

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30 May 2018

PRE-TRIAL CHAMBER I

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

Public with Public Annexes A and B

**Submissions on Behalf of the Victims
Pursuant to Article 19(3) of the Statute**

Source: GLOBAL RIGHTS COMPLIANCE

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

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Detention Section

**Victims Participation and Reparations
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Other

INTRODUCTION

1. The Office of the Prosecutor of the International Criminal Court (“Prosecution”) have filed an exceptional request seeking a ruling on the question of whether the International Criminal Court (“Court”) may exercise its jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh (“Request”).¹
2. This is the first time the Prosecution has exercised its discretion to seek a ruling pursuant to Article 19(3).²
3. Following the Request, these submissions are filed on behalf of 400 Rohingya women and children (“Applicants”), pursuant to article 19(3) or, alternatively, article 68(3) of the Rome Statute (“Submission”). All of the Applicants are victims for the purpose of the Rome Statute.
4. The Applicants support the Request. However, it is submitted that the Prosecution’s approach to jurisdiction is unjustifiably narrow. It does not take into consideration the continuous nature of the crime of deportation under article 7(1)(d) and other crimes, namely persecution under article 7(1)(h), apartheid under article 7(1)(j) and genocide under article 6(c). The Court may exercise territorial jurisdiction under article 12(2)(a) to investigate and, if necessary, prosecute these four crimes that commenced in Myanmar but are also continuing to occur in Bangladesh.
5. In summary, it will be submitted on behalf of the Applicants that:
 - i. The Applicants are amongst a group of 670,000 victims of deportation as a crime against humanity, prohibited by article 7(1);
 - ii. By virtue of article 12(2)(a) and the principle of objective territoriality, the Court has jurisdiction to investigate deportation to Bangladesh, a State Party;
 - iii. Additionally, deportation, apartheid, persecution and genocide (pursuant to article 6(c)) are continuing offences that continue to be perpetrated on the territory of Bangladesh; and
 - iv. The Applicants are victims within the meaning of rule 85 and have standing in the Request by virtue of article 19(3) or, in the alternative, article 68(3).

¹ Application under Regulation 46(3), [Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute](#), 9 April 2018 (‘OTP Request’).

² [OTP Request](#), para. 6.

6. Accordingly, submissions will be presented under the following headings and in the following order:

- i. Relevant Procedural and Factual Background;
- ii. The Court has Jurisdiction Pursuant to the Principle of Objective Territoriality;
- iii. The Court has Jurisdiction Based on the Continuity of Crimes Perpetrated Against the Rohingya in Bangladesh; and
- iv. The Applicants' Right to Make Submissions and Relief Sought.

PROCEDURAL AND FACTUAL BACKGROUND

7. On 9 April 2018, the Prosecution submitted an application to the President of the Pre-Trial Division under regulation 46(3) ("Request") and requested a ruling on jurisdiction under article 19(3) of the Rome Statute in relation to the crime of deportation committed against the Rohingya population in Myanmar and Bangladesh.³

8. On 11 April 2018, the President of the Pre-Trial Division issued a decision assigning Pre-Trial Chamber I to adjudicate the Request.⁴

9. On 7 May 2018, Pre-Trial Chamber I issued a decision inviting the competent authorities of the People's Republic of Bangladesh to submit observations on the Request as *amicus curiae* pursuant to rule 103(1) of the Rules of Procedure and Evidence ("RPE").⁵

10. On 11 May 2018, Pre-Trial Chamber I decided to convene a status conference on 20 June 2018. The Court has ordered that the status conference will consider the Request in a closed session, in the presence of the Prosecutor only.⁶

SUBMISSIONS

³ [OTP Request](#).

⁴ Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, [Decision assigning the "Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute" to the Pre-Trial Chamber I](#), 11 April 2018.

⁵ Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, [Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103\(1\) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute"](#), 7 May 2018.

⁶ Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)/01/18, [Order Convening a Status Conference](#), 11 May 2018.

I. RELEVANT FACTUAL BACKGROUND

11. The Rohingya have faced many years of persecution and deprivation of fundamental rights within Myanmar. These acts emanate from the maintenance of an institutionalised regime of oppression and domination over the Rohingya by the Myanmar government. This system has escalated into a genocidal campaign, consisting of a variety of underlying acts, including killings, sexual and gender-based violence, torture, mutilations, destruction of property, and the arbitrary deprivation of liberty. The section below details the factual background relevant to this Submission established by credible open-source material.

A. The existence of an institutionalised regime of systematic oppression and domination over the Rohingya

12. The crimes consisting of the severe deprivation of fundamental human rights directed against the Rohingya in Myanmar exist within, and are enabled by, the institutionalised regime of systematic oppression and domination by the Myanmar authorities over the Rohingya minority.

13. Underpinning the apartheid regime is a legal system designed to ensure the Rohingya are denied basic rights as citizens. Indicative of this is the 1982 Citizenship Law which introduced a verification process that effectively denies the Rohingya citizenship based upon their ethnicity.⁷ As of August 2017, only 4,000 Muslims had been recognised as citizens or naturalised citizens, leaving a population of about one million Muslims stateless, and devoid of the rights associated with citizenship.⁸ This system of denying citizenship, specifically targeting the Rohingya, forces the Rohingya to settle for lesser forms of existence, which do not guarantee, for example, the right to stand for election or to own property, and which can in any event be arbitrarily revoked by the State.⁹ The law is discriminatory, contravenes the prohibition of arbitrary deprivation of nationality, and violates the right of every child to acquire nationality.¹⁰

14. There exists an abundance of legal measures contributing to the institutionalised nature of the Rohingya's oppression, including the 2014 census that prohibited the Rohingya

⁷ Amnesty International, [“Caged without a roof”: Apartheid in Myanmar’s Rakhine State](#), 2017 (‘Amnesty International 2017’), p. 28; United Nations General Assembly (‘UNGA’), Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary General, [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), UN Doc. A/HRC/32/18, 29 June 2016 (‘Situation of human rights of Rohingya Muslims and other minorities in Myanmar, 29 June 2016’), paras 19, 26.

⁸ Advisory Commission on Rakhine State, [Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State](#), August 2017, p. 26.

⁹ [Amnesty International 2017](#), p. 30.

¹⁰ [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 26.

from self-identifying, which led to their *de facto* exclusion from official figures,¹¹ and the expiry of “temporary identity certificates” held by some 700,000 stateless people in February 2015, leaving them with no valid identity document confirming their legal residence.¹² In addition, available information suggests that the denial of fundamental rights is continuously aggravated by attempts from the authorities to deprive the Rohingya of official documentation required for full citizenship and to safeguard their rights to remain,¹³ including the denial of birth certificates to Rohingya children,¹⁴ the maintenance of obstacles to registering new-born Rohingya, and the arbitrary removal of others from official records.¹⁵

15. Furthermore, the Myanmar authorities confine the Rohingya in villages, townships and displacement camps deliberately designed to segregate them from the rest of the civilian population within Myanmar.¹⁶ The Rohingya face restrictions on their freedom of movement,¹⁷ often enforced by arrest and prosecution,¹⁸ preventing, amongst other things, access to places they rely on for their livelihoods such as farmlands, fishing areas, and local markets,¹⁹ as well as health centres, clinics and hospitals.²⁰ Freedom of religion is also significantly restricted,²¹ and buildings belonging to the Rohingya community, including mosques and madrasas, have been demolished by the Myanmar authorities.²²

16. Annex A to this submission contains a list of demands agreed upon by the Shanti Mohila (Peace Women), a group to which the Applicants belong. It provides an illustration of the severe, unlawful and institutionalised oppression faced by the Rohingya. Before returning to Myanmar, the Applicants demand, *inter alia*, physical and mental safety, the official

¹¹ [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, paras 4, 27; [Amnesty International 2017](#), p. 30.

¹² [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 46; [Amnesty International 2017](#), p. 30.

¹³ [Amnesty International 2017](#), p. 34.

¹⁴ [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 44; [Amnesty International 2017](#), p. 34.

¹⁵ [Amnesty International 2017](#), pp. 34, 38; [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 44.

¹⁶ [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 10; [Amnesty International 2017](#), p. 48; UNGA, [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), UN Doc. A/HRC/34/67, 14 March 2017 (‘Report of the Special Rapporteur on human rights in Myanmar, 14 March 2017’), para. 35; UN Office of the High Commissioner for Human Rights (‘OHCHR’), [Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016](#), 3 February 2017 (‘Report of OHCHR mission to Bangladesh, 3 February 2017’), p. 6.

¹⁷ [Amnesty International 2017](#), p. 43; [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 28.

¹⁸ [Report of OHCHR mission to Bangladesh](#), 3 February 2017, p. 6.

¹⁹ [Amnesty International 2017](#), p. 12.

²⁰ [Amnesty International 2017](#), p. 60; [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 39.

²¹ [Amnesty International 2017](#), p. 12, 81.

²² [Report of the Special Rapporteur on human rights in Myanmar](#), 14 March 2017, para. 37; [Amnesty International 2017](#), p. 84.

recognition of the Rohingya identity, and an equality of rights, including, but not limited to, rights to education, the right to practice religion, the right to own property and possessions, the right to employment, freedom of movement, and a minimum standard of living.²³

B. The persecutory course of conduct committed against the Rohingya

17. The above system is enforced and enabled by a violent persecutory campaign involving the severe deprivation of fundamental rights, that includes the widespread and systematic perpetration of murder, torture, sexual and gender-based violence, and the forced displacement of hundreds of thousands of Rohingya across the border to Bangladesh. At all stages of this violent and continuous campaign, widespread and systematic sexual and gender-based violence is used to persecute and brutalise women, girls and families. Alongside the killing and other violence against men, women and children, these crimes are specifically being used to inflict conditions that are designed to attack the sexual autonomy of the victims, cause serious physical and mental harm, destroy family life, and otherwise to create conditions that undermine the ability of the Rohingyas to survive as a group.

18. Violence against the Rohingya has been particularly prevalent since 2010, leading to multiple deaths, destruction and mass displacement in Rakhine State.²⁴ Concurrently, Myanmar authorities have separated communities and displaced Rohingya have been forced into internally displaced person (“IDP”) camps where their movement is restricted.²⁵

19. Within the context of this widespread and systematic attack on the Rohingya population, in October 2016 a Rohingya armed group, known as the Arakan Rohingya Salvation Army (“ARSA”) conducted attacks against police posts, leading to a vicious military response by the Myanmar authorities that in the ensuing ten months led to 87,000 Rohingya fleeing to Bangladesh.²⁶ Similarly, on 25 August 2017, following an attack by ARSA on around 30 security posts in townships in northern Rakhine State, the Myanmar security forces launched a well-organised, coordinated and systematic attack against the Rohingya civilian population.²⁷

²³ See Annex A.

²⁴ [Amnesty International 2017](#), pp. 8, 22.

²⁵ [Amnesty International 2017](#), pp. 8, 22.

²⁶ [Amnesty International 2017](#), pp. 9, 23; [Report of OHCHR mission to Bangladesh](#), 3 February 2017, p. 14.

²⁷ [Amnesty International 2017](#), pp. 9, 24; UN Human Rights Council (“UNHRC”), [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), UN Doc. A/HRC/37/70, 9 March 2018 (‘Report of the Special Rapporteur on human rights in Myanmar, 9 March 2018’), para. 42; OHCHR, [Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh](#), 13-24 September 2017 (‘Mission report of OHCHR, 13-24 September 2017’), p. 3; UNHRC, [Statement by Mr. Marzuki Darusman](#), Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37th session of the Human Rights Council, 12 March 2018 (‘Statement by Mr Marzuki Darusman, 12 March 2018’).

20. Médecins Sans Frontières estimate that at least 6,700 Rohingya were killed between 25 August and 24 September 2017, including 730 children.²⁸ During the violence and the attacks in August 2017, villages, homes and property belonging to the Rohingya were destroyed and large sections of the Rohingya population were forcefully displaced from their dwellings and villages in northern Rakhine State.²⁹ Accounts of the attacks describe the Myanmar security forces surrounding or entering villages or settlements, separating out men and boys for execution or firing indiscriminately at Rohingya villagers,³⁰ and villages and homes being set ablaze by security forces.³¹

21. Sexual and gender-based violence has been a characterising and dominant theme of the violent campaign against the Rohingya. Even prior to August 2017, Rohingya women and young girls were regularly subjected to sexual violence.³² During the August 2017 attacks, whilst the men and boys were separated for execution, women and girls were systematically raped, as well as being tortured and killed.³³ Credible and consistent evidence demonstrates the targeting of young women, their separation from their families and their removal to unknown destinations.³⁴ The gender-based violence is not limited to adults. Girls as young as five to seven years old have been raped, often in front of their relatives, and sometimes by three to five men wearing military uniforms.³⁵

22. Further, the sexual violence appears designed to cause permanent and devastating injury and to kill. Reports outline that victims of sexual violence were often raped by more than one soldier, and instances have been documented of pregnant women being raped.³⁶ Penetration by objects such as rifles or bamboo sticks have been well documented.³⁷

23. As of March 2018, an estimated 836,210 Rohingya refugees had fled to Bangladesh,³⁸ the majority having arrived in Cox's Bazar following the August 2017 attacks.³⁹ The violent

²⁸ Médecins Sans Frontières, [Myanmar/Bangladesh: MSF surveys estimate that at least 6,700 Rohingya were killed during the attacks in Myanmar](#), 12 December 2017.

²⁹ [Mission report of OHCHR](#), 13-24 September 2017, p. 3; OHCHR, [Statement by Ms. Yanghee Lee](#), Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council ('Statement by Ms. Yanghee Lee, 12 March 2018'), 12 March 2018.

³⁰ [Mission report of OHCHR](#), 13-24 September 2017, pp. 3-4; [Statement by Mr Marzuki Darusman](#), 12 March 2018.

³¹ [Statement by Ms. Yanghee Lee](#), 12 March 2018.

³² [Report of OHCHR mission to Bangladesh](#), 3 February 2017, p. 20; [Situation of human rights of Rohingya Muslims and other minorities in Myanmar](#), 29 June 2016, para. 60.

³³ [Statement by Ms. Yanghee Lee](#), 12 March 2018; [Statement by Mr. Marzuki Darusman](#), 12 March 2018; [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), 9 March 2018, para. 48.

³⁴ [Mission report of OHCHR](#), 13-24 September 2017, p. 7.

³⁵ [Mission report of OHCHR](#), 13-24 September 2017, paras 7-8.

³⁶ [Report of OHCHR mission to Bangladesh](#), 2 February 2017, p. 21.

³⁷ [Report of OHCHR mission to Bangladesh](#), 2 February 2017, p. 21.

³⁸ Inter Sector Coordination Group ('ISCG'), [Situation Report: Rohingya Refugee Crisis](#), 25 March 2018, p. 1.

³⁹ ISGC, [Situation Report: Rohingya Refugee Crisis](#), 25 March 2018, p. 1.

acts committed against the Rohingya nonetheless continued throughout their journey to Bangladesh. Victims account fleeing to the nearby hills without any personal belongings, where they would encounter many dead bodies, and witness women, including young female children, being raped and mutilated in front of them.⁴⁰ Those fleeing the atrocities occurring in their villages were forced to walk for days without food or water, with pregnant women being forced to give birth along the way without any medical support.⁴¹ Available documentation suggests that the Myanmar military continued to harass, systematically rob and sexually abuse the Rohingya men, women and children on their route to Bangladesh.⁴²

24. Even at the crossing to Bangladesh, the Rohingya were faced with danger and the continued threat from the Myanmar security forces. On 29 September 2017 at least 14 refugees, among them nine children, drowned when a packed boat capsized in the Bay of Bengal.⁴³ Those refugees unable to pay for boat crossings had to walk across the border, attempt to swim or were stranded.⁴⁴

C. This conduct deliberately inflicts conditions of life calculated to bring about its physical destruction

25. As suggested by the authoritative sources outlined above, the Applicants submit that there is clear evidence that the violent campaign, along with the underlying regime of oppression and domination, was designed to create conditions of life that not only forced the Rohingya to submit or flee but to ensure against their survival. The below are illustrative examples of the conduct designed to cause the destruction of the Rohingya group.

26. First, a plethora of evidence points to the systematic killing of men, women and children. Throughout but not limited to the 2017 attacks, available documentation recounts the indiscriminate killing of the Rohingya population.⁴⁵ For example, the security forces shot indiscriminately at crowds gathered on the beach in Tula Toli killing many of them. Some of the villagers attempted to swim across the fast-moving river to seek safety, and over the course of the day, hundreds of men, women and children unable to flee to safety were gunned

⁴⁰ [Mission report of OHCHR](#), 13-24 September 2017, p. 4; Human Rights Watch, [“All of My Body Was Pain”: Sexual Violence Against Rohingya Women and Girls in Burma](#), 16 November 2017 (‘Human Rights Watch, 16 November 2017’).

⁴¹ [Mission report of OHCHR](#), 13-24 September 2017, p. 8; [Statement by Mr. Marzuki Darusman](#), 12 March 2018.

⁴² Amnesty International, [Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya, as Ethnic Cleansing Continues](#), February 2018 (‘Amnesty International, 2018’), p. 5; [Mission report of OHCHR](#), 13-24 September 2017, p. 8-9; [Statement by Mr. Marzuki Darusman](#), 12 March 2018.

⁴³ UNHCR, [100 days of horror and hope: A timeline of the Rohingya crisis](#), 10 December 2017; [Statement by Mr. Marzuki Darusman](#), 12 March 2018.

⁴⁴ Human Rights Watch, [Bangladesh Should Accept, Protect Rohingya Refugees](#), 23 November 2016.

⁴⁵ [Mission report of OHCHR](#), 13-24 September 2017, p. 3-4; [Statement by Mr. Marzuki Darusman](#), 12 March 2018.

down.⁴⁶ Particularly striking is the apparent systematic targeting of children. A Human Rights Watch Report details children being thrown into the river or nearby fires, hacked to death by machetes and beaten to death in front of their mothers.⁴⁷

27. Second, available information points to the separation of men and boys in order to facilitate their execution⁴⁸ and to enable sexual violence on women and girls (see below). For example, in Tula Toli, soldiers and armed Rakhine villagers surrounded the Rohingya families on the beach and began to separate the women and children from the men, the killing of whom continued for many hours.⁴⁹ One Applicant describes that: “[t]he military then tied all the men and boys up and started beating them with a large piece of wood. The boys would scream out in pain. After they beat them they shot them”.⁵⁰

28. Third, in addition to the separation of men from the women and children, systematic sexual and gender-based violence has been perpetrated against the women and young girls suggestive of an intent to destroy not only the sexual autonomy of the women but the physical and mental wellbeing of the women and girls so as to undermine their ability to have any family life, including bearing children and to ensure their destruction as a group. A Human Rights Watch Report evidences the widespread rape against women and children, accompanied by aggravating acts of violence, humiliation and cruelty.⁵¹ Credible and consistent information demonstrates the use of rape, including gang rape, and other forms of sexual violence designed to cause severe physical injuries, including the mutilation of parts of the victim’s bodies, including genitalia.⁵² Instances of sexual slavery in the northern Rakhine state have also been recorded.⁵³ In Tula Toli, hundreds of women and children were taken to empty houses in the village, where they were raped or subjected to other forms of sexual violence, and then beaten or cut with knives or machetes until they were dead or unconscious, after which soldiers set fire to the houses with the women and children inside.⁵⁴ One of the current Applicants describes that: “10 of our young girls were caught by the military. The

⁴⁶ Human Rights Watch, [Massacre by the River – Burmese Army Crimes against Humanity in Tula Toli](#), 19 December 2017 (‘Human Rights Watch, 19 December 2017’), p. 14.

⁴⁷ [Human Rights Watch](#), 19 December 2017, p. 21; [Statement by Ms. Yanghee Lee](#), 12 March 2018; [Statement by Mr. Marzuki Darusman](#), 12 March 2018.

⁴⁸ [Statement by Ms. Yanghee Lee](#), 12 March 2018.

⁴⁹ [Human Rights Watch](#), 19 December 2017, pp. 13-15.

⁵⁰ Applicant 004.

⁵¹ [Human Rights Watch](#), 16 November 2017.

⁵² [Statement by Mr Marzuki Darusman](#), 12 March 2018; [Mission report of OHCHR](#), 13-24 September 2017, p. 8.

⁵³ [Amnesty International](#), 2018, p. 5.

⁵⁴ [Human Rights Watch](#), 19 December 2017, p. 21.

military cut the girls and beat them. Military cut their breasts and on the vagina. Step by step. After they cut the girls they beheaded them”.⁵⁵

29. Finally, available reports describe other conditions of life designed to destroy the ability of the Rohingya to survive. For example, the Myanmar authorities have taken a number of measures aimed at starving the Rohingya, including the destruction of essential items such as rice and oil,⁵⁶ and restricting access to agricultural lands, markets and humanitarian aid, and stealing livestock belonging to the Rohingya.⁵⁷ The Myanmar authorities have also engaged in the bulldozing of entire villages of burned Rohingya houses, including the surrounding trees and other vegetation.⁵⁸

D. The continuing persecutory and oppressive conduct to ensure the Rohingya are forced to stay in Bangladesh and be destroyed

30. The Myanmar authorities have designed a violent and oppressive campaign that appears designed to destroy the ability of the group to survive. An essential component of these conditions rests upon deportation wherein the most challenging physical and mental circumstances are deliberately created and inflicted in a manner calculated to complete the destructive campaign.

31. Apart from the ongoing apartheid regime and genocidal campaign extant in Myanmar, the government continues to act to prevent any return of the Rohingya to their homes. The Myanmar authorities have laid mines along the border with Bangladesh.⁵⁹ As observed by a senior UN human rights official in March 2018, “[s]afe, dignified and sustainable returns are impossible under the current conditions... given the immediate threat of almost certain killings, rape and other forms of violence; the impossibility of living at the places of origin, given that all sources of food and livelihood have been destroyed or declared off-limits for most of the remaining Rohingya; and the apparent absence of any will to address the root causes of the violence”.⁶⁰

⁵⁵ Applicant 007.

⁵⁶ [Report of OHCHR mission to Bangladesh](#), 2 February 2017, p. 34.

⁵⁷ [Amnesty International](#), 2018, p. 2; [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), 9 March 2018, paras 44, 51.

⁵⁸ Amnesty International, [Myanmar: Military land grab as security forces build bases on torched Rohingya villages](#), 12 March 2018.

⁵⁹ UNHRC, Special Session of the Human Rights Council on the human rights situation of the Rohingya Muslim population and other minorities in the Rakhine State of Myanmar, [Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein](#), 5 December 2017.

⁶⁰ UN News, [No other conclusion, ethnic cleansing of Rohingyas in Myanmar continues – senior UN rights official](#), 6 March 2018.

32. In sum, the Myanmar government continues to act to ensure the maintenance of the apartheid regime in Myanmar through a persecutory and genocidal campaign that spans both Myanmar and Bangladesh. Having subjected the Rohingya's to the most severe deprivation of their rights within Myanmar, the Myanmar authorities continue to act to subject the Rohingyas who have fled to Bangladesh to conditions that prevent any recuperation, recovery or enjoyment of their fundamental rights.

33. By continuing this campaign and condemning the Rohingyas to a choice between genocidal and persecutory violence or refugee camps where recovery from extreme violence is impossible, the Myanmar authorities maintain and continue their attack on the Rohingya in both Myanmar and Bangladesh. The systematic killing of men, women and children, the targeted and deliberate use of sexual and gender-based violence and the maintenance of the survivors in crowded refugee camps without any access to their homes and lacking appropriate physical and mental health assistance are key features of this design. Each of the crimes of deportation, apartheid, persecution and genocide plays its part in the brutalising and continuous campaign.

II. THE COURT HAS JURISDICTION PURSUANT TO THE PRINCIPLE OF OBJECTIVE TERRITORIALITY

A. Summary

34. The Request sets out a comprehensive case that the Court may exercise objective territorial jurisdiction under article 12(2)(a) when persons are deported from the territory of a State that is not a party to the Rome Statute directly into the territory of a State that is a State Party.

35. Endorsing that analysis, the Applicants submit that:

- i. By virtue of article 12, territorial jurisdiction is a precondition to the exercise of the Court's jurisdiction;
- ii. Article 12(2)(a) provides that territorial jurisdiction to prosecute an article 5 crime will engage when the "conduct in question" occurs in a State Party's territory;
- iii. The provisions of article 12(2)(a) must be understood in the context of established public/customary international law principles that hold that territorial jurisdiction engages when one element (or part) of the conduct in question is consummated within the territory of a State Party (pursuant to the principles of objective or subjective territoriality);

- iv. Deportation requires, as an essential element, displacement of a victim “to another State” or, put differently the “crossing of an international border”. This is part of the conduct in question for the purposes of article 12(2)(a);
- v. The act of crossing an international border is not consummated until the victims enter into the state of destination. The evidence demonstrates that the State of destination for these purposes is Bangladesh; and
- vi. Consequently, part of the conduct in question occurs in the territory of Bangladesh, a State Party, and the jurisdiction of the Court is engaged.

B. Deportation is not consummated until the victims are forcibly displaced “to another State”

36. Footnote 13 of the Elements of Crimes states that “[d]eported or forcibly transferred” is interchangeable with “forcibly displaced”. Whilst this could be understood, in isolation, to draw equivalence between the two offences, read in context it is clear that the interchangeable nature of the two applies solely to the acts of displacement. It does not extend to the locations to which the victims are displaced as the provision of two alternative possibilities demonstrates (namely, “another location or State”).

37. Deportation is an inherently transnational crime, which cannot be completed in one State alone. This is well established in international criminal law.⁶¹ It belongs to a category of offences that represent the law’s response to trans-border criminality, recognising a need to prohibit it in a manner that reflects as closely as possible the particular interests infringed.

38. According to the Elements of Crimes,⁶² the crimes of deportation and forcible transfer require that:

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.⁶³

⁶¹ See for example, *Prosecutor v. Stakić*, Case No. IT-97-24-A, [Judgment](#), 22 March 2006 (‘*Stakić* Appeal Judgment’), para 278, 288-302, 317 (in particular, para 278: “[t]he Appeals Chamber is of the view that the *actus reus* of deportation is the forced displacement of persons [...] from the area in which they were lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border”); *Prosecutor v. Prlić, et. al.*, Case No. IT-04-74-T, [Judgment](#), 29 May 2013 (‘*Prlić* Trial Judgment’), para. 47 (“[u]nlike forcible transfer, which may be carried out entirely within the border of a single state, deportation is by definition effected by crossing a border.”); *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, [Judgment](#), 17 March 2009 (‘*Krajišnik* Appeal Judgment’), para. 304.

⁶² See Rome Statute, article 21(a): the Court must primarily apply the Statute, Elements of Crimes and the Rules of Procedure and Evidence.

⁶³ Elements of Crimes, article 7(1)(d), Crimes against humanity of deportation or forcible transfer of population, element 1 [footnotes omitted].

39. The Elements of Crimes therefore recognize two distinct offences: forcible transfer and deportation. A reading of this element against the legal and purposive framework within which it was drafted not only supports this distinction, it indicates that the point of difference is that deportation requires displacement “to another State”, whereas forcible transfer merely requires displacement to another “location”.

40. It is submitted that the disjunctive juxtaposing of forcible transfer with deportation, reflects an intention of the drafters to recognize that though many of the rights infringed are common between the two, they are not equivalent. In light of the distinct misconduct that these two prohibitions were intended to address, that distinction must be preserved.⁶⁴

41. International criminal law has long recognised the distinction between forcible transfer and deportation. As the Prosecution demonstrate, the ICTY has held and repeatedly affirmed that the distinction rests upon the requirement that deportation involves “the forced displacement across a *de jure* State border or, in certain circumstances, a *de facto* border”.⁶⁵

42. The evolution of the distinction reflects the need to address the infringement of a distinct set of values. Credible and consistent evidence suggests that the Applicants have suffered from acts perpetrated against them in the territory of Myanmar that engages a compendium of other crimes against humanity, as well as genocide.⁶⁶ However, similarly relevant and probative evidence also establishes that the Applicants, joined by hundreds of thousands of other victims, were forced from their homes, out of their own country and into a foreign State.⁶⁷ Criminal responsibility for the infringement of that distinct set of rights cannot be recognized, unless the distinguishing feature of deportation - the displacement to another State - is recognized as an essential element of the offence.

43. Society has long been afflicted by transnational crime. Legislators have responded to it by enacting prohibitions that specifically reflect the transnational character of those crimes. In

⁶⁴ United Nations, [Vienna Convention on the Law of Treaties](#) (signed on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331, articles 31 and 32; *cited in* [OTP Request](#), para. 21.

⁶⁵ [OTP Request](#), para. 16; *citing*: [Stakić Appeal Judgment](#), para. 278, *see also* paras 288-302, 317 (discussing the distinction between deportation and forcible transfer and dismissing the sole decision taking the opposite view that no cross-border transfer is required for deportation); [Prlić et al. Trial Judgment](#), para. 47; [Krajišnik Appeal Judgment](#), para. 304; *contra*, *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, [Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence](#), 20 October 1995 (‘*Nikolić* Rule 61 Decision’), para. 23. *See further*, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, [Judgment](#), 17 October 2003 (‘*Simić et al.* Trial Judgment’), paras 122-123; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, [Judgment](#), 15 March 2002, paras. 474-476 (also rejecting the approach of the *Nikolić* Rule 61 Decision).

⁶⁶ *See* paras 12-33.

⁶⁷ *See for example*, ISGC, [Situation Report: Rohingya Refugee Crisis](#), 25 March 2018, p. 1; [Statement by Mr. Marzuki Darusman](#), 12 March 2018.

many jurisdictions, the criminalization of kidnapping,⁶⁸ child abduction,⁶⁹ drug trafficking,⁷⁰ smuggling of migrants,⁷¹ and human trafficking⁷² all require, as an objective element of the offending conduct, the crossing of an international border into another State (whether as an express requirement or as an inevitable consequence of such a requirement).

44. These laws cannot be faulted for permitting the precipitating conduct (e.g., the seizure of a hostage or the selling of drugs) within the confines of national borders. It is also prohibited. However, the transnational character of these offences recognises the aggravated conduct and harm caused by perpetrating that conduct in a trans-border context, or with a trans-border objective or result.

45. Equally, there can be no suggestion that the mere ejection from a State (rather than into another state) is sufficient to fulfil the requirements of deportation. Neither the phraseology employed by the Elements of Crimes - displacement “to another State” - nor that of the ICTY- “enforced displacement across a *de jure* State border” - permits this strained construction. On their ordinary meanings, both require transfer from one State to another. In any event, such an interpretation would fail to deter the additional and distinct harm that deportation is specifically enacted to address.

46. As the Prosecution correctly argue, and as borne out by the facts underpinning the Request,⁷³ the recognition of the “different values protected by the two crimes [of forcible transfer and deportation]” is critical.⁷⁴ The legally protected interests engaged on the facts concern “the right of individuals to live in the particular State in which they are lawfully present - which means living within a particular culture, society, language, set of values and

⁶⁸ In Canada, article 279 of the [Criminal Code \(R.S.C., 1985, c. C-46\)](#) requires that the victim “be unlawfully sent or transported out of Canada against the person’s will”.

⁶⁹ In the United Kingdom, the offence of child abduction, contrary to section 1 of the [Child Abduction Act 1984, Chapter 37](#) makes it an offence to “take[...] or send [...] child out of the United Kingdom without the appropriate consent.”

⁷⁰ In Canada, section 6 of the [Controlled Drugs and Substances Act \(S.C. 1996, c.19\)](#) states that “no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI”. In the United States, Title 21. Food and Drugs prohibits the import and export of controlled substances; [21 U.S.C. 952 - Importation of Controlled Substances](#): “[i]t shall be unlawful to import into the customs territory of the United States from any place outside thereof...any controlled substance...any narcotic drug...”; [21 U.S.C. 953 - Exportation of Controlled Substances](#): “[i]t shall be unlawful to export from the United States any narcotic drug in schedule I, II, III, or IV...”.

⁷¹ UNGA, [Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime](#) (adopted on 15 November 2000 and entered into force on 28 January 2004) 2241 UNTS 507, article 3 and 6. Article 3 defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” Article 6 provides that each State Party shall adopt legislation and other measures to establish the smuggling of migrants as a criminal offence.

⁷² In the United Kingdom, the [Modern Slavery Act 2015, Chapter 30](#) makes it an offence for a person to arrange or facilitate the travel of another person (“V”) with a view to V being exploited. It defines “travel” as “... (a) arriving in, or entering, any country, (b) departing from any country, (c) travelling within any country.”

⁷³ See paras 12-33.

⁷⁴ [OTP Request](#), para. 17.

legal protections” and being “forced to live in a foreign State, subjected to foreign laws and authorities, and with no role in the political decision-making process. They will not only be deprived of a home and immediate community but will be forced to become refugees, with all the consequences that such status entails”.⁷⁵

i. The Court’s jurisdiction engages when part of the “conduct in question” is perpetrated on the territory of a State Party.

47. Article 12(2)(a) grants the Court territorial jurisdiction to prosecute article 5 crimes. It provides that:

[...] the Court may exercise jurisdiction 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:

The State on the territory of which the conduct in question occurred [...].

48. Accordingly, the Court may exercise jurisdiction where the “conduct in question” occurred within the territory of one of the State Parties to the Rome Statute.

49. As the Prosecution rightly observe, the notion that a State may exercise its jurisdiction in circumstances where only part of the criminal conduct in question occurs on its territory, is not controversial. Principles of objective and subjective territoriality are well established expressions of this concept. Indeed, the ability to prosecute inherently trans-national crimes, relies on the concept. As discussed above, these are crimes that are incapable of being perpetrated completely on the territory of a single State. Therefore, for a State to claim jurisdiction to prosecute transnational crimes it must be able to do so where only part of the criminal conduct in question is perpetrated on its territory. This is true of deportation. The process of enacting the offence of deportation within the Rome Statute itself evidences an intention on the part of the drafters that the principles of objective/subjective territoriality apply and be read into article 12(2)(a).

50. The Request comprehensively sets out the rationale for and the principles underpinning objective territoriality, as part of the principles and rules of international law.⁷⁶ For the reasons given, it is submitted that article 12(2)(a) must be read as being consistent with this principle of international law.

51. As demonstrated above, the crime of deportation involves the displacement of a population “to another State”. The arrival of the victims in a second State is an essential element of deportation, distinguishing it from forcible transfer. Therefore, part of the “conduct

⁷⁵ [OTP Request](#), para. 17.

⁷⁶ [OTP Request](#), paras 31-42.

in question” is perpetrated on a State other than the State of origin. On the facts of this case, the State of origin is Myanmar and the State of destination is Bangladesh. Since Bangladesh is a State Party, the Court has jurisdiction pursuant to article 12(2)(a).

ii. “Conduct in question” cannot be distinguished from “circumstance” and the relevant conduct encompassed by deportation includes the crossing of an international boundary

52. In the General Introduction to the Elements of Crimes, it is stated that:

The elements of crimes are generally structured in accordance with the following principles:

(a) As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;

(b) When required, a particular mental element is listed after the affected conduct, consequence or circumstance;

[...]

53. It may be that, read in isolation, it is possible to construe this paragraph as seeking to distinguish between “conduct”, “consequences” and “circumstances” with the consequence that for the purposes of deportation the transfer of the population “to another State” should be considered a mere “consequence” rather than the required “conduct”.

54. It is submitted that, understood in context, such a construction would be overly formalistic and, does not stand up to scrutiny. The Court has already cautioned against an overly formalistic reading of the terms of Statute, finding that certain provisions in the Statute “are written in very general or ambiguous terms and that it is not possible to clearly answer the question, by simply reading them, in the French or English version, and referring to their ordinary meaning.”⁷⁷

55. Moreover, this approach would fail to appreciate that the Rome Statute employs the word “conduct” in a variety of different contexts that suggest different meanings.⁷⁸ Any

⁷⁷ *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, [Reasons for the Oral Decision on the Motion of Challenging the Admissibility of the Case \(Article 19 of the Statute\)](#), 16 June 2009, para. 36.

⁷⁸ For example, there are references to conduct “underlying” a crime, which would not necessarily imply both the essential acts and consequences underpinning a crime, as well as to conduct “constituting” which, it is submitted, would impliedly incorporate both acts and consequences. See for example, Rome Statute, article 20(1): “no person shall be tried before the Court with respect to *conduct which formed the basis of crimes* for which the person has been convicted or acquitted”; article 22(1): “[a] person shall not be criminally responsible under this Statute unless the conduct in question *constitutes*, at the time it takes place, a crime within the jurisdiction of the Court”; article 24(1): “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute”; article 31(1)(b) and (d): “conduct *constituting a crime*” and “conduct which is alleged to constitute a crime” respectively; article 78(2) refers to “conduct *underlying the crime*”; article 90: “conduct which *forms the basis of the crime*” and “conduct other than that which constitutes the crime”; and article 101: “the conduct or course of conduct *which forms the basis of the crimes* for which that person has been surrendered.”

attempt to transpose a meaning into article 12(2)(a) merely on the basis of its usage in the General Introduction to the Elements of Crimes, must necessarily be flawed.

56. As may be seen, first, the purpose of paragraph 7 of the General Introduction to the Elements of Crimes is to set out the general order in which the elements will be described. Conduct is generally the first element. In the context of deportation, the requirement that a population is removed “to another State” is contained within the first element consistent with movement equating to “conduct”.

57. Second, distinguishing between essential elements describing consequences and those describing conduct would, it is submitted, produce irrational and unintended results. For example, combatants discharging munitions in the territory of a non-State Party with the intention and effect of assaulting a civilian population across the border in the territory of State Party would escape prosecution and the victims of the assault, concomitantly, would be denied the value of the Court’s jurisdiction. This would frustrate the intention of State Parties who sign the Rome Statute, in part, to seek the Court’s protective mantle in exchange for a delegation of their criminal authority in favour of the Court’s jurisdiction. The cross-border shooting to which the Prosecution make reference is an eloquent illustration of the arbitrary consequence of such a construction.⁷⁹

58. Finally, years after the Rome Conference, the States Parties still understood the problematic consequences of equating conduct solely with the acts and omissions of the perpetrator, excluding their consequences. In the Report of the Special Working Group on the Crime of Aggression of 2008, the States Parties discussed the nature of the crime of aggression in relation to the territorial jurisdiction of the Court under article 12(2)(a) and specifically the need to prosecute the crime of aggression not only where the criminal acts of aggression were carried out, but on the territory in which the consequences of those acts were realised. It concluded that:

Given that the conduct of a leader responsible for the crime of aggression would typically occur on the territory of the aggressor State, the question was raised whether the crime could also be considered to be committed where its consequences were felt, namely on the territory of the victim State. The answer to that question had important consequences for the application of article 12, paragraph 2 (a), which linked the Court’s jurisdiction to “the State on the territory of which the conduct in question occurred”. Broad support was expressed for the view that concurrent jurisdiction arises where the perpetrator acts in one State and the consequences are felt in another, while some delegations required more time to consider the issue. While, some delegations expressed the possible need for clarifying language, possibly in the elements of crime, several stated that the Rome Statute was sufficiently clear and “over-legislating” should be avoided. *The reference to “conduct” in article 12 encompassed also the consequences of*

⁷⁹ [OTP Request](#), paras 13, 27.

the conduct. The decision of the Permanent Court of International Justice in the *Lotus case* supported this reasoning. Furthermore, the drafters of article 12 intended for it to be consistent with article 30, which referred to conduct, consequences and circumstances. Some delegations questioned the need to address this issue with respect to the crime of aggression and emphasized that the issue could also arise in connection with other crimes. It was argued that for all crimes under the Rome Statute, territorial jurisdiction extended to the territory where the impact of the act was experienced. War crimes, for example, could also give rise to cross-border scenarios, such as in the case of the shooting of civilians from across a State border. Introducing a specific provision on territoriality with respect to aggression would bear the risk that an *a contrario* reasoning would be applied to other crimes.⁸⁰

III. THE COURT HAS JURISDICTION BASED ON CONTINUITY

59. Although the Applicants endorse the Prosecution's submissions that the Court has jurisdiction over the crime of deportation, pursuant to the principle of objective territoriality, it is submitted that on the facts this position reflects an unnecessarily and unjustifiably narrow view of the Court's jurisdiction.

60. In summary, it is submitted that:

- i. Not only is the crime of deportation consummated in Bangladesh, it continues to be perpetrated for as long as the Rohingya are prevented from returning to Myanmar;
- ii. Persecution and apartheid, as crimes against humanity, are continuing in nature, because as a matter of law they involve a course of conduct, part of which continues to be perpetrated in Bangladesh; and
- iii. Genocide, contrary to article 6(c), consisting of the *actus reus* of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", includes a course of conduct as an essential element and is therefore a continuing crime. It was initially perpetrated on the territory of Myanmar and continues into Bangladesh.

61. As such the Court's territorial jurisdiction is engaged because conduct underpinning article 5 crimes continues to be perpetrated in the territory of Bangladesh.

A. Continuing crimes

62. The forensic need to consider the continuing character of international crimes is likely to feature most prominently where, as in this case, it involves an examination of whether crimes continued beyond the most obvious temporal or territorial criminal jurisdiction of the relevant international criminal jurisdiction. Accordingly, the concept of continuing liability

⁸⁰ Seventh Session of the Assembly of State Parties to the Rome Statute, Report of the Special Working Group on the Crime of Aggression, [Annex III](#), ICC-ASP/7/20 (14-22 November 2008, The Hague, Netherlands), para. 28 [emphasis added].

for international crimes has not been examined in detail at the international criminal tribunals to date. This was an issue that was not required to be conclusively determined at the international criminal courts that pre-dated the ICC.

63. Accordingly, the question of whether deportation, persecution, apartheid or genocide, pursuant article 6(c), are continuing crimes has not yet been the subject of (detailed) judicial consideration. The concept is, nevertheless, well established in international law.

a. General Principles

64. The International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts ("Draft Articles") provide a useful indication of the distinction that may be drawn between continuing crimes and those that are instantaneous. A breach of an international obligation by a wrongful act of a State can be (i) instantaneous, meaning resolved immediately or (ii) continuing, meaning resulting in a continuing illegal situation.⁸¹ Instantaneous crimes are completed by a single or a discreet act that transpires in a single, immediate period of time (such as arson or murder), rather than a series of acts.⁸²

65. An instantaneous crime may take time to prepare and have lasting effects, but it is committed in an instance and its physical elements do not persist in time.⁸³ The process of commission, that is, the completion of all the defining components or elements of the crime, is finalised in that single defined moment.⁸⁴ The harm that the discreet act causes occurs at that moment and does not continue beyond it, even if its effects persist in time.⁸⁵

66. On the other hand, a continuing wrongful act is prolonged in time.⁸⁶ For an act to possess that character, it must be continuing in essence and not merely in terms of its effects.⁸⁷ Continuing acts of States involve the perpetuation of an illegal situation, such as the maintenance in force of legislation that constitutes a continuing interference with the right of

⁸¹ J Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) p. 240; *see also* International Law Commission ('ICL'), Draft Articles on Responsibility of States for Internationally Wrongful Acts, as contained in ICL, [Report of the International Law Commission on the Work of its 52nd Session](#), UN Doc. A/56/10, 26 November 2001 ('Draft Articles on State Responsibility'), articles 14(1), 14(2), 14(3), 15.

⁸² J Boles, 'Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine' (2012) 7 Nw. J. L. & Soc. Pol'y 219 ('Boles 2012'), pp. 227-228. *See also* B Garner (ed.), *Black's Law Dictionary*, 9th Ed. (Eagan: West Publishing Corp., 2009), p. 428.

⁸³ A Nissel, 'Continuing Crimes in the Rome Statute' (2004) 25 Mich. J. Int'l L. 653 ('Nissel 2004'), p.661.

⁸⁴ *See* Due Process Law Foundation, '[Digest of Latin American Jurisprudence on International Crimes](#)' (Washington DC, 2010) ('Due Process Law Foundation 2010'), p. 46; *citing* Chile, Case of Miguel Angel Sandoval, (Juan Miguel Contreras Sepulveda, et al.) – Rol no 517-04, Corte Suprema, Sala Penal, 17 November 2004, para. 36.

⁸⁵ Boles 2012, pp. 227-228.

⁸⁶ J Salmon, 'Duration of a Breach', in J Crawford et al. (eds), *The Law of International Responsibility* (Oxford University Press, 2010) ('Salmon 2010'), pp. 383, 386.

⁸⁷ A Zimmermann, 'Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12(3)' (2013) 11 Jnl. Int'l Crim. Jus. 303, p. 323.

an individual to respect for his private life,⁸⁸ the illegal detention of a foreign official,⁸⁹ an illegitimate occupation of part of the territory of another State, the maintenance of armed contingents on the territory of another State without its consent and the maintenance of colonial domination by force or the illegal blockade of foreign coasts and ports.⁹⁰

67. Therefore, continuing crimes entail an on-going course of conduct that causes harm that lasts as long as the harm persists.⁹¹ They are premised on the continuing operation of the cause or influence exerted by the precipitating conduct.⁹² In turn, the continuing cause or influence, entails the emergence of an unlawful state of affairs, which is then maintained by the subsequent conduct of the perpetrator.⁹³ The *actus reus* of the crime continues as long as this unlawful state of affairs persists⁹⁴ and once the perpetrator ceases the proscribed course of conduct (act or omission).⁹⁵

68. In this sense, a continuing offence is also distinguishable from “an offence that continues in a factual sense, as [is the case] where a defendant engages in a course of conduct comprised of repeated criminal violations, such as recurring sales of narcotics or a string of

⁸⁸ ECHR, *Dudgeon v. the United Kingdom*, [Application No. 7525/76](#), 22 October 1981, para. 41.

⁸⁹ International Court of Justice (‘ICJ’), [Case Concerning USA Diplomatic and Consular Staff in Tehran \(USA v. Iran\)](#), (Judgment) 24 May 1980, ICJ Rep 1980, p. 3, paras 76, 77, 78.

⁹⁰ Salmon 2010, pp. 383, 386.

⁹¹ Boles 2012, p. 228, *citing* Judge O’Scannlain’s definition of a continuing offence in *United States v Morales*, 11 F 3d at 921 (9th Cir. 1993) (O’Scannlain, J., dissenting).

⁹² *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, [Partly Dissenting Opinion of Judge Shahabuddeen in Judgment](#), 28 November 2007, para 26. *See also*, E Peled, ‘Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims’ (2015) 41 Ohio Northern University Law Review 343 (‘Peled 2015’), p. 366, *citing* *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). *See also*, Permanent Court of International Justice, *Phosphates in Morocco (Italy v France)* (Judgment) 14 June 1938, 1938 PCIJ Rep Series A/B No 74, p 26.

⁹³ *See* A Di Amato, *Criminal Law in Italy*, 2nd ed. (Kluwer Law International, 2011) p. 78; Nissel 2004, p. 654. *See also*, [Due Process Law Foundation 2010](#), p. 47-8, *citing* Venezuela, Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez)- Sentencia 1474, Expediente 06-1656, MP. Carmen Zuleta de Merchán, Tribunal Supremo de Justicia, 10 August 2007, para IV.1 (referring to an “antijudicial situation”); Mexico, Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) – Recurso de apelación extraordinaria 1/2003, MP.Juventino V. Castro y Castro, Suprema Courte de Justicia de la Nación, 5 November 2003.

⁹⁴ *See* W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press 2016) (‘Schabas 2016’), p. 557.

⁹⁵ Boles 2012, p. 229, *citing* *United States v. McGoff*, 831 F.3d 1071, 1079 (D.C. Cir. 1987); *United States v. Motz*, 652 F. Supp. 2d 284, 293 (E.D.N.Y. 2009). *See also*, [Due Process Law Foundation 2010](#), p. 47, *citing* Venezuela, Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez)- Sentencia 1474, Expediente 06-1656, MP. Carmen Zuleta de Merchán, Tribunal Supremo de Justicia, 10 August 2007, para IV.1. *See also*, Case 002/01, Case No. 002/19/09-2007-ECCC/SC, [Appeals Judgment](#), 23 November 2006, paras 215, 216 holding that: “[t]he temporal extent of [acts constituting a JCE] starts with the initial contribution to the common purpose as an expression of the shared criminal intent and ends with either cessation of any further criminal activity by the enterprise or, as far as individuals contributing to the implementation are concerned, withdrawal from the enterprise, the latter requiring cessation of any further contribution as well as abandonment of the shared criminal intent.” ECCC also held: “the crime of conspiracy is considered to be completed as soon as the agreement between the conspirators has been made, it continues as long as its design is being carried out. In American criminal law, in respect of conspiracy, which is considered to be a continuing crime, statutes of limitation will start tolling only once the criminal agreement has been completed, abandoned or after the last overt act in furtherance of the agreement has been carried out, irrespective of when the participant invoking the statute of limitations last contributed to it”.

separate robberies.”⁹⁶ In contrast, for a crime to be continuing in nature, the legal interest which is protected must be susceptible to harm over a prolonged period,⁹⁷ the harm that the relevant prohibition was designed to prevent continues to be inflicted⁹⁸ and the harm caused to the victim(s) accumulates as long as the crime continues.⁹⁹

b. Continuing Crimes in International Criminal Law

69. In determining challenges, based in an alleged lack of temporal jurisdiction, the Appeals Chamber of the International Criminal Tribunal for Rwanda (‘ICTR’) in the *Nahimana et al.* case adopted the following definition: a crime is considered continuing if it “continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] (such as driving a stolen vehicle) that continues over an extended period.”¹⁰⁰ The Applicants respectfully endorse that definition.

70. Chambers of the ICTY, ICTR and ECCC have found the crime of conspiracy to be continuing.¹⁰¹ In so doing, the ICTY Trial Chamber in the *Popović* case placed reliance on the following passage from an American case:

It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. [...] But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural

⁹⁶ Boles 2012, p. 228, *citing* United States v. Rivlin, No. 07-Cr-524, 2007 U.S. Dist. LEXIS 89323, at 6–7 (S.D.N.Y. Dec. 5, 2007); United States v. Yashar, 166 F.3d 873, page 875 (7th Cir. 1999); United States v. Reitmeyer, 356 F.3d 1313, 1321 (10th Cir. 2004). *See also*, *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-15-Corr, [Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”](#), 5 October 2011 (‘*Situation in Republic of Côte d’Ivoire* Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute’), paras 68, 69.

⁹⁷ *See* [Due Process Law Foundation 2010](#), p. 46, *citing* Chile, Case of Miguel Angel Sandoval, (Juan Miguel Contreras Sepulveda, et al.) – Rol no 517-04, Corte Suprema, Sala Penal, 17 November 2004, para. 36.

⁹⁸ Boles 2012, p.229, *citing* United States v. Yashar, 166 F.3d 873, p. 875 (7th Cir. 1999); Toussie v United States, 397 U.S. 112 (1970), p. 122. *See also*, [Due Process Law Foundation 2010](#), p. 46, *citing* Chile, Case of Miguel Angel Sandoval, (Juan Miguel Contreras Sepulveda, et al.) – Rol no 517-04, Corte Suprema, Sala Penal, 17 November 2004, para. 36.

⁹⁹ K Graham, ‘The Continuing Violations Doctrine’, (2007-2008) 43 Gonz. L. Rev. 271 (‘Graham 2007-2008’), p. 286; *citing* Kuhnle Bros., Inc v. County of Geauga, 103 F.3d 516, p. 522 (6th Cir. 1997). *See also*, [Due Process Law Foundation 2010](#), p. 48; Mexico, Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) – Recurso de apelación extraordinaria 1/2003, MP.Juventino V. Castro y Castro, Suprema Courte de Justicia de la Nación, 5 November 2003. *See further*, Peled 2015, pp. 348-349.

¹⁰⁰ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, [Judgment](#), 28 November 2007, para. 721; *citing* B Garner (ed.), *Black’s Law Dictionary*, 8th Ed. (Saint Paul, Minnesota: West Publishing Co., 200), p. 399.

¹⁰¹ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, [Judgment and Sentence](#), 3 December 2003, paras 1017, 1044: the ICTR Trial Chamber and qualified conspiracy as a continuing crime. This finding was not considered on appeal. Similarly, the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) qualified conspiracy to be continuing in nature: Case 002/01, Case No. 002/19/09-2007-ECCC/SC, [Appeals Judgment](#), 23 November 2006, paras 215-216. The ICTY also qualified conspiracy as a continuing crime: *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, [Judgment: Volume I](#), 10 June 2010 (‘*Popović* Trial Judgment’), para. 876.

language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.¹⁰²

71. The four crimes under consideration, both as a matter of law and on the facts of the case, fit squarely within that description.

72. The SCSL have attributed a continuing nature to the following offences: enslavement, sexual slavery, use of child soldiers and forced marriage.¹⁰³

73. At the ICC, both the Pre-Trial Chamber and the Trial Chamber in the *Lubanga* case found the crime of conscription and enlistment of children under the age of 15¹⁰⁴ to be continuing in nature, without providing a clear definition to the term.¹⁰⁵ Additionally, in a dissenting opinion appended to a decision taken in the Situation in Cote d'Ivoire, Judge de Gurmendi relied upon the *Nahimana* definition and identified the crimes of enforced disappearance of persons, enslavement, imprisonment, or other severe deprivation of physical liberty, sexual slavery, enforced prostitution, persecution and apartheid as continuing crimes.¹⁰⁶

74. The Trial Chamber in the *Lubanga* case held that “the crime of enlisting and conscripting continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen.”¹⁰⁷

75. As academics have also observed:

Although the initial act of recruitment will constitute a discrete event, arguably the essence of the prohibition is not merely the original moment of conscription or enlistment, but rather the child's continuing membership in the armed group or force... In line with the reasoning in *Lubanga*, because the act of underage membership occurs every day that the child remains

¹⁰² [Popović Trial Judgment](#), para. 876, citing *United States v. Kissel*, 218 U.S. 601, 607 (1910), per Holmes J. [citations omitted].

¹⁰³ The Special Court for Sierra Leone ('SCSL') found the crimes of enslavement, sexual slavery and use of child soldiers to be continuous in nature: see *Prosecutor v. Brima et al.*, SCSL-04-16-T, [Judgment](#), 20 June 2007, paras 39, 1820; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, [Judgment](#), 2 March 2009, para. 427, referring to “continuous crimes pleaded in counts 6 to 9” in relation to crimes of sexual slavery, forced marriages, forced labour constituting enslavement (paras 1380-1494), and to forced marriage (para. 1410, fn 2621).

¹⁰⁴ See Rome Statute, articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

¹⁰⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Decision on the Confirmation of Charges](#), 29 January 2007 ('*Lubanga* Decision on the Confirmation of Charges'), para. 248; *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Judgment pursuant to Article 74 of the Statute](#), 14 March 2012 ('*Lubanga* Trial Judgment'), para. 618.

¹⁰⁶ [Situation in Republic of Côte d'Ivoire Corrigendum to “Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute](#), paras 68-69.

¹⁰⁷ [Lubanga Decision on the Confirmation of Charges](#), para. 248. The Pre-Trial Chamber's interpretation was confirmed verbatim by the Trial Chamber in the trial judgment: see [Lubanga Trial Judgment](#), para. 618.

enlisted or conscripted, it may be said to commence and be completed on each successive day it continues to occur.¹⁰⁸

c. Draft Articles on State Responsibility for Internationally Wrongful Acts

76. The Request raises questions concerning the Court's jurisdiction to investigate conduct that amounts to an ongoing system of oppression, for which the evidence suggests a State is responsible, in circumstances where the conduct underpinning the system is taking place, at least in part, on territory within the Court's jurisdiction. It is submitted that jurisdiction to investigate whether crimes have occurred must entail consideration of the conduct as a whole. Accordingly, the assessment must encompass the totality of the conduct, namely the (potentially) instantaneous element of the acts of the perpetrator and the State-sponsored and systematic nature of the harm that genocide, apartheid and persecution seek to address.

77. Principles governing State responsibility clearly establish that genocide, apartheid and persecution are 'composite' crimes that create continuous liability. All three offences share in common a tiered description of the prohibited conduct, consisting both of a system of abuse and the individual acts of the perpetrators that contribute to those systems. The Draft Articles suggest that genocide, persecution and apartheid are all continuing crimes. State responsibility for composite crimes "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation".¹⁰⁹

78. The commentary to the Draft Articles expressly include "genocide, apartheid or crimes against humanity, systematic acts of racial discrimination" as examples of composite crimes attracting continuing liability. For example, the Draft Articles observe that "[g]enocide is not committed until there has been an accumulation of acts of killing, causing harm etc., committed with the relevant intent [...] Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed".¹¹⁰

¹⁰⁸ R Rastan and M Badar, 'Article 11: Jurisdiction Ratione Temporis', in O Triffterer and K Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ('Triffterer 2016'), p. 668, nm 24.

¹⁰⁹ Draft Articles on State Responsibility, article 15(2)

¹¹⁰ ILC, [Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), ILC Report A/56/10, 2001 ('Commentary on the Draft Articles on State Responsibility'), commentary on article 15, para. 3

79. Furthermore, the Draft Articles envisage no conflict between this notion of collective responsibility and principles of individual criminal responsibility, finding that “any individual responsible for any of [those acts] with the relevant intent will have committed genocide”.¹¹¹

80. In conclusion, continuing crimes are characterised by a continuation of the *actus reus* through the maintenance of an unlawful state of affairs wherein the harm caused to the victim accumulates over time, and is contingent upon the will of the perpetrator.¹¹²

B. Continuing crimes relevant to the current submissions

i. Deportation under article 7(1)(d)

81. Deportation must be assessed as a continuous crime. Whilst the crossing of an international border is a discrete and instantaneous act of consummation, the aggravated harm that deportation prohibits, namely the removal into another State, persists until the victims are permitted to return.

82. The jurisdictional analysis of the deportation of the Rohingya can be summarised as:

- i. Coercive acts that initially drove the Rohingya from their homes were committed in Myanmar;
- ii. The crime of deportation was consummated in the territory of Bangladesh, upon the crossing of an international border (objective territoriality);
- iii. Additionally, as will be demonstrated below, liability continues until the Rohingya are permitted to return to Myanmar.

83. According to the Elements of Crimes, the *actus reus* of the crime of deportation is met when:

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.¹¹³

84. Article 7(2)(d) states in terms that deportation may be set in train by the commission of “coercive acts” which cause the forced displacement of a population. The crime of deportation commences with the commission of these acts but is not consummated until the

¹¹¹ Commentary on the Draft Articles on State Responsibility, commentary on article 15, para. 3.

¹¹² Graham 2007-2008, p. 286; *citing* Kuhnle Bros., Inc v. County of Geauga, 103 F.3d 516, p. 522 (6th Cir. 1997). [Due Process Law Foundation 2010](#), p. 48, *citing* Mexico, Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) – Recurso de apelación extraordinaria 1/2003, MP.Juventino V. Castro y Castro, Suprema Courte de Justicia de la Nación, 5 November 2003.

¹¹³ Elements of Crimes, Article 7(1)(d), Crime against humanity of deportation or forcible transfer, element 1. *See also*, [Prlić et al. Trial Judgment](#), para. 47; [Krajišnik Appeal Judgment](#), para. 304.

crossing of an international border, a further essential element. Responsibility for those coercive acts must be continuing, as a matter of law, to enable it to continue until the point at which it is consummated by the crossing of the international border. Put another way, for deportation to be properly made out, the coercive acts must be the cause of the international border crossing rather than, for example, the victim's free will. It would be illogical to prosecute deportation, given its inherently transnational character, where evidence suggests that perpetrators created conditions that coerced a population to leave their homes, but which did not force them to leave the country. In such circumstances forcible transfer would be the most appropriate and proximate charge.

85. It follows that responsibility for the coercive acts underpinning deportation must have a continuing character to encompass the essential, transnational character of the offence. However, the injurious effects of those coercive acts and their legal significance do not end there: whilst the crossing of the international border consummates deportation, "it does not exhaust it".¹¹⁴ Indeed in circumstances where those coercive acts not only cause the international border crossing but also continue to prevent a return to the territory on which the victims were lawfully present, there would appear to be ample rational basis for considering the liability for those crimes as continuing throughout that period, in a manner commensurate with the will of the perpetrator and the ongoing harm.

86. Just as with the offence of the conscription of child soldiers, a continuing crime, where the harm caused by the conscription of child soldiers does not end upon completion of the act of conscription but continues at least until the victim is permitted to return to his or her ordinary life,¹¹⁵ deportation harm may also continue. The responsibility for the deportation starts with the conduct of the perpetrators that removes any genuine choice that the victim has in their displacement. Such conduct that forces the victim to depart from his home and from his country of origin constitutes the precipitating act that creates an unlawful state of affairs, that is, the forced removal of the victim from his State of lawful residence. Accordingly, there is a clear and definitive moment in which deportation is consummated, that is, upon arrival in the receiving State. However, where the coercive acts that forced the victims to leave the State of origin continue with the object and purpose of preventing their return, the crime may be viewed as continuing.¹¹⁶

¹¹⁴ [Popović Trial Judgment](#), para. 872, citing *United States v. Kissel*, 218 U.S. 601, 607 (1910), per Holmes J. [citations omitted] discussing the continuity of the offence of criminal conspiracy.

¹¹⁵ [Lubanga Trial Judgment](#), para. 618.

¹¹⁶ Schabas 2016, p. 557.

87. The legally protected interest in criminalising deportation is the right of individuals to live in their communities and homes, in a particular State in which they were lawfully present and within a particular culture, society, language, set of values and legal protections.¹¹⁷ This legal right is infringed if the victims are displaced to another State, so that they are no longer able to enjoy those rights.¹¹⁸ It cannot, on any reasoned analysis, be restored until the victims are permitted to safely return home. As a result, the harm caused to the victims continues to be inflicted upon them and accumulates over time. The victims often end up living in significantly worse conditions than they enjoyed before their enforced displacement across a State border. Accordingly, the *actus reus* of the crime of deportation is prolonged through the continuing conduct of the perpetrator that maintains the forced removal of the victims from their homelands. As long as the victims are prevented from returning to their homes, through acts contingent upon the will of the perpetrator, the crime continues.

ii. Apartheid under article 7(1)(j)

88. Apartheid is criminalised under article 7(1)(j) of the Statute. It is defined as “inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic, oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”¹¹⁹

89. The Elements of Crimes for apartheid are:¹²⁰

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was referred to in article 7, paragraph 1, of the Statute, or was an act of a character (i.e. nature and gravity) similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.

90. Although there is yet to be a prosecution under article 7(1)(j) of the Rome Statute, Judge de Gurmendi has observed that apartheid is a continuing crime.¹²¹ Although these

¹¹⁷ See [OTP Request](#), para. 17; *Prosecution v. Krnojelac*, Case No. IT-97-25-A, [Judgment](#), 17 September 2003, para. 218; UN General Assembly, [Universal Declaration of Human Rights](#) (adopted 10 December 1948) UN Doc. A/Res/3/217 A(III), article 13(2); UN General Assembly, [International Covenant on Civil and Political Rights](#) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 12.

¹¹⁸ [Prlić Trial Judgment](#), para. 49; [Simić et al. Trial Judgment](#), para. 130; *Prosecutor v. Stakić*, Case No. IT-97-24-T, [Judgment](#), 31 July 2003 (‘*Stakić Trial Judgment*’), para. 677.

¹¹⁹ Rome Statute, article 7(2)(h).

¹²⁰ Elements of Crimes, article 7(1)(j), Crime against humanity of apartheid [contextual elements omitted].

comments were *obiter dicta* in the context of a dissenting opinion, they are wholly supported by an analysis of the offence in context.

91. It has been observed that, along with the Genocide Convention, the Apartheid Convention is “one of the main antecedents of the ICC Statute”.¹²² Two years before its enactment, the ICJ issued its Advisory Opinion on the *Continued Presence of South Africa in Namibia*, in which it referred to the “policy of apartheid as applied by South Africa in Namibia” as an “official governmental policy pursued [...] to achieve a complete separation of races and ethnic groups...”.¹²³ In that case, the policy consisted of the enactment of laws and decrees that constituted a “violation of the purposes and principles of the Charter of the United Nations”.¹²⁴

92. The ICJ’s view that apartheid was synonymous with a policy (and not an instantaneous act) was reflected in article II of the Apartheid Convention that criminalised apartheid. It stated that “... ‘the crime of apartheid’... shall include similar *policies and practices* of racial segregation and discrimination as practised in southern Africa...”.¹²⁵ It made clear that it is the policy that characterises the prohibition and that any relevant inhuman acts must be committed for the purpose of “maintaining” the policy of apartheid.¹²⁶

93. Although the Apartheid Convention enumerates specific inhumane acts as constituting the *actus reus*, it appears clear from the wording of article II that the policy remains a critical part of the relevant conduct rather than mere context. The inhuman acts constitute the enabling conduct of the policy, even though many are not themselves criminal unless committed with the ulterior motive of “establishing and maintaining domination”. For example, the imposition of “any legislative measures and other measures”, calculated to prevent the participation of the victim group in the “political, social, economic and cultural life of the country”¹²⁷ plainly encompasses conduct that instrumentalises the policy of apartheid.

¹²¹ [Situation in Republic of Côte d’Ivoire Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute](#), paras 68-69.

¹²² C Hall, ‘Article 7’, in Triffterer 2016, p. 282, mn. 144.

¹²³ ICJ, [Legal Consequences for States of the Continued Presence of South Africa in Namibia \(South West Africa\) Notwithstanding Security Council Resolution 276 \(1970\)](#) (Advisory Opinion) 21 June 1971, ICJ Reports 1971, p.16 (‘*South Africa* Advisory Opinion’), para. 129.

¹²⁴ [South Africa Advisory Opinion](#), para. 130.

¹²⁵ UNGA, [International Convention on the Suppression and Punishment of the Crime of Apartheid](#) (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (‘Apartheid Convention’), article II [emphasis added].

¹²⁶ [Apartheid Convention](#), article II.

¹²⁷ [Apartheid Convention](#), article II(c).

94. As one of the “main antecedents” of article 7(1)(j) of the Rome Statute, much of the form and language of the Apartheid Convention is to be found in the Elements of Crimes that preserve the essence of the prohibited conduct. The requirement to prove “an institutionalized regime of systematic oppression and domination by one racial group over any other racial group”, and that “inhumane acts” be committed and intended to “maintain” that regime, mirrors the description in the Apartheid Convention.¹²⁸

95. Whilst a reading of element 1 and element 4 in isolation might suggest that apartheid can be perpetrated through a single instantaneous “inhumane act” perpetrated in the context of the “institutionalised regime or systematic oppression”, such a construction would deny the central objective of the “inhumane act(s)” which, as element 5 makes clear, is the maintenance of the regime. Element 5 ensures that the *continuing* existence of the apartheid regime is an essential element and is the defining characteristic of the offence.

96. Indeed, apartheid bears all the characteristics of a continuing crime. According to article I of the Apartheid Convention, the overarching legally protected interest of the crime of apartheid is the right to be free of racial segregation and discrimination.¹²⁹ Apartheid requires the institution and maintenance of an unlawful state of affairs, namely the institutionalised regime of systematic oppression and domination by one racial group over another. In this sense, the precipitating act that sets this unlawful state of affairs can be seen as the initial establishment of the relevant apartheid regime. For instance, the apartheid regime in South Africa started with the institutionalisation of separation of races through classification and miscegenation laws in the late 1940s.¹³⁰

97. Moreover, this must certainly be correct where the deprivation of rights is carried out, maintained and enforced by a crime such as deportation¹³¹ which, as illustrated above, is itself continuing in nature. When (one of) the act(s) maintaining the “institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”¹³² is deportation, they must be seen as coterminous and thus the crime of apartheid continues for as long as the deportation continues.

98. The existence and maintenance of an apartheid regime entails the continuing infringement of this legally protected interest, as well as any other associated rights, until the

¹²⁸ [Apartheid Convention](#), article II.

¹²⁹ [Apartheid Convention](#), article I.

¹³⁰ South African Apartheid Litigation, (2009) 617 F. Supp. 2d 288 (SDNY, 2009), p. 241.

¹³¹ See Elements of Crimes, article 7(1)(h), Crime against humanity of persecution, element 4: deportation being an “act referred to article 7, paragraph 1”.

¹³² Rome Statute, article 7(2)(h).

institutionalised regime of racial oppression and domination comes to an end. The oppressive regime is maintained and perpetuated through the acts of perpetrators and is contingent upon their will. The consequent harm inflicted upon victims accumulates as long as they are subjected to the measures imposed upon them by the apartheid regime due to the acts or omissions of the perpetrators.

iii. Persecution under article 7(1)(h)

99. Persecution is characterized by the deprivation of fundamental rights, an inherently continuing state of affairs. The Statute defines persecution as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a group or collectivity”.¹³³ The relevant elements of the crime of persecution are the following:¹³⁴

1. The perpetrator severely deprived, contrary to international law, 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.

100. Judge de Gurmendi has observed that persecution is a continuing crime.¹³⁵ This must certainly be correct where the deprivation of rights is carried out “in connection with” a crime such as deportation¹³⁶ which, as illustrated above, is itself continuing in nature. Logically, when the deprivation of rights (the persecution) results in whole or part from the commission of a continuing act (the deportation), then it follows that each are continuing until the perpetrator ceases to act to further the deportation.

101. In any event, even without the connection to deportation, a contextual analysis of the offence confirms more generally that it is inherently continuing nature. As already argued, the deprivation of rights is an inherently continuous act that is often systematised at State-level.¹³⁷ It continues until the rights in question are restored or no longer engaged. Whilst it

¹³³ Rome Statute, article 7(2)(g).

¹³⁴ Elements of Crimes, article 7(1)(h), Crime against humanity of persecution [contextual elements omitted].

¹³⁵ [Situation in Republic of Côte d'Ivoire Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute](#), paras 68-69.

¹³⁶ See Elements of Crimes, article 7(1)(h), Crime against humanity of persecution, element 4: deportation being an “act referred to article 7, paragraph 1”.

¹³⁷ See paras 12-33.

may be possible to envisage an instantaneous deprivation of the right to life in circumstances where persecution amounts to a single killing (although arguably an unlawful killing engages procedural rights that would continue after the killing was complete), the collective targeting of demographically defined groups¹³⁸ suggests that this is no more than a theoretical possibility. Persecution envisages a discriminatory campaign that results in a deprivation of rights that accumulates over time and is effected through the commission of acts.

102. Whilst it is the deprivation of rights that characterises persecution and describes the culpable conduct of the perpetrator,¹³⁹ it is also artificial to consider it in isolation from the acts underlying it. Indeed, the practice of the Court so far in relation to article 7(1)(h) has been to refer to specific crimes under the Statute as the underlying acts that have caused the deprivation of fundamental rights of the victims.¹⁴⁰ In sum, persecution recognises the aggravated harm involved in systematically carrying out acts with a persecutory objective and the deprivation of fundamental rights that such a system entails. According to element 4 those acts will either be crimes in their own right under the Rome Statute or will be committed *in connection with* those crimes. Labelling those acts as persecutory incorporates the deprivation of rights within and provides a complete description of the conduct under consideration and the resulting criminality.

103. Understood in context it is clear that persecution can only be understood to be a continuing crime. Through the commission of underlying acts criminalised under the Statute, the perpetrator creates an unlawful state of affairs, that is the deprivation of the fundamental rights of the victims. The perpetrator may then perpetuate this unlawful state of affairs through subsequent conduct. The harm inflicted upon the victims and the infringement of their legally protected interests under article 7(1)(h) continue to be infringed as long as the perpetrator maintains such unlawful state of affairs through further persecutory conduct.

¹³⁸ See Elements of Crimes, article 7(1)(h), Crime against humanity of persecution, elements 2 and 3.

¹³⁹ Rome Statute, article 7(2)(g): “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”

¹⁴⁰ See *Prosecutor v. Ntaganda*, ICC-1/04/-02/06, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), 9 June 2014 (‘*Ntaganda*, Decision on the Confirmation of Charges’), para.58, where the Pre-Trial Chamber found the deprivation of fundamental rights to have taken place in connection with murder, attacking civilians, rape, pillaging, forcible transfer of population, attacking protected objects, destroying enemy’s property. See also, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, (‘*Ruto et al.* Decision on the Confirmation of Charges’), paras 271, 277, where persecution was held to be committed through acts of murder and deportation or forcible transfer of population, destruction of property and looting; *Prosecutor v. Kenyatta et al.*, ICC-01/09-02/11, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, (‘*Kenyatta et al.* Decision on the Confirmation of Charges’), para. 283, where persecution was held to be committed through killings, displacement, rape, serious physical injuries, and acts causing serious mental suffering.

Accordingly, the continuation of the crime of persecution continues until the perpetrator desists from exercising his/her will to perpetuate the deprivation of fundamental rights.

iv. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction under article 6(c)

104. Article 6(c) of the Statute prohibits, as an act of genocide, “[d]eliberately inflicting on [a national, ethnical, racial or religious group] conditions of life calculated to bring about its physical destruction in whole or in part” when committed with genocidal intent. The destruction in question is the material destruction of the relevant group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group, or its dissolution.¹⁴¹

105. The legally protected value under the crime of persecution is “the denial of the right of existence of entire human groups”.¹⁴² The ICTR confirmed that the crime of genocide exists to “protect certain groups from extermination or attempted extermination.”¹⁴³ Further, it is recognised that the denial of the right of existence “results in great losses to humanity in the form of cultural and other contributions represented by these human groups”.¹⁴⁴ It is submitted that the denial of the right to existence of certain groups inherently encompasses all other fundamental human rights recognised internationally as the right to existence predetermines the enjoyment of these rights. Considering that the conditions of life must take place within a “the context of a manifest pattern of similar conduct directed against that group” (element 5), the deprivation of the right to existence of a group tends towards viewing the crime as continuing nature. Moreover, the infliction of certain conditions of life calculated to bring about the physical destruction of the group (elements 1 and 4), by its nature, must be considered as continuous.

106. The elements of genocide under article 6(c) are the following:¹⁴⁵

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such.

¹⁴¹ ILC, ‘[Report of the International Law Commission on the Work of its Forty-eighth Session](#)’, UN Doc. A/51/10, 6 May-26 July 1996, pp. 45-46; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Judgment](#), 24 March 2016, [Karadžić Trial Judgment](#), para. 547.

¹⁴² UN General Assembly, [The Crime of Genocide](#), UN Doc A/96(1), 11 December 1946, p.188.

¹⁴³ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, [Judgment](#), 2 September 1998 (‘*Akayesu* Trial Judgment’), para. 469.

¹⁴⁴ UN General Assembly, [The Crime of Genocide](#), UN Doc A/96(1), 11 December 1946, p.187.

¹⁴⁵ Elements of Crimes, article 6(c), Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction [contextual elements omitted].

4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

107. Element 4 clarifies that the term “conditions of life” may include, but is not necessarily restricted to, “deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”¹⁴⁶ In general, the creation of circumstances that would lead to a slow death, such as lack of proper housing, food, water, clothing, sanitation or shelter or the imposition of excessive work or physical exertion would constitute genocide under article 6(c).¹⁴⁷

108. In other words, the focus is on the destruction of the group not by immediately killing them,¹⁴⁸ but by subjecting them to measures such as imposing a subsistence diet, withholding sufficient living accommodation, the reduction of essential medical services below minimum requirements,¹⁴⁹ sexual and gender-based violence,¹⁵⁰ as well as the looting and destruction of property,¹⁵¹ detention, robbery and theft,¹⁵² committed with the requisite specific intent.

109. In this sense, the acts meeting the threshold of article 6(c) typically relate to the deliberate withholding or taking away of the basic necessities of life over an extended period of time.¹⁵³ For instance, in the context of the commission of genocide under article 6(c) at a

¹⁴⁶ Elements of Crimes, article 6(c), Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, element 4, fn. 4.

¹⁴⁷ *Prosecutor v. Brđanin*, Case No. IT-99-36-T, [Judgment](#), 1 September 2004 (‘*Brđanin* Trial Judgment’), para. 691; *The Prosecutor v. Kayishema*, Case No. ICTR-95-01-1088, [Judgment](#), 21 May 1999 (‘*Kayishema* Trial Judgment’), paras 115-116; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, [Judgment](#), 8 April 2015 (‘*Tolimir* Appeals Judgment’), para. 225; [Stakić Trial Judgment](#), para. 517; *The Prosecutor v. Musema*, Case No. ICTR-96-13-T, [Judgment and Sentence](#), 27 January 2000, para. 157; [Akayesu Trial Judgment](#), para. 506.

¹⁴⁸ This was interpreted to mean that killings cannot be considered as an underlying act under genocide committed by infliction of conditions of life calculated to bring about physical destruction: [Tolimir Appeals Judgment](#), para. 227.

¹⁴⁹ [Akayesu Trial Judgment](#), paras 505-506; N Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, World Jewish Congress, 1960), pp. 63–64; cited with approval by the ILC, *Code of Crimes against the Peace and Security of Mankind*, UN Doc. A/51/332 (1996) p. 126. The ICJ assessed whether the conditions of non-Serb detainees in various camps run by the Serbs in Bosnia and Herzegovina such as deprivation of adequate food, water, medical care: ICJ, [Bosnia and Herzegovina v. Yugoslavia \(Serbia and Montenegro\) \(Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide\)](#), [Judgment](#) (26 February 2007) I.C.J. Reports 2007, p. 43 (‘*Bosnia Genocide Judgment*’), paras 315, 346, 347, 348, 349, 350, 352.

¹⁵⁰ [Kayishema Trial Judgment](#), para. 116.

¹⁵¹ ICJ, [Croatia v. Serbia and Montenegro \(Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide\)](#) (Judgment) 3 February 2015, I.C.J. Reports 2015, p. 3 (‘*Croatia Genocide Judgment*’), para. 383-385.

¹⁵² [Croatia Genocide Judgment](#), paras 374, 375: the ICJ drew the conclusion that “in the present case, the forced displacement of the population is a consequence of the commission of acts capable of constituting the *actus reus* of genocide”, in particular as defined in Article II (a) to (c) of the Convention. In the [Bosnia Genocide Judgment](#), paras 345-354: the ICJ considered there to be “convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps” but held there to be insufficient evidence of such conduct being accompanied by specific intent to destroy the protected group.

¹⁵³ [Tolimir Appeals Judgment](#), para. 234..

detention centre, any subsequent conduct of the perpetrators such as withholding food, water, medical care or otherwise the imposition of inadequate living standards for a prolonged period of time are capable of qualifying as the maintenance of conditions calculated to bring about physical destruction.¹⁵⁴

110. In the absence of direct evidence, the Court may be guided by the objective probability of these conditions leading to the physical destruction of the group in part based on factors such as the length of time that members of the group were subjected to these conditions and the characteristics of the group including its vulnerability.¹⁵⁵

111. The displacement, deportation, or expulsion of a group or part of a group does not in itself suffice for genocide as it is not necessarily and automatically equivalent to destruction of that group.¹⁵⁶ Nevertheless, deportation could be an additional means by which to ensure the physical destruction of a protected group.¹⁵⁷ The totality of the circumstances must be examined to assess whether the forced displacements and associated crimes were calculated to bring about the physical destruction of the group and whether they may constitute genocide under article 6(c).¹⁵⁸

112. Although the nature of these circumstances is critical in deciding whether it could constitute an underlying act of article 6(c),¹⁵⁹ forced removal may lead to the infliction of conditions on the deportees where they lack food, water, medical assistance, shelter or hygiene facilities.¹⁶⁰ For instance, the ECCC has examined the issue of whether the conditions that the victims who were deported from Phnom Penh were severe enough to qualify as extermination through the creation of conditions of life aimed at destroying part of a population.¹⁶¹ The ECCC considered the fact that the evacuees were forced to leave their homes at gunpoint without being able to take adequate supplies without any assistance whatsoever as a crucial factor in this regard.¹⁶² Moreover, the ECCC noted the fact that the

¹⁵⁴ See [Karadžić Trial Judgment](#), para. 2587: note that the Chamber in this case refused to convict the accused pursuant to this crime as it was not satisfied “that conditions of life calculated to bring about the physical destruction of the Bosnian Muslims and Bosnian Croats were *deliberately* inflicted on these groups.”

¹⁵⁵ [Karadžić Trial Judgment](#), para. 548; [Brđanin Trial Judgment](#), para. 906.

¹⁵⁶ [Stakić Trial Judgment](#), para. 519; [Bosnia Genocide Judgment](#), para. 190.

¹⁵⁷ [Tolimir Appeals Judgment](#), para. 209; *Prosecutor v. Krstić*, Case No: IT-98-33-A, [Judgment](#), 19 April 2004, para. 31; see also, *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, [Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hasan Ahmad Al Bashir](#), 4 March 2009, para. 145.

¹⁵⁸ See [Croatia Genocide Judgment](#), para. 163.

¹⁵⁹ [Tolimir Appeals Judgment](#), para. 232.

¹⁶⁰ See for example, ECCC, Case 002/01, Case No. 002/10-09-2007/ECCC/TC, [Judgment](#), 7 August 2014 (‘ECCC, Case 002/01 Trial Judgment’), para. 562, where the Chamber found that the evacuation of Phnom Penh constituted conditions of life that led to the death of the victims, constituting extermination. The Chamber held that these conditions during the evacuation included lack of food, water, medical assistance and shelter, or hygiene facilities.

¹⁶¹ See [Case 002/01 Trial Judgment](#), para. 416 for the definition of the *actus reus* of the crime of extermination.

¹⁶² See [Case 002/01 Trial Judgment](#), para. 471, 556.

evacuees experienced terrible conditions throughout their journey including extreme heat and lack of sufficient food, clean water, medicine or adequate accommodation leading to weakness, sickness and even death.¹⁶³ Ultimately, the ECCC found these circumstances to be severe enough to constitute infliction of conditions of life aimed at destroying part of the victim population.¹⁶⁴

113. The *actus reus* of genocide under article 6(c) requires the “[infliction of] certain conditions of life upon one or more persons, calculated to bring about the physical destruction of that group, in whole or in part.”¹⁶⁵ As outlined above, this can be achieved through a myriad of underlying acts. The acts precipitate an unlawful state of affairs, i.e. the imposition of genocidal conditions of living upon the victims. These conditions may then be prolonged through the subsequent conduct of the perpetrator.

114. Particularly pertinent to the genocidal campaign waged against the Rohingya has been the instrumentalisation of sexual and gender-based violence in its cause. In *Kayishema and Ruzindana*, the ICTR recognised that rape may also constitute a condition of life calculated to bring about physical destruction.¹⁶⁶ At the ICC, a warrant of arrest has been issued in the case of *Al-Bashir* charging the defendant with rape as part of the *actus reus* of genocide by causing serious bodily or mental harm.¹⁶⁷ In the *Akayesu* case, the ICTR Trial Chamber noted that “acts of rape and sexual violence ... reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.”¹⁶⁸

115. Sexual and gender-based violence against the Rohingya must be considered as part of the infliction of conditions of life calculated to bring about the physical destruction of the Rohingya population. The targeting of women and girls and the severity and systematic nature of the crimes against the Rohingya women and girls (including the present Applicants) points inexorably to its use as an instrument of the genocidal campaign against the group. It reflects an attempt to attack the health and wellbeing of women and girls to a degree that death and debilitating illness ensues, undermining their and the group’s ability to survive. It is a direct attack on the women and the girls and the group.

¹⁶³ See [Case 002/01 Trial Judgment](#), para. 491.

¹⁶⁴ See [Case 002/01 Trial Judgment](#), para. 562.

¹⁶⁵ Elements of Crimes, article 6(c), Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, element 1.

¹⁶⁶ [Kayishema Trial Judgment](#), 21 May 1999, para. 116.

¹⁶⁷ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, [Decision on the Prosecution’s Application for a Warrant of Arrest](#), 12 July 2010 (*Al Bashir* Warrant of Arrest), para 30.

¹⁶⁸ [Akayesu Trial Judgment](#), para. 733.

116. As required by element 5, the conduct of the perpetrator must take place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.” This additional requirement is indicative of the fact that the imposition of conditions must be part of an ongoing systematic course of conduct that maintains and perpetuates the unlawful state of affairs.

117. In this sense, the *actus reus* of the crime does not cease once such conditions are set in place; it continues as long as they are maintained by the perpetrator. Any conduct of the perpetrators that perpetuates such conditions, would, therefore, prolong the commission of the *actus reus* of article 6(c). As a result, the harm inflicted upon the victims accumulates and their legally protected interests under article 6(c) continue to be infringed as long as they are subjected to such conditions at the will of the perpetrator.

v. Conclusion

118. As outlined above, in regards to the crimes of deportation, apartheid, persecution and genocide, relevant conduct continues to be perpetrated in Myanmar and Bangladesh. The totality of the conduct is relevant to the question of the Court’s jurisdiction under 12(2)(a). In summary, deportation, apartheid, persecution and genocide (pursuant to article 6(c)) are continuing offences that continue to be perpetrated on the territory of Bangladesh providing the Court with jurisdiction to investigate each of the crimes.

IV. THE APPLICANT’S STANDING TO MAKE SUBMISSIONS

119. As emphasised by the Preamble to the Rome Statute, “millions of children, women and men have been victims of unimaginable atrocities that shock the conscience of humanity”.¹⁶⁹ At the end of World War II, the scale of atrocities was so overwhelming that individual suffering was obscured as the sheer magnitude of the victims suffering transcended all imagination whilst simultaneously illuminating their plight and powerlessness in the face of the most serious international crimes.¹⁷⁰ The Preamble’s reference to the suffering of millions brings into sharp focus the determination to ensure that this history remains at the forefront of the collective human conscience and emphasises the centrality of victims’ participation in the Court’s proceedings.¹⁷¹ Indeed, this emphasis on victims, including their active participation in proceedings, is often cited as one of the greatest innovations of the Rome Statute.¹⁷² The Rome Statute and the practice of the Court have sought to place the

¹⁶⁹ O Triffterer, M Bergsmo, and K Ambos, ‘Preamble’, in Triffterer 2016, p. 7, mn. 8.

¹⁷⁰ O Triffterer, M Bergsmo, and K Ambos, ‘Preamble’, in Triffterer 2016, p. 7, mn. 8.

¹⁷¹ O Triffterer, M Bergsmo, and K Ambos, ‘Preamble’, in Triffterer 2016, p. 7, mn. 8.

¹⁷² Schabas 2016, p. 42.

emphasis, in determining when victims' should participate, on the engagement of the "personal interests of the victims".¹⁷³

120. In summary, it is submitted that:

- i. The Applicants have standing to make these and other "observations" to the Court by virtue of article 19(3) that provides a legal basis for the participation of victims specifically, *inter alia*, "in proceedings with respect to jurisdiction" conducted pursuant to article 19(3). The Applicants qualify for those rights because they are "victims", as defined in rule 85 of the Rules;
- ii. Alternatively, the Applicants are permitted to participate by virtue of article 68(3) as victims whose "personal interests are affected";
- iii. Alternatively, the Pre-Trial Chamber should permit the Applicants' participation pursuant to rule 103, as *amicus curiae*, or pursuant to rule 93; and
- iv. The scope of participation, a matter within the broad discretion of the Pre-Trial Chamber, should extend to enable the filing of these submissions and to permit the Applicants to participate in the oral hearing on 20 June 2018, as well as any subsequent proceedings concerning the Request.

A. **The Applicants are Victims**

121. According to rule 85, victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." Accordingly, there are four criteria that must *prima facie* be satisfied to determine victim status:

- a. the victim must be a natural person;
- b. he or she must have suffered harm;
- c. the crime from which the harm ensued must fall within the jurisdiction of the Court; and
- d. there must be a causal link between the crime and the harm suffered.¹⁷⁴

¹⁷³ D Donat-Cattin, 'Article 68', in Triffterer 2016, p. 1686, mn. 8.

¹⁷⁴ *Situation in the Democratic Republic of the Congo*, ICC-01/04, [Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6](#), 17 January 2006 ('*Situation in the Democratic Republic of Congo* Decision on Application for Participation in the Proceedings'), para. 79; *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, [Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08](#), 2 April 2008 ('*Katanga & Chui* Decision on Applications for Participation'), p. 8.

122. The rule 85 definition of victims includes the immediate family or dependents of the direct victim who have suffered harm as a consequence of a crime within the jurisdiction of the court.¹⁷⁵

123. 11 of the Applicants have filed applications for victim status with the VPRS on 29 May 2018, that are currently pending with the Registry. These prospective victims are members of the Shanti Mohila (Peace Women) and are representatives of the 400 women and children that constitute the Applicants for the purposes of this Submission. The content of the application forms demonstrate that each of the 11 Applicants individually satisfy each of the four criteria for “victim” status pursuant to Rule 85. The remainder of the Applicants will file applications in the required form in due course.

B. **Applicants Have Standing in the Request**

124. The Applicants have standing in this application by virtue of two independent but concurrent legal bases: under Articles 19(3) and 68(3).

125. Article 19(3) provides that:

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.¹⁷⁶

126. Article 68(3) provides that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers appropriate, in accordance with the Rules of Procedure and Evidence.¹⁷⁷

127. These two provisions have a *lex generalis* and *lex specialis* relationship in that Article 19(3) (*lex specialis*) will override the provisions of article 68(3) (*lex generalis*) in the event that both powers are engaged.¹⁷⁸ It is therefore appropriate to consider the article 19(3) legal basis first.

¹⁷⁵ See for example, *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 9 OA 10, [Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008](#), 11 July 2008, para 32; *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Redacted version of “Decision on ‘indirect victims’”](#), 8 April 2009, paras 44-45; [Katanga & Chui Decision on Applications for Participation](#), p. 8.

¹⁷⁶ Rome Statute, article 19(3).

¹⁷⁷ Rome Statute, article 68(3).

¹⁷⁸ *Situation in the Republic of Kenya*, ICC-01/09, [Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya](#), 3 November 2010, para. 7.

i. Standing Under Article 19(3)

128. This being the first time a request has been submitted under article 19(3), it follows that it is also the first time that the Court has had to determine the applicability of victims' participatory rights in such a request.

129. As discussed, the participatory rights under article 19(3) provide an express *lex specialis* overlaying the *lex generalis* rights in article 68(3). Articles (19)(1), (2) and (3) provide a panoply of mechanisms through which questions of admissibility and jurisdiction may be determined. Article 19(3) couples the right of victims to "submit observations" co-extensively with proceedings conducted pursuant to those mechanisms. If, as the Prosecution's Request suggests, the Prosecution's right to seek a determination pursuant to article 19(3) is unfettered by the stage of the proceedings at which it is sought so that the full range of jurisdictional matters may be addressed,¹⁷⁹ it follows that the Applicants' associated right to participate in that procedure remains equally as extensive.

130. The need to ensure *lex specialis* participatory rights in this specific context reflects the centrality of the jurisdictional and admissibility questions to which they attach and the paramount importance of the victims' vested interest in them as essential safeguards and guarantees of access to justice. In this case, article 19(3) ensures commensurate stakeholder participation in the jurisdictional decision that is the subject of the Prosecutor's request, recognising the engagement of rights beyond those that it is appropriate (in the context of the Rome Statute) for the Prosecutor to exercise alone. As evidenced by the individual applications and the contextual circumstances of the case, the Applicants' personal interests are engaged by the proceedings. They have suffered relevant harm and the proceedings offer the victims a chance of legal redress for the crimes committed.

131. The Prosecutor does not dispute the right of the victims to make observations, but indicates that this should be through the auspices of the Office of the Public Counsel for Victims ("OPCV") or through the requesting of leave under rule 103 to file as an *amicus curiae*, rather than under article 19(3).¹⁸⁰

132. The Prosecutor's (somewhat equivocal) resistance to participatory rights appears to rest entirely upon the timing of the Request. The Prosecution observes that: "[s]ince the events triggering this request are not subject to a State or UN Security Council referral, and no relevant "situation" exists before the Court, it appears that no [...] participating victim is

¹⁷⁹ [OTP Request](#), para. 53.

¹⁸⁰ [OTP Request](#), para. 61.

formally entitled to file additional observations on this matter under article 19(3)".¹⁸¹ However, as detailed below, there is no real basis for conditioning the application of article 19(3) on the 'triggering' events of a State or UN Security Council referral.

133. On further analysis, if the Prosecution's restrictive construction of article 19(3) is adopted, it would:

- e. curtail the victims' rights to participate where the Prosecutor's request is brought before a referral, whereas it is beyond argument that those rights would engage had the Prosecutor delayed her request until after a referral had been made; and
- f. foreclose the victims' participation in an Article 19(3) procedure where a case or situation had been opened by means other than an article 13 referral (in which case participation would be permitted).

134. In the absence of a clear indication in the wording of article 19(3) that there was any intention to limit the scope of victims' rights to justify these consequences, the procedural inequality and unfairness that arises cannot be justified and lacks any reasoned basis.

135. Moreover, any ambiguity in the terms of article 19(3) that may be capable of implying that the participation of victims at this stage is contingent on a referral under article 13, is definitively removed by a reading of it alongside rule 59. Rule 59(1) makes it clear that the participatory rights contained in article 19(3) are vested in two distinct categories of participants, describing "victims" as distinct from "those [states] who have referred a situation pursuant to article 13". Read in context, the standing of victims cannot be construed as narrowed or qualified by reference to the existence of an article 13 referral.

136. It is submitted that the engagement of the personal interests of the victims is a more rational trigger for the invocation of participatory rights than the timing of the Request (over which the Applicants have had no control). In this regard, it is instructive that the engagement of "personal interests of the victims" is the threshold test for the *lex generalis* article 68(3) participatory rights. Even though absent from the express wording of article 19(3), it remains a compelling threshold for its operation.

137. In light of an ongoing apartheid, persecutory and genocidal campaign spanning Myanmar and Bangladesh,¹⁸² and the Applicants' associated harm, there can be little doubt that the Applicants' rights are profoundly affected *at this time*. Depending on the outcome, the

¹⁸¹ [OTP Request](#), para. 61.

¹⁸² Reuters, [U.N. rights boss wants allegations of crimes against Rohingya referred to ICC](#), 9 March 2018.

Request may have determinative consequences for the Applicants' rights to access justice. Conversely, it has the potential to contribute to the end of the Applicants' suffering at the hands of an extant apartheid regime enforced by an ongoing persecutory and genocidal campaign.¹⁸³ Natural justice demands that these victims be permitted to participate.

138. Finally, the Prosecution's reliance on an Appeals Chamber decision in the Democratic Republic of the Congo ('the DRC') situation fails to proffer support for their restrictive view of the victims participatory rights.¹⁸⁴ On the contrary, in that case the Appeals Chamber considered that "*it is not necessary to rule on the applicability of article 19(3) of the Statute in general but in the present circumstances even if this right is applicable it must necessarily be restricted in its enforcement due to the under seal and ex parte, Prosecutor only, nature of the proceedings [emphasis added].*"¹⁸⁵ In other words, the Appeals Chamber restricted the participation of victims in that instance due to the confidential and *ex parte* nature of the arrest warrant proceedings, and not because it determined that article 19(3) required any restriction in the pre-situation phase.

139. In conclusion, enabling the victims' participation in the proceedings as early as possible would be in line with the intention of the drafters of the Statute to ensure victims' participation at the early stages of proceedings¹⁸⁶ and, as demonstrated above, would be consistent with principles of natural justice. In light of the scale, seriousness and ongoing nature of the crime, these considerations could not be more relevant and urgent.

ii. The Applicants Have Communicated with the Court for the Purposes of Rule 59

140. As detailed above, the Applicants have communicated with the Court for the purposes of rule 59(1).¹⁸⁷ Therefore, it is submitted that the Applicants are entitled to receive the information outlined in rule 59(2) and, consequently, that they are entitled to make these written representations in relation to the Request, pursuant to rule 59(3).

¹⁸³ Reuters, [U.N. rights boss wants allegations of crimes against Rohingya referred to ICC](#), 9 March 2018.

¹⁸⁴ *Situation in the Democratic Republic of Congo*, ICC-01/04, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"](#), 13 July 2006 ('*Situation in the Democratic Republic of Congo* Judgment on the Prosecutor's appeal against the Pre-Trial Chamber I Decision on the Prosecutor's Application for Warrants of Arrest'), para. 30-31.

¹⁸⁵ [Situation in the Democratic Republic of Congo, Judgment on the Prosecutor's appeal against the Pre-Trial Chamber I Decision on the Prosecutor's Application for Warrants of Arrest](#), para. 30.

¹⁸⁶ D Donat-Cattin, 'Article 68', in Triffterer 2016, p. 1686, mn. 8: the first eleven years of practice of the Court in general and the Pre-Trial procedures in the DRC and Central African Republic situations in particular, including the first Court case against an individual (Lubanga), attest the centrality of victims' participation in the ICC proceedings from the earliest stages in which the personal interests of victims are affected.

¹⁸⁷ See para. 122.

iii. Standing Under Article 68(3)

141. Article 68(3) empowers the Court to ensure victims participation where their “personal interests are affected”. Participation is permitted “at stages of the proceedings determined to be appropriate by the Court”. Although framed permissively, it is submitted that in circumstances where the express criteria are satisfied it would be an inappropriate exercise of discretion not to allow victims’ participation. As outlined, the legal basis for victim’s participation under article 68(3) is neither limited nor affected by the stage of the proceedings in which it falls to be exercised.

142. Article 68(3) provides that victims’ participatory rights will engage “at stages of proceedings determined to be appropriate by the Court”.

143. The rights of victims to participate prior to the investigations or preliminary examinations stages is yet to be considered. However, the Court has not found that any temporal limit on the scope of victims’ rights may be implied through the use of the word “proceedings”. It has found that victims’ rights to participate under this provision extend to all stages of the proceedings, including the situation phase,¹⁸⁸ i.e. preliminary examinations stage¹⁸⁹ as well as the investigations stage.¹⁹⁰

144. According to the Appeals Chamber, “proceedings” for the purposes of article 68(3) denotes “judicial cause pending before a Chamber.”¹⁹¹ In this case, a judicial cause is now pending before the Pre-Trial Chamber: a ruling has been sought; a State Party has been invited to participate; and a hearing will be held pursuant to a judicial decision.

145. As already argued, the engagement of the victims’ “personal interests” is a more rational criterion against which to assess the right of victims’ to participate and is an express threshold requirement of article 68(3). Reasons have already been developed as to the extent to which the Request engages the Applicants’ personal interests. For the same reasons, it is “appropriate” for the Court to enable the Applicants’ participation.

¹⁸⁸ *Situation in Uganda*, ICC-02/04, [Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda](#), 9 March 2012, para. 10-12.

¹⁸⁹ See Rome Statute, article 15(3); *Prosecutor v. Kony, et al.*, ICC-02/04-01/05, [Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), 2 February 2007, para. 15.

¹⁹⁰ *Situation in the Democratic Republic of the Congo*, ICC-01/04 OA4 OA5 OA6, [Judgment on victims participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007](#), 19 December 2008 (‘*Situation in the Democratic Republic of Congo Judgment on victims participation in the investigations stage*’), para. 56.

¹⁹¹ [Situation in the Democratic Republic of Congo, Judgment on victims participation in the investigations stage](#), para. 45.

C. Admissibility of Submission Under Rule 103 or Rule 93

146. In the alternative, the Court should grant the Applicants standing to participate in these proceedings pursuant to rule 103(1) and to admit these submissions on the basis that, for the reasons given, they are “desirable for the proper determination of the case”.¹⁹²

147. Alternatively, pursuant to rule 93, the Pre-Trial Chamber may seek the views of victims or their legal representatives on *any issue*.

D. Scope of the Applicants’ Right to Participate

148. It is submitted that the Applicants’ right to participate subsists for as long as their “personal interests are affected”. This includes making these submissions but should also be construed as extending to any further filings or oral hearings conducted pursuant to the Request, or in any other meaningful opportunity to have their views taken into consideration.

149. It is further submitted that the Pre-Trial Chamber should amend its order to conduct an *ex parte* status conference on 20 June 2018, to enable the participation of victims and, where appropriate, *amicus curiae* admitted pursuant to rule 103, and to hold the hearing in public.

150. Regulation 20 of the Regulations of the Court, states “[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.”¹⁹³ Further, if a Chamber orders that a certain hearing shall be held in a closed session, “the Chamber shall make public the reasons for such an order.”¹⁹⁴

151. The issues raised in the Request and in this Submission are issues with a clear and inherent public interest. Proceedings to which they relate should be held in public, absent any compelling justification to the contrary. For these reasons, it is respectfully submitted that the Pre-Trial Chamber should amend its order accordingly.

CONCLUSION

152. For the foregoing reasons, the Applicants request the Pre-Trial Chamber to:

- a. Accept the Applicants’ standing in the issues raised by the Request and to admit this Submission;

¹⁹² Rules of Procedure and Evidence, rule 103(1).

¹⁹³ Regulations of the Court, regulation 20(1).

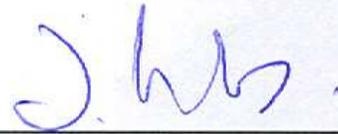
¹⁹⁴ Regulations of the Court, regulation 20(2).

- b. Set a reasonable timetable to ensure that other victims' representatives may participate fully and interested *amicus curiae* are able to seek leave to participate in the issues *sub judice*;
- c. Amend the Order of 11 May 2018 to enable the participation of the Applicants and other victims and *amicus curiae*, as appropriate, in the status conference and any other relevant hearings and to hold them in public; and
- d. Find that the Court has jurisdiction, pursuant to article 12(2)(a), to enable the Prosecution to investigate the crimes of deportation, apartheid, persecution and genocide perpetrated against the Rohingya during and related to their deportation from Myanmar to Bangladesh.

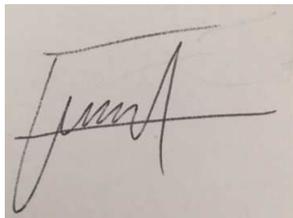
30 May 2018
Respectfully submitted,



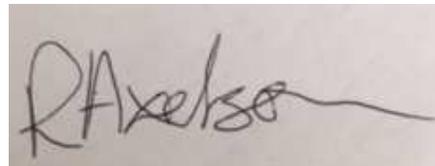
Wayne Jordsah QC



Joe Holmes



Uzay Aysev



Ruby Mae Axelson