.

<sup>5</sup> Prosecutor's Request, ICC-01/19-7, paras 1 and 297.

<sup>6</sup> Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence, ICC-01/19-13 and Annex A ('Dr. Tin Aung Aye Request').

<sup>7</sup> Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence, ICC-01/19-16 and Annexes A, B, C and D, ('CTUM Request').

‘Applicants’),<sup>8</sup> sought leave to submit *amicus curiae* observations on the Article 15 Request (together, the ‘Requests’).

6. On 18 October 2019, the Prosecutor provided supplementary information to the Article 15 Request (‘Supplementary Information’),<sup>9</sup> which she submits is ‘relevant to the issue of admissibility under the complementarity criterion’.<sup>10</sup>
7. On 29 October 2019, the Prosecutor filed a ‘Motion to Set Aside’.<sup>11</sup>
8. On 1 November 2019, Dr. Tin Aung Aye filed a ‘Response to Motion to Set Aside’.<sup>12</sup>

## II. Analysis

9. As a preliminary matter, the Chamber notes that under the applicable law, and as acknowledged by the Prosecutor,<sup>13</sup> there is no legal basis for the Prosecutor to respond to the Requests. In this regard, the Chamber further observes that Rule 103 of the Rules confines the automatic right to respond solely to observations authorised and submitted under this provision. Similarly, Dr. Tin Aung Aye has no procedural standing to respond to the Motion to Set Aside. In these circumstances, the Chamber dismisses the Motion to Set Aside and the Response to Motion to Set Aside *in limine*.
10. Turning to the merits of the Requests, 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’.

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<sup>8</sup> Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence, ICC-01/19-18-Conf and public Annex A (‘ASJ Request’). A redacted version was filed on the same day.

<sup>9</sup> Supplementary Information for Request for authorisation of an investigation pursuant to Article 15, ICC-01/19-17 (notified on 21 October 2019).

<sup>10</sup> Supplementary Information, ICC-01/19-17, para. 1.

<sup>11</sup> Motion to Set Aside, 29 October 2019, ICC-01/19-20.

<sup>12</sup> Response to Motion to Set Aside, ICC-01/19-23, para. 5.

<sup>13</sup> Motion to Set Aside, 29 October 2019, ICC-01/19-20, para. 5.

11. The Chamber recalls that the Appeals Chamber has determined that a decision pursuant to Rule 103 of the Rules is discretionary.<sup>14</sup> It has also 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’.<sup>15</sup>
12. Concerning the Requests at hand, the Chamber notes that Dr. Tin Aung Aye is a law professor from Myanmar and a former Judge at the Supreme Court and the Constitutional Court,<sup>16</sup> who seeks to submit observations on the issue of territorial jurisdiction and the interpretation of Article 12(2)(a) of the Statute with regard to the crimes of deportation, persecution and other inhumane acts.<sup>17</sup>
13. CTUM is an organisation that declares to be working on the development of ‘greater awareness of all social and political issues currently affecting Myanmar’.<sup>18</sup> It submits to be ‘ideally placed’ to represent the interests of the Myanmar public and to acquire information ‘which might otherwise be denied to the Prosecutor given her present inability to enter the territory of Myanmar, and, otherwise, to interact with Myanmar governmental agencies’.<sup>19</sup> In these circumstances, CTUM seeks to present observations on ‘the context of discrimination and violence against the Rohingya in Myanmar’.<sup>20</sup>
14. ASJ is a Myanmar non-governmental organisation with the stated objectives of ‘prevention of conflict, development of human resources and the pursuit of peace and stability’.<sup>21</sup> It seeks leave to present observations on: (i) the timing of the mandatory notification requirement under Article 18(1) of the Statute;<sup>22</sup> (ii) the

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<sup>14</sup> Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua arap Sang*, Decision on applications for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence, 12 October 2015, ICC-01/09-01/11-1987 OA10, para. 15.

<sup>15</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 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.

<sup>16</sup> Dr. Tin Aung Aye Request, ICC-01/19-13, para. 1 and Annex A.

<sup>17</sup> Dr. Tin Aung Aye Request, ICC-01/19-13, paras 10 to 31.

<sup>18</sup> CTUM Request, ICC-01/19-16, para. 1.

<sup>19</sup> CTUM Request, ICC-01/19-16, paras 1 and 6.

<sup>20</sup> CTUM Request, ICC-01/19-16, paras 8 to 39.

<sup>21</sup> ASJ Request, ICC-01/19-18-Red, para. 1 and Annex A.

<sup>22</sup> ASJ Request, ICC-01/19-18-Red, paras 8 to 10.

scope of the Prosecutor's activities prior to the authorisation of an investigation;<sup>23</sup> and (iii) issues of admissibility, and notably complementarity, by supplying additional information and documentation concerning the various domestic initiatives adopted to examine the waves of violence in Rakhine State in 2016 and 2017.<sup>24</sup>

15. The Chamber considers that, given the nature and limited scope of Article 15 proceedings, it has been provided with all the necessary elements to take a decision on the Article 15 Request, and would not be assisted by any of the suggested further submissions. Indeed, several of the factual issues raised in the Requests can more appropriately be raised directly with the Prosecutor. The Chamber is also of the view that, in the event of an authorisation to open an investigation, the Applicants will have ample opportunity to raise their concerns thereafter.
16. Lastly, the Chamber notes the submission of ASJ on the timing of the mandatory notification requirement under Article 18(1) of the Statute.<sup>25</sup> With reference to the submissions on the timing of the mandatory notification requirement under article 18(1) of the Statute, the Chamber considers that, given the level of publicity these proceedings have received, Myanmar can be presumed to have been aware of the Prosecutor's Request and the ongoing proceedings before this Chamber. As such, Myanmar was in a position to inform the Court if it had procedural concerns. It is not for *amicus curiae* to raise such issues on Myanmar's behalf. As the position of Myanmar is presently unknown, the Chamber sees no benefit in considering the correct interpretation of Article 18 of the Statute *in abstracto*.
17. In light of the above, and within the meaning of Rule 103 of the Rules, the Chamber considers that in the present circumstances, the observations proffered by Dr. Tin Aung Aye, CTUM and ASJ would not assist the Chamber in the proper determination of the Article 15 Request.

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<sup>23</sup> ASJ Request, ICC-01/19-18-Red, para. 11.

<sup>24</sup> ASJ Request, ICC-01/19-18-Red, paras 6 and 12 to 26.

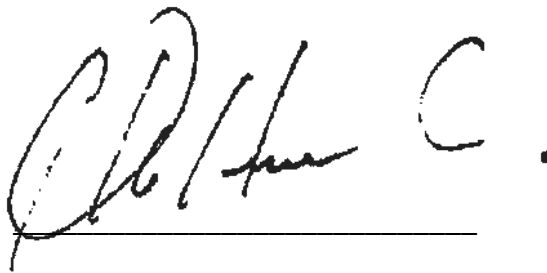
<sup>25</sup> ASJ Request, ICC-01/19-18-Red, paras 8 to 10.

**FOR THESE REASONS, THE CHAMBER HEREBY**

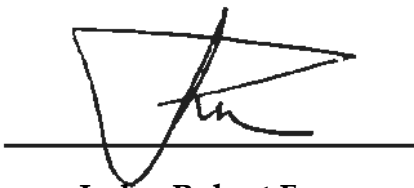
**REJECTS** the Motion to Set Aside and the Response to Motion to Set Aside *in limine*.

**REJECTS** the Requests.

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

A handwritten signature in black ink, appearing to read 'C. Herrera Carbuccia', written over a horizontal line.

**Judge Herrera Carbuccia, Presiding Judge**

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**Judge Robert Fremr**

A handwritten signature in black ink, appearing to read 'G. Henderson', written over a horizontal line.

**Judge Geoffrey Henderson**

Dated this 14 November 2019

At The Hague, The Netherlands