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**COMMUNICATION TO THE ICC PROSECUTOR
PURSUANT TO ARTICLE 15 OF THE ROME STATUTE OF
THE INTERNATIONAL CRIMINAL COURT TO OPEN A
PRELIMINARY INQUIRY INTO THE SITUATION IN
BANGLADESH**

I. Introduction

1. This communication is submitted to set out potential charges in relation to the crimes currently being committed with impunity throughout Bangladesh against the civilian population. The list of individuals set out in the filing is not exhaustive and final as this is left to the discretion of the Prosecutor of the International Criminal Court (hereinafter: ICC), although assistance in identifying those most culpable for the commission of such crimes will be provided with the communication along with a detailed hierarchy of individual members of the Government of Bangladesh, Bangladesh Security Forces and Bangladesh Armed Forces.
2. It is requested that the Office of the Prosecutor, when analysing the seriousness of the information received, seeks additional information under Article 15(2). This is particularly important, given the restrictions in place on the media and independent reporting in Bangladesh and the absolute refusal on the part of the Government of Bangladesh to initiate an investigation in relation to the matters set out herein. It is further noted that there is no currently no suitable legislation in force in Bangladesh that would enable compliance with the principle of complementarity at the national level.
3. It is set out in the communication that there is a reasonable basis to proceed with an investigation under Article 53(1)(a) – (c). The ICC has jurisdiction (temporal, material, and territorial). The identified set of incidents, individuals and proposed charges indicates, based on the information available, that the potential evidence that would likely arise from an investigation into the situation by the ICC would be admissible under Article 17. The situation is admissible under the principle of complementarity.

II. Who We Represent

4. The legal team from the Chambers of Anthony Berry QC has been instructed by the International Coalition for Freedoms of Rights, an independent human rights organisation based in Europe that comprises international human rights lawyers from around the world. The ICFR has at the core of its mandate the investigation of human rights abuses and referral of cases to the International Criminal Court in The Hague.
5. The legal team has received reports of human rights abuses from a variety of sources in Bangladesh and internationally, including NGOs and victims' families. This material has been analyzed and is now being provided to the ICC Prosecutor.

III. What We Are Seeking

6. The purpose of the filing is to request the ICC Prosecutor to exercise her discretion in opening a preliminary inquiry into the situation in Bangladesh. It is expected that a detailed investigation will be required to identify sufficient evidence to bring charges against members of the Awami League Government for Crimes Against Humanity.

IV. Procedure

7. It is recognised that the Prosecutor exercises an independent discretion to initiate her own investigations *proprio motu*. The procedure is as follows.
8. First, the Prosecutor must conduct a preliminary examination of information received regarding alleged crime(s). She can request information from United Nations organs, States, NGOs and other reliable sources to aid in this process. It is submitted that the communication, and supporting material, contains a sufficient basis to pass the first strand of the test.
9. Second, once the Prosecutor has assessed the seriousness of the allegations she must demonstrate that there is a reasonable basis to commence an investigation. This is a relatively low evidentiary threshold, in the sense that the information presented to the Chamber need not be conclusive. The Pre-Trial Chamber must be satisfied that a reasonable or sensible justification exists for the belief that a crime(s) within the ICC's jurisdiction is being or has been committed
10. Third, a request is presented to a Pre-Trial Chamber to launch an investigation.
11. Once an application has been filed, it falls upon the Judges of the Pre-Trial Chamber to evaluate the information presented by the Prosecutor. For the Judges to authorize an investigation, a number of requirements must be met.

A. *Jurisdiction*

12. First, the crimes must be within the jurisdiction of the ICC:
 - a. They must fall within the definition of war crimes, crimes against humanity or genocide (*jurisdiction ratione materiae*);
 - b. They must have been committed by a national of a State Party or on the territory of a State Party (*jurisdiction ratione personae*);
 - c. They must have been committed after 1 July 2002 or after the date in which the State in question

ratified the Rome Statute (*jurisdiction ratione temporis*).

13. Bangladesh became a State Party to the Rome Statute of the International Criminal Court (ICC) on 23 March 2010. Accordingly, the ICC has jurisdiction to try those alleged to have committed crimes on the territory of Bangladesh or those individuals who are alleged to have committed crimes who are citizens of Bangladesh. In the present case the crimes alleged to have been committed fall within the territorial jurisdiction of Bangladesh. Further, those individuals alleged to have committed the crimes are all nationals of the People's Republic of Bangladesh.
14. The proposed charges focus on three time periods. The first is from 28 February 2013 onward; the second being 5-6 May 2013 and the third being the election period of 24 December 2013 to the present. Furthermore, the proposed charges deals with the International Crimes Tribunal that was formed in March 2010. The acts alleged to fall within the jurisdiction of the ICC concern the death penalties handed down (and in one case carried out) against members of opposition political parties and in all but one case members of an identifiable group, namely an Islamist religious group.

B. *Principle of Complementarity*

15. Second, the ICC operates under the principle of complementarity. The ICC is not an alternative to the jurisdiction; it is a court of last resort. There is essentially a three part "complementarity analysis" that is done to determine if a case is admissible at the ICC. First, the analysis starts from the proposition that cases within the jurisdiction of the Court generally are admissible. Second, a case becomes presumably inadmissible if there has been a national prosecution or a decision not to prosecute the same individual for the same conduct before the Court. Third, a case can become admissible once again if it turns out that the national prosecution resulted from the unwillingness or inability of the State genuinely to prosecute. Note that it is unnecessary to go into an unwillingness/inability analysis if there have been no national prosecutions or decisions not to prosecute.

C. *Gravity Threshold*

16. Third, an application must demonstrate that the matter under consideration is of sufficient gravity to justify an international prosecution. This involves an assessment of the groups of persons or individuals likely to form the object of the Prosecutor's investigations, the nature of the crimes alleged and their modus operandi through a qualitative and quantitative approach.
17. Based on the information currently available, and should the Prosecutor's Office seek additional information under Article 15(2) of the Rome Statute in order to analyse the seriousness of the information received, it is submitted that (i) the entire situation is of sufficient gravity to justify further action; (ii) the individuals or groups of persons that are likely to be the object of investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (iii) the crimes

committed within the incidents which are likely to be the object of an investigation are of sufficient gravity to justify further action.

18. The Government has systematically and systemically sought to increasingly repress opposition to its rule, through murder, torture, forced disappearances arbitrary imprisonment, persecution and other inhumane acts.
19. In determining the gravity threshold, the Prosecutor will have to consider the scale, nature, manner of commission of the crimes and impact on the local community.
20. The scale of the situation should be assessed both quantitatively and qualitatively, and by taking into account the number of direct and indirect victims, and the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (intensity of the crimes over a brief period or low intensity violence over an extended period).
21. The underlying acts are of the most serious in nature, and include increasing numbers of state killings, torture, deportation, imprisonment, persecution on political grounds, enforced disappearance and other inhumane acts of civilians. Groups, and persons belonging to these groups have been stigmatised and deliberately targeted on the basis of their presumed political affiliations.
22. The crimes have been committed systematically and systemically, through state machinery, including the police force, the Rapid Action Battalion, the Border Guards Bangladesh, the judiciary and judicial system. The Skype conversations published by Amar Desh in December 2012, indicated the Governmental interference in the judicial system, through appointments, pressure, and by amending the law. Government speeches and rhetoric also evidence the abuse of power, and the organised policy to systematically repress and discriminate against the opposition.
23. The impact of the crimes on the local community is significant. It is submitted that the acts of indiscriminate killings in response to large-scale protests, the brutal torture of opposition leaders and critics, the imprisonment and show trials of high level political opponents are crimes that have been committed with the aim or consequence of increasing the vulnerability of civilians and to spread terror among the civilian population. Moreover the repression of the opposition has drastically enhanced social divisions and tensions, adding to the climate of fear and social unrest, and is likely to lead to long-term social damage.
24. It is important to note that the gravity threshold, following the Kenya Situation Decision, the Trial Chamber is not required to conduct an examination of the gravity threshold, it is not required to do so with regard to a concrete case, but may do so against the backdrop of potential cases. As regards the group of persons likely to be the object of the investigation it is designed to capture those that

may bear the greatest responsibility. The second criterion, the crimes under consideration, it is important to note that this requires consideration of not only the crimes, but also the context and the *modus operandi*.

25. It is only when the Pre-Trial Chamber is satisfied of the aforementioned elements, that the Prosecutor can be authorized to commence a *proprio motu* investigation.

V. The Alleged Crimes

26. The communication to the ICC Prosecutor sets out a number of allegations in relation to the following:

- i. Deployment of armed forces and armoured personnel vehicles;
- ii. Firing at civilian protestors with lethal weapons;
- iii. Large-scale arrests of protestors;
- iv. Large-scale arbitrary detention of protestors;
- v. Torture of protestors whilst detained by, *inter alia*, use of heated metal rods; use of belts, cables and car tyres to tie hands and feet; use of electric shocks; and use of stress positions for lengthy periods.

27. The crimes alleged took place at the following locations: (1) Gazipur; (2) Gaibandha; (3) Dinajpur; (4) Dhaka; (5) Cox'sBazar; (6) Comilla; (7) Shatkhira; (8) Shirajgonj; (9) Bogura; (10) Jessore, (11) Rangpur, (12) Thakurgaon, (13) Sylhet, (14) Rajshahi (15) Pabna ; (16) Nilphamari ; (17) Nawakhali; (18) Mymensing; (19) manikgonj; (20) Joypurhat (21) Jhinaidaya; (22) Chapai Nawabgonj (23) Chadpur ; (24) Brahmanbaria; and (11) Chittagong.

28. The communication sets out the following crimes within the jurisdiction of the ICC:

- i. Murder as a crime against humanity;
- ii. Torture as a crime against humanity
- iii. Enforced disappearance as a crime against humanity;
- iv. Persecution as a crime against humanity;
- v. Other inhuman acts as a crime against humanity; and
- vi. Incitement to commit Genocide.

VI. Potential Defendants

29. It is the discretion of the Prosecutor, after having considered the evidence, to determine who bears criminal responsibility. The communication sets in some detail that the Prime Minister, Sheikh Hasina Wajed, along with several senior ministers and cabinet members, the Police Commissioner, Director of the Rapid Action Battalion (“RAB”) and the Border Guards Bangladesh (“BGB”) were persons in positions to effectively exercise control over or direct the political and police action in Bangladesh. It is further important to note that the Prime Minister, since 5 January 2014, also heads the Ministries of Defence, Home Affairs and Foreign Affairs.
30. On 18 December 2013, the Prime Minister’s son, Sajeeb Ahmed Wazed, a senior government advisor issued a public statement calling for members of the opposition Islamist political party to be wiped out. In the days following his statement numerous members of the opposition were killed. On 5 January 2014 at least 21 civilians were killed.

VII. National Level

31. The principle of complementarity, as already mentioned, requires that the State in question be given the opportunity to investigate alleged crimes at the national and the ICC should only intervene in cases where it is unable or unwilling.
32. It is clear that there have been repeated calls by the international community to investigate the large numbers of deaths and injuries. In particular, Human Rights Watch repeatedly called for an independent commission to investigate the 4-5 May 2013 incident. Amnesty International and the Asian Human Rights Commission have repeated these calls. At the national level, Odhikar, a national human rights NGO has conducted numerous investigations into deaths in police custody, extrajudicial killings and the 4-5 May 2013 incident. The result was that two leading members of the organization were arrested and charged with offences of publishing false information. The response of the Government has been a stark refusal to acknowledge any deaths and a refusal to investigate.
33. In terms of the legal and institutional framework, it is clear that there is no legislation for cooperation with the ICC. The International Crimes Tribunal and its founding legislation the International Crimes (Tribunals) Act 1973 (as amended) has been determined to be in breach of international law on a number of occasions and is not set up to deal with any cases other than those that arise out of the 1971 war of liberation.
34. It is clear that since the current Awami League Government first came to power in 2009 there have

been hundreds of deaths from anti-Government protesters and members of the security forces. The numbers are difficult to quantify due to the absence of credible investigations the inability for the media and international NGOs to properly document crimes.

VIII. Conclusion

35. In summary, it is clear that crimes including, *inter alia*, arbitrary arrest and detention, murder, torture, enforced disappearance have been committed that constitute crimes against humanity. The conduct constitutes an attack; campaign or operation, against the civilian population and that such an attack involves a course of conduct involving the multiple commission of acts. It is clear that the attack is pursuant to or in furtherance of a State or organizational policy. The crimes were committed as part of a widespread or systematic act thereby constituting crimes against humanity. Finally, there is a clear nexus between the individual acts and the 'attack'.
36. On 11 December 2013 the UN High Commissioner for Human Rights, Navi Pillay, reminded the authorities in Bangladesh that as a State Party to the Rome Statute of the International Criminal Court its actions fell within the jurisdiction of the International Criminal Court and its political leaders, whether in government or opposition, could be charged with election violence. The UN High Commissioner gave the example of Kenya as precedent.
37. It is clear that crimes have been committed on the territory of Bangladesh on a massive scale. It is clear that the crimes have been committed on a widespread or systematic basis, against the civilian population in furtherance of a State Policy against members of the opposition. It is quite clear that members of the ruling party, citizens of Bangladesh, are responsible for the crimes committed. It is also quite clear, from a number of statements issued by members of the ruling party that there is no intention to investigate such allegations. Only an independent investigation by the Prosecutor is capable of identifying the actual number of civilian casualties over the time period under consideration.



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