

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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 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

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

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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

REGISTRY

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**Victims Participation and Reparations
Section**
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Other

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PRE-TRIAL CHAMBER III of the International Criminal Court ('Court') issues this 'Decision pursuant to Article 15 of the Statute on the authorisation of an investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (the 'Situation in Bangladesh/Myanmar')'.

I. Procedural history

1. On 6 September 2018, Pre-Trial Chamber I issued its 'Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"¹' (the 'Jurisdiction Decision') finding 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.²
2. On 12 June 2019, the Prosecutor informed the Presidency, pursuant to Regulation 45 of the Regulations, of her intention, pursuant to article 15(3) of the Statute, to submit a request for judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar.³
3. On 25 June 2019, the Presidency constituted this Chamber, and assigned the Situation in Bangladesh/Myanmar to it, with immediate effect.⁴
4. On 27 June 2019, the judges of the Chamber designated Judge Olga Herrera Carbuccion as Presiding Judge.⁵
5. 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' (the 'Request').⁶

¹ ICC-RoC46(3)-01/18-1.

² Pre-Trial Chamber I, [Jurisdiction Decision](#), ICC-RoC46(3)-01/18-37.

³ ICC-01/19-1-Anx.

⁴ 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).

⁵ Decision on the Election of the Presiding Judge, ICC-01/19-4.

6. On 30 August, 13 and 27 September, and 11 and 31 October 2019, in accordance with the Chamber's decision granting an extension of time for victims to make representations under article 15(3) of the Statute,⁷ the Victims Participation and Reparations Section (the 'VPRS') of the Registry submitted reports on victims' representations.⁸

7. On 21 October 2019, the Prosecutor submitted supplementary information regarding the admissibility criterion, in particular complementarity.⁹

8. On 23 October 2019, the Chamber received a representation made by the Legal Representatives of Victims on behalf of 86 victims from the village of Tula Toli.¹⁰

9. On 11 and 31 October 2019, victims' representations were transmitted to the Chamber.¹¹ On 31 October 2019, VPRS also filed its Final Consolidated Report on victims' representations.¹²

10. On 7 and 11 November 2019, further victims' representations were transmitted to the Chamber.¹³

⁶ Request for authorisation of an investigation pursuant to article 15, ICC-01/19-7 and 10 annexes. *See also* Decision on the Prosecutor's Request for an Extension of the Page Limit, 28 June 2019, ICC-01/19-5.

⁷ [Decision on the 'Registry's Request for Extension of Notice Period and Submissions on the Article 15\(3\) Process'](#), 28 June 2019, ICC-01/19-6.

⁸ First Registry Report, ICC-01/19-10-Conf (a public redacted version was filed on 3 September 2019); Second Registry Report, ICC-01/19-11-Conf (a public redacted version was filed on the same day); Third Registry Report, ICC-01/19-12-Conf (a public redacted version was filed on 30 September 2019); Fourth Registry Report, ICC-01/19-15-Conf with Conf and Conf-Exp Annexes I and II (a public redacted version was filed on 17 October 2019). *See also* Decision on the Prosecutor's 'Request on the Victim Representation Form', 11 July 2019, ICC-01/19-9.

⁹ ICC-01/19-17.

¹⁰ ICC-01/19-19.

¹¹ First Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 of 28 June 2019, ICC-01/19-14, with 32 confidential *ex parte* annexes only available to the Registry; Second Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 of 28 June 2019, ICC-01/19-21, with 176 confidential *ex parte* annexes only available to the Registry. Although the annexes are confidential *ex parte*, information contained therein is referred to in this public decision in a manner that does not identify the individuals or groups concerned or in any way compromise their safety.

¹² Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 of 28 June 2019, 31 October 2019, ICC-01/19-22 with confidential annex I, confidential *ex parte* annex II only available to the Registry and confidential annex III (notified on 1 November 2019).

II. Procedure under Article 15 of the Statute

11. The procedure for initiating an investigation upon the Prosecutor's own initiative is regulated by article 15 of the Statute. This provision subjects the Prosecutor's power to open an investigation *proprio motu* to the judicial scrutiny of the Pre-Trial Chamber.¹⁴ Article 15(3) provides that, '[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected'.

12. Article 15(4) of the Statute clearly states the limited mandate of the Chamber at this stage of the proceedings:

[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

III. Preliminary consideration

13. The Chamber notes that the Prosecutor states that the term 'Rohingya' is contested:

The Rohingya self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State. Successive Myanmar Governments have rejected these claims. Instead the Rohingya are widely regarded as 'illegal immigrants' from

¹³ Third Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 of 28 June 2019, 7 November 2011, ICC-01/19-24 with 86 confidential *ex parte* annexes only available to the Registry. The Registry also transmitted 16 videos in support of some representations; Fourth Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 of 28 June 2019, 12 November 2019, ICC-01/19-25 with 24 confidential *ex parte* annexes only available to the Registry. The Registry also transmitted 26 video representations and one video in support of a previous representation.

¹⁴ Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Kenya Article 15 Decision](#), 31 March 2010, ICC-01/09-19-Corr, paras 17-18; Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire*, [Côte d'Ivoire Article 15 Decision](#), 15 November 2011, ICC-02/11-14-Corr, para. 21; Pre-Trial Chamber I, *Situation in Georgia*, Georgia Article 15 Decision', 27 January 2016, ICC-01/15-12, para. 3; Pre-Trial Chamber III, [Burundi Article 15 Decision](#), 9 November 2017, ICC-01/17-9-Red, paras 27-28.

neighbouring Bangladesh, and are often referred to as ‘Bengalis’. Even use of the term ‘Rohingya’ is contested.¹⁵

14. Nevertheless, the Prosecutor uses the term throughout the Request and she identifies and refers to the victims of the alleged crimes as the ‘Rohingya’.¹⁶

15. The material on the record also points to the use of the term Rohingya as being contested. Reports prepared by the Irish Centre for Human Rights (the ‘ICHR’),¹⁷ International Crisis Group (the ‘ICG’),¹⁸ and Amnesty International¹⁹ indicate that persons who identify themselves as Rohingya reportedly claim that the term denotes an ethno-religious group.²⁰ Whereas reports prepared by the United Nations Office of the High Commissioner for Human Rights (the ‘OHCHR’)²¹ and Public International Law & Policy Group (the ‘PILPG’)²² indicate that other ethnic groups in Myanmar

¹⁵ Request, para. 46 (footnotes omitted).

¹⁶ See generally the Request and *in particular* paras 21, 87, 124, 174.

¹⁷ Based at the School of Law at National University of Ireland, Galway, this centre is an institute for ‘[p]romoting human rights through teaching, research and advocacy’. It prepared a report titled ‘Crimes against Humanity in Western Burma: The Situation of the Rohingyas’ (‘ICHR Report’) that was funded by Irish Aid to conduct ‘independent research [...] on the situation of the Rohingyas’ and was based on ‘a fact-finding mission to the region, including Burma, as well as on extensive open-source research, and confidential meetings with organisations working in the region’. The report states that it examined ‘the situation of the Rohingyas through the lens of crimes against humanity’. See ICHR Report, BGD-OTP-0001-4318, at 4417, 4326.

¹⁸ The International Crisis Group is an NGO that describes itself as ‘an independent organisation working to prevent wars and shape policies that will build a more peaceful world’. Its report titled ‘International Crisis Group, The Dark Side of Transition: Violence Against Muslims in Myanmar’ (‘ICG Report’) is ‘based on detailed background research and in-depth interviews with a wide range of individuals conducted in towns that have experienced violence in recent months, as well as in the main cities of Yangon and Mandalay’. See ICG Report, BGD-OTP-0002-1355, at 1359.

¹⁹ Amnesty International is a non-governmental organisation that investigates serious human rights abuses across the world and raises public awareness of human rights issues. The report titled ‘Caged without a roof: Apartheid in Myanmar’s Rakhine State’ (‘AI Report 2017’) states that its underlying research was ‘carried out between November 2015 and September 2017, and included four field trips to Rakhine State, over 200 interviews, extensive review of legislation, academic and other literature, as well as review of photographs, videos and other documentation’. It adds that its representatives interviewed 166 people living in Rakhine State. See AI Report 2017, BGD-OTP-0001-1743, at 1758.

²⁰ ICHR Report, BGD-OTP-0001-4318, at 4338-4339; ICG Report 2013, BGD-OTP-0002-1355, at 1361; AI Report 2017, BGD-OTP-0001-1743, at 1762.

²¹ Its report titled ‘Mission report of the OHCHR rapid response mission to Cox’s Bazar, Bangladesh’, (‘OHCHR Report 2017b’) is based on ‘information gathered from approximately 65 interviews with Rohingya refugees in Cox’s Bazar, both with individuals and with groups’. See OHCHR Report 2017b, BGD-OTP-0001-0035, at 0037.

²² The PILPG prepared the report titled ‘Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State’ (‘PILPG Report’). For this report, the PILPG conducted a ‘human rights documentation investigation mission’ in March and April 2018, which focused on ‘systematically collecting first-hand accounts from a random and representative sample of refugees living in camps in Bangladesh’ and conducted 1,024 interviews. The purpose of the investigation mission ‘was to provide an accurate accounting of the patterns of abuse and atrocity crimes perpetrated against the Rohingya in Myanmar’s Rakhine State and to help inform the policy decisions related to accountability in Myanmar’. See PILPG Report, BGD-OTP-0001-3307, at 3313-3314.

reject this claim.²³ Certain Burmese sources on the record indicate that Myanmar authorities do not recognise the term ‘Rohingya’.²⁴ Other documents, including a report by Fortify Rights,²⁵ indicate that governmental authorities have denied the existence of the Rohingya as an indigenous group²⁶ instead, State authorities refer to them as either ‘Bengali’²⁷ or ‘the Muslim community in (northern) Rakhine State’.²⁸ Further, a report from Amnesty International contains references to new reports where

²³ ‘Myanmar’s “Rohingya” Conflict’ authored by Anthony Ware and Costas Laoutides (‘Myanmar’s “Rohingya” Conflict’), BGD-OTP-0001-4667, at 4682; PILPG Report, BGD-OTP-0001-3307, at 3351; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0040.

²⁴ ‘Final Report of Inquiry Commission on Sectarian Violence in Rakhine State’ prepared by The Republic of the Union of Myanmar, BGD-OTP-0002-1214, at 1282 (‘MMR Report 2013’); ‘News release on the act of British MPs in connection with Rakhine issue and the decision of European Union Foreign Affairs Council meeting on Myanmar’ BGD-OTP-0002-0021, para. 5 (‘Myanmar News Release’) prepared by President Office, the Republic of the Union of Myanmar. *See also* Myanmar’s “Rohingya” Conflict, BGD-OTP-0001-4667, at 4681-4682.

²⁵ Fortify Rights is an independent non-profit non-governmental organisation based in Southeast Asia that investigates human rights violations. It prepared a report titled ‘They Gave Them Long Swords/Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar’, (‘Fortify Rights Report’). According to the report, its findings were based primarily on 254 interviews conducted by it from October 2016 to June 2018 with eyewitnesses and survivors of human rights violations’ and officials from Myanmar; these interviews included ‘242 Rohingya men and women from 31 villages’. *See* Fortify Rights Report, BGD-OTP-0001-2415, at 2417, 2443.

²⁶ Myanmar’s “Rohingya” Conflict, BGD-OTP-0001-4667, at 4681-4682; AI Report 2017, BGD-OTP-0001-1743, at 1762; Fortify Rights Report, BGD-OTP-0001-2415, at 2450.

²⁷ The Myanmar Armed Forces employ the term ‘Bengali’ *see* Myanmar News Release BGD-OTP-0002-0021; ‘Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtau region, Rakhine State’, BGD-OTP-0002-0017, prepared by President Office, The Republic of the Union of Myanmar. It has also been used by national investigation or inquiry commissions established by Myanmar authorities, namely the Inquiry Commission on Sectarian Violence in Rakhine State (established on 17 August 2012, through Presidential Executive Order) and the Investigation Commission on Maungtau (established on 1 December 2016, also through Presidential Order); *see* MMR Report 2013 BGD-OTP-0002-1214, at 1219-1220 (stating that ‘the report uses the term “Bengalis” when referring to people of Bengali origin. The term “Rohingya” is not recognised in Myanmar [...]’); ‘Interim Report of the Investigation Commission on Maungtau’, BGD-OTP-0002-1162, prepared by President Office, the Republic of the Union of Myanmar.

²⁸ Reportedly, in 2016, the State Counsellor Aung San Suu Kyi asked all parties to refrain from using names likely to inflame tensions – particularly, Rohingya, *kala* and Bengali – requesting that the phrase ‘the Muslim community in northern Rakhine State’ be used; Myanmar’s “Rohingya” Conflict BGD-OTP-0001-4667 at 4682-4683; *see also* BDG-OTP-0001-3802, at 3806. The Advisory Commission on Rakhine State (established on 5 September 2016 by the Office of the State Counsellor and the Kofi Annan Foundation) employed this phrase stating that ‘[i]n line with the request of the State Counsellor, the Commission uses neither the term “Bengali” nor “Rohingya”, who are referred to as “Muslims” or “the Muslim community in Rakhine”’; ‘Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine/Final Report of the Advisory Commission on Rakhine State’, BGD-OTP-0001-5031 at 5036, 5042 (‘[ACRS Report](#)’) prepared by the Advisory Commission on Rakhine State; *see also* ‘Investigation Commission writing full report on Maungtau’, BGD-OTP-0002-1164, prepared by President Office, the Republic of the Union of Myanmar.

the Bangladeshi Home Minister used the term,²⁹ whereas the agreement concluded on 23 November 2017 between Bangladesh and Myanmar on the return of displaced persons from Rakhine State does not employ it.³⁰

16. The Chamber notes that certain victims in their representations have emphasised their wish to be recognised as and called ‘Rohingya’ instead of other denominations, such as ‘Bengali’ or ‘Khola’ – a derogatory Burmese term – or even ‘Non-Myanmar national Bengali’ and ‘illegal immigrants’.³¹

17. It is also noted that the United Nations General Assembly (the ‘UNGA’) has used the term in its resolutions and called upon the Government of Myanmar to allow self-identification.³² In that respect, and considering the discussion above, the Chamber will employ the term ‘Rohingya’ in the present decision to refer to the alleged victims individually and collectively.³³ Notwithstanding this, the Chamber stresses that the use of the term in this decision does not imply endorsement of any particular historical narrative or political claim, or recognition of a specific group for purposes outside of the present decision. The Chamber also emphasises the need for further analysis of this issue during any future stages of proceedings before the Court.

²⁹ See “‘We are at breaking point’/Rohingya: persecuted in Myanmar, neglected in Bangladesh’ prepared by Amnesty International, (‘AI Report 2016’), at 1714. This report ‘is based on 35 interviews conducted by Amnesty International with victims of, and eyewitnesses to, abuses in October, November, and December 2016’. Amnesty International’s research for this report also included speaking ‘to a further 20 people, including human rights monitors, humanitarian workers, journalists and Rohingya leaders’. See AI Report 2016, BGD-OTP-0001-1675, at 1684.

³⁰ The agreement refers to the ‘displaced people from Rakhine State’, ‘Muslims from Rakhine State’, or ‘displaced Myanmar residents from Rakhine State’; see ‘Arrangement on Return of Displaced Persons from Rakhine State’ BGD-OTP-0002-0050, at 0051-0053 prepared by the Governments of Bangladesh and Myanmar.

³¹ Fourth Registry Report, ICC-01/19-15-Conf, footnote 12. See, in particular, First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx20, p. 3. See also Video annex to victims’ representation r/00020/19, ICC-01/19-14-Conf-Exp-Anx31.

³² See ‘Resolution adopted by the General Assembly on 22 December 2018 /A/RES/73/264’ BGD-OTP-0002-0518; see also ‘Resolution adopted by the Human Rights Council on 27 September 2018 / Situation of human rights of Rohingya Muslims and other minorities in Myanmar / A/HRC/RES/39/2’ BGD-OTP-0001-0612.

³³ ICG Report 2013 BGD-OTP-0002-1355, at 1361.

IV. Victims' representations

A. Introduction

18. The Chamber notes that within a relatively short time span, the Registry has collected and transmitted representations on behalf of a significant number of alleged victims of the Situation in Bangladesh/Myanmar that have come forward to present their accounts and views on whether or not the Chamber should authorise the commencement of the Prosecutor's investigation into this situation. Victims have also provided valuable information relevant to the scope of an eventual investigation.

19. Generally, the victims' representations confirm the information provided by the Prosecutor in the Request. These victims' representations, which were gathered from individuals and organisations representing alleged victims living in all camps in Bangladesh, also appear to be a representative sample of the affected population and thus useful in the Chamber's assessment of the merits of the Prosecutor's request.³⁴ Although the Chamber has reached its decision on the basis of the material provided by the Prosecutor, the abundant information contained in the victims' representations would have also allowed the Chamber to reach the same conclusion.

20. The Court received a total of 339 representations in English (311 representations were submitted in written form and 28 were put forward in video format).³⁵ The Registry engaged with victims directly, as well as with individuals and organisations working with the affected communities.³⁶ The Registry received representations that were submitted in English, but also in Burmese, and in Bengali. The Registry also received video representations in Rohingya.³⁷ The Registry reports

³⁴ Decision on the 'Registry's Request for Extension of Notice Period and Submissions on the Article 15(3) Process', 28 June 2019, ICC-01/19-6, para. 14.

³⁵ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 44-52; Third Registry Transmission, ICC-01/19-24, para. 1; Fourth Registry Transmission, ICC-01/19-25, para. 1. Although the Chamber refers in this decision to confidential filings, it has referred to the Registry's reports and victims' representations in a general manner so as not to identify any victim or group of victims.

³⁶ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 1.

³⁷ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, pp. 22-24. *See also* Third Registry Transmission, ICC-01/19-24; Fourth Registry Transmission, ICC-01/19-25, para. 1.

that it was able to travel or meet individuals from all 34 refugee camps in Bangladesh and held more than 60 meetings with approximately 1,700 individuals.³⁸

21. The Chamber has reviewed victims' representations submitted or translated into English. In the First Registry Transmission, a total of 29 victims' representations were notified to the Chamber.³⁹ In the Second Registry Transmission, a total of 176 victims' representations were transmitted to the Chamber (174 written forms and two video representations).⁴⁰ In the Third Registry Transmission, a total of 85 representation forms were transmitted to the Chamber, along with 16 videos in support of some representations.⁴¹

22. The victims' representations transmitted represent either small family groups or were completed on behalf of a larger community of victims (*i.e.* living in the same refugee camp). The Registry indicates that a few representations still need to be translated into English. These will be transmitted to the Chamber after the set deadline.⁴² Nonetheless, the Registry estimates that out of the transmitted representations, 202 representations were introduced on behalf of approximately 470,000 individual victims, two were submitted on behalf of a total of eight families

³⁸ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 14 and 29.

³⁹ First Registry Transmission, ICC-01/19-14; Fourth Registry Report, ICC-01/19-15-Conf-Exp-AnxI.

⁴⁰ Second Registry Transmission, ICC-01/19-21; Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI and AnxII.

⁴¹ Third Registry Transmission, ICC-01/19-24.

⁴² Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 52.

and one representation was introduced on behalf of one village'.⁴³ Further, multiple representations were submitted on behalf of thousands of alleged individual victims.⁴⁴

23. The Chamber acknowledges all the individuals, groups and organisations that have come forward to present their views and accounts of the events pertaining to the present situation.

24. The Registry submitted a total of five reports during the present article 15 proceedings. Therein, the Registry explained the approach taken when reaching out to the victims,⁴⁵ emphasised the high interest amongst the victims to participate in the process,⁴⁶ but also stressed the logistical challenges faced by the VPRS when collecting victims' representations.

25. The Registry also made it clear that it was not in a position to verify the accuracy of the information contained in the representation forms, in particular the number of victims allegedly represented. It states that, as previously done in situations

⁴³ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 57-59. The Registry notes that there may be overlap and that it cannot exclude the possibility that not all victims represented understood the process.

⁴⁴ For example r/00047/19 submitted on behalf of 740 individuals, r/00046/19, submitted on behalf of 3303 individuals, r/00057/19, submitted on behalf of 1000 individuals, r/00056/19, submitted on behalf of 2800 individuals, r/00055/19, submitted on behalf of 3182 individuals, r/00061/19, submitted on behalf of 3546 individuals, r/00063/19, submitted on behalf of 3637 individuals, r/00062/19, submitted on behalf of 1815 individuals, r/00065/19, submitted on behalf of 1976 individuals, individuals, r/00089/19, submitted on behalf of 2000 individuals, r/00095/19, submitted on behalf of 6500 individuals, r/00094/19, submitted on behalf of 7425 individuals, r/00098/19, submitted on behalf of 7532 individuals, r/00097/19, submitted on behalf of 4836 individuals, r/00096/19, submitted on behalf of 16725 individuals, r/00099/19, submitted on behalf of 1870 individuals, r/00102/19, submitted on behalf of 5132 individuals, r/00104/19, submitted on behalf of 1503 individuals, r/00110/19, submitted on behalf of 2905 individuals, r/00117/19, submitted on behalf of 11700 individuals, r/00155/19, submitted on behalf of 3333 individuals, r/00158/19, submitted on behalf of 7024 individuals, r/00160/19, submitted on behalf of 3024 individuals, r/00161/19, submitted on behalf of 8180 individuals, r/00163/19, submitted on behalf of 5000 individuals, r/00168/19, submitted on behalf of 7700 individuals, r/00165/19, submitted on behalf of 12450 individuals, r/00177/19, submitted on behalf of 13700 individuals, r/00176/19, submitted on behalf of 9139 individuals, r/00184/19, submitted on behalf of 5500 individuals, r/00190/19, submitted on behalf of 9850 individuals. Available in Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24

⁴⁵ Specifically in Annex II of its Fourth Report, the Registry explains in detail the assessment criteria applied, including the standard of proof, the approach taken as regards individual and collective representation forms, the scope of the information gathered in relation to alleged crimes and harm suffered. See Fourth Registry Report, ICC-01/19-15-Conf-AnxII. See also Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 15-32; Third Registry Report, ICC-01/19-12-Conf, para 18; First Registry Report, ICC-01/19-10-Conf, paras 20, 29.

⁴⁶ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 62; Fourth Registry Report, ICC-01/19-15-Red, para. 12; Third Registry Report, ICC-01/19-12-Conf, para. 16; First Registry Report, ICC-01/19-10-Conf, para. 15.

before the Court, and in light of the applicable standard of proof, when reporting to the Chamber it has taken into consideration the intrinsic coherence of the information provided by the victims and their representatives.⁴⁷

B. Views on the scope of the investigation

26. All victims' representations are submitted on behalf of alleged victims who, as a result of the alleged attack against Rohingya in Myanmar, were forced to seek refuge in Bangladesh.⁴⁸

27. Most victims' representations allege that crimes were committed during the 2017 wave of violence. However, some victims' representations allege that crimes (particularly, those concerning coercive acts of deportation) took place at an earlier time, as of 2012.⁴⁹ The Registry reports that a large number of victims request that the alleged conduct after 1 June 2010 also be covered by an eventual investigation.⁵⁰

28. Alleged coercive acts: as noted above, all victims' representations are submitted on behalf of alleged victims who either survived or witnessed the coercive

⁴⁷ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 58; Fourth Registry Report, ICC-01/19-15-Conf-AnxII, para. 6.

⁴⁸ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 23.

⁴⁹ See for example r/00004/19, r/00017/19, r/00018/19, r/00019/19, r/00020/19, r/00021/19, r/00022/19, r/00023/19, r/00028/19, r/00029/19, which make reference to alleged crimes prior to 2017. Specifically r/00029/19 refers to crimes being allegedly committed since 1942 until present. Fourth Registry Report, ICC-01/19-15-Conf-AnxI. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx. The following victims' representations refer to alleged acts in 2016: r/00044/19, r/00050/19, r/00088/19, r/00148/19, r/00199/19, r/00030/19, r/00031/19, r/00058/19, r/00071/19, r/00073/19, r/00074/19, r/00075/19, r/00076/19, r/00077/19, r/00078/19, r/00079/19, r/00080/19, r/00081/19, r/00082/19, r/00083/19, r/00106/19, r/00116/19, r/00117/19, r/00118/19, r/00121/19, r/00124/19, r/00130/19, r/00131/19, r/00132/19, r/00147/19, r/00149/19, r/00154/19, r/00213/19, r/00222/19. The following victims' representations refer to acts as of 2012: r/00051/19, r/00061/19, r/00062/19, r/00063/19, r/00064/19, r/00067/19, r/00068/19, r/00069/19, r/00070/19, r/00089/19, r/00090/19, r/00098/19, r/00101/19, r/00102/19, r/00104/19, r/00107/19, r/00109/19, r/00110/19, r/00112/19, r/00113/19, r/00120/19, r/00122/19, r/00125/19, r/00166/19, r/00167/19, r/00191/19, r/00192/19, r/00220/19, r/00226/19, r/00227/19, r/00233/19, r/00237/19, r/00238/19, r/00239/19, r/00240/19, r/00241/19, r/00242/19, r/00243/19, r/00245/19, r/00252/19, r/00255/19, r/0268/19, r/00303/19, r/00304/19, r/00205/19. Representations are available in the corresponding confidential *ex parte* annexes in the Second Registry Transmission, ICC-01/19-21. See also video annex to victims' representation r/00200/19, available only to the Chamber in Third Registry Transmission, ICC-01/19-24, referring to acts of deportation as of 2012, and even 1992.

⁵⁰ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 63. The following victims' representations refer to acts as of 2010: r/00095/19, r/00096/19, r/00115/19, r/00119/19, r/00164/19, r/00169/19, r/00170/19, r/00171/19, r/00228/19, r/00230/19, r/00244/19, r/00258/19, r/00302/19. Representations are available in the corresponding confidential *ex parte* annexes in the Second Registry Transmission, ICC-01/19-21.

acts described below in this subsection and who, as a result of these coercive acts, now live in refugee camps in Bangladesh or in other countries. Several victims' representations describe how they had no choice but to leave Myanmar.⁵¹ One victims' representation clearly describes the cause-effect of the coercive acts they allegedly suffered and the resulting deportation: 'We lost our family members. We survive with [gunshot] wounds. We lost our property, our houses, our lands and cattle and everything. Kicked out from our motherland and made us refugee. Destroyed our everything.'⁵² Another representation, submitted on behalf of women, also states that the 'atrocities of August 2017 were the turning point of the Rohingya crisis, after this date none of the women represented could return to their motherland Myanmar'.⁵³ A representation submitted on behalf of alleged victims living in the same refugee camp in Bangladesh similarly states that victims 'decided to escape and save our lives from the extra-judicial killings [...] the people had just one way to save their lives. [It] was to come to Bangladesh'.⁵⁴

29. Alleged killings underlying the alleged coercive acts: several individuals filling in the victims' representations directly witnessed the killing of close family members, who they are now seeking to represent.⁵⁵ Victims' representations refer to attacks in which the Myanmar military (*Tatmadaw*) and other Myanmar security

⁵¹ See for example Victims' representations r/0002/19, r/0004/19, r/00005/19, r/0006/19, r/00011/19, r/00018/19, r/00019/19, r/00020/19, r/00027/19, r/00029/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21. See also video annex to victims' representation r/00127/19, video annex to victims' representation r/00155/19bis and corresponding translation, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁵² Victims' representation r/00001/19, First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx1, p. 3; see also video annex to victims' representation r/00242/19, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁵³ Victims' representation r/00017/19, First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx17, p. 4.

⁵⁴ Victims' representation r/00025/19, First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx25, p. 2.

⁵⁵ See for example r/00005/19, r/00006/19, r/00007/19, r/00008/19, r/00009/19, r/00010/19, r/00011/19, r/00012/19, r/00013/19, r/00014/19, r/00015/19, r/00016/19, r/00008/19, r/00008/19, r/00008/19, r/0043/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21. See also video annex to victims' representation r/00155/19bis and corresponding translation, video annex to victims' representation r/00155/19 and corresponding translation (explaining how in August 2017 the military allegedly killed over 250 villagers in one day in his village, threw them in mass graves), video annex to victims' representation r/00193/19, at 04:30, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

forces allegedly entered villages and started shooting indiscriminately at villagers.⁵⁶ Victims' representations also mention that children were often targeted and killed, including small children who were thrown into water or fire to die.⁵⁷ Victims' representations refer to entire families being torched after perpetrators locked them in their homes.⁵⁸ Other victims' representations report how Rohingya were allegedly killed on their way to Bangladesh.⁵⁹

30. Alleged arbitrary arrests and infliction of pain and injuries underlying the alleged coercive acts: many victims' representations refer to mass arrests of Rohingya men, including influential community leaders, who were allegedly detained by the Myanmar authorities in order to assess whether or not they had ties with or knowledge of Arakan Rohingya Salvation Army (hereinafter 'ARSA').⁶⁰ Victims' representations

⁵⁶ See for example r/00001/19, r/00002/19, r/00006/19, r/00025/19, r/00026/19, r/00027/19, r/00028/19, r/0053/19, r/00030/19, r/00052/19, r/00054/19, r/00058/19, r/00056/19, r/00055/19, r/00190/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁵⁷ Video annex to victims' representation r/00017, ICC-01/19-14-Conf-Exp-Anx32. See also Victims' representations r/00003/19, r/00017/19, r/00020, r/00023/19, r/00028/19, r/00029/19, r/00034/19, r/00060/19, r/00048/19, r/00041/19, r/00073/19, r/00072/19, r/00074/19, r/00080/19, r/00077/19, r/00076/19, r/00078/19, r/00079/19, r/00083/19, r/00082/19, r/00081/19, r/00094/19, r/00098/19, r/00117/19, r/00124/19, r/00132/19, r/00152/19, r/00151/19, r/00153/19, r/00235/19; r/00175/19, r/00173/19, r/00177/19, r/00176/19, r/00181/19, r/00184/19, r/00190/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24. See also video annex to victims' representation r/00193/19, at 04:30, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁵⁸ See for example Victims' representations r/00071/19, r/00073/19, r/00072/19, r/00074/19, r/00080/19, r/00077/19, r/00079/19, r/00076/19, r/00078/19, r/00083/19, r/00082/19, r/00081/19, r/00175/19, r/00173/19, r/00179/19, r/00180/19, r/00181/19. Representations are available in the corresponding confidential *ex parte* annexes in the Second Registry Transmission, ICC-01/19-21; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁵⁹ See for example Victims' representations r/00001/19, r/00005/19, r/00006/19, r/00028/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21.

⁶⁰ See for example r/00002/19 (indicating that 58 individuals were arrested in one location). See also r/00004/19, r/00007/19, r/00008/19, r/00009/19, r/00010/19, r/00011/19, r/00013/19, r/00014/19, r/00015/19, r/00016/19, r/00019/19, r/00020, r/00024/19, r/00025/19, r/00028/19, r/00029/19, r/00050/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21.

also refer to conduct that may amount to torture (such as beating) and arbitrary arrests.⁶¹

31. Alleged sexual violence underlying the alleged coercive acts: numerous victims' representations recount frequent occurrence of incidents of rape and other forms of sexual violence.⁶² One victim representation claims that most of the women consulted, who are now refugees in Bangladesh, had been subjected to rape(s), sexual harassment, and other forms of sexual violence whilst in Myanmar.⁶³ Other victims' representations report that victims were subject to gang rapes and mutilations.⁶⁴ One victims' representation also refers to third-gender persons who were reportedly subjected to rape and sexual violence.⁶⁵

32. Alleged destruction of houses and other buildings underlying the alleged coercive acts: most victims' representations mention that in addition to the aforesaid violent acts committed against them or their family members, their property were

⁶¹ See for example r/00001/19, r/00004/19, r/00005/19, r/00007/19, r/00008/19, r/00009/19, r/00010/19, r/00011/19, r/00013/19, r/00014/19, r/00015/19, r/00016/19, r/00017/19, r/00018/19, r/00019/19, r/00020/19, r/00023/19, r/00024/19, r/00025/19, r/00028/19, r/00031/19, r/00045/19, r/00044/19, r/00057/19, r/00058/19, r/00036/19, r/000038/19, r/00037/19, r/00155/19, r/00184/19, r/00186/19, r/00190/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anxs; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24. See also video annex to victims' representation r/00155/19bis and corresponding translation, video annex to victims' representation r/00242/19, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁶² Victims' representation, r/00033/19, r/00032/19, r/00039/19, r/00040/19, r/00034/19, r/00041/19, r/00042/19, r/00053/19, r/00054/19, r/00058/19, r/00060/19, r/00075/19, r/00089/19, r/00090/19, r/00098/19, r/00096/19, r/00112/19, r/00114/19, r/00111/19, r/00115/19, r/00116/19, r/00120/19, r/00119/19, r/00121/19, r/00125/19, r/00122/19, r/00132/19, r/00131/19, r/00130/19, r/00147/19, r/00152/19, r/00149/19, r/00151/19, r/00154/19, r/00166/19, r/00169/19, r/00171/19, r/00189/19, r/00191/19, r/00192/19, r/00208/19, r/00207/19, r/00211/19, r/00210/19, r/00209/19, r/00217/19, r/00226/19, r/00222/19, r/00220/19, r/00219/19, r/00234/19, r/00230/19, r/00228/19, r/00227/19, r/00239/19, r/00238/19, r/00237/19, r/00236/19, r/00235/19, r/00243/19, r/00244/19, r/00242/19, r/00302/19, r/00303/19, r/00268/19, r/00036/19, r/00035/19, r/00038/19, r/00092/19, r/00037/19, r/00163/19, r/00168/19, r/00176/19, r/00179/19, r/00180/19, r/00186/19, r/00190/19, r/00185/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24. See also video annex to victims' representation r/00190/19, at 10:40, video annex to victims' representation r/00200/19, video annex to victims' representation r/00242/19, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁶³ Victims' representation r/00024/19, ICC-01/19-14-Conf-Exp-Anx24, p. 6.

⁶⁴ Victims' representations r/00002/19, r/00017/19, r/00018/19, r/00022/19, r/00029/19, r/00089/19, r/00132/19, r/00130/19, r/00152/19, r/00154/19, r/00166/19, r/00169/19, r/00171/19, r/00226/19, r/00166/19, r/00169/19, r/00171/19, r/00226/19, r/00220/19, r/00219/19, r/00186/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁶⁵ Victims' representation r/00003/19, ICC-01/19-14-Conf-Exp-Anx3.

destroyed or taken away from them. Victims' representations also refer to incidents of burning of their homes, as well as destruction of schools and mosques, either during the attacks to their villages or while they were on their way to Bangladesh.⁶⁶ They also claim that their livestock and their property was taken away from them. Some victims' representations mention that, in some instances, entire villages were destroyed.⁶⁷

33. Alleged discriminatory intent: all victims' representations assert that these aforementioned alleged acts were committed on grounds of their ethnicity and religion, namely Rohingya and Muslims.⁶⁸ Furthermore, the Registry states that victims 'insisted to convey to the ICC Judges how important it is to them to have an acknowledgement that the Rohingya as a recognised and recognisable group by virtue of a common culture, identity and religion were victims of atrocious crimes exclusively based on their ethnicity and religion'.⁶⁹

C. Views on gravity and the interests of justice

1. Gravity

34. Victims' representations refer to the gravity of the crimes. Some identify those that are allegedly most responsible and some describe the scale of the crimes, the elements of brutality and cruelty of the alleged conduct.

⁶⁶ See for example r/00001/19, r/00002/19, r/00003/19, r/00004/19, r/00005/19, r/00006/19, r/00017/19, r/00018/19, r/00020/19, r/00021/19, r/00022/19, r/00023/19, r/00024/19, r/00025/19, r/00026/19, r/00027/19, r/00028/19, r/00029/19, r/00030/19, r/00049/19, r/00047/19, r/00046/19, r/00050/19, r/0053/19, r/00052/19, r/0054/19, r/00057/19, r/00058/19, r/00056/19, r/00055/19, r/00061/19, r/00063/19, r/00062/19, r/00064/19, r/00065/19, r/00066/19, r/00067/19, r/00068/19, r/00069/19, r/00070/19, r/00071/19, r/00174/19, r/00176/19, r/00093/19. Representations are available in the corresponding annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anxs; Second Registry Transmission, ICC-01/19-21; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁶⁷ See for example r/00120/19, r/00122/19, r/00123/19, r/00233/19, r/00268/19, r/00179/19, r/00181/19, r/00184/19. Representations are available in the corresponding confidential *ex parte* annexes in the Second Registry Transmission, ICC-01/19-21; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁶⁸ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxII; Fourth Registry Report, ICC-01/19-15-Conf, AnxI; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁶⁹ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 41, 65(d). See also Fourth Registry Report, ICC-01/19-15-Conf, footnote 12. Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 41. See also First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx20, p. 3. See also victims' representations r/00227/19, r/00101/19, r/00102/19, r/00242/19, r/00255/19, available in Second Registry Transmission, ICC-01/19-21; and video annex to victims' representation r/00090/19, at 04:41, video annex to victims' representation r/00115/19, at 06:30, video annex to victims' representation r/00196/19, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

35. The Registry reported that the vast majority of victims' representations identified the *Tatmadaw*, the Border Guard Police ('BGP'), the Myanmar Government, Myanmar Police Force ('MPF') and other local authorities, as well as members of the local population and Buddhist monks, as being among those who were allegedly responsible for the acts and conduct described above.⁷⁰ Some victims have specifically identified high-ranking alleged perpetrators.⁷¹ Victims also claimed that during the alleged attacks, the alleged perpetrators referred to them in a derogatory and discriminatory manner.⁷²

36. Victims' representations refer to the impact of the conduct, particularly how people were forced to flee to Bangladesh.⁷³ Victims also state that, as a result of the deportation, many families have been separated.⁷⁴ Victims, particularly Rohingya youth, also claim that they need access to education in order to have a future.⁷⁵

37. As noted above, victims' representations mention that perpetrators purposely targeted children and that sexual violence, often committed in a brutal manner, was prevalent.

2. *Interests of justice*

38. According to the Registry, victims unanimously insist that they want an investigation by the Court.⁷⁶ The Registry reports that many of the consulted alleged victims 'believe that only justice and accountability can ensure that the perceived

⁷⁰ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 64. *See also* Fourth Registry Report, ICC-01/19-15-Conf-Exp-AnxI; First Registry Transmission, ICC-01/19-14; Second Registry Transmission, ICC-01/19-21. *See also, for example*, video annex to victims' representation r/00163/19, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁷¹ *See* r/00001/19, r/00005/19, r/00047/19, r/00046/19, r/00163/19, r/00179/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx; Second Registry Transmission, ICC-01/19-21; Third Registry Transmission, ICC-01/19-24.

⁷² *See for example* Victims' representations r/00020/19 and r/00028/19. Representations are available in the corresponding confidential *ex parte* annexes in the First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx.

⁷³ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 43 and 65. *See for example* r/00006/19, First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx6. *See also* r/00190/19, submitted on behalf of more than 9000 individuals, Third Registry Transmission, ICC-01/19-24.

⁷⁴ *See* r/00004/19; First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx4.

⁷⁵ First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx19; Anx20; *see also* video annex to victims' representation r/00115/19, video annex to victims' representation r/00190/19, at 05:40, available only to the Chamber in Third Registry Transmission, ICC-01/19-24.

⁷⁶ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, paras 34-36, 62, 66.

circle of violence and abuse comes to an end and that the Rohingya can go back to their homeland, Myanmar, in a dignified manner and with full citizenship rights'.⁷⁷ Victims have also expressed their willingness and eagerness to engage with the ICC and 'explained that bringing the perpetrators to justice within a reasonable time is crucial in preventing future crimes from being committed and for the safe and dignified return of the Rohingya to their homeland Myanmar'.⁷⁸ One victims' representation states: 'We are educated, we read about the ICC, about what the Court can do and what it cannot. Despite its limitations, the ICC is the only Court that can look into what happened to the Rohingya and we strongly believe that if the Court opens an investigations, the perpetrators will think twice about committing these crimes again'.⁷⁹

39. Despite the challenges faced during the present article 15 process, the Registry states that the process has been welcomed by the victims.⁸⁰ However, the Registry also conveys the victims' message that proceedings should be expeditious, evidence should be collected as soon as possible, and victims should be protected as they fear retaliation if they cooperate with the Court.⁸¹ The Registry also reports that victims wish direct interaction with the ICC, including judges, who victims state 'should come here and see for themselves how the Rohingya are and how they live'.⁸²

V. Jurisdiction

40. The Chamber recalls that, for conduct to fall within the jurisdiction of the Court, it must: (i) fall within the category of crimes set out in article 5 and defined in

⁷⁷ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 34; *see also* video annex to victims' representation r/00127/19, at 03:37, video annex to victims' representation r/00155/19 and corresponding translation, video annex to victims' representation r/00163/19, video annex to victims' representation r/00193/19, *available only to the Chamber in Third Registry Transmission*, ICC-01/19-24.

⁷⁸ Fourth Registry Report, ICC-01/19-15-Red, para. 12.

⁷⁹ *See* r/00019/19, First Registry Transmission, ICC-01/19-14-Conf-Exp-Anx19. *See also* Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 20.

⁸⁰ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 30.

⁸¹ Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 65; *see also* video annex to victims' representation r/00163/19, at 05:05, 05:48, video annex to victims' representations r/00190/19, at 01:50, video annex to victims' representation r/00200/19, *available only to the Chamber in Third Registry Transmission*, ICC-01/19-24.

⁸² Final Registry Report, ICC-01/19-22-Conf-Exp-AnxI, para. 65; *see also* video annex to victims' representation r/00115/19, at 07:45, video annex to victims' representation r/00127/19, at 03:37, video annex to victims' representation r/00163/19, at 05:13, video annex to victims' representation r/00242/19, *available only to the Chamber in Third Registry Transmission*, ICC-01/19-24.

articles 6 to 8 *bis* of the Statute (jurisdiction *ratione materiae*); (ii) fulfil the temporal conditions specified in article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) meet one of the two requirements contained in article 12(2) of the Statute (jurisdiction *ratione loci* or *ratione personae*).⁸³

41. In her Request, the Prosecutor seeks authorisation to investigate, specifically, ‘crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events.’⁸⁴ Accordingly, the Chamber will assess whether or not in light of the applicable law and with regard to the information provided in the Request, the criteria of territorial jurisdiction, material jurisdiction and temporal jurisdiction are satisfied.

A. Jurisdiction *ratione loci*

1. Applicable law

42. Article 12(2)(a) of the Statute establishes that the Court may exercise its jurisdiction in the event of a State Party referral (article 13(a) of the Statute) or as a result of the Prosecutor’s *proprio motu* initiation of an investigation (article 13(c) of the Statute):

[...] if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.⁸⁵

43. In the context of the situation in Bangladesh/Myanmar, the Chamber recalls that Pre-Trial Chamber I 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 a crime is committed on the territory of a State Party to

⁸³ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 39; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 31.

⁸⁴ Request, ICC-01/19-7, para. 20.

⁸⁵ In case of a Security Council referral, the preconditions of article 12(a) and (b) of the Statute do not apply.

the Statute'.⁸⁶ For the reasons given below, the Chamber agrees with the conclusion of Pre-Trial Chamber I that the Court may exercise jurisdiction over crimes when part of the criminal conduct takes place on the territory of a State Party.

44. Article 12(2)(a) of the Statute has been widely interpreted as an expression of the territoriality principle. To date, the application of this principle in most of the situations and related cases before the Court has generally been uncontroversial. Most of them were territorially confined within the boundaries of a single State Party.⁸⁷

45. The facts underlying the Request compel the Chamber, however, to interpret the principle of territoriality further. In particular, the question arises as to whether the Court may exercise its jurisdiction over crimes that occurred partially on the territory of a State Party and partially on the territory of a non-State party. In order to answer this question two issues must be addressed: first, the Chamber must ascertain the exact meaning of the term 'conduct' in article 12(2)(a) of the Statute and, second, whether article 12(2)(a) of the Statute requires that all conduct must take place in the territory of a State Party.

i. Meaning of the term 'conduct' in article 12(2)(a) of the Statute

46. In addressing the first issue, the Chamber begins by assessing the textual interpretation of the term 'conduct' in article 12(2)(a) of the Statute. An assessment of the plain meaning of the word 'conduct' indicates that it is best defined as a form of

⁸⁶ Jurisdiction Decision, para. 72.

⁸⁷ See, for example, [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 175 and 177-178; [Côte d'Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, paras 187-188; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 194; Pre-Trial Chamber I, *Prosecutor v Bosco Ntaganda*, [Decision on the Prosecution Application for a Warrant of Arrest](#), 6 March 2007, ICC-01/04-02/06-1-Red-tENG, paras 27-28 and 31; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, [Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6](#), 17 January 2006, ICC-01/04-101-tEN-Corr, paras 91-93.

behaviour,⁸⁸ encompassing more than the notion of an act.⁸⁹ This understanding of ‘conduct’ is supported by the French version of article 12(2)(a) of the Statute, which uses the word ‘*comportement*’.⁹⁰ Nonetheless, apart from suggesting that it must be more than a mere act, the plain meaning of conduct does not indicate *what* it is that must take place on the territory of one or more State Parties.

47. In this regard, the contextual interpretation discussed below provides some clarity. As part of assessing the immediate context of the term ‘conduct’ in this provision, a comparison between the terms ‘crime’ and ‘conduct’ as they appear in article 12(2)(a) of the Statute offers some guidance.

48. Article 12(2)(a) of the Statute uses the term ‘conduct’, when referring to State territory; and ‘crime’, when referring to vessels and aircrafts registered in a State. At first glance, the term ‘conduct’ appears to be distinct from the term ‘crime’. However, the use of both ‘conduct’ and ‘crime’ in the language of article 12(2)(a) of the Statute indicates that the term conduct, short of crime, is a reference to criminal conduct absent legal characterisation. The *travaux préparatoires* offer no explanation as to why the drafters selected to use a different word in relation to vessel/aircraft. There is no apparent reason why the threshold for territorial jurisdiction would be different based on whether the location of the conduct/crime is on land or vessel/aircraft. In the absence of any explanation as to why the drafters chose different words for the determination of territorial jurisdiction, a contextual reading of the provision allows

⁸⁸ The Oxford English Dictionary (hereinafter ‘OED’) defines ‘conduct’ as a ‘manner of conducting oneself or one’s life; behaviour; usually with more or less reference to its moral quality’. See ‘conduct, n.1’, OED Online, June 2019, Oxford University Press. <https://www.oed.com/view/Entry/38617?rskey=4srVHm&result=1&isAdvanced=false> (accessed 27 August 2019); ‘conduct, n.1’, OED Online, June 2019, Oxford University Press. <https://www.oed.com/view/Entry/38617?rskey=4srVHm&result=1&isAdvanced=false> (accessed 27 August 2019). The Collins English Dictionary describes someone’s conduct as ‘the way they behave in particular situations’. ‘conduct, 4’, Collins English Dictionary Online, 2019 <https://www.collinsdictionary.com/dictionary/english/conduct> (accessed 27 August 2019). Merriam-Webster further qualifies ‘conduct’ as ‘a mode or standard of personal behavior especially as based on moral principles’. See ‘conduct, n.1’, Merriam-Webster Online, 2019 <https://www.merriam-webster.com/dictionary/conduct> (accessed 27 August 2019).

⁸⁹ Behaviour itself has been defined by the OED as both the ‘manner of conducting oneself in the external relations of life’ and ‘the manner in which a thing acts under specified conditions or circumstances, or in relation to other things’. See ‘behaviour | behavior, n.’, OED Online, June 2019, Oxford University Press, <https://www.oed.com/view/Entry/17197?redirectedFrom=behaviour> (accessed 27 August 2019).

⁹⁰ The term ‘*comportement*’, Le Nouveau Petit Robert de la langue française, 2010, p. 487. This word is similarly defined as both a ‘*manière de se comporter*’ and an ‘*ensemble des réactions objectivement observables*’.

an inference to be drawn that the juxtaposition of ‘conduct in question’ on the territory of a State immediately before ‘crime’ committed on board a vessel or aircraft means that the notions of ‘conduct’ and ‘crime’ in article 12(2)(a) of the Statute have the same functional meaning.

49. A contextual interpretation of the term involving a comparison with other provisions of the Statute using the same term also renders the same conclusion. For instance, use of the term conduct in article 20 is understood to refer to conduct absent legal characterisation.⁹¹ For these reasons, the word is used in a factual sense, capturing the *actus reus* element underlying a crime subject to the jurisdiction *ratione materiae* of the Court.

50. Further, depending on the nature of the crime alleged, the *actus reus* element of conduct may encompass within its scope, the consequences of such conduct. For instance, the consequence of an act of killing is that the victim dies. Both facts concerning the act and the consequence (*i.e.* the killing and the death) are required to be established.

51. In respect of certain crimes within the Statute, the particular consequence may be that the victim behaves, or is caused to behave, in a certain way as a result of conduct attributable to the alleged perpetrator. The negative corollary is that, should those consequences not follow from the conduct of the perpetrator, the crime cannot be said to have occurred (although the suspect’s conduct may constitute attempt).

52. The legal elements of the crime of deportation require, *inter alia*, that the ‘perpetrator deport [...] by expulsion or other coercive acts’. This element may be carried out by the perpetrator either by physically removing the deportees or by coercive acts that cause them to leave the area where they were lawfully present.⁹² In such a situation, the victims’ behaviour or response as a consequence of coercive environment is required to be established for the completion of the crime. If the victims refused to leave the area despite the coercive environment or they did not

⁹¹ See also articles 17(1) (c), 22(1), 24, 30(2),⁹¹ 90(1), 101(1), and 108 of the Statute.

⁹² Elements of Crimes, article 7(1)(d), para. 1.

cross an international border, it would constitute forcible transfer or an attempt to commit the crime of deportation.

53. In the present Request, it is alleged that the coercive acts of the perpetrators, which took place in Myanmar, have forced the Rohingya population to cross the border into Bangladesh. The Prosecutor avers that the crime of deportation was completed when the victims left the area where they were lawfully present and fled to Bangladesh as a result of coercive acts and a coercive environment. Accordingly, it could be concluded that part of the *actus reus* of the crime of deportation occurred in the territory of Bangladesh.

ii. Location of the conduct

54. A second issue requiring the analysis of the Chamber is whether article 12(2)(a) of the Statute requires that all the conduct takes place in the territory of one or more State Parties.

55. As noted above, the wording of article 12(2)(a) is generally accepted to be a reference to the territoriality principle. In order to interpret the meaning of the words ‘on the territory of which the conduct occurred’, it is instructive to look at what territorial jurisdiction means under customary international law, as this would have been the legal framework that the drafters had in mind when they were negotiating the relevant provisions.⁹³ It is particularly significant to look at the state of customary international law in relation to territorial jurisdiction, as this is the maximum the States Parties could have transferred to the Court.

56. Customary international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle. A brief survey of State practice reveals that States have developed different concepts for a variety of situations that enables domestic prosecuting authorities to assert territorial jurisdiction in transboundary criminal matters, such as:

⁹³ In accordance with article 31(3)(c) Vienna Convention on the Law of Treaties, the Chamber shall take into account ‘any relevant rules of international law applicable in the relations between the parties’.

- (i) the objective territoriality principle according to which the State may assert territorial jurisdiction if the crime is initiated abroad but completed in the State's territory;⁹⁴
- (ii) the subjective territoriality principle, according to which the State may assert territorial jurisdiction if the crime has been initiated in the State's territory but completed abroad;⁹⁵
- (iii) the principle of ubiquity, according to which the State may assert territorial jurisdiction if the crime took place in whole or in part on

⁹⁴ A number of States have adopted this concept, *see for example*, **Australia**: section 14.1, paragraph 2(b) of the Criminal Code Act, as published on 15 March 1995, last amended on 13 December 2017; **Argentina**: article 1(1) of the *Código Penal de la Nación Argentina*, as published on 29 October 1921, last amended on 1 February 2018; **China**: article 6(3) of the Criminal Law of the People's Republic of China, as published on 1 July 1979, last amended on 14 March 1997; **Czech Republic**: section 4(2)(b) of the Criminal Code of the Czech Republic, as published on 8 January 2009; **Colombia**: article 14 of the *Código Penal*, as published on 24 July 2000; **Egypt**: Court of Cassation, Appeal No. 109 Judicial Year 57, 1/4/1987 Year No. 38, p. 530; also Appeal No. 23201 Judicial Year 63 3/10/1995 Year No. 46, p. 1055; **Estonia**: section 11 of the Criminal Code, as passed on 6 June 2001; **Finland**: section 10(1) of the Criminal Code, as published on 1 January 2010, last amended on 1 March 2018; **Georgia**: article 4(2), first sentence, of the Criminal Code; **Germany**: section 9(1) of the German Criminal Code, as published on 13 November 1998, last amended on 31 October 2017; **Mexico**: article 2(1) of the *Código Penal Federal*, as published on 14 August 1931, last amended on 21 February 2018; **New Zealand**: section 7 of the Crimes Act 1961, as published on 1 November 1961, last amended on 28 September 2017; **Poland**: article 6(2) of the Criminal Code, as published on 6 June 1997; **Romania**: article 8(4) of the Criminal Code, as published on 12 November 2012; **Serbia**: article 17(1) of the Criminal Code; **Switzerland**: article 8(1) of the Criminal Code of the Swiss Confederation, as published on 21 December 1937, last amended on 1 January 2017; **Tajikistan**: article 14(2)(b) of the Criminal Code of the Republic of Tajikistan, as published on 21 May 1998; **Thailand**: section 5(1) of the Criminal Code of Thailand; *see further* article 2 of the 1931 *Projet de l'Institut de Droit International*.

⁹⁵ A number of States have also adopted this concept, *see for example*, **Armenia**: article 14(2) of the Criminal Code of the Republic of Armenia, as published on 18 April 2003, last amended on 27 February 2018; **Azerbaijan**: article 11.1 of the Criminal Code of the Republic of Azerbaijan, as published on 1 September 2000; **Georgia**: article 4(2), first sentence, of the Criminal Code; **Kazakhstan**: article 7(2) of the Criminal Code of the Republic of Kazakhstan, as published on 3 July 2014, last amended on 1 January 2016; **Lithuania**: article 4(3) of the Criminal Code, as published on 26 September 2000, last amended on 17 December 2017.

the territory of the State irrespective of whether the part occurring on the territory is a constitutive element of the crime;⁹⁶

- (iv) the constitutive element theory, according to which a State may assert territorial jurisdiction if at least one constitutive element of the crime occurred on the territory of the State;⁹⁷ and
- (v) the effects doctrine, according to which the State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State.⁹⁸

57. It is safe to assume that all the states reviewed are of the view that their domestic legislation on territorial jurisdiction over cross-boundary conduct are in conformity with international law (*opinio juris*).

⁹⁶ See for example Council of Europe, European Committee on Crime Problems, ‘Extraterritorial Criminal Jurisdiction’ (1990), p. 8. This concept has been adopted in a variety of international agreements. See article 4(1) of the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#), UNTS vol. 2802, p. 225; article 17(1)(a) of the [Criminal Law Convention on Corruption](#), UNTS vol. 2216, p. 225; article 7(1) of the [European Convention on Extradition](#), UNTS vol. 359, p. 273; article 4(f) of the [Model Treaty on Extradition](#), annexed to UNGA Res. 45/116; article 5(e) of the Protocol on Extradition of the South Africa Development Community. A number of States have also adopted this concept. For example **Afghanistan**: article 15(1) of Afghanistan’s Criminal Code 1976; **Australia**: section 14.1, paragraph 2(a) of the Criminal Code Act, as published on 15 March 1995, last amended on 13 December 2017; **Colombia**: article 14 of the *Código Penal*, as published on 24 July 2000; **Czech Republic**: Section 4(2)(a) of the Criminal Code of the Czech Republic, as published on 8 January 2009; **Tanzania**: section 7 of the Criminal Code of 1945, last amended 1991; **Timor-Leste**: article 6 of the Criminal Code of the Democratic Republic of Timor Leste, as approved on 18 March 2009; **Yemen**: article 3 of the Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, as published on 12 October 1994.

⁹⁷ This concept was endorsed by the PCIJ in the *Lotus Case*, see PCIJ, [Lotus Judgment](#), p. 23. At the international level, it has been adopted in, for example, article 4(a) of the [Inter-American Convention on Forced Disappearance of Persons](#), OAS Treaty Series No. 68, p. 33 [ILM 1429 (1994)]. A number of States have also adopted this concept. For example **Algeria**: article 586 of the *Code de Procédure Pénale*; **Belgium**: *Cour de Cassation*, 24 January 2001, R.D.P.C., I, p. 664; *Cour de Cassation*, 4 February 1986, Pas., I, p. 671; **Benin**: article 640 of the *Code de Procédure Pénale*, as promulgated on 30 March 2012; **Cambodia**: article 13 of the Criminal Code; **Cameroon**: article 8 of the Criminal Code, as published on 12 July 2016; **Chad**: article 7 of the *Code Pénal*, as published on 8 May 2017; **Central African Republic**: article 340 of the *Code de Procédure Pénale*, as published on 6 January 2010; **Côte d’Ivoire**: article 662 of the *Code de Procédure Pénale*. **Djibouti**: article 11 of the *Code Pénal*, promulgated on 5 January 1995; **France**: article 113-2 of the *Code Pénal*, as published on 22 July 1992, last amended on 16 December 2016; **Guinea**: article 10 of the *Code Pénale*; **Jordan**: article 7(2) of the Criminal Code No. 16 of 1960; **Luxembourg**: article 7-2 of the *Code de Procédure Pénale*; **Madagascar**: article 510 of the *Code de Procédure Pénale*, as published on 20 September 1962; **Mali**: article 22(5) of the *Code de Procédure Pénale*, as published on 20 August 2001; **Mauritania**: article 600 of the *Code de Procédure Pénale*, as promulgated on 9 July 1983; **Niger**: article 646 of the *Code de Procédure Pénale*, as published on 14 August 1961, last amended on 16 May 2004; **Republic of the Congo**: article 614 of the *Code de Procédure Pénale*, as promulgated on 13 January 1963; **Rwanda**: article 11 of the *Code Pénal*; **Vanuatu**: article 2(a) of the Criminal Code, as published on 7 August 1981.

⁹⁸ The origins of this concept are reported to lie in the case of *United States v Aluminium Company of America (ALCOA) et al*, 148 F.2d 416 (2nd Cir., 12 March 1945). It is noted however that the concept was developed mainly in the field of antitrust and competition law.

58. Two conclusions follow from this: first, under customary international law, States are free to assert territorial criminal jurisdiction, even if part of the criminal conduct takes place outside its territory, as long as there is a link with their territory. Second, States have a relatively wide margin of discretion to define the nature of this link.

59. Article 12(2)(a) of the Statute does not specify under which circumstances the Court may exercise jurisdiction over transboundary crimes on the basis of the territoriality principle. However, it would be wrong to conclude that States intended to limit the Court's territorial jurisdiction to crimes occurring exclusively in the territory of one or more States Parties. Moreover, reading article 12(2)(a) of the Statute in this manner would go against the principle of good faith (including effective) interpretation.

60. Indeed, when States delegate authority to an international organisation they transfer all the powers necessary to achieve the purposes for which the authority was granted to the organisation. In this respect, it is recalled that the Statute contains a number of war crimes that take place in international armed conflicts. If the Court could not exercise its jurisdiction over crimes that were partly committed in the territory of a non-State party, this would mean that the Court could not hear cases involving war crimes committed in international armed conflicts involving non-States Parties. There is no indication anywhere in the Statute that the drafters intended to impose such a limitation. This is confirmed by the fact that the States Parties deemed it necessary to include such a limitation in article 15 *bis* (5) of the Statute in relation to the crime of aggression. It follows from this that, since the States Parties did not explicitly restrict their delegation of the territoriality principle, they must be presumed to have transferred to the Court the same territorial jurisdiction as they have under international law.

61. The only clear limitation that follows from the wording of article 12(2)(a) of the Statute is that at least part of the conduct (*i.e.* the *actus reus* of the crime) must take place in the territory of a State Party. Accordingly, provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law.

2. Conclusion

62. The alleged deportation of civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the *actus reus* of this crime (*i.e.* the crossing into Bangladesh by the victims). This is the case under the objective territoriality principle, the ubiquity principle, as well as the constitutive elements approach. The present situation therefore falls well within the limits of what is permitted under customary international law. Under these circumstances, the Chamber does not otherwise deem it necessary to formulate abstract conditions for the Court's exercise of territorial jurisdiction for all potentially transboundary crimes contained in the Statute.

B. Jurisdiction *ratione materiae*

1. Alleged contextual elements of crimes against humanity

i. Applicable law

63. The *chapeau* of article 7 of the Statute sets out the contextual elements of crimes against humanity as 'a widespread or systematic attack directed against any civilian population'.⁹⁹ Article 7(2)(a) of the Statute further defines an 'attack directed against any civilian population' as 'a course of conduct involving the multiple commission of acts referred to in [article 7(1) of the Statute] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.¹⁰⁰ As regards the elements 'attack',¹⁰¹ 'civilian population',¹⁰² 'policy',¹⁰³

⁹⁹ The Chamber considers that the requirement that the perpetrator had knowledge of the attack cannot be addressed at the current stage of the proceedings as there is no suspect before the Court at this point; see [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 79; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, footnote 43.

¹⁰⁰ See also paragraphs 2 and 3 of the Introduction to article 7 in the Elements of Crimes.

¹⁰¹ Paragraph 3 of the Introduction to article 7 in the Elements of Crimes; Trial Chamber III, *Prosecutor v Jean-Pierre Bemba Gombo*, [Bemba Trial Judgment](#), 21 March 2016, ICC-01/05-01/08-3343, paras 149-151; [Katanga Trial Judgment](#), ICC-01/04-01/07-3436-tENG, para. 1101.

¹⁰² Article 50 of the Additional Protocol I, adopted on 8 June 1977, UNTS vol. 1125, p. 3; [Bemba Trial Judgment](#), ICC-01/05-01/08-3343, paras 152-156; [Katanga Trial Judgment](#), ICC-01/04-01/07-3436-tENG, paras 1102-1105; Pre-Trial Chamber II, *Prosecutor v Jean-Pierre Bemba Gombo*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), 15 June 2009, ICC-01/05-01/08-424, paras 76-78.

¹⁰³ Paragraph 3 of the Introduction to article 7 and footnote 6 of the Elements of Crimes; [Bemba Trial Judgment](#), ICC-01/05-01/08-3343, paras 159-161; [Katanga Trial Judgment](#), ICC-01/04-01/07-3436-tENG, paras 1106-1109.

and ‘widespread or systematic’,¹⁰⁴ the Chamber refers to the established case law of the Court. Lastly, any of the underlying crimes must have been committed as part of the attack.

ii. Alleged contextual facts

a. Background

64. The Prosecutor submits that in Myanmar’s political and constitutional context the *Tatmadaw* essentially dominates the government.¹⁰⁵ The Prosecutor also states that in Myanmar, but more specifically in Rakhine State, there is systematic discrimination, institutionalised oppression, human rights violations, and hostility against the Rohingya.¹⁰⁶ The Prosecutor alleges that the government has discriminated against this ethnic group for decades, by implementing policies and laws that deny citizenship to persons of this ethnic group, ‘rendering them stateless’.¹⁰⁷ The Prosecutor also states that the government of Myanmar has violated fundamental rights of the Rohingya people, including by restricting their movement between townships.¹⁰⁸

65. The Prosecutor further submits that on previous occasions the government of Myanmar forced many Rohingya to flee Myanmar (including in 1978, 1991-1992, and 2012-2013).¹⁰⁹ She also states that there was increasing Buddhist nationalism and use of hate speech against Muslims in general and the Rohingya in particular.¹¹⁰ Within this context, the Prosecutor submits that ARSA emerged and launched attacks against government posts in Rakhine State.¹¹¹ Consequently, the Prosecution states that the *Tatmadaw* launched ‘clearance operations’ that resulted in the 2016 and 2017 waves of violence, which are the subject of this Request.¹¹²

¹⁰⁴ [Bemba Trial Judgment](#), ICC-01/05-01/08-3343, paras 162-163; [Katanga Trial Judgment](#), ICC-01/04-01/07-3436-tENG, para. 1123.

¹⁰⁵ ICC-01/19-7, para. 43.

¹⁰⁶ ICC-01/19-7, para. 45.

¹⁰⁷ ICC-01/19-7, paras 44-51.

¹⁰⁸ ICC-01/19-7, paras 52-53.

¹⁰⁹ ICC-01/19-7, paras 54-58.

¹¹⁰ ICC-01/19-7, paras 59-60.

¹¹¹ ICC-01/19-7, paras 61-64.

¹¹² ICC-01/19-7, paras 64-66.

66. According to the supporting material, including the report of the Independent International Fact-Finding Mission on Myanmar (the ‘UNFFM’),¹¹³ Myanmar¹¹⁴ and more specifically Rakhine State are ethnically diverse,¹¹⁵ with the Rohingya forming the second largest group in Rakhine State.¹¹⁶ It is reported that, unlike the vast majority of the population in Myanmar, who are almost 90% Buddhist,¹¹⁷ the Rohingya are predominantly Muslim.¹¹⁸ Further, according to the supporting material, the Rohingya also have their own language, which is a spoken language, with no agreed written script.¹¹⁹

67. According to the information on the record, the Rohingya have gradually been deprived of citizenship through legislation,¹²⁰ and via administrative decisions

¹¹³ The UNFFM, established by the Human Rights Council, was mandated ‘to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State [...], with a view to ensuring full accountability for perpetrators and justice for victims’. It prepared a report titled ‘Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar /A/HRC/39/CRP.2’ ([‘UNFFM Report’](#)). In interpreting its mandate, the UNFFM ‘selected several significant incidents for in-depth fact-finding, aiming to make findings on specific allegations of human rights violations and abuses while revealing broader patterns of conduct’. During its mandate from 24 March 2017 to end July 2018, the UNFFM ‘conducted 875 in-depth interviews with victims and eyewitnesses’ to ‘examine allegations against both State and non-State actors’. The UNFFM also held over 250 consultations with other stakeholders including intergovernmental and non-governmental organisations, researchers, and diplomats. Moreover, the UNFFM obtained a large body of satellite imagery and analysis. *See* UNFFM Report, BGD-OTP-0001-0129, at 0134-0135, 0137

¹¹⁴ UNFFM Report, BGD-OTP-0001-0129, at 0153, para. 84; ICHR Report, BGD-OTP-0001-4318, at 4339.

¹¹⁵ UNFFM Report, BGD-OTP-0001-0129, at 0228, para. 406, n. 905; ‘Myanmar: The Politics of Rakhine State’ BGD-OTP-0001-3880, at 3884 (‘ICG Report 2014’) prepared by the ICG; ICHR Report, BGD-OTP-0001-4318, at 4339.

¹¹⁶ The figure of approximately 1.1 million is an estimate, as exact population counts for the Rohingya are not available. The Government of Myanmar carried out a nation-wide census in 2014, but the Rohingya were not counted as they were reportedly not allowed to self-identify as such. The figure of approximately 1.1 million is based on the number of individuals in the Rakhine State who were not included in the census – presumed to be Rohingya – which the Myanmar Census Office estimated at 1,090,000; UNFFM Report BGD-OTP-0001-0129, at 0228, para. 406, n. 906; ‘Census Atlas Myanmar/The 2014 Myanmar Population and Housing Crisis’ BGD-OTP-0002-0113, at 0126, 0157 (‘MMR Report 2014’) prepared by the Ministry of Labour, Immigration and Population, The Republic of the Union of Myanmar; AI Report 2017, BGD-OTP-0001-1743, at 1761; on how the census was carried out in Rakhine State and the events surrounding it, *see further*, ‘Update Briefing/Asia Briefing No. 144/Counting the Costs: Myanmar’s Problematic Census’ BGD-OTP-0002-0268, at 0268-0269, 0278-0280 prepared by ICG. *See also* ICHR Report, BGD-OTP-0001-4318, at 4339; ‘Ninety Percent of Rohingya Population Ejected from Rakhine’, BGD-OTP-0001-0773, at 0774 prepared by The Irawaddy.

¹¹⁷ MMR Report 2014, BGD-OTP-0002-0113, at 0157.

¹¹⁸ AI Report 2017, BGD-OTP-0001-1743, at 1761.

¹¹⁹ BGD-OTP-0001-4318, at 4339; BGD-OTP-0001-4667, at 4757.

¹²⁰ UNFFM Report, BGD-OTP-0001-0129, at 0244, para. 477; [Burma Citizenship Law](#), BGD-OTP-0001-4298.

applying the legislation.¹²¹ For example, it is reported that the Rohingya are not entitled to full citizenship by birth.¹²² The supporting material indicates that the Rohingya have allegedly been subjected to severe violations of their human rights for decades,¹²³ including the right to freedom of movement,¹²⁴ marriage,¹²⁵ and other aspects of family life.¹²⁶

68. The supporting material, including reports by Amnesty International¹²⁷ and Human Rights Watch (hereinafter ‘HRW’),¹²⁸ refers in particular to waves of violence in June and October 2012, involving confrontations between Buddhist and other inhabitants of Rakhine State on one side, and Rohingya and other Muslim groups¹²⁹ on the other.¹³⁰ The available information suggest that acts of violence were

¹²¹ ACRS Report, BGD-OTP-0001-5031, at 5059-5060; ICG Report 2014, BGD-OTP-0001-3880 at 3902.

¹²² Other individuals considered to be of Chinese, Indian or Nepali descent are also not entitled to full citizenship by birth; UNFFM Report, BGD-OTP-0001-0129, at 0244, para. 477; AI Report 2017, BGD-OTP-0001-1743, at 1770; MMR Report 2013, BGD-OTP-0002-1214, at 1231, n. 4. *See also* ACRS Report, BGD-OTP-0001-5031 at 5056.

¹²³ *See also* ICHR Report, BGD-OTP-0001-4318.

¹²⁴ Pursuant to instructions issued by the Rakhine State Immigration and National Registration Department; AI Report 2017, BGD-OTP-0001-1743, at 1785-1786, 1799; UNFFM Report, BGD-OTP-0001-0129, at 0249-0250, para. 503. According to some of the available information, restrictions on movement go back as far as 1964 UNFFM Report, BGD-OTP-0001-0129, at 0157, para. 100.

¹²⁵ UNFFM Report, BGD-OTP-0001-0129, at 0269-0271, paras 589-595; ‘Situation of human rights of Rohingya Muslims and other minorities in Myanmar /A/HRC/32/18’ BGD-OTP-0002-0567, at 0577 (‘UNHCHR Report’) prepared by the United Nations High Commissioner for Human Rights, para. 43; PILPG Report, BGD-OTP-0001-3307, at 3334.

¹²⁶ UNFFM Report, BGD-OTP-0001-0129, at 0271, para. 597, at 0273, para. 606, at 0263-0265, paras 559-560, 565, 567; UNHCHR Report, BGD-OTP-0002-0567 at 0576, para. 41.

¹²⁷ *See* ‘We will destroy everything/Military responsibility for crimes against humanity in Rakhine State, Myanmar’ (‘AI Report 2018’) prepared by Amnesty International. The purpose of the AI Report 2018 was ‘to investigate human rights violations and abuses committed in Myanmar during the period around and following the 25 August 2017 attacks by [ARSA]’. The report is the product of field and remote research undertaken from September 2017 to early June 2018. In Bangladesh, interviews were conducted with, amongst others, 319 Rohingya refugees, mainly either survivors or eyewitnesses of human rights violations. In Myanmar, interviews were conducted with 41 people (and a further 23 by telephone) from villages across northern Rakhine State seeking information on ‘abuses by ARSA and on people’s perception of the violence around 25 August’. Also in Myanmar, Amnesty International interviewed three members of the BGP and 16 Village Administrators (the head village tract-level authority within Myanmar’s General Administration Department), and met with Myanmar government officials, foreign diplomats, representatives of humanitarian organisations and development agencies, local activists, and journalists. *See* AI Report 2018, BGD-OTP-0001-2649, at 2665-2666.

¹²⁸ HRW is an independent organisation that ‘investigate[s] abuses, expose[s] the facts widely, and pressure[s] those with power to respect rights and secure justice’ (BGD-OTP-0001-1375 at 1377).

¹²⁹ *See* UNFFM Report, BGD-OTP-0001-0129, at 0286-0287, paras 664-668, explaining that despite the fact that the Kaman Muslims are one of the 135 officially recognised ethnic groups of Myanmar, the Kaman were also affected by the violence possibly because of a ‘prevailing anti-Muslim sentiment and [...] the frequent absence of distinction between the Kaman and the Rohingya’.

¹³⁰ UNFFM Report, BGD-OTP-0001-0129, at 0278, para. 628; AI Report 2018, BGD-OTP-0001-2649, at 2669; ‘All You Can Do is Pray/Crimes Against Humanity and Ethnic Cleansing of Rohingya

perpetrated by members of both communities,¹³¹ but that most of the internally displaced were Muslim, and among them, most of them Rohingya.¹³²

69. The supporting material suggests that the violence in Rakhine was partly inter-communal, fuelled by an increasing anti-Muslim sentiment propagated by nationalist Buddhist groups and individuals who portrayed the Rohingya and Muslims as a ‘threat to race and religion’.¹³³ According to the supporting material, members of the Myanmar security forces (the *Tatmadaw*, the police and the Border Area Immigration Control Headquarters, known as the NaSaKa) allegedly participated in the attacks, supported them, or failed to stop them.¹³⁴

70. According to the available information, following the 2012 waves of violence, the restrictions against the Rohingya, as well as other Muslim groups, were tightened and expanded, particularly in terms of their freedom of movement.¹³⁵ The available information suggests that the authorities sought to segregate the two communities in order to prevent further violence and reduce tensions.¹³⁶ However, it is alleged that the restrictions, which involved limitations on freedom of movement, travel permits, school segregation, and confinement to internal displacement camps, discriminately and disproportionately targeted the Muslim communities.¹³⁷

Muslims in Burma’s Arakan State’, BGD-OTP-0001-1505, at 1558 ([‘HRW Report 2013’](#)) prepared by HRW; UNHCHR Report, BGD-OTP-0002-0567, at 0569, para. 10.

¹³¹ UNFFM Report, BGD-OTP-0001-0129, at 0279, para. 633, at 0280, para. 637, at 0281, paras 642-643, at 0283-0285, paras 652, 655-661; MMR Report 2013, BGD-OTP-0002-1214, at 1235-1240, 1246-1252.

¹³² HRW Report 2013, BGD-OTP-0001-1505, at 1517; UNFFM Report, BGD-OTP-0001-0129, at 0292, para. 689; UNHCHR Report, BGD-OTP-0002-0567, at 0569, para. 10. *See also* PILPG Report, BGD-OTP-0001-3307, at 3325. There is information that an estimated 13,000 Rohingya arrived by boat in Malaysia in 2012 and 6,000 in Thailand since October 2012; HRW Report 2013, BGD-OTP-0001-1505, at 1534, 1559, 1586; *see also* AI Report 2017, BGD-OTP-0001-1743, at 1797.

¹³³ UNFFM Report, BGD-OTP-0001-0129, at 0296-0300, paras 696-716; HRW Report 2013, BGD-OTP-0001-1505, at 1535-1545; UNHCHR Report, BGD-OTP-0002-0567, at 0569, para. 9.

¹³⁴ UNFFM Report, BGD-OTP-0001-0129, at 0279, para. 632, at 0280, para. 635, at 0282, paras 646, 648, at 0284, para. 657

¹³⁵ AI Report 2017, BGD-OTP-0001-1743, at 1784.

¹³⁶ UNHCHR Report, BGD-OTP-0002-0567, at 0574, para. 28; AI Report 2017, BGD-OTP-0001-1743, at 1764, 1795; UNFFM Report, BGD-OTP-0001-0129, at 0251, para. 513, at 0252, paras 515-516; MMR Report 2013, BGD-OTP-0002-1214, at 1240.

¹³⁷ UNHCHR Report, BGD-OTP-0002-0567, at 0574, paras 28, 29, 31; at 0576, paras 38-41; AI Report 2017, BGD-OTP-0001-1743, at 1784, 1785, 1795.

b. Systematic or widespread attack directed against any civilian population

71. The Prosecutor submits that there is a reasonable basis to believe that the alleged crimes which form the object of the Request were committed as part of a widespread or systematic attack directed against a civilian population.¹³⁸ She states that the alleged crimes were committed in the context of two waves of violence, starting on 9 October 2016 ('2016 wave of violence') and on 25 August 2017 ('2017 wave of violence'), which constitute – either in combination or separately – an 'attack' within the meaning of article 7 of the Statute.¹³⁹ The Prosecutor contends that the available information supports allegations that the attack was widespread, particularly given the high number of people reportedly killed (10,000) and deported (700,000) during the 2017 wave of violence.¹⁴⁰ She also argues that the attack was systematic, given the high-degree of organisation and amount and type of State resources used to commit it.¹⁴¹ The Prosecutor further submits that there is a link between the identified crimes of deportation and inhumane attacks and the attack.¹⁴² With respect to the 2016 wave of violence, she states that there are striking analogies between the two waves, suggesting that the crimes committed in 2016 also meet the widespread/systematic threshold.¹⁴³

72. In her Request, the Prosecutor claims that there is information about acts of violence allegedly committed by ARSA and of armed confrontations between ARSA and the *Tatmadaw*. She states that, if authorised to investigate, her office will keep these allegations under review, to determine whether crimes within the jurisdiction of the Court were committed in the territory of a State Party.¹⁴⁴

¹³⁸ Request, para. 181.

¹³⁹ Request, paras 4-5, 181, 213.

¹⁴⁰ ICC-01/19-7, paras 201-204.

¹⁴¹ ICC-01/19-7, paras 205-209.

¹⁴² ICC-01/19-7, paras 210-212.

¹⁴³ ICC-01/19-7, paras 213-222. The Prosecutor also submits that, although she does not refer specifically to incidents in the 2016 wave of violence, there are 'striking similarities' between the two waves of violence that demonstrate their link. ICC-01/19-7, para. 84.

¹⁴⁴ ICC-01/19-7, paras 24 and 65-66.

1) *The 2016 wave of violence*

73. As regards the 2016 wave of violence, the Prosecutor states that on 9 October 2016 and on 12 November 2016, following ARSA attacks, the *Tatmadaw*, together with other governmental forces and non-Rohingya civilians, started ‘clearance operations’ in Rakhine State that resulted in the use of violence against Rohingya. It is estimated that 87,000 persons fled to Bangladesh as a result.¹⁴⁵

74. According to the information on the record, ARSA emerged as a response to the events of 2012.¹⁴⁶ It is reported that on 9 October 2016, ARSA launched an attack on three border police posts in Maungdaw and Rathedaung townships, resulting in the death of nine police officers.¹⁴⁷ The supporting material, including a report by the OHCHR,¹⁴⁸ indicates that these events marked the starting point of an escalation in the scale and severity of the violence perpetrated by Myanmar security forces against the Rohingya.¹⁴⁹

75. The supporting material suggests that, in the course of these operations, the *Tatmadaw* and the police, most notably the BGP, with the participation of some non-Rohingya civilians, murdered, tortured, raped, sexually assaulted, mutilated, imprisoned, and severely deprived Rohingya men and women of their physical liberty.¹⁵⁰ The ‘clearance operations’ reportedly lasted until January/February 2017

¹⁴⁵ Request, para. 67.

¹⁴⁶ UNFFM Report, BGD-OTP-0001-0129, at 0371, paras 1009, 1011; ‘Myanmar: A New Muslim Insurgency in Rakhine State’ BGD-OTP-0001-3802, at 3804, 3817, (‘ICG Report 2016’) prepared by ICG.

¹⁴⁷ AI Report 2016, BGD-OTP-0001-1675, at 1691; UNFFM Report, BGD-OTP-0001-0129, at 0384, para. 1069.

¹⁴⁸ See ‘Report of OHCHR mission to Bangladesh/Interviews with Rohingyas fleeing from Myanmar since 9 October 2016/ Flash Report’ (‘OHCHR Report 2017a’) prepared by OHCHR. In preparation of this report, the OHCHR interviewed more than 220 Rohingya people between 12-21 January 2017, who had fled Rakhine State. The purpose of the interviews were to assess whether any human rights violations had occurred in Rakhine State in the aftermath of the 9 October 2016 attacks. See OHCHR Report 2017a, BGD-OTP-0002-0337, at 0339.

¹⁴⁹ UNFFM Report, BGD-OTP-0001-0129, at 0376, para. 1036, at 0384, para. 1069; ICG Report 2016, BGD-OTP-0001-3802, at 3811-3812; PILPG Report, BGD-OTP-0001-3307, at 3338; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0343.

¹⁵⁰ See V.B.2 Alleged underlying acts constituting crimes against humanity; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0347-0348.

and caused as many as 87,000 Rohingya to flee to Bangladesh.¹⁵¹ It is estimated that a further 20,000 to 22,000 people remained internally displaced.¹⁵²

2) *The 2017 wave of violence*

76. In relation to the 2017 wave of violence, the Prosecutor submits that following ARSA attacks on 26 August 2017, the *Tatmadaw* together with other governmental forces and non-Rohingya civilians, again launched ‘clearance operations’ of Rohingya villages, but this time on a larger scale. During this wave of violence, hundreds of villages were destroyed; thousands of persons were killed, raped and injured. As a result, she estimates over 700,000 Rohingya were deported to Bangladesh.¹⁵³

77. According to the information on the record, on 25 August 2017 ARSA allegedly launched a series of coordinated attacks and further clashes were reported over the next several days.¹⁵⁴ The aim of the attacks was reportedly to respond to what ARSA viewed as an ‘increased oppression of the Rohingya’ and to draw attention to their situation.¹⁵⁵ It is reported that, following the aforesaid attacks, the Government of Myanmar declared ARSA a ‘terrorist organisation’ and launched ‘clearance operations’ in hundreds of villages across Maungdaw, Buthidaung and Rathedaung townships.¹⁵⁶ In the course of these operations, the *Tatmadaw* and other security forces, often with the participation of non-Rohingya civilians, allegedly murdered,

¹⁵¹ OHCHR Report 2017a, BGD-OTP-0002-0337, at 0342, 0344; UNFFM Report, BGD-OTP-0001-0129, at 0384, para. 1070; ‘Tatmataw ends area clearance operations in northern Rakhine’ BGD-OTP-0002-0020 prepared by President Office, The Republic of the Union of Myanmar; Fortify Rights Report, BGD-OTP-0001-2415, at 2453.

¹⁵² OHCHR Report 2017a, BGD-OTP-0002-0337, at 0343; Fortify Rights Report, BGD-OTP-0001-2415, at 2453.

¹⁵³ Request, para.64

¹⁵⁴ UNFFM Report, BGD-OTP-0001-0129, at 0308, para. 750, at 0377-0378, paras 1038-1039, 1046; ‘Myanmar’s Rohingya Crisis Enters a Dangerous New Phase’ BGD-OTP-0001-3527 at 3536 (‘ICG Report 2017’) prepared by ICG; AI Report 2018, BGD-OTP-0001-2649, at 2687-2688.

¹⁵⁵ UNFFM Report, BGD-OTP-0001-0129, at 0308, para. 750, at 0378-0379, paras 1043, 1047; AI Report 2018, BGD-OTP-0001-2649, at 2687.

¹⁵⁶ UNFFM Report, BGD-OTP-0001-0129, at 0308, paras 750-751, at 0377 to 0379, paras 1038-1039, at 1042-1043, at 1046-1047; ICG Report 2017, BGD-OTP-0001-3527, at 3536, 3544; AI Report, 2018 BGD-OTP-0001-2649, at 2687-2688.

tortured, raped, sexually assaulted, mutilated, and imprisoned or otherwise severely deprived Rohingya men and women of their physical liberty.¹⁵⁷

3) *Common characteristics of the 2016 and 2017 waves of violence*

78. The supporting material suggests that the clearance operations during the 2016 wave of violence were mostly limited to Maungdaw Township.¹⁵⁸ In relation to the clearance operations during the 2017 wave of violence, documents including a report by Médecins Sans Frontières (hereinafter ‘MSF’),¹⁵⁹ attacks were allegedly carried out in hundreds of villages across the Maungdaw, Buthidaung, and Rathedaung Townships.¹⁶⁰

79. PILPG and Kaladan Press Network (hereinafter ‘Kaladan’)¹⁶¹ report that the focus of the clearance operations were village raids.¹⁶² Organisations that have

¹⁵⁷ See V.B.2 Alleged underlying acts constituting crimes against humanity; UNFFM Report, BGD-OTP-0001-0129, at 0308, paras 751-752, at 0310, para. 761, at 0314, para. 776, at 0315, para. 782; at 0319, para. 797, at 0323, para. 817, at 0323-0324, paras 821, 827, at 0327-0328, paras 837, 844, at 0329-0330, paras 847, 858, at 0332-0334, paras 869, 873, 878.

¹⁵⁸ UNFFM Report, BGD-OTP-0001-0129, at 0385, para. 1072; Fortify Rights Report, BGD-OTP-0001-2415 at 2453, 2557. The Chamber notes however that some references in the supporting material suggest that crimes were also committed in Buthidaung Township, UNFFM Report, BGD-OTP-0001-0129, at 0388.

¹⁵⁹ See “‘No one was left’/Death and Violence Against the Rohingya in Rakhine State, Myanmar’ (‘MSF Report’) prepared by Medecins Sans Frontieres. This report is based on six health surveys conducted by MSF in Cox’s Bazar district in November 2017, as well as qualitative analysis of testimonies (including of patients and their caretakers) collected by MSF since August. See MSF Report, BGD-OTP-0001-3412, at 3416.

¹⁶⁰ UNFFM Report, BGD-OTP-0001-0129, at 0308, para. 750; ‘Documentation of Atrocities in Northern Rakhine State’ BGD-OTP-0001-1226, at 1232 (‘USA Report’) prepared by Department of State, United States of America ; Fortify Rights Report, BGD-OTP-0001-2415, at 2446, 2454, 2473; MSF Report, BGD-OTP-0001-3412, at 3427; AI Report 2017, BGD-OTP-0001-1743, at 1761.

¹⁶¹ See ‘Rape by Command/Sexual violence as a weapon against the Rohingya’ (‘Kaladan Report’) prepared by Kaladan. While the Chamber is aware that Kaladan is the first Rohingya news agency, there is no further information before the Chamber about this organisation. This report is based on interviews conducted by the chief researcher Razia Sultana, who is also an advocate for Rohingya rights. From September to December 2017, interviews were conducted with 36 Rohingya refugees (including eight rape victims) to document the use of sexual violence by the Myanmar authorities during the 2017 clearance operation in northern Rakhine State. See Kaladan Report, BGD-OTP-0001-0695, at 0697, 0700, 0703, 0708.

¹⁶² PILPG Report, BGD-OTP-0001-3307, at 3331 to 3337, 3347; Kaladan Report, BGD-OTP-0001-0695, at 0717 to 0718.

conducted investigations in the area, including UNFFM, OHCHR, and Xchange¹⁶³ report that the village raids were allegedly perpetrated by *Tatmadaw* soldiers, often accompanied by local civilians,¹⁶⁴ and at times accompanied by the BGP.¹⁶⁵ According to the supporting material, these assaults were full-fledged military operations.¹⁶⁶

80. It is reported that most of the attacked villages were comprised almost exclusively of Rohingya.¹⁶⁷ It is further reported that in villages with mixed ethnic population, the non-Rohingya population remained unharmed.¹⁶⁸ According to the information submitted, including a report by Physicians for Human Rights (the ‘PHR’),¹⁶⁹ the attackers referred to the victims in a derogatory and discriminatory manner during the attacks.¹⁷⁰

81. The supporting material suggests that the village raids were carried out following the same pattern.¹⁷¹ Documents, including research by HRW¹⁷² report that,

¹⁶³ See ‘The Rohingya Survey 2017’ (‘Xchange Report’) prepared by Xchange. While the Chamber is aware that Xchange conducts research related to the migration of people, there is no further information before the Chamber about this organisation. Xchange’s research was intended to address the types of incident(s) committed against the Rohingya following the 25 August 2017 military operation, perpetrators of the incident(s), and migration patterns and dynamics of the exodus. Between 15 September and 15 October 2017, Xchange conducted 1,360 interviews with Rohingya refugees who had either experienced or witnessed incidents/abuses. See Xchange Report, BGD-OTP-0003-3651, at 3651, 3658.

¹⁶⁴ UNFFM Report, BGD-OTP-0001-0129, at 0308, 0315, 0319, 0324, 0328, 0333, 0354, 0365; ‘Massacre in Myanmar’ BGD-OTP-0001-0861, at 0865 (‘Reuters Report’) prepared by Reuters ; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0036, 0038; Xchange Report, BGD-OTP-0001-3651, at 3672.

¹⁶⁵ See also UNFFM Report, BGD-OTP-0001-0129, at 0439.

¹⁶⁶ PILPG Report, BGD-OTP-0001-3307, at 3348-3349.

¹⁶⁷ PILPG Report, BGD-OTP-0001-3307, at 3352.

¹⁶⁸ PILPG Report, BGD-OTP-0001-3307, at 3352, at 3356.

¹⁶⁹ See “‘Please Tell the World What They Have Done to Us’/The Chut Pyin Massacre: Forensic Evidence of Violence against the Rohingya in Myanmar’ (‘PHR Report’) prepared by Physicians for Human Rights. PHR uses science and medical professionals ‘to document and call attention to severe human rights violations around the world’. The findings of this report are based on interviews and forensic examinations with 25 survivors from the village of Chut Pyin in Rakhine State. See PHR Report, BGD-OTP-0001-3927, at 3932.

¹⁷⁰ PILPG Report, BGD-OTP-0001-3307, at 3351-3352; AI Report 2018, BGD-OTP-0001-2649, at 2718; Fortify Rights Report, BGD-OTP-0001-2415, at 2477-2478; PHR Report, BGD-OTP-0001-3927, at 3972; Reuters Report, BGD-OTP-0001-0861, at 0863, 0878; UNFFM Report, BGD-OTP-0001-0129, at 0385; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0039-0040, at 0043.

¹⁷¹ See also PHR Report, BGD-OTP-0001-3927, at 3933.

after entering villages, the *Tatmadaw* and other security forces often shot indiscriminately at villagers.¹⁷³ As a result of these indiscriminate shootings, numerous Rohingya, including many children,¹⁷⁴ were reportedly killed or injured, many whilst fleeing.¹⁷⁵

82. Several village raids reportedly resulted in mass killings with hundreds of Rohingya dead,¹⁷⁶ many of them allegedly buried in mass graves.¹⁷⁷ According to the supporting material, such massacres allegedly occurred at least in Min Gyi, Maung

¹⁷² HRW prepared a report titled ‘Massacre by the River/Burmese Army Crimes against Humanity in Tula Toli’ prepared by Human Rights Watch (‘HRW Report 2017’). This report is based largely on interviews conducted from September and October 2017 with 18 Rohingya survivors and witnesses to events in Tula Toli. The report also draws on a broader investigation whereby Human Rights Watch conducted interviews with 200 Rohingya refugees from September to November 2017. See HRW Report 2017, BGD-OTP-0001-1375 at 1389.

¹⁷³ PILPG Report, BGD-OTP-0001-3307, at 3360; AI Report 2016, BGD-OTP-0001-1675, at 1692-1694; UNFFM Report, BGD-OTP-0001-0129, at 0310, 0315, 0323, 0327, 0329, at 0330-0331, at 0333-0334, at 0338, 0386; AI Report 2018, BGD-OTP-0001-2649, at 2724-2726, at 2710; ‘Burma: Satellite Images Show Massive Fire Destruction’ BGD-OTP-0001-3438, at 3439-3440 prepared by HRW; PHR Report, BGD-OTP-0001-3927, at 3939, at 3960-3987; HRW Report 2017, BGD-OTP-0001-1375, at 1392; Fortify Rights Report, BGD-OTP-0001-2415, at 2476-2477; Kaladan Report, BGD-OTP-0001-0695, at 0735; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0041; Xchange Report, BGD-OTP-0001-3651, at 3676.

¹⁷⁴ UNFFM Report, BGD-OTP-0001-0129, at 0312, 0317, at 0320-0323, 0328, 0348; PHR Report, BGD-OTP-0001-3927, at 3941, at 3962-3963, at 3967, 3981; HRW Report 2017, BGD-OTP-0001-1375, at 1400; Fortify Rights Report, BGD-OTP-0001-2415, at 2477; “‘My world is finished’/Rohingya targeted in crimes against humanity in Myanmar’ BGD-OTP-0001-2861, at 2880 (‘[AI Report 2017a](#)’) prepared by Amnesty International; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0041; Xchange Report, BGD-OTP-0001-3651, at 3680-3682. *See also* ‘All of My Body was Pain/Sexual Violence against Rohingya Women and Girls in Burma’ (‘[HRW Report 2017a](#)’) prepared by HRW. In preparing this report, between 3 and 13 October 2017 HRW ‘conducted interviews with 52 women and girls who were the victims of serious violations during Burmese security forces operations in Rakhine State in late August and September 2017’. See HRW Report 2017a, BGD-OTP-0001-1437, at 1467-1469, at 1452.

¹⁷⁵ UNFFM Report, BGD-OTP-0001-0129, at 0310, 0329, 0323, at 0330-0331, at 0335, para. 884, at 0337, para. 891, at 0339, para. 900, at 0342, para. 917, at 0343, para. 918; Fortify Rights Report, BGD-OTP-0001-2415, at 2560-2562, at 2469-2480; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0350-0351; MSF Report, BGD-OTP-0001-3412, at 3421-3422; AI Report 2016, BGD-OTP-0001-1675, at 1691-1693; PHR Report, BGD-OTP-0001-3927, at 3938, 3960, at 3960-3987; AI Report 2018, BGD-OTP-0001-2649, at 2728; HRW Report 2017, BGD-OTP-0001-1375, at 1392; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0041.

¹⁷⁶ UNFFM Report, BGD-OTP-0001-0129, at 0337, para. 891.

¹⁷⁷ PILPG Report, BGD-OTP-0001-3307, at 3367; Reuters Report, BGD-OTP-0001-0861, at 0888; UNFFM Report BGD-OTP-0001-0129, at 0318; AI Report 2018, BGD-OTP-0001-2649, at 2726.

Nu, Chut Pyin, Gu Dar Pyin and Koe Tan Tauk village tract, Shila Khali and Tong Bazar.¹⁷⁸

83. The available information further suggests that, as part of the clearance operations, Rohingya houses in northern Rakhine were systematically burnt down,¹⁷⁹ leading to the death of numerous Rohingya¹⁸⁰ and the destruction of their homes.¹⁸¹ It is reported that where houses were not burned, they were destroyed by other means.¹⁸² According to UNOSAT, 392 settlements were affected between 25 August 2017 and 18 March 2018 and approximately 37,700 structures were destroyed.¹⁸³

84. Estimates in the supporting material indicate that 6,097 sexual and gender based incidents have been reported between 27 August 2017 and 25 March 2018.¹⁸⁴ The majority of the alleged rapes occurred during village raids.¹⁸⁵

¹⁷⁸ UNFFM Report, BGD-OTP-0001-0129, at 0314, para. 774 (750 individuals were allegedly killed in Min Gyi), at 0318, para. 796 (358 individuals were allegedly killed in Chut Pyin), at 0322, para. 815 (82 individuals were allegedly killed in Maung Nu), at 0326, para. 833 (243 individuals were allegedly killed in Gu Dar Pyin), at 0328, para. 843 (94 individuals were allegedly killed in Chein Khar Li, 94 in Koe Tan Kauk, resulting in a total of over 180 deaths in Koe Tan Kauk village tract); PILPG Report, BGD-OTP-0001-3307, at 3367. *See also* Fortify Rights Report, BGD-OTP-0001-2415, at 2469-2471, at 2476-2480 (Chut Pyin, Tula Toli and Maung Nu); PHR Report, BGD-OTP-0001-3927 to (Chut Pyin).

¹⁷⁹ UNFFM Report, BGD-OTP-0001-0129, at 0315, 0310, 0324, 0327, para. 838, at 0330, 0331, at 0333-0334, at 0354, 0384, 0387; AI Report 2016, BGD-OTP-0001-1675, at 1700-1703; PHR Report, BGD-OTP-0001-3927, at 3940, at 3960; AI Report 2018, BGD-OTP-0001-2649, at 2715; HRW Report 2017, BGD-OTP-0001-1375, at 1392; Reuters Report, BGD-OTP-0001-0861, at 0874, 0879; AI Report 2017a, BGD-OTP-0001-2861, at 2879, at 2898; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0036, 0041; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0368; Xchange Report, BGD-OTP-0001-3651, at 3674; Fortify Rights Report, BGD-OTP-0001-2415, at 2484, at 2569-2570; 'Burma: Military Burned Villages in Rakhine State' BGD-OTP-0001-3622, at 3622 ('HRW Report 2016') prepared by HRW.

¹⁸⁰ Fortify Rights Report, BGD-OTP-0001-2415 at 2453, 2473, 2476, at 2559, 2560; UNFFM Report, BGD-OTP-0001-0129, at 0327, para. 838, at 0329; AI Report 2018, BGD-OTP-0001-2649, at 2726, at 2728.

¹⁸¹ UNFFM Report, BGD-OTP-0001-0129, at 0315, 0329, 0331, 0340, para. 905, 0387; USA Report, BGD-OTP-0001-1226, at 1239; AI Report 2018, BGD-OTP-0001-2649, at 2715, 2725, 2728; Reuters Report, BGD-OTP-0001-0861, at 0874; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0036.

¹⁸² PILPG Report, BGD-OTP-0001-3307, at 3365.

¹⁸³ 'UNOSAT analysis of destruction and other developments in Rakhine State, Myanmar' BGD-OTP-0002-0537, at 0543 prepared by United Nations Institute for Training and Research. *See also* UNFFM Report, BGD-OTP-0001-0129, at 0352.

¹⁸⁴ 'Situation Report: Rohingya Refugee Crisis' March 2018 BGD-OTP-0001-1354, at 1365 prepared by Inter Sector Coordination Group. Another report shows that alone between late July until mid-September 2017 over 300 women and girls were raped, *see also* Kaladan Report, BGD-OTP-0001-0695, at 0728.

¹⁸⁵ AI Report 2016, BGD-OTP-0001-1675, at 1698. *See also* Kaladan Report, BGD-OTP-0001-0695, at 0719, 0736; Fortify Rights Report, BGD-OTP-0001-2415, at 2453, at 2564-2566; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0357-0358; UNFFM Report, BGD-OTP-0001-0129, at 0312, 0331.

85. The clearance operations allegedly also involved the systematic abduction of girls and women ‘of fertile age’ to military and police compounds and bases, where they were detained and raped for extended periods of time,¹⁸⁶ and often subsequently killed.¹⁸⁷ Most alleged rapes were reportedly carried out by the *Tatmadaw*, although members of the BGP, the MPF and local civilians equally committed these acts.¹⁸⁸

86. Although the majority of alleged rapes concern women and girls, the Chamber notes that the supporting material also refers to incidents of rape, forced nudity, forced witnessing of rape, sexual violence humiliation of men during the 2017 clearance operations,¹⁸⁹ in particular while in detention.¹⁹⁰ Moreover, the available information suggests that in some instances ‘Hijra’ individuals, who are defined as third-gender persons, transgender women, and intersex persons in South Asia who were assigned a masculine gender at birth’,¹⁹¹ were reportedly targeted for rape and sexual violence.¹⁹²

87. The supporting material further indicates that at least between August 2016 and October 2017, Myanmar authorities allegedly carried out mass arrests of Rohingya, often in order to assess whether they had ties with or knowledge of ARSA.¹⁹³ In particular men and boys between the age of 17 and 45,¹⁹⁴ at times as

¹⁸⁶ MSF Report, BGD-OTP-0001-3412, at 3429; USA Report, BGD-OTP-0001-1226, at 1231; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0355; Kaladan Report, BGD-OTP-0001-0695, at 0704, 0728; PILPG Report, BGD-OTP-0001-3307, at 3354-3355; UNFFM Report, BGD-OTP-0001-0129, at 0346-0347, 0350.

¹⁸⁷ UNFFM Report, BGD-OTP-0001-0129, at 0346.

¹⁸⁸ UNFFM Report, BGD-OTP-0001-0129, at 0346.

¹⁸⁹ ‘It’s Happening to Our Men as Well: Sexual Violence Against Rohingya Men and Boys’ BGD-OTP-0001-3443, in particular at 3450 (‘WRC Report’) prepared by Women’s Refugee Commission; HRW Report 2017a, BGD-OTP-0001-1437, at 1461; UNFFM Report, BGD-OTP-0001-0129 at 0343, at 0348; AI Report 2018, BGD-OTP-0001-2649, at 2683.

¹⁹⁰ WRC Report, BGD-OTP-0001-3443, at 3468-3469; UNFFM Report, BGD-OTP-0001-0129, at 0289.

¹⁹¹ WRC Report, BGD-OTP-0001-3443, at 3447.

¹⁹² WRC Report, BGD-OTP-0001-3443, at 3477.

¹⁹³ AI Report 2016, BGD-OTP-0001-1675, at 1695; Fortify Rights Report, BGD-OTP-0001-2415, at 2568; USA Report, BGD-OTP-0001-1226, at 1231; PILPG Report, BGD-OTP-0001-3307, at 3341; ‘Where There is Police, There is Persecution’ BGD-OTP-0002-0380, at 0383 prepared by PHR; AI Report 2018, BGD-OTP-0001-2649, at 2657, 2674; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0040, 0042; Xchange Report, BGD-OTP-0001-3651, at 3682.

¹⁹⁴ AI Report 2018, BGD-OTP-0001-2649, at 2717; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0355; AI Report 2016, BGD-OTP-0001-1675, at 1695; Fortify Rights Report, BGD-OTP-0001-2415, at 2568; PILPG Report, BGD-OTP-0001-3307, at 3335, 3347; UNFFM Report, BGD-OTP-0001-0129, at 0320, 0351, 0385; HRW Report 2017a, BGD-OTP-0001-1437, at 1470; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0036, 0040.

young as 15,¹⁹⁵ and influential community members such as village elders, religious leaders and teachers, were allegedly targeted.¹⁹⁶

88. According to available information, numerous Rohingya were killed or injured en route to Bangladesh.¹⁹⁷ MSF reports that 13.4% of violent deaths occurred during the period between their displacement from their village to their arrival in Bangladesh.¹⁹⁸

89. In light of the allegations described above, it is reported that over 700,000 Rohingya allegedly fled to Bangladesh.¹⁹⁹ This has been reported to be ‘one of the fastest refugee exoduses in modern times [which] has created the largest refugee camp in the world’.²⁰⁰

c. Alleged State policy

90. The Prosecutor submits that the alleged crimes against Rohingya were ‘carried out pursuant to a State policy to attack the Rohingya civilian population’. The Prosecution identifies the following as perpetrators of the crimes: the *Tatmadaw* (Myanmar defence forces comprising the army, navy and air force), the MPF and the BGP. The Prosecutor also submits that non-Rohingya civilians may have also been involved in the commission of the crimes. The Prosecutor avers that the existence of a policy is suggested by: (a) patterns of violence, (b) institutionalised oppression, (c) public statements of high officials, (d) and the failure to bring those responsible to justice or to prevent or deter further crimes.²⁰¹

91. According to the supporting material, members of the *Tatmadaw* led the 2016 and 2017 ‘clearance operations’.²⁰² Other security forces such as the BGP and the

¹⁹⁵ UNFFM Report, BGD-OTP-0001-0129, at 0320.

¹⁹⁶ OHCHR Report 2017a, BGD-OTP-0002-0337, at 0355-0356; AI Report 2016, BGD-OTP-0001-1675, at 1695; Fortify Rights Report, BGD-OTP-0001-2415, at 2568; PILPG Report, BGD-OTP-0001-3307, at 3335, at 3347; UNFFM Report, BGD-OTP-0001-0129, at 0320, 0351; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0036.

¹⁹⁷ PILPG Report, BGD-OTP-0001-3307, at 3366; UNFFM Report, BGD-OTP-0001-0129, at 0366.

¹⁹⁸ UNFFM Report, BGD-OTP-0001-0129, at 0366.

¹⁹⁹ By September 2018; UNFFM Report, BGD-OTP-0001-0129, at 0308, para. 751.

²⁰⁰ ICG Report 2017, BGD-OTP-0001-3527, at 3537.

²⁰¹ Request, paras 187-200.

²⁰² UNFFM Report, BGD-OTP-0001-0129, at 0513, para. 1521; HRW Report 2017a, BGD-OTP-0001-1437, at 1445-1446; Xchange Report, BGD-OTP-0001-3651, at 3671; USA Report, BGD-OTP-0001-1226, at 1227-1228, 1232.

MPF reportedly operated jointly with the *Tatmadaw* during clearance operations.²⁰³ The available information further suggests that non-Rohingya civilians (including Buddhist monks), may also have taken part in village raids conducted during the clearance operations.²⁰⁴ The supporting material suggests that they participated in consistent ways, carrying out specific functions.²⁰⁵

iii. Conclusion

92. Based on the above, the Chamber accepts that there exists a reasonable basis to believe that since at least 9 October 2016 widespread and/or systematic acts of violence may have been committed against the Rohingya civilian population, including murder, imprisonment, torture, rape, sexual violence, as well as other coercive acts, resulting in their large-scale deportation. Given that there are many sources indicating the heavy involvement of several government forces and other state agents, there exists reasonable basis to believe that there may have been a state policy to attack the Rohingya.

93. In reaching these conclusions, the Chamber has taken into account the allegations underpinning the 2016 and 2017 waves of violence, which took place on the territory of Myanmar. In this regard, the Chamber wishes to make the following clarification: while the Court is not permitted to conduct proceedings in relation to alleged crimes which do not fall within its jurisdiction, it ‘has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence’.²⁰⁶ In other words, the Court is permitted to consider facts which fall outside its jurisdiction in order to establish, for instance, the contextual elements of the alleged crimes. In the situation at hand, the Chamber has considered the information regarding alleged coercive acts (including alleged murder, forcible transfer of population, imprisonment, torture, rape or persecution) which have allegedly occurred entirely on the territory of Myanmar

²⁰³ OHCHR Report 2017a, BGD-OTP-0002-0337, at 0347-0349. *See also* AI Report 2017, BGD-OTP-0001-1743, at 1766; UNFFM Report, BGD-OTP-0001-0129, at 0513, para. 1521; HRW Report 2017a, BGD-OTP-0001-1437, at 1445-1446; HRW Report 2017, BGD-OTP-0001-1375, at 1384; AI Report 2017, BGD-OTP-0001-1743, at 1766; Xchange Report, BGD-OTP-0001-3651, at 3672.

²⁰⁴ Fortify Rights Report, BGD-OTP-0001-2415, at 2469-2472; PILPG Report, BGD-OTP-0001-3307, at 3349; UNFFM Report, BGD-OTP-0001-0129, at 0439.

²⁰⁵ UNFFM Report, BGD-OTP-0001-0129, at 0439.

²⁰⁶ Comoros Article 53 Decision, ICC-01/13-34, para. 17.

for the purpose of evaluating whether the Prosecutor has a reasonable basis to believe that an attack against the Rohingya civilian population pursuant to a State policy may have occurred. In other words, although the Court does not have jurisdiction over these alleged crimes *per se*, it considered them in order to establish whether or not the contextual elements of crimes against humanity may have been present.

2. *Alleged underlying acts constituting crimes against humanity*

94. In her Request, the Prosecutor submits that there is a reasonable basis to believe that, since 9 October 2016, members of the *Tatmadaw* jointly with the BGP and the MPF, with some participation of non-Rohingya civilians, and other Myanmar authorities, committed crimes within the jurisdiction of the Court, of which at least one element occurred on the territory of Bangladesh.²⁰⁷

95. According to the Prosecutor these include crimes against humanity of deportation (article 7(1)(d) of the Statute), other inhumane acts (article 7(1)(k) of the Statute), and persecution on grounds of ethnicity and/or religion (article 7(1)(h) of the Statute).²⁰⁸ She however states that further crimes may be identified during an authorised investigation.²⁰⁹

96. In the following, the Chamber will focus its assessment on the alleged crimes of deportation and persecution, in order to establish whether the threshold under article 15 of the Statute is met. If this is the case, there is no need to assess whether other crimes within the jurisdiction of the Court may have been committed, even though such alleged crimes could be part of the Prosecutor's future investigation.

i. Applicable Law

a. Deportation

97. Deportation or forcible transfer of a population, within the meaning of article 7(1)(d) of the Statute, are committed when:²¹⁰

²⁰⁷ Request, paras 1, 4-5.

²⁰⁸ Request, para. 75. *See further* paras 87 *et seq.*, 123 *et seq.* and 171 *et seq.*

²⁰⁹ Request, para. 86.

²¹⁰ Elements of Crimes, article 7(1)(d).

1. The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

98. The forcible displacement of individuals must occur without grounds permitted under international law. While it is for the Prosecutor to prove that this is the case,²¹¹ the Chamber notes that, under international law, deportation of a State's nationals as well as the arbitrary or collective expulsion of aliens is generally prohibited.²¹² International humanitarian law permits displacement in specific circumstances, where the security of the population or imperative military reasons so require.²¹³ However, this is not the case where the humanitarian crisis that caused the displacement is the result of an unlawful activity.²¹⁴

99. The lawful presence of a person must be assessed on the basis of international law,²¹⁵ and should not be equated with the requirement of lawful residence.²¹⁶

²¹¹ See also ICTY, Appeals Chamber, *Prosecutor v. Đorđević*, Judgement, 27 January 2014, IT-05-87/1-A, para. 705.

²¹² United Nations General Assembly, articles 12(3) and 13 of the International Covenant on Civil and Political Rights, 19 December 1966, 999 United Nations Treaty Series 17955 ('ICCPR'); Organization of American States, article 22 of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955 ('IACHR'); Organization of African Unity, article 12 of the African Charter on Human and Peoples' Rights, 10 June 1998 ('ACHPR'); Council of Europe, articles 2, 3 and 4 of the Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 16 September 1963, European Treaty Series No. 46; UNGA, article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, A/RES/45/158; United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, 27 May 2008, HRI/GEN/1/Rev.9 (vol. I), p. 191, para. 10; V. Chetail, 'Is There any Blood on my Hands? Deportation as a Crime of International Law' in *29 Leiden Journal of International Law* (2016), pp. 926-928 (international law generally prohibits collective expulsion of aliens, arbitrary deportation of aliens without due process, or expulsions which severely infringe basic rights).

²¹³ International Committee of the Red Cross, article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 United Nations Treaty Series 287; International Committee of the Red Cross, article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 08 June 1977, 1125 United Nations Treaty Series 606.

²¹⁴ ICTY, Appeals Chamber, *Prosecutor v. Stakić*, Judgement, 22 March 2006, IT-97-24-A, para. 287.

²¹⁵ See C. K. Hall and C. Stahn, 'Article 7: Crimes Against Humanity' in O. Triffterer and K. Ambos (ed.) *The Rome Statute of the International Criminal Court: a Commentary* (2015), pp. 263-264 (mn. 125) and 267 (mn. 128); R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2010), p. 250, fn. 129.

²¹⁶ ICTY, Trial Chamber, *Prosecutor v. Vujadin Popović et. al.*, Judgement, 10 June 2010, IT-05-88-T, paras 899-900. See also ICTY, Trial Chamber, *Prosecutor v. Zdravko Tolimir*, Judgement, 12 December 2012, IT-05-88/2-T, para. 797.

b. Persecution

100. Persecution, within the meaning of article 7(1)(h) and (2)(g)²¹⁷ of the Statute,²¹⁸ is committed, either through a single act or a series of acts,²¹⁹ when:

1. The perpetrator severely deprived, contrary to international law,²²⁰ one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.²²¹

101. Not every infringement of human rights amounts to persecution, but only a ‘severe deprivation’ of a person’s ‘*fundamental* rights contrary to international law’ (*emphasis added*). Fundamental rights may include a variety of rights, whether derogable or not, such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association and the right to education.²²²

²¹⁷ Article 7(2)(g) of the Statute stipulates: “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.

²¹⁸ Elements of Crimes, article 7(1)(h).

²¹⁹ [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 130.

²²⁰ Footnote 21 of the Elements of Crimes stipulates: ‘This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes’. Paragraph 6 of the General Introduction reads: ‘The requirement of “unlawfulness” found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes’.

²²¹ Elements of Crimes, article 7(1)(h). Footnote 22 of the Elements of Crimes stipulates: ‘It is understood that no additional mental element is necessary for this element other than that inherent in element 6’.

²²² [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 132. In relation to the right to education, the Chamber has regard to, *for example*, article 26 of the [1948 Universal Declaration of Human Rights](#); article 13 of the [International Covenant on Economic, Social and Cultural Rights](#), 16 December 1966, UNTS vol. 993, p. 3; articles 28-29 of the [Convention on the Rights of the Child](#), 20 November 1989, UNTS vol. 1577, p. 3; article 5(e)(v) of the [International Convention on the Elimination of All Forms of Racial Discrimination](#), 21 December 1965, UNTS vol. 660, p. 195; article 13 of the [Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights](#) “[Protocol of San Salvador](#)”, 17 November 1988, OAS Treaty Series, No. 69; article 17 of the [African Charter on Human and Peoples’ Rights](#); article 11 of the [African Charter on the Rights and Welfare of the Child](#), OAU Doc. CAB/LEG/24.9/49 (1990); article 2 of Protocol No. 1 to the (European) [Convention for the Protection of Human Rights and Fundamental Freedoms](#), 20 March 1952.

102. The targeted group or collectivity must be identifiable by any of the characteristics mentioned in article 7(2)(g) of the Statute. In assessing whether a group is identifiable, a mixed approach may be adopted,²²³ considering both objective and subjective criteria.

103. Based on objective considerations, an *ethnic* group may be defined as a group whose members share a common language and culture.²²⁴ A *religious* group may be defined as one ‘whose members share the same religion, denomination or mode of worship’.²²⁵ As regards the subjective criteria, the perception of the group by the

²²³ See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, [ICC-01/04-01/06-2359](#), paras 1010-1011; ICTR, Trial Chamber, *The Prosecutor v. Clément Kayishema et. al.*, [Judgment](#), 21 May 1999, ICTR-95-1-T, para. 98; ICTY, Trial Chamber, *The Prosecutor v. Radoslav Brđanin*, [Judgment](#), 01 September 2004, IT-99-36-T, paras 683-684; ICTR, *Semanza* Trial Judgment, ICTR-97-20-T, para. 317; ICTR, *Musema* Trial Judgment, ICTR-96-13-A, paras 161-63; ICTR, *Rutaganda* Trial Judgment, ICTR-96-3-T, paras 56-57; ICTR, *Kajelijeli* Trial Judgment, ICTR-95-1A-T, para. 811.

²²⁴ ICTR, Trial Chamber, *The Prosecutor v. Clément Kayishema et. al.*, [Judgment](#), 21 May 1999, ICTR-95-1-T, para. 98; ICTR, *Akayesu* Trial Judgment, ICTR-96-4-T, para. 513, both in the context of the crime of genocide.

²²⁵ ICTR, Trial Chamber, *The Prosecutor v. Clément Kayishema et. al.*, [Judgment](#), 21 May 1999, ICTR-95-1-T, para. 98; ICTR, *Akayesu* Trial Judgment, ICTR-96-4-T, para. 515, both in the context of the crime of genocide.

perpetrator²²⁶ as well as the perception and self-identification of the victims may be considered.²²⁷

ii. *Alleged facts*

a. Deportation

104. Pursuant to the information on the record, as a result of the clearance operations described above,²²⁸ many Rohingya were forced to flee to Bangladesh.²²⁹ In particular, the supporting material suggests that as a result of the 2016 wave of

²²⁶ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, [ICC-01/04-01/06-2359](#), paras 1010-11; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 133; Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on the confirmation of charges against Dominic Ongwen](#), 23 March 2016, ICC-02/04-01/15-422-Red, paras 25, 39, 52, 65; Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, [Decision on the confirmation of charges against Charles Blé Goudé](#), 11 December 2014, ICC-02/11-02/11-186, para. 123; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the confirmation of charges against Laurent Gbagbo](#), 12 June 2014, ICC-02/11-01-656-Red, para. 204; Pre-Trial Chamber III, *The Prosecutor v. Simone Gbagbo*, [Decision on the Prosecutor's Application Pursuant to article 58 for a Warrant of Arrest Against Simone Gbagbo](#), 2 March 2012, ICC-02/11-01/12-2-Red, para. 21; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-02/11-382-Red, para. 283; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373, para. 172; Pre-Trial Chamber I, *Situation in Libya*, [Decision on the 'Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi](#), Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-1, para. 65; ICTY, Trial Chamber, *The Prosecutor v. Goran Jelešić*, <http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf>, 14 December 1999, IT-95-10-T, para. 70; ICTR, Rutaganda Trial Judgment, ICTR-96-3-T, para. 56; ICTY, Appeals Chamber, *The Prosecutor v. Milorad Krnojelac*, [Judgment](#), 17 September 2003, IT-97-25-A, para. 185; ICTY, Trial Chamber, *The Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Stela"*, [Judgment](#), 31 March 2003, IT-98-34-T, para. 636.

²²⁷ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, [ICC-01/04-01/06-2359](#), paras 1010-1011; ICTR, Trial Chamber, *The Prosecutor v. Clément Kayishema et. al.*, [Judgment](#), 21 May 1999, ICTR-95-1-T, para. 98.

²²⁸ See section V.B.1.ii above in which the attack is analysed.

²²⁹ AI Report 2017, BGD-OTP-0001-1743, at 1765; AI Report 2017a, BGD-OTP-0001-2861, at 2887, 2899; OHCHR Report 2017a, BGD-OTP-0002-0337, at 0378-0379; HRW Report 2017, BGD-OTP-0001-1375, at 1383; UNFFM Report, BGD-OTP-0001-0129, at 0505. The supporting material contains several reports of NGOs who interviewed victims of violence in Myanmar, who subsequently fled to Bangladesh, for instance AI Report 2016, BGD-OTP-0001-1675, at 1692, at 1698; PHR Report, BGD-OTP-0001-3927, at 3960-3987; UNFFM Report, BGD-OTP-0001-0129, at 0326, 0388; AI Report 2018, BGD-OTP-0001-2649, at 2740; AI Report 2017a, BGD-OTP-0001-2861, at 2885; OHCHR Report 2017b, BGD-OTP-0001-0035, at 0042, at 0043-0045; Xchange Report, BGD-OTP-0001-3651, at 3663; Kaladan Report, BGD-OTP-0001-0695, at 0725.

violence, 87,000 Rohingya²³⁰ were forced to flee to Bangladesh,²³¹ while others have reportedly been internally displaced, residing in camps with severe restrictions on freedom of movement and access to healthcare, education and livelihoods.²³²

105. It is estimated that, following the 2017 wave of violence, approximately 700,000 Rohingya were forced to escape to Bangladesh.²³³ Only 10% of the original Rohingya population allegedly remains in northern Rakhine State.²³⁴ The supporting material further indicates that the majority of Rohingya arrived in Bangladesh during the peak of the 2017 clearance operations,²³⁵ between 25 August and 31 December 2017.²³⁶ A 2017 survey on Rohingya migration reports that of the 1,360 respondents interviewed following the 2017 wave of violence, 92% answered that they had suffered or witnessed a major incident prompting them to flee to Bangladesh.²³⁷

106. While reliable numbers of the current Rohingya refugee population in Bangladesh are not available to the Chamber, UNHCR reported that 907,199

²³⁰ UNFFM Report, BGD-OTP-0001-0129, at 0384, 0515; HRW Report 2017a, BGD-OTP-0001-1437, at 1456; AI Report 2017, BGD-OTP-0001-1743, at 1765; PHR Report, BGD-OTP-0001-3927, at 3937 (between October 2016 and July 2017); HRW Report 2017, BGD-OTP-0001-1375, at 1383; OHCHR Report 2017a, BGD-OTP-0002-0337 at 0342, fn. 7 (IOM reports 65,000 in its Cox's Bazar Situation Report of 5 January 2017. A 20 January 2017 update by the UN Office for the Coordination of Humanitarian Affairs ('OCHA') reported 66,000); Fortify Rights Report, BGD-OTP-0001-2415, at 2453 (74,000 fled to Bangladesh, 94,000 Rohingya were displaced); Kaladan Report, BGD-OTP-0001-0695, at 0710 (70,000).

²³¹ AI Report 2017, BGD-OTP-0001-1743, at 1765.

²³² HRW Report 2017, BGD-OTP-0001-1375, at 1383; HRW Report 2016, BGD-OTP-0001-3622, at 3624.

²³³ Fortify Rights Report, BGD-OTP-0001-2415, at 2484 (700,000); 'Situation Report Rohingya Refugee Crisis' November 2018 BGD-OTP-0001-0581, at 0582 (700,000) ('ISCG Report') prepared by Inter Sector Coordination Group; Kaladan Report, BGD-OTP-0001-0695, at 0703 (680,000); UNFFM Report, BGD-OTP-0001-0129, at 0505 (725,000); PHR Report, BGD-OTP-0001-3927, at 3929 (720,000). The supporting material further suggests that others have fled to Malaysia, Pakistan, Saudi Arabia, India, the United Arab Emirates, Thailand and Indonesia, PILPG Report, BGD-OTP-0001-3307, at 3326.

²³⁴ PILPG Report, BGD-OTP-0001-3307, at 3326.

²³⁵ USA Report, BGD-OTP-0001-1226, at 1230 suggests that the majority of killings and injuries took place in August and September 2017.

²³⁶ 'Bangladesh Refugee Emergency Population factsheet' BGD-OTP-0001-0647, at 0647 'UNHCHR Bangladesh factsheet') prepared by UNHCHR. *See also* Xchange Report, BGD-OTP-0001-3651, at 3666.

²³⁷ Xchange Report, BGD-OTP-0001-3651, at 3671.

Rohingya lived in Bangladeshi refugee camps in January 2019,²³⁸ with the largest camp in Cox's Bazar hosting over 700,000 people.²³⁹

107. According to the material submitted, most of the Rohingya interviewed in refugee camps in Bangladesh wish to return to Myanmar,²⁴⁰ but expressed concerns about their safety and citizenship rights.²⁴¹ Many stated that they would return only if they were treated with dignity, including respect for their religion, their ethnic identity, the return of their possessions, and a sustainable future for their children.²⁴²

108. In light of the above, a reasonable prosecutor could believe that coercive acts towards the Rohingya forced them to flee to Bangladesh, which may amount to the crime against humanity of deportation.

b. Persecution

109. The Chamber is further satisfied that the Prosecutor could reasonably believe that the alleged coercive conduct leading to the Rohingya's deportation to Bangladesh

²³⁸ UNHCHR Bangladesh factsheet, BGD-OTP-0001-0647, at 0647. *See also* ISCG Report, BGD-OTP-0001-0581, at 0581.

²³⁹ 'Oral update of the High Commissioner for Human Rights on Situation of human rights of Rohingya people /A/HRC/38/CRP/2' BGD-OTP-0002-0586, at 0587 ('UNHCHR Oral Report') prepared by UNHCHR.

²⁴⁰ In this regard, *see also* Xchange Report 2018, BGD-OTP-0002-1465, at 1502, an Xchange report providing that almost 97 per-cent of the displaced Rohingya indicated that they do not want to stay in Bangladesh permanently, and at 1470, indicating that in January and February 2018, a small number of respondents stated unequivocally that they would not return to Myanmar because of the traumas they had experienced there.

²⁴¹ PILPG Report, BGD-OTP-0001-3307, at 3326-3328; 'Bangladesh and Burma: the Rohingya Crisis/Second Report of Session 2017-19' BGD-OTP-0002-0640, at 0647-0677, paras 64-67 prepared by International Development Committee, House of Commons; UNHCHR Oral Report, BGD-OTP-0002-0586, at 0595. In this regard, *see also* Xchange Report 2018, BGD-OTP-0002-1465, at 1498, 1500, showing that, according to a survey among 1,703 Rohingya interviewed by Xchange between 15 April and 6 May 2018 across 12 official and unofficial refugee camps in Cox's Bazar, 69.8 per-cent did not believe that the Myanmar Government would eventually recognise their rights, while 97.77 per-cent feared returning to Myanmar, most of them fearing that they would face discrimination upon their return, 43 per-cent feared genocide/ethnic killing, 41 per-cent killing and 35 per-cent rape.

²⁴² PILPG Report, BGD-OTP-0001-3307, at 3326-3328; 'Bangladesh is Not My Country/The Plight of Rohingya Refugees from Myanmar' BGD-OTP-0002-0721, at 0774 prepared by HRW. In this regard, *see also* Xchange Report 2018, BGD-OTP-0002-1465, at 1469, a 2017 Xchange survey revealing that 78 per-cent of respondents indicated that they would return to Myanmar if the security, welfare and/or political situation improved, 16 per-cent indicated that they would not return under any circumstances and 6 per-cent indicated that they would return unconditionally; and at 1497, providing that 97.5 per-cent of the 1,703 Rohingyas interviewed between 15 April and 6 May 2018 across 12 official and unofficial refugee camps in Cox's Bazar stated that they would consider returning overall, but 99 per-cent mentioned that they would only go back if certain conditions were met, with the majority mentioning citizenship of Myanmar, with acknowledgment that they are Rohingya, freedom of movement and religion, and their rights and dignity restored. *See also* MSF Report, BGD-OTP-0001-3412, at 3432.

was directed against an identifiable group or collectivity.²⁴³ This is confirmed by victims representations that have indicated that they self-identify as belonging to the same group.²⁴⁴ Further, based on the available information the Prosecutor could reasonably believe that the targeting may have been based on ethnic and/or religious grounds. It is for the investigation to determine whether or not this was actually the case. The Chamber reiterates the need to obtain further clarity on the contours of the group-identity in question as well as the basis of the alleged targeting.

iii. Conclusion

110. Upon review of the available information, the Chamber accepts that there exists a reasonable basis to believe that since at least 9 October 2016, members of the *Tatmadaw*, jointly with other security forces and with some participation of local civilians, may have committed coercive acts that could qualify as the crimes against humanity of deportation (article 7(1)(d) of the Statute) and persecution on grounds of ethnicity and/or religion (article 7(1)(h) of the Statute) against the Rohingya population.

111. As noted above, the Chamber does not consider it necessary to form any view in relation to the facts identified as relevant to the Prosecutor's submissions concerning the alleged crime of other inhumane acts. Nevertheless, the Chamber stresses that the Prosecutor is not restricted to investigating only the events mentioned in her Request, much less their provisional legal characterisation.

C. Jurisdiction *ratione temporis*

112. Pursuant to article 11 of the Statute, the Court may exercise jurisdiction over crimes committed after the entry into force of the Statute or, where a State has become party to the Statute later, after the entry into force of the Statute for that State.

²⁴³ See also Section V.B.1 Alleged contextual elements of crimes against humanity.

²⁴⁴ See also Section III Preliminary consideration.

113. The Chamber notes that Bangladesh ratified the Rome Statute on 23 March 2010,²⁴⁵ and therefore, pursuant to article 126(2) of the Statute, the Statute entered into force for that State on 1 June 2010.

114. In light of the information submitted and allegations described above, the Chamber notes that alleged crimes have partially been committed on the territory of Bangladesh since at least 9 October 2016. Consequently, the Court may assert jurisdiction *ratione temporis* over those crimes.

VI. Admissibility

A. Complementarity

115. Article 17(1)(a)-(b) of the Statute provides, in the relevant part, that '[...] the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute'. The Chamber has taken note of the Prosecutor's submission in relation to the admissibility of potential cases arising out of the situation. Given the open-ended nature of the Request – there are at present no specific suspects or charges – and the general nature of the available information, the Chamber sees no need to conduct a detailed analysis, as this would be largely speculative.

116. Moreover, the Chamber has not received submissions from Myanmar on the issue of admissibility. Regardless of the question whether or not the Prosecutor should have notified Myanmar at this stage of the proceedings, the Chamber would receive and entertain an application by the Prosecutor, should Myanmar ask for deferral on the basis of article 18(2) of the Statute within one month of the issuing of the present decision. Moreover, specific challenges to the admissibility of specific cases can be brought at a later stage, pursuant to article 19 of the Statute.

²⁴⁵ See [website](#) of the Assembly of States Parties, 'Bangladesh'.

117. The Chamber therefore does not consider it necessary to assess complementarity at this point in time. It suffices to note that, on the basis of the currently available information, there is no indication that any potential future case would be inadmissible.

B. Gravity

118. With respect to the gravity of the situation at hand, the Chamber is of the view that the mere scale of the alleged crimes and the number of victims allegedly involved – according to the supporting material, an estimated 600,000 to one million Rohingya were forcibly displaced from Myanmar to neighbouring Bangladesh as a result of the alleged coercive acts²⁴⁶ – clearly reaches the gravity threshold.

C. The interests of justice

119. As regards the interests of justice, the Prosecutor has stated that she ‘has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice’²⁴⁷ and the Chamber has no reason to disagree with this assessment. This view is reinforced by the fact that, according to the Registry’s Final Consolidated Report, ‘all victims representations state that the victims represented therein want the Prosecutor to start an investigation in the Situation.’²⁴⁸

VII. The scope of the authorised investigation

120. The Prosecutor requests authorisation to proceed with the investigation into crimes allegedly committed since 9 October 2016, in the context of the 2016 and 2017 waves of violence which occurred in Rakhine State, Myanmar, and any other crimes which are sufficiently linked to these events, where at least one element of the crime occurred on the territory of Bangladesh.²⁴⁹ The Prosecutor makes a number of specific

²⁴⁶ ISCG Report, BGD-OTP-0001-0581 at 0582; UNFFM Report, BGD-OTP-0001-0129, at 0308, para. 751, at 0384-0388, paras 1069-1095, at 0407, para. 1174, at 0505, para. 1489; AI Report 2017, BGD-OTP-0001-1743 at 1752, 1765; HRW Report 2017, BGD-OTP-0001-1375 at 1383; Fortify Rights Report, BGD-OTP-0001-2415 at 2453; OHCHR Report 2017a, BGD-OTP-0002-0337 at 0342. *See also* Section IV Victims’ representations.

²⁴⁷ Request, para. 290.

²⁴⁸ ICC-01/19-22-Conf-AnxI, para. 29.

²⁴⁹ Request, ICC-01/19-7, paras 1, 20-21.

submissions regarding the material and temporal scope of the investigation, as follows.

121. Regarding the material scope, she submits that the incidents identified in her Request are ‘examples of relevant criminality within the situation’ and that the Chamber should not limit the scope of the authorised investigation to these acts or incidents, but should authorise an investigation into the situation as a whole.²⁵⁰ Similarly, she highlights that while the Request focuses on crimes allegedly committed by Myanmar authorities and some non-Rohingya civilians, she is aware of a number of acts of violence allegedly committed by ARSA. She submits that, if the authorisation to investigate is granted, she will keep these allegations under review, together with any allegations that an armed conflict may have existed between Myanmar and ARSA.²⁵¹

122. Regarding the temporal scope, the Prosecutor submits that the environment in Myanmar remains volatile and she specifically requests that the authorisation extend also to ‘any alleged crimes that may be committed and/or completed *after* the filing of [the] Request, provided that they occur within the context of the waves of violence [...] or are sufficiently linked to these events’.²⁵²

123. In what follows, the Chamber will set out the parameters of the authorised investigation in terms of territorial, material and temporal scope.

A. Territorial scope of the investigation (*ratione loci*)

124. The Chamber recalls its determination regarding jurisdiction *ratione loci* where it found that the Court can exercise jurisdiction where a part of the *actus reus* of a crime within the jurisdiction of the Court is committed on the territory of a State Party.²⁵³ Consequently, the Chamber authorises the commencement of the investigation for crimes committed at least in part on the territory of Bangladesh.²⁵⁴ Following this principle, the Prosecutor may also extend her investigation to alleged

²⁵⁰ Request, ICC-01/19-7, para. 22.

²⁵¹ Request, ICC-01/19-7, paras 4, 24.

²⁵² Request, ICC-01/19-7, para. 20 (emphasis in the original).

²⁵³ See above V.A.2 Conclusion.

²⁵⁴ For example if a person is shot on the territory of Myanmar and dies, as a result, on the territory of Bangladesh.

crimes committed at least in part on the territory of other States Parties, or States which would accept the jurisdiction of this Court in accordance with article 12(3) of the Statute, insofar as they are sufficiently linked to the situation as described in this decision.²⁵⁵

125. Considering that article 12(2) of the Statute is formulated in the alternative,²⁵⁶ the Prosecutor is authorised to investigate alleged crimes which fall within these parameters irrespective of the nationality of the perpetrators.²⁵⁷

B. Material scope of the investigation (*ratione materiae*)

126. The Chamber authorises the commencement of the investigation in relation to *any crime* within the jurisdiction of the Court committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State making a declaration under article 12(3) of the Statute, if the alleged crime is sufficiently linked to the situation as described in this decision.²⁵⁸ Noting the Prosecutor's submissions,²⁵⁹ the Chamber wishes to emphasise that the Prosecutor is not restricted to the incidents identified in the Request and the crimes set out in the present decision but may, on the basis of the evidence gathered during her investigation, extend her investigation to other crimes against humanity or other article 5 crimes, as long as they remain within the parameters of the authorised investigation.²⁶⁰ Similarly, the Prosecutor is also not restricted to the persons or groups of persons identified in the Request. The Chamber considers that, for the reasons that follow, such a limitation would be inconsistent with the object and purpose of article 15 of the Statute.

127. First, the Chamber recalls that the purpose of article 15, as envisaged by the drafters of the Statute, is to subject the Prosecutor's power to trigger the jurisdiction

²⁵⁵ Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, [Decision on the "Defence Challenge to the Jurisdiction of the Court"](#), 26 October 2011, ICC-01/04-01/10-451, para. 16.

²⁵⁶ Article 12(2) of the Statute provides that the Court may exercise jurisdiction if *either* (a) the conduct occurred on the territory of a State Party or on the territory of a State that has lodged a declaration under article 12(3) accepting the jurisdiction of the Court; *or* (b) the crime was committed by a national of one such State.

²⁵⁷ See Legal Representatives of Victims, [Representations of Victims from Tula Toli](#), 23 October 2019, ICC-01/19-19, paras 3, 50-76.

²⁵⁸ [Georgia Article 15 Decision](#), ICC-01/15-12, para. 64.

²⁵⁹ Request, ICC-01/19-7, para. 22; *see also* Legal Representatives of Victims, [Representations of Victims from Tula Toli](#), 23 October 2019, ICC-01/19-19, paras 2-3, 34.

²⁶⁰ [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 193; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 64; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 75.

of the Court *proprio motu* to judicial scrutiny, in order to prevent ‘unwarranted, frivolous, or politically motivated investigations’.²⁶¹ This objective is achieved as soon as it can be established, based on the available information, that there is a reasonable basis to believe that ‘*at least one crime* within the jurisdiction of the Court has been committed’ and the potential case(s) are admissible (article 53(1) of the Statute).²⁶² If and once this is established, it can no longer be said that an investigation would be unwarranted or politically motivated.

128. Second, the information available to the Prosecutor at the preliminary examination stage is necessarily limited, as her powers under article 15(2) compared to those provided for in article 54 at the investigation stage are themselves more limited.²⁶³ As a result, she is not in a position to identify all incidents, crimes and actors involved – and is not expected to do so.²⁶⁴ It is precisely the purpose of the investigation to discover proper evidence and establish the facts to enable a determination as to which crimes, if any, may be prosecuted.²⁶⁵ Limiting the Prosecutor to investigating the incidents and groups of persons that she has knowledge of at the preliminary examination stage would be contrary to her obligation under article 54(1)(a) of the Statute to ‘extend the investigation to cover all facts and evidence’, ‘[i]n order to establish the truth’.²⁶⁶

129. Third, the Chamber notes that, following a referral by the Security Council or a State Party in accordance with articles 13 and 14 of the Statute, the Prosecutor may investigate any crimes within the jurisdiction of the Court within the temporal and territorial/personal parameters of the situation as long they are ‘sufficiently linked’ to

²⁶¹ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, paras 17-18, 32; [Côte d’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, para. 21; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 3; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, para. 28.

²⁶² [Comoros Article 53 Decision](#), ICC-01/13-34, para. 13 (emphasis added).

²⁶³ [Comoros Article 53 Decision](#), ICC-01/13-34, para. 13; [Georgia Article 15 Decision](#), ICC-01/15-12, para. 63.

²⁶⁴ [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 27; [Côte d’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, para. 24.

²⁶⁵ [Georgia Article 15 Decision](#), ICC-01/15-12, para. 63 (*see also* paras 29, 34-35); [Comoros Article 53 Decision](#), ICC-01/13-34, para. 13.

²⁶⁶ [Georgia Article 15 Decision](#), ICC-01/15-12, para. 63; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, para. 205; *see also* Legal Representatives of Victims, [Representations of Victims from Tula Toli](#), 23 October 2019, ICC-01/19-19, para. 22.

the situation that triggered the jurisdiction of the Court through the referral.²⁶⁷ The same should apply to situations initiated pursuant to article 15 of the Statute.

130. Lastly, limiting the Prosecutor in her investigation to the incidents identified in the Request would have a negative impact on the efficiency of proceedings and the effectiveness of the investigation. It would require the Prosecutor to request authorisation every time she wishes to add new incidents to the investigation, making the article 15 procedure highly cumbersome. It would also put pressure on her to identify the incidents, crimes and actors involved as comprehensively as possible at the preliminary examination stage, even after she is satisfied that the requirements set out in article 53(1)(a)-(c) of the Statute are met. This will inevitably delay the request for authorisation and the investigation itself and would be highly inefficient with regard to the collection of evidence.

C. Temporal scope of the investigation (*ratione temporis*)

131. While the Prosecutor requests authorisation to initiate an investigation into crimes allegedly committed since 9 October 2016,²⁶⁸ the Chamber notes, based on the available information, that some crimes have allegedly been committed before 9 October 2016. Therefore, the Chamber authorises the commencement of the investigation for crimes allegedly committed on or after 1 June 2010, the date of entry into force of the Statute for Bangladesh. Further, the Prosecutor may extend the investigation into crimes allegedly committed at least in part on the territory of other States Parties after the date of entry into force of the Statute for those States Parties, insofar as the alleged crimes are sufficiently linked to the situation as described in this decision.

132. Regarding alleged crimes that have a continuous nature, the Prosecutor may extend her investigation even when such crimes commenced before 1 June 2010 (or the date of entry into force of the Statute for any other relevant State Party) in so far as the crimes continued after this date.

²⁶⁷ Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, [Decision on the “Defence Challenge to the Jurisdiction of the Court”](#), 26 October 2011, ICC-01/04-01/10-451, para. 16; *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, [Warrant of Arrest](#), 15 August 2017, ICC-01/11-01/17-2, para. 23.

²⁶⁸ Request, ICC-01/19-7, paras 1, 20.

133. Lastly, the Chamber finds that any crimes committed after the issuance of this decision remain within the temporal scope of the authorised investigation, as long as such crimes are sufficiently linked to the situation identified in the present decision.²⁶⁹

134. As a final remark, the Chamber considers that, considering the complexity of the situation, the specific circumstances of the victims, and the difficulties for the Trial Chambers to evaluate testimonial evidence when witnesses testify a long time after the events,²⁷⁰ it is advisable for the Prosecutor to use the dispositions of article 56 of the Statute to preserve evidence which may not be available for the purposes of a potential future trial or whose reliability may be undermined by lapse of time.

²⁶⁹ [Côte d'Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, para. 179; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, [Decision on the "Defence Challenge to the Jurisdiction of the Court"](#), 26 October 2011, ICC-01/04-01/10-451, para. 16; *see also* Legal Representatives of Victims, [Representations of Victims from Tula Toli](#), 23 October 2019, ICC-01/19-19, paras 2, 26, 48-49.

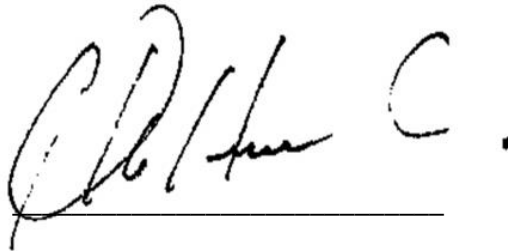
²⁷⁰ [Katanga Trial Judgment](#), ICC-01/04-01/07-3436-tENG, para.83.

For these reasons, the Chamber hereby


AUTHORISES the commencement of an investigation into the Situation in Bangladesh/Myanmar; and

ORDERS the VPRS to communicate the present Decision to the organisations and individuals who have submitted victims' representations to the Chamber in relation to the Situation in Bangladesh/Myanmar.

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

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

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