

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/19  
Date: 23 October 2019

**PRE-TRIAL CHAMBER III**

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

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

**PUBLIC**

**Representations of victims from Tula Toli**

**Source:** Legal Representatives of Victims

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

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**Unrepresented Applicants  
(Participation/Reparation)**

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Victims**

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**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. These submissions are made by the Legal Representatives of Victims (“LRVs”) on behalf of 86 victims from the village of Tula Toli (the “Tula Toli Victims” or the “Victims”) in response to the Prosecutor’s Request for authorisation of an investigation pursuant to article 15 (the “Request”).
2. The Tula Toli Victims request Pre-Trial Chamber III (the “Chamber”) to authorise an investigation, and to make clear that the scope of that investigation includes sufficiently linked crimes that have not been identified in the Request. These include crimes committed *before* 9 October 2016 but which began or continued after Bangladesh became a state party to the Rome Statute (the “Statute”) on 1 June 2010. It is also important that the temporal scope of the investigation continues beyond the date of its authorisation, given the unfortunate possibility that additional crimes are ongoing or may in future be committed both in Myanmar and Bangladesh.
3. The scope of the investigation must encompass all potential perpetrators. The Tatmadaw must be the primary focus, but others facilitating their crimes must also be subject to scrutiny. So too must officials of Bangladesh, and the agencies supporting them, whose conduct increasingly resembles ill-treatment designed to effect unsafe repatriation. The Court should seek to deter these potential crimes by confirming that they are within the scope of the investigation.
4. The LRVs submit that the Tula Toli Victims have standing to make these representations, and to do so by means of a direct filing to the Chamber.

## II. STANDING

### *General information about the Tula Toli victims*

5. The Tula Toli Victims are 86 individuals. They live in refugee camps in the Cox’s Bazar area of Bangladesh, but are originally from the village of Tula Toli, in Maungdaw township, Rakhine State, Myanmar. All are ethnically Rohingya. Of the 86 individuals: 45 are women, 32 are men, and 9 are children (6 girls and 3 boys).
6. Ten of the Victims made submissions to the ICC in its jurisdictional proceedings

in 2018,<sup>1</sup> and at that time submitted victim participation application forms and powers of attorney to the Registry.<sup>2</sup> The other 76 individuals have yet to complete application forms, but consented to these submissions being made on their behalves.

### *Victim status*

7. Article 15(3) representations may only be made by “victims” as defined in rule 85 of the Rules of Procedure and Evidence (“RPE”). At this stage, whether a person meets that definition is assessed by the “intrinsic coherence” of the information submitted.<sup>3</sup> Such material need not be submitted using standard Registry forms.<sup>4</sup>

8. All of the Tula Toli Victims clearly meet the rule 85(a) definition of “victim”. All were forcibly deported from Myanmar into Bangladesh by acts of extreme violence. The great majority most recently<sup>5</sup> entered Bangladesh during 2017.<sup>6</sup> Among the coercive acts which forced their flight to Bangladesh the Victims describe, *inter alia*, the killing of family members, rapes, acts of extreme physical violence, the destruction of homes and the theft of property. However they also emphasise that these acts were part of a prolonged experience of persecution. As a result of their deportation and the violence involved in it, all have suffered multiple forms of harm: they have been denied their citizenship and ethnic identity, and have been forced from their homes into inhumane conditions in refugee camps. Most have also suffered other forms of harm including the deaths of family members, physical injuries and psychological trauma.

9. No information provided by any of the Tula Toli Victims conflicts with their status as “victims” within rule 85(a). The LRVs submit that they all therefore meet the definition and are entitled to submit representations under to article 15(3).

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<sup>1</sup> [Tula Toli Victims’ Observations on Jurisdiction](#), ICC-RoC46(3)-01/18-26, 18 Jun 2018.

<sup>2</sup> Those victims were assigned the following reference numbers by the Registry: a/60011/18, a/60012/18, a/60013/18, a/60014/18, a/60015/18, a/60016/18, a/60017/18, a/60018/18, a/60019/18, a/60020/18.

<sup>3</sup> [Decision on the Representation Process](#), ICC-01/19-6, 28 Jun 2019, para. 20.

<sup>4</sup> [Decision on the Representation Process](#), ICC-01/19-6, 28 Jun 2019, para. 17.

<sup>5</sup> Some had previously returned from Bangladesh to Myanmar, but were forced to flee again in 2017.

<sup>6</sup> At least one entered in 2014.

*Standing of victims to submit representations directly to the Chamber*

10. The LRVs submit that they are permitted to file direct, public representations to the Chamber. Although this approach has not previously been taken in article 15 proceedings, it is supported by the Court's texts.

11. As in previous article 15 proceedings,<sup>7</sup> the Chamber has established a process to enable widespread victim engagement via the Registry. Victims may complete a simple form and submit it to the Registry. These forms are reviewed by the Registry, transmitted confidentially to the Chamber, and summarised in a public report. This process ensures that the Chamber *"is provided with the highest possible number of victims' representations in order to have a meaningful and representative sample of the affected population."*<sup>8</sup> Most victims will not have a lawyer, so the process is maximally accessible to victims and the lay persons who assist them to make representations.

12. This Registry-led process is essential to ensure that a large number of victims – particularly those who are not legally represented – are heard by the Chamber. However it should not prevent victims from making representations directly in the event that they *are* legally represented. Nothing in the Chamber's decisions precludes direct filing by victims' lawyers; to the contrary, the Chamber has specifically indicated that victims need not use the standard form, and that *"victims' representations submitted through different means should equally be accepted."*<sup>9</sup>

13. The legal texts clearly envisage victims filing article 15(3) representations directly to a Pre-Trial Chamber through a lawyer. Rule 50(1) of the RPE speaks of notifying victims through *"their legal representatives"*. And regulation 38(3)(a) of the Regulations of the Court (the *"RoC"*), which sets out page limits for various filings, includes a limit (30 pages) specifically for victims' representations under article 15(3).

14. There are also policy reasons for permitting victims who *are* legally represented

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<sup>7</sup> [Kenya Order to the VPRS](#), ICC-01/09-4, 10 Dec 2009; [Côte D'Ivoire Order to the VPRS](#), ICC-02/11-6, 6 Jul 2011; [Afghanistan Order to the VPRS](#), ICC-02/17-6, 9 Nov 2017. In the Situation in Georgia no judicial decision was issued but a similar approach was followed, as set out in the Registry report: [Georgia VPRS Report on the Victims' Representations](#), ICC-01/15-11, 4 Dec 2015.

<sup>8</sup> [Decision on the Representation Process](#), ICC-01/19-6, 28 Jun 2019, para. 14.

<sup>9</sup> [Decision on the Representation Process](#), ICC-01/19-6, 28 Jun 2019, para. 18.

at this stage to file representations directly to a Pre-Trial Chamber. This ensures transparency, and enables victims' views to be widely heard and accessed. Victim participation is intended to give victims an element of control over their own voices in the judicial process. However representations submitted through the Registry remain confidential; even if they were to be reclassified, annexes to a Registry transmission are not easily found. The Registry report itself, while important in providing an overview of victims' views and a means for unrepresented victims to be heard, does not enable victims to present the issues of concern to them in detail and with nuance through the assistance of a lawyer.

15. The LRVs respectfully submit that the process established by the Chamber and the Registry to enable unrepresented victims to be heard is intended to empower victims, not silence them. It is not a basis on which to deny legally represented victims the opportunity to be directly heard, as clearly intended by the legal texts.

16. Even if the Chamber does not recognise a general right for represented victims to file representations directly in article 15 proceedings, the LRVs submit that this possibility should be extended on a discretionary basis to the Tula Toli Victims. They were heard directly pursuant to rule 93 in the jurisdictional proceedings,<sup>10</sup> and therefore have an established role in this process.

### **III. OVERVIEW OF VICTIMS' SUBMISSIONS**

17. Through these submissions the Victims express their views as to: (i) whether an investigation should be authorised; (ii) the appropriate scope of the investigation; (ii) whether the jurisdiction and admissibility requirements are met for an investigation of that scope; and (iii) whether such investigation is in the interests of justice.

### **IV. VICTIMS' VIEWS ON THE AUTHORISATION OF AN INVESTIGATION**

18. The Tula Toli Victims emphatically support the authorisation of an investigation. Even after detailed discussions about the Court's processes and limitations, the

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<sup>10</sup> [Decision on the Jurisdiction](#), 6 Sep 2018, ICC-RoC46(3)-01/18-37, para. 21.

challenge of operating without Myanmar's cooperation, and the possibility that there will be no arrests or trials for many years (or ever), the Victims remain unambiguously supportive of an investigation.

19. The Victims want criminal accountability for the crimes perpetrated against them specifically and the Rohingya generally: *"Please let the world know that they need to arrest those people"; "All I want is justice for the killings of my mother, my sister, my brothers; I want justice for that"; "My grandfather and grandmother were shot and killed and I miss them a lot ... We want justice"*. They emphasise that they see value in pursuing justice even if it may not be achieved for a long time: *"I know it will take a long time to make justice for us but I will wait"; "We also heard from other people that the ICC takes a long time to do the cases. We hope that the case will be solved in the future – whether it takes 2, 3, 5 years we want this to go on"; "Even if we don't see justice our grandchildren can see it"; "Yes, it may take longer and longer but we are hopeful that one day they will be arrested"; "Even after ten years if not us, our next generation will get peace"*.

20. An investigation is important partly because it can lead to public recognition at the highest level regarding Myanmar's crimes, particularly given its outrageous and continuing denials: *"We told you what happened to us but Myanmar is still denying it"*.

21. Of great importance to the Victims is recognition of their Burmese citizenship and their safe return home, which cannot of course be achieved directly through the Court's work, but the Victims hope that an ICC investigation can contribute indirectly to the restoration of their rights: *"When the ICC will bring justice against the crimes at that time we also hope that we will get other rights like citizenship because if there is a bird in the tree and you shoot the bird, both the leaves and the bird will fall down. We need that trial."*

## **V. THE APPROPRIATE SCOPE OF THE AUTHORISED INVESTIGATION**

### *The importance of the scope of the investigation*

22. An investigation's scope is crucially important to victims. One reason for this is that a wide scope maximises the range of potential cases. The Prosecutor can of

course select only a limited number of cases,<sup>11</sup> but it would be inappropriate, and an abdication of the duties imposed by article 54 of the Statute, if case selection was prejudged before an investigation. The Prosecutor may not limit an investigation to only one part of a wider pattern of criminal activity on the basis that this part seems likely to be the focus of case selection due to its apparent gravity. Such decisions can only properly be made after an investigation; only then can the relevant factors (including gravity) be assessed, as the Prosecutor herself has acknowledged:

*“While some kind of parameters are necessary, none is a sine qua non, and they must nonetheless be sufficiently broad so that they do not intrude into the Prosecutor’s independent duty to conduct objective, evidence-led investigations, and to select cases for prosecution.”*<sup>12</sup>

23. Victims value a broad investigation for several additional reasons. First, an appropriately broad scope implicitly recognises the extent of the atrocities. The Prosecutor recognises that charges brought should reflect the *“true extent of the criminality”* in the situation;<sup>13</sup> likewise, it is important that the scope of an investigation truly reflects the extent of the crimes. An unduly limited investigation may wrongly suggest that events outside of its scope were not article 5 crimes, thereby undermining the objective of establishing accountability for such crimes.

24. Secondly, *“positive complementarity”* is most likely to be achieved for crimes within the scope of an investigation. The Prosecution seeks to encourage domestic prosecutions during both the preliminary examination and investigation stages;<sup>14</sup> this engagement naturally focuses on crimes within the scope of the investigation.

25. Thirdly, and crucially, an investigation’s scope affects the support which may be provided under the Trust Fund for Victims’ *“assistance mandate”*.<sup>15</sup> Such activities have to date been limited by the scope of the *“situation”* open before the Court.<sup>16</sup>

<sup>11</sup> See OTP, [Policy paper on case selection and prioritisation](#), 15 Sep 2016, especially paras 5-8.

<sup>12</sup> [Afghanistan Prosecution Appeal Brief](#), ICC-02/17-74, 30 Sep 2019, para. 77.

<sup>13</sup> OTP, [Policy paper on case selection and prioritisation](#), 15 Sep 2016, para. 8.

<sup>14</sup> OTP, [Strategic Plan 2019-2021](#), 17 Jul 2019, para. 50.

<sup>15</sup> Regulation 50(a), [Regulations of the Trust Fund for Victims](#).

<sup>16</sup> See: [Uganda 2008 TFV Regulation 50 Notification](#), ICC-02/04-114, 25 Jan 2008, paras 28-29, 35-36; [Uganda 2019 TFV Regulation 50 Decision](#), ICC-02/04-235, 4 Feb 2019, para. 8; [DRC 2008 TRV](#)



*Relevant law as to scope of investigations authorised under article 15*

26. It is well-established that an investigation authorised under article 15 includes crimes within the express parameters of the scope, as well as any other crimes which are *sufficiently linked* thereto.<sup>17</sup> (Although a narrower approach was applied in the *Afghanistan Situation*, it remains subject to appeal.<sup>18</sup>) An investigation may include crimes which occur or continue after the dates on which an investigation is requested (or authorised), so long as they are *sufficiently linked*.<sup>19</sup>

27. This concept of sufficient linkage should be interpreted broadly. As submitted by the Prosecutor,<sup>20</sup> it should include any crimes sufficiently linked to the “events” described in the Request; or as held in earlier decisions, any crimes sufficiently linked to the “situation of crisis” which led the ICC to exercise jurisdiction.<sup>21</sup>

28. Although the starting point for a determination of scope is the Prosecutor’s request, this is not the only consideration. Pre-Trial Chambers have expanded or clarified the scope requested by the Prosecutor, including in response to input from victims,<sup>22</sup> and/or to ensure sufficient breadth to comply with the investigation’s purpose and prosecutorial duties.<sup>23</sup> Unduly confining the scope of an investigation:

*“...would be inconsistent with: (i) the purpose behind investigating an entire situation*

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[Regulation 50 Notification](#), ICC-01/04-439, 24 Jan 2008, paras 28-29, 35-36; [CAR TFV Regulation 50 Notification](#), ICC-01/05-39, 11 Oct 2012, para. 27.

<sup>17</sup> [Côte D’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, 15 Nov 2011, paras 178-179. See also [Georgia Article 15 Decision](#), ICC-01/15-12, 27 Jan 2016, para. 64. The same effect was achieved in the *Burundi Situation*, although the specific language of “specifically linked” was not employed: [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), paras 192-194.

<sup>18</sup> [Afghanistan First Victims’ Appeal Brief](#), ICC-02/17-73-Corr, 2 Oct 2019, paras 144-166; [Afghanistan Prosecution Appeal Brief](#), ICC-02/17-74, 30 Sep 2019, paras 73-93; [Afghanistan Second Victims’ Appeal Brief](#), ICC-02/17-75-Corr, 1 Oct 2019, paras 100-116.

<sup>19</sup> [Côte D’Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, 15 Nov 2011, para. 179; [Côte d’Ivoire Article 15 Separate Opinion of Judge Fernández de Gurmendi](#), ICC-02/11-15-Corr, 5 Oct 2011, paras 64-73; [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), para. 192; [Mbarushimana Warrant Decision](#), ICC-01/04-01/10-1, 28 Sep 2010 (made public on 11 Oct 2010), para. 6; [Mbarushimana Jurisdiction Decision](#), ICC-01/04-01/10-451, 26 Oct 2011, paras 16, 21, 41; [Mudacumura Warrant Decision](#), ICC-01/04-01/12-1-Red, 13 Jul 2021, para. 14.

<sup>20</sup> [Request](#), paras 1, 20, 21, 23, 84, 297.

<sup>21</sup> [Mbarushimana Warrant Decision](#), ICC-01/04-01/10-1, 28 Sep 2010 (made public on 11 Oct 2010), paras 6, 7; [Mbarushimana Jurisdiction Decision](#), ICC-01/04-01/10-451, 26 Oct 2011, paras 16, 21, 41.

<sup>22</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), paras 92, 192; [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, 31 Mar 2010, paras 204-205.

<sup>23</sup> [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, 31 Mar 2010, para. 205.

*as opposed to subjectively selected crimes and; (ii) the Prosecutor's duty to establish the truth by extending the investigation to cover all facts and evidence pursuant to article 54(1) of the Statute.*"<sup>24</sup>

29. Several decisions have emphasised that where some facts remain in doubt, an investigation should be permitted so that those doubts can be resolved:

*Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation. ... [O]nly by investigating could doubts be overcome. This is further demonstrated by the fact that only during the investigation may the Prosecutor use her powers under article 54 of the Statute; conversely, her powers are more limited under article 53(1) of the Statute.*<sup>25</sup>

30. The same logic applies to an investigation's scope. Where credible material suggests that additional and related crimes within the Court's jurisdiction have been or may be committed, the scope of the investigation should be drawn so as to engage prosecutorial duties and enable the resolution of any doubts through the investigation itself.

#### *The scope as requested by the Prosecutor*

31. The Request seeks an investigation into events beginning on 9 October 2016,<sup>26</sup> continuing beyond the date of the Request,<sup>27</sup> and encompassing "*crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of neighbouring Myanmar, as well as any other crimes which are sufficiently linked to these events.*"<sup>28</sup>

32. Although the Request is based on an analysis of three forms of crime against humanity (deportation, persecution, other inhumane acts), it expressly seeks to

<sup>24</sup> [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, 31 Mar 2010. The Prosecutor has also recognised that "*Neither the Prosecutor nor the Pre-Trial Chamber may delimit the parameters of an investigation so narrowly that it defeats other requirements of the Statute....*": [Afghanistan Prosecution Appeal Brief](#), ICC-02/17-74, 30 Sep 2019, para. 78.

<sup>25</sup> [Comoros First Decision on Prosecutor's decision not investigate](#), ICC-01/13-34, 16 Jul 2016, para. 13; see also [Georgia Article 15 Decision](#), ICC-01/15-12, 27 Jan 2016, para. 29 and [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), para. 30.

<sup>26</sup> [Request](#), para. 20.

<sup>27</sup> [Request](#), para. 23.

<sup>28</sup> [Request](#), para. 20.

include other crimes which may be revealed by the investigation. Likewise the Request is not limited to identified groups of suspects, but mentions Burmese security forces, other Myanmar authorities, non-Rohingya civilians, and ARSA.

*The Tula Toli Victims' submissions on scope*

33. The Tula Toli Victims agree that the categories of conduct identified in the Request should be investigated, but argue that in some respects the investigation's scope must be wider.

(i) Legal characterisation of crimes

34. It is important to the Victims that the Prosecutor can investigate the widest possible range of crimes committed against the Rohingya. The LRVs therefore support the Prosecutor's request that she be permitted to investigate conduct which may amount to any article 5 crime, despite the Request's focus on crimes under article 7(1)(d), (h) and (k).<sup>29</sup> It is particularly important that the Prosecutor is not prevented from investigating genocide or the crime against humanity of apartheid.

(ii) Crimes committed between 1 June 2010 and 9 October 2016

35. Although the great majority of the Tula Toli Victims entered Bangladesh (at least most recently) in 2017, they note the decades of persecution against the Rohingya in Myanmar, including peaks of violence from 2012 onward, and express the view that the investigation should not be limited to crimes committed in 2016 and thereafter.

36. The Request recognises that a sequence of violence began in Rakhine State in 2012 which caused the displacement of tens of thousands of persons, perhaps up to 140,000 by mid-2013.<sup>30</sup> Peaks of violence occurred in June and October 2012, and again in 2013<sup>31</sup> and 2014<sup>32</sup>. Although Myanmar presented this as spontaneous

<sup>29</sup> See [Request](#), footnote 33; para. 75, 86.

<sup>30</sup> [Request](#), paras 55-58.

<sup>31</sup> [FFM September 2018 Report](#), 17 Sept 2018, para.628; HRW, "[All You Can Do is Pray](#)", Apr 2013, pp21-23.

<sup>32</sup> UN, [Top UN officials call for probe into latest violence in Myanmar's Rakhine state](#), 23 Jan 2014; Fortify Rights, [Myanmar: End Mass Arrests of Muslim Men and Boys in Rakhine State, Protect At-Risk Communities](#), 23 Jan 2014; New York Times, [Rise in Bigotry Fuels Massacre Inside Myanmar](#), 1 Mar 2014; [Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana](#), 2 Apr 2014, para. 47.

“intercommunal” fighting,<sup>33</sup> the Independent International Fact-Finding Mission on Myanmar (“FFM”) has compellingly revealed that characterisation to be false:<sup>34</sup>

*Between 2012 and 2013, security forces – sometimes acting alongside the Rakhine – committed serious human rights violations against Rohingya and Kaman across Rakhine State. This included the burning of houses, looting of shops, extrajudicial and indiscriminate killings, including of women, children and elderly people. ...”<sup>35</sup>*

37. Numerous factors indicate that this violence was part of the same pattern as that which followed in 2016 and thereafter. Killings, extreme physical and sexual violence and arson were used by, at the instigation of, and under the supervision of security forces. These acts appear to have been intended to – and in fact did – clear parts of Rakhine State of Rohingya.

38. Like the violence of 2016 and 2017, the earlier violence was preceded and accompanied by hate speech and incitement.<sup>36</sup> It portrayed Rohingya as illegal immigrants, violent criminals or terrorists.<sup>37</sup> State media actively engaged in this campaign,<sup>38</sup> as did senior officials, including the President’s spokesperson, who published the following statement on social media days before the 2012 violence:

*We received news that the Rohingya terrorists, under the name [Rohingya Solidarity Organization] are crossing the border with weapons. This is Rohingya infiltration from*

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<sup>33</sup> [Statement of The Government of the Republic of the Union of Myanmar Ministry of Foreign Affairs](#), ASEAN Secretariat News, 21 Aug 2012; [President Office issues statement with regard to conflict in Rakhine State](#), New Light of Myanmar, (statement dated 25 Oct 2012, published 26 Oct 2012); See also: Reuters, [Four killed as Rohingya Muslims riot in Myanmar: government](#), 8 Jun 2012. These characterisations were unfortunately adopted by many journalists and international actors at the time. On how this occurred within the UN in a way which partly explains the current deeply flawed approach to creating conditions for safe repatriation, see Liam Mahony, [Time to Break Old Habits: Shifting from Complicity to Protection of the Rohingya in Myanmar](#), Jun 2018, pp22, 23, 28.

<sup>34</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 745-747, 728, 745-747.

<sup>35</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 628. Regarding specific acts of violence and the involvement of security forces see also paras 632, 635, 638, 640, 645, 646, 649, 653-659, 662-663, 669-678; [FFM SGBV Report](#), 22 Aug 2019, paras 69, 92-93, 159, 165.

<sup>36</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 696-716, 1322; [FFM SGBV Report](#), 22 Aug 2019, paras 90-91; HRW, [“All You Can Do is Pray”](#), Apr 2013, pp24-30; Equal Rights Trust, [Burning Homes, Sinking Lives](#), Jun 2012, p9.

<sup>37</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 626-627, 634, 702-716; HRW, [“All You Can Do is Pray”](#), Apr 2013, pp28-29. The Burmese Government has gone so far as to suggest that the very use of the word “Rohingya” suggests wrongdoing: *“The said term is maliciously used by a group of people with ulterior motives”*: [Comments by the State](#), on the Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, 12 Mar 2014, para. 27.

<sup>38</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 625, 701-703, 1324, 1333.

*abroad. Because our troops have received the news in advance, we are going to eradicate them [the Rohingya], until the job is done. I assume that the troops are already eradicating [the Rohingya]. Regarding this issue, we don't want to hear any humanitarian or human rights excuses. We don't want to hear your moral superiority, or so-called peace and loving kindness. (Go and look at Buthidaung, Maungdaw areas in Rakhine State. Our ethnic people are in constant fear in their own land. I feel very bitter about this. This is our country. This is our land.)*<sup>39</sup>

39. That Myanmar's intention was at best to forcibly transfer and deport the Rohingya is confirmed by the fact that, in a meeting with the UN High Commissioner for Refugees, the Burmese President

*"referred to 'illegal migrants' who 'sneaked into' Myanmar and 'later took the name Rohingya'" and "stated that he could not take responsibility for them and that they should either be sent to IDP camps and be supported by UNHCR, or be sent to a third country."*<sup>40</sup>

40. Some Rohingya communities were virtually destroyed by this violence and the measures that followed. Before 2012 an estimated 73,000 Muslims (Rohingya and Kaman) lived in Sittwe;<sup>41</sup> the population since is estimated at around 4000 persons, all of whom are ghettoised in the Aung Mingalar quarter and virtually unable to move elsewhere.<sup>42</sup> As the FFM report makes clear, the removal of these people was entirely intentional: some were removed by force, some were told to leave.<sup>43</sup>

41. The FFM emphatically concluded that the violence was planned and involved state officials. Rakhine communities were expressly invited to participate in attacks, and were transported and armed.<sup>44</sup> Security forces and civilian officials directly participated.<sup>45</sup> The events followed what has become a recognisable pattern, wherein

<sup>39</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 705, 1328.

<sup>40</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 712. See also para. 1424. See also HRW, ["All You Can Do is Pray"](#), Apr 2013, p83. Various groups later called for this promise of Rohingya expulsion to be implemented: HRW, ["All You Can Do is Pray"](#), Apr 2013, pp33, 84.

<sup>41</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 641.

<sup>42</sup> Amnesty International, ["Caged Without a Roof"](#), 2017, p55; [Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana](#), 2 Apr 2014, para. 44; [FFM September 2018 Report](#), 17 Sept 2018, paras 520, 525, 643, 650. The FFM found that these persons are, like those in internment camps, subject to illegal, arbitrary and discriminatory deprivation of liberty: paras 527-529.

<sup>43</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 650.

<sup>44</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 729-731.

<sup>45</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 733-735, 739; [FFM SGBV Report](#), 22 Aug 2019, paras 69, 91; HRW, ["The Government Could Have Stopped This"](#), Aug 2012, pp1-3, 24-27; HRW, ["All](#)



an allegation of rape or other crime is made and spread by nationalist groups, and followed by a public rally involving further incitement and, ultimately, violence.<sup>46</sup>

*The Government's portrayal of the 2012 violence as "intercommunal" between the Rohingya and Rakhine has prevailed but is inaccurate. While there certainly was violence between Rohingya and Rakhine groups, resulting in killing and destruction of property, these attacks were not spontaneous outbursts of hostility. They resulted from a plan to instigate violence and build tensions. This was facilitated and amplified by the hate campaign that started in February 2012 and intensified significantly after 28 May 2012. Myanmar security forces failed to stop the violence and often actively participated.*<sup>47</sup>

42. The violence was used as a pretext to impose increasingly extreme restrictions on Rohingya.<sup>48</sup> During and after the violence there were mass arbitrary arrests<sup>49</sup> and forced transfers.<sup>50</sup> A state of emergency was declared in Rakhine State and remained in place for almost four years.<sup>51</sup> Restrictions on freedom of movement were dramatically increased<sup>52</sup> (with severe impacts on livelihoods, nutrition, healthcare, and education<sup>53</sup>), including by suspending and later restricting the issuance of travel

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[You Can Do is Pray](#)", Apr 2013, pp35, 53-63; Equal Rights Trust, [Burning Homes, Sinking Lives](#), Jun 2012, pp11-13.

<sup>46</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 742; The Sentinel Project had identified this pattern in its September 2013 report which warned of an extremely high risk of genocide in Burma: The Sentinel Project, [Burma Risk Assessment](#), Sep 2013, p40.

<sup>47</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 728.

<sup>48</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 628; HRW, ["All You Can Do is Pray"](#), Apr 2013, pp77-82.

<sup>49</sup> [FFM September 2018 Report](#), 17 Sept 2018, 608, 638, 640; HRW, ["All You Can Do is Pray"](#), Apr 2013, pp36-40; HRW, ["The Government Could Have Stopped This"](#), Aug 2012, pp5, 27-29.

<sup>50</sup> HRW, ["The Government Could Have Stopped This"](#), Aug 2012, pp34-35.

<sup>51</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 685-687.

<sup>52</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 512, 514, 1113; HRW, ["All You Can Do is Pray"](#), Apr 2013, p78; Amnesty International, ["Caged Without a Roof"](#), 2017, pp11-12, 42-57; The Government openly reported that it was *"tightening the regulations in order to handle travelling, birth, death, immigration, migration, marriage, construction of new religious buildings, repairing and land ownership and right to construct building of Bengalis under the law"*: New Light of Myanmar, [Reforms must be undertaken](#), 1 Aug 2012, p9.

<sup>53</sup> People were unable to work or access health centres, some schools closed, the one previously accessible university (Sittwe) was no longer reachable, and levels of hunger increased due to loss of income and/or fear of attempting movement: see [FFM September 2018 Report](#), 17 Sept 2018, paras 536, 539-540, 546, 561-562, 565-567, 683. See also HRW, ["All You Can Do is Pray"](#), Apr 2013, pp81-82; Fortify Rights, [Policies of Persecution](#), Feb 2014, pp33-34; HRW, ["The Government Could Have Stopped This"](#), Aug 2012, pp39-42; Amnesty International, ["Caged Without a Roof"](#), 2017, pp12, 59-79.

permits;<sup>54</sup> the imposition of a curfew;<sup>55</sup> requirements for overnight guests to be registered;<sup>56</sup> “checks” on Rohingya homes;<sup>57</sup> and policies of segregation.<sup>58</sup> Other restrictions, such as those on marriage and worship, were tightened.<sup>59</sup> An estimated 126,000 Rohingya were interned and remain illegally and arbitrarily detained to this day.<sup>60</sup> Arson and theft were used not only to displace Rohingyas but also to destroy or remove documents, thereby consolidating the discriminatory denial of citizenship.<sup>61</sup> No doubt to limit scrutiny, humanitarian access was restricted and international agencies were increasingly subjected to intimidation and violence.<sup>62</sup>

43. Having concluded that the pre-2016 violence was planned, with state officials actively involved, the FFM situated it firmly within the history of Rohingya repression.<sup>63</sup> It confirmed that *“this is not the first time Myanmar has driven large numbers of Rohingya off their lands and into Bangladesh.”*<sup>64</sup> Indeed it explained the violence as part of a long-established pattern of persecution, noting similar bursts of mass violence against Rohingya in 1978 and 1992.<sup>65</sup>

44. It is estimated that tens of thousands of Rohingya fled Myanmar in 2012 and the

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<sup>54</sup> [FFM September 2018 Report](#), 17 Sept 2018, para. 506.

<sup>55</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 509, 680-683, 1122; [FFM September 2019 Report](#), 16 Sep 2019, para. 148; Amnesty International, [“Caged Without a Roof”](#), 2017, pp44-45.

<sup>56</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 522-524.

<sup>57</sup> HRW, [“All You Can Do is Pray”](#), Apr 2013, p81; Fortify Rights, [Policies of Persecution](#), Feb 2014, pp37-38.

<sup>58</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 513, 515-516, 525.

<sup>59</sup> HRW, [“All You Can Do is Pray”](#), Apr 2013, p80; Amnesty International, [“Caged Without a Roof”](#), 2017, p12.

<sup>60</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 517-519, 525, 691-695; [FFM September 2019 Report](#), 16 Sep 2019, para. 111; Amnesty International, [“Caged Without a Roof”](#), 2017, pp53-54.

<sup>61</sup> HRW, [“All You Can Do is Pray”](#), Apr 2013, p112; HRW, [“The Government Could Have Stopped This”](#), Aug 2012, pp47-48.

<sup>62</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 573, 717-723; HRW, [“All You Can Do is Pray”](#), Apr 2013, pp46-46; HRW, [Burma: New Violence in Arakan State, Satellite Imagery Shows Widespread Destruction of Rohingya Homes, Property](#), 25 Oct 2015.

<sup>63</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 748, 749. See also paras 724-727, describing how many Rohingyas viewed 2012 as a turning point in their treatment by Rakhine communities. See also [FFM SGBV Report](#), 22 Aug 2019, paras 90 and 99.

<sup>64</sup> [FFM September 2019 Report](#), 16 Sep 2019, para. 202.

<sup>65</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 100-103. This assessment fits with that of the former UN Special Rapporteur, who in 2014 referred to the treatment of Rohingya in Myanmar, particularly since 2012, as a crime against humanity: [Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana](#), 2 Apr 2014, para. 51.

following years, particularly by boat.<sup>66</sup> Large numbers are reported to have sought refuge in Bangladesh. Many were sent back after entering Bangladesh,<sup>67</sup> but others evaded security and remained.<sup>68</sup> Many likely travelled onwards by boat to other destinations.<sup>69</sup> Because Bangladesh maintained a policy of refusing entry and assistance, those who entered did so secretly and were not recorded.

45. The LRVs submit that the violence of 2012-2016 must be included in the scope of the investigation. They note that in the *Situation in Burundi* the Prosecutor was specifically authorised by the Chamber to investigate crimes occurring *before* the Prosecutor's requested start date of the investigation which were sufficiently connected to the investigation;<sup>70</sup> this was prompted by complaints by victims of earlier crimes.<sup>71</sup> In the present case there can be no doubt that the violence which began in 2012 was "sufficiently linked" to that which followed in 2016 and thereafter. Any doubt would in any event only highlight the need for an investigation: "*open questions should not preclude an investigation but should indeed be resolved as part of it.*"<sup>72</sup> Indeed it is crucial that this violence is included within the scope so as to correct the misperception about this period; too many in the international community uncritically adopted Myanmar's narrative of intercommunal violence,<sup>73</sup> with tragic results including the lifting of sanctions<sup>74</sup> and a complete failure of accountability

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<sup>66</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 623, 660; UNHCR, [As thousands continue to flee Myanmar, UNHCR concerned about growing reports of abuse](#), 10 June 2014; HRW, ["All You Can Do is Pray"](#), Apr 2013, pp72-77.

<sup>67</sup> HRW, [Bangladesh: Stop Boat Push-Backs to Burma](#), 19 Jun 2012; Daily Star, [No more refugees](#), 23 Jun 2012; HRW, ["The Government Could Have Stopped This"](#), Aug 2012, pp49-50; Equal Rights Trust, [Burning Homes, Sinking Lives](#), Jun 2012, pp18-19.

<sup>68</sup> Equal Rights Trust, [Burning Homes, Sinking Lives](#), Jun 2012, p19-20; Reuters, [Myanmar boat people swap violence for desperation](#), 17 Jun 2012; Guardian, [Persecuted Burmese tribe finds no welcome in Bangladesh](#), 7 Aug 2012.

<sup>69</sup> HRW, ["All You Can Do is Pray"](#), Apr 2013, p76.

<sup>70</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), para. 192.

<sup>71</sup> *Ibid.* para. 92.

<sup>72</sup> [Georgia Article 15 Decision](#), ICC-01/15-12, 27 Jan 2016, para. 29; see also [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), para. 30.

<sup>73</sup> For a critique of the UN's adoption of this interpretation, see Liam Mahony, [Time to Break Old Habits: Shifting from Complicity to Protection of the Rohingya in Myanmar](#), Jun 2018, pp22-23, 28-29.

<sup>74</sup> In April 2013 the EU decided to lift all restrictive measures against Myanmar other than the arms embargo: [Council Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma](#)



which may have emboldened the perpetration of further atrocities. Recognition that this violence was part of the same historical pattern of international crimes is the least that the ICC can do to address the victims' right to truth.

(iii) Continuing crimes which began before 1 June 2010

46. The LRVs submit that the scope of the investigation must include continuing crimes which *began* before the start date of the temporal scope – or indeed before the start date of temporal jurisdiction – but continued thereafter. As at 1 June 2010 hundreds of thousands of Rohingya had already been forcibly deported into Bangladesh. To the extent that the crimes committed against these people are continuing crimes,<sup>75</sup> the Court's jurisdiction is engaged.

47. In *Burundi*, the ICC's temporal jurisdiction was ended by withdrawal from the Statute, yet Pre-Trial Chamber III held that the investigation could include crimes which began during the Court's temporal jurisdiction but continued thereafter.<sup>76</sup> Similarly, continuing crimes which began *before* temporal jurisdiction, but continued into it, can be part of an investigation so long as it is sufficiently linked.

(iv) Crimes initiated in Myanmar after 4 July 2019

48. The LRVs endorse the Prosecutor's request for authorisation to investigate crimes committed *after* the filing of the Request.<sup>77</sup> The Tula Toli Victims emphasise that conditions in Myanmar have not improved. Rohingyas continue to be subjected to persecution and apartheid and the danger of additional international crimes

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[and repealing Decision 2010/232/CFSP](#), 22 Apr 2013. See also: Reuters, [EU lifts Myanmar sanctions despite human rights concerns](#), 22 Apr 2013; The USA announced the easing of sanctions on 11 Jul 2012, only a month after extreme violence and mass arbitrary arrests and displacements were carried out against Rohingya in Rakhine State: White House Office of the Press Secretary, [Statement by the President on the Easing of Sanctions on Burma](#), 11 Jul 2012; the ILO lifted its restrictions on Myanmar on 13 Jun 2012, citing "*cautious optimism regarding the process of change and the process of democratization in Myanmar*" (para. 5), with Switzerland and Canada referring to progress made on human rights (paras 24 and 26): [ILO Provisional Record](#), 101<sup>st</sup> Session, Geneva, May-June 2012, 13 Jun 2012; ILO, [ILO lifts restrictions on Myanmar](#), 13 Jun 2012.

<sup>75</sup> See [GRC Victims' Observations on Jurisdiction](#), ICC-RoC46(3)-01/18-9, 30 May 2018, paras 81-118.

<sup>76</sup> [Burundi Article 15 Decision](#), ICC-01/17-9-Red, 25 Oct 2017 (made public 9 Nov 2017), para. 192.

<sup>77</sup> [Request](#), para. 23.

persists.<sup>78</sup> More than 100,000 remain in illegal detention facilities.<sup>79</sup> Those not detained are denied free movement and other basic freedoms.<sup>80</sup> In mid-2019 the Burmese government implemented a mobile data shutdown in parts of Rakhine State.<sup>81</sup> The UN Special Rapporteur states that living conditions for Rohingya “remain dreadful.”<sup>82</sup> As one victim explained: “The conflict is still going on – there are still some Rohingya people becoming victims even now ... Still in Myanmar the Tatmadaw are harming Rohingya.” Rohingya refugees continue to flee to Bangladesh.<sup>83</sup>

49. Deterrence is a fundamental objective of the Court, and one of particular relevance in this case, as the LRVs emphasised in the jurisdictional proceedings.<sup>84</sup> It is therefore essential that future conduct can be investigated. This must include not only the continuation of crimes which have already begun, but also new crimes committed after 4 July 2019 which are sufficiently linked to the events in question. This should encompass further crimes involving persecution of and violence against the Rohingya in Myanmar, so long as they are within the Court’s jurisdiction.

(v) Crimes which may be initiated within Bangladesh: forced deportation or transfer

50. The greatest fear expressed by the Tula Toli Victims is that of a forced and unsafe return to Myanmar: “If we go there without security we will be killed”; “If we go back without our rights, they will kill us”. They are frightened by indications of a forced return: “I fear that now in the camps the smart card is done by the military and government so I fear that we will be sent back to Myanmar without justice ... The smartcard is a big issue for me because it is related with the MOU – now the registration is done by UNHCR so then the Myanmar and Bangladesh government will discuss and send us back ... if we are sent

<sup>78</sup> [Tula Toli Victims’ Observations on Jurisdiction](#), ICC-RoC46(3)-01/18-26, 18 Jun 2018, paras 58-59. No material change has occurred since those submissions were made more than a year ago.

<sup>79</sup> [Report of Special Rapporteur on the situation of human rights in Myanmar](#), 30 Aug 2019, para. 45.

<sup>80</sup> See for example, this month: HRW, [Myanmar: Rohingya Jailed for Traveling](#), 8 Oct 2019; Al Jazeera, [Myanmar jails 21 Rohingya, detains children, for trying to travel](#), 11 Oct 2019.

<sup>81</sup> [Report of Special Rapporteur on the situation of human rights in Myanmar](#), 30 Aug 2019, para. 40.

<sup>82</sup> [Report of Special Rapporteur on the situation of human rights in Myanmar](#), 30 Aug 2019, para. 40.

<sup>83</sup> See [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), 2 May 2019, para. 41. In the first half of 2019, more than 1000 are reported to have reached Bangladesh: [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), 30 Aug 2019, para. 54.

<sup>84</sup> [Tula Toli Victims’ Observations on Jurisdiction](#), ICC-RoC46(3)-01/18-26, 18 Jun 2018, paras 64-65.

*back without our rights it would be better to take us to the river and drown us.” Indeed some victims perceive forced return as a crime: “If Bangladesh sends us back to our country without any justice it will be a crime on us.”*

51. Victims have good reason to fear a forced return. Rohingya refugees, including some of the Tula Toli Victims, have repeatedly been forcibly returned from Bangladesh to Myanmar in the past,<sup>85</sup> and recent conduct of Bangladeshi officials and international agencies suggests that this might happen yet again.

52. First, a series of secretive repatriation agreements have been made by Myanmar, Bangladesh, UNHCR and UNDP.<sup>86</sup> These were negotiated without any involvement of Rohingyas and are not published. Most worryingly, they assume that the conditions for safe return either exist already or could be created through initiatives such as “*pilot coexistence*”, “*quick impact projects*” and “*community resilience-building, including...conflict sensitivity*”.<sup>87</sup> They thus implicitly endorse the Burmese Government’s denial of criminal responsibility. The Tula Toli Victims remind the Court that Rohingya refugees are in Bangladesh because of repeated systematic violence by the Burmese state; return cannot therefore be contemplated unless there is fundamental change in that state, including the dismantling of its persecutory laws and institutions.<sup>88</sup> The secretive repatriation agreements dangerously ignore this reality, and cause fear of a forced and unsafe return.

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<sup>85</sup> Xchange, [Rohingya Repatriation Survey](#), 23 May 2018, pp8-9; [FFM September 2019 Report](#), 16 Sep 2019, paras 203-205; HRW, [Burmese Refugees in Bangladesh: Still No Durable Solution](#), 1 May 2000; Katy Long, UNHCR, [Back to where you once belonged: A historical review of UNHCR policy and practice on refugee repatriation](#), Sep 2013, paras 4, 41-43, 51, 65-74.

<sup>86</sup> Arrangement on the Return of Displaced Persons from Rakhine State between the Government of the People’s Republic of Bangladesh and the Government of the Republic of the Union of Myanmar, 23 Nov 2017 ([leaked copy](#)); Physical Arrangements for Repatriation of Displaced Myanmar Residents from Bangladesh Under the Arrangement on Return of Displaced Persons from Rakhine State, between Myanmar and Bangladesh, 16 Jan 2018 ([leaked copy](#), filed as document ICC-01/19-16-AnxD); Memorandum of Understanding Between the Ministry of Labour, Immigration and Population of the Government of the Republic of the Union of Myanmar (GoM) and the United Nations Development Programme and The Office of the United Nations High Commissioner for Refugees, 6 Jun 2018 ([leaked copy](#)) (“MOU”), which was extended for one year on 27 May 2019: [UNHCR, UNDP and Government of the Union of Myanmar extend MoU](#), 28 May 2019.

<sup>87</sup> [MOU](#), paras 13 and 14.

<sup>88</sup> See a similar point made in: Liam Mahony, [Time to Break Old Habits: Shifting from Complicity to Protection of the Rohingya in Myanmar](#), Jun 2018, pp28-29, 56.

53. Secondly, the two governments have repeatedly declared the sudden initiation of repatriation.<sup>89</sup> The first plan, announced in December 2017, to begin repatriation in January 2018,<sup>90</sup> was abandoned at the last minute amid protests.<sup>91</sup> Then on 30 October 2018 it was announced that returns would begin on 15 November 2018, using a list of around 4000 individuals “cleared” by Myanmar.<sup>92</sup> The individuals listed had not been consulted and had no prior knowledge. Refugees were terrified that their names may be on the list and that forced returns were imminent;<sup>93</sup> many responded by fleeing their shelters and hiding.<sup>94</sup> At least two are reported to have attempted suicide.<sup>95</sup> It was conceded that none of the listed refugees had consented to return.<sup>96</sup>

54. Despite those disastrous results, the governments repeated their actions almost exactly in mid-2019. On 15 August 2019 officials from Myanmar and Bangladesh suddenly announced plans for “*the repatriation of 3450 people*” just seven days later.<sup>97</sup> The identified individuals were said to have been “agreed” by Myanmar, again without the knowledge of the listed individuals. Refugees again feared that they

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<sup>89</sup> In August 2019 the UN Special Rapporteur stated that “*Myanmar has entirely failed to dismantle the system of persecution under which the Rohingya in Rakhine continue to live. While this situation persists, it is not safe or sustainable for refugees to return.*”: [Report of the Special Rapporteur on the situation of human rights in Myanmar](#), 30 Aug 2019, para. 54. See also: Australian Strategic Policy Institute, [Mapping conditions in Rakhine State](#), 24 Jul 2019.

<sup>90</sup> Dhaka Tribune, [Rohingya repatriation: Joint working group formed, repatriation process to begin by January 23](#), 19 Dec 2017.

<sup>91</sup> Guardian, [Rohingya Muslims’ repatriation to Myanmar postponed](#), 22 Jan 2018.

<sup>92</sup> Radio Free Asia, [Bangladesh, Myanmar to Begin Repatriating Rohingya in November](#), 30 Oct 2018; Reuters, [Bangladesh, Myanmar agree to begin Rohingya repatriation by mid-November](#), 30 Oct 2018; Al Jazeera, [Bangladesh, Myanmar to start returning Rohingya in November](#), 30 Oct 2018.

<sup>93</sup> UN OHCHR, [Myanmar: UN expert pleads for Rohingya returns to stop, fears repeat abuse may await](#), 6 Nov 2018.

<sup>94</sup> Reuters, [Rohingya flee refugee camps in Bangladesh, as Myanmar prepares for first returnees](#), 11 Nov 2018; Guardian, [Bangladesh army arrives in Rohingya refugee camps as repatriations loom](#), 14 Nov 2018; Al Jazeera, [Rohingya in Bangladesh will not be forced back to Myanmar](#), 15 Nov 2018; BBC, [Rohingya return to Myanmar: Confusion and fear in refugee camps](#), 15 Nov 2018.

<sup>95</sup> Guardian, [Rohingya fears grow as refugees face forcible return to Myanmar](#), 11 Nov 2018; UN News, [‘Terror and panic’ among Rohingya who may be forced to return to Myanmar](#), 13 Nov 2018.

<sup>96</sup> Guardian, [Bangladesh admits no Rohingya willing to take repatriation offer](#), 15 Nov 2018.

<sup>97</sup> Reuters, Myanmar, [Bangladesh agree to start Rohingya repatriation next week](#), 15 Aug 2019; Guardian, [Myanmar and Bangladesh to start sending back thousands of Rohingya](#), 16 Aug 2019.

would be forced to return.<sup>98</sup> None of those listed agreed to return,<sup>99</sup> but the governments were continuing to attempt to identify returnees as of October 2019.<sup>100</sup>

55. Thirdly, statements by the Bangladeshi Foreign Minister A.K. Abdul Momen indicate that senior officials are countenancing forced return. In respect of the failed return process he has said that he hoped “*good sense would finally prevail*” and that the Rohingya refugees “*want to achieve all their demands by taking us [Bangladesh] as hostage. But I don’t know how long we can accept it*”.<sup>101</sup> He has also expressed support for forced relocation to Bhasan Char, an isolated island prone to extreme weather;<sup>102</sup> he said: “*We may force [the Rohingya to go to Bhasan Char]. We don’t have enough space here so we will force them. If they are not willing we will force them.*”<sup>103</sup> In recent days Bangladesh announced that relocation to Bhasan Char will begin by December, and that thousands of refugees have agreed to move.<sup>104</sup> It appears that international agencies have not been involved in securing this agreement,<sup>105</sup> and no explanation has been given of how voluntariness has been assured.

56. If the Rohingya were forced to unsafely return to Myanmar, this would almost certainly constitute a crime against humanity of deportation falling within the Court’s jurisdiction. Mass relocations to Bhasan Char may also constitute a crime if there is an “*absence of genuine choice*”,<sup>106</sup> and must therefore be closely scrutinised. International law permits coercive relocation in only extremely narrow instances,

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<sup>98</sup> Reuters, [‘People were hiding’: Bangladesh bid to repatriate Rohingya stalls as refugees refuse](#), 22 Aug 2019; AP, [Rohingya shun repatriation to Myanmar, want safety guarantee](#), 23 Aug 2019; BDNews24, [Repatriation plan stalls again as Rohingya keep refusing Myanmar return](#), 23 Aug 2019.

<sup>99</sup> Guardian, [Rohingya refugees turn down second Myanmar repatriation effort](#), 22 Aug 2019; CNN, [Rohingya say no to repatriations around anniversary of atrocities](#), 22 Aug 2019; Al Jazeera, [Empty buses in Bangladesh as no Rohingya turn up for repatriation](#), 22 Aug 2019.

<sup>100</sup> BDNews24, [Bangladesh hands Myanmar new list of 50,000 Rohingya refugees](#), 15 Oct 2019; Anadolu Agency, [Bangladesh gives Myanmar new list of Rohingya refugees](#), 15 Oct 2019.

<sup>101</sup> Frontier Myanmar, [No Rohingya turn up for repatriation to Myanmar](#), 22 Aug 2019.

<sup>102</sup> HRW, [For Rohingya, Bangladesh’s Bhasan Char ‘Will Be Like a Prison’](#), 24 Mar 2019.

<sup>103</sup> DW, [Bangladesh may “force” 100,000 Rohingya to resettle on uninhabited island](#) (including video), 3 Sep 2019.

<sup>104</sup> Telegraph, [Thousands of Rohingya refugees to be transported to flood-prone Bangladeshi island](#), 20 Oct 2019.

<sup>105</sup> Radio Free Asia, [Bangladesh Official: Rohingya Families Will Move to Bhashan Char](#), 21 Oct 2019.

<sup>106</sup> ICTY, [Karadžić Trial Judgment](#), 24 Mar 2016, para. 489.

where (temporarily) required for the safety of evacuees.<sup>107</sup> Officials engaged in proposed repatriations or relocations must be reminded that they may be held accountable if their conduct amounts to a crime. These potential crimes must therefore be recognised as within the scope of the investigation, so as to deter unlawful forced movement and thus provide some reassurance to the victims.

(vi) Crimes which may be initiated within Bangladesh: inhumane living conditions

57. The Request recognises that the Rohingya suffer greatly from “*dire conditions*” in Bangladesh, including “*overcrowding, disease, lack of hygiene, lack of access to food and clean water and safety risks*”.<sup>108</sup> Many of the adverse conditions are not merely the unavoidable reality of refugee life; they are intentionally imposed by Bangladesh through discriminatory laws and policies. These conditions are *increasingly* inhumane, discriminatory, unjustifiable, and so grave that their imposition may now or in future constitute a crime within the Court’s jurisdiction.

*Forms of discrimination and mistreatment*

58. *Registration of births*: Rohingya babies born in the camps are not registered by the Bangladeshi authorities.<sup>109</sup> They are thus deprived of recognition of their legal identity, and left vulnerable to a range of abuses and disadvantages.<sup>110</sup>

59. *Education and language*: Bangladesh has banned formal education for Rohingya children, even at primary level.<sup>111</sup> There is also a ban on Rohingya children learning Bangla.<sup>112</sup> The ban does not merely preclude access to state-run schools; it prohibits local and international groups from providing formal education.<sup>113</sup> Only informal

<sup>107</sup> ICTY, [Karadžić Trial Judgment](#), 24 Mar 2016, para. 492; ICTY, [Gotovina Trial Judgment](#), 15 Apr 2011 para. 1740. The LRVs note also that lawfulness of presence in a location is not a question related to national immigration law; persons seeking temporary refugee can be “lawfully present”: ICTY, [Popović Trial Judgment](#), 10 June 2010 para. 900.

<sup>108</sup> [Request](#), paras 69; see also paras 145-147.

<sup>109</sup> OSJI, [Saving Newborn Rohingya from a Legal Abyss](#), 10 Aug 2018; IRC, [Access to Justice for Rohingya and Host Community in Cox’s Bazar](#), Feb 2019, p4; Healthy Newborn Network, [Born Invisible: Accounting for every newborn life in Cox’s Bazar](#), 19 Aug 2019.

<sup>110</sup> OSJI, [Saving Newborn Rohingya from a Legal Abyss](#), 10 Aug 2018.

<sup>111</sup> UNHCR, [Stepping Up: Refugee Education in Crisis](#), 2019, p32.

<sup>112</sup> HRW, “[Bangladesh Is Not My Country](#)”, Aug 2018, p60; News Deeply, [How Rohingya Refugee Children Are Torn Between Languages](#), 1 Apr 2019.

<sup>113</sup> ICG, [Building a Better Future for Rohingya Refugees in Bangladesh](#), 25 Apr 2019, p5.



education in “learning centres” is permitted.<sup>114</sup> It is aimed at children aged under 15 and is limited<sup>115</sup> and unregulated,<sup>116</sup> and leads to no certification.<sup>117</sup> Learning centres are often overcrowded<sup>118</sup> and many refugees report that there is no centre close enough to them with available space.<sup>119</sup> Enrolment levels are low: 40% for ages 3-5; 60% for ages 6-14; and dramatically lower for older children (14% for boys aged 15-18; 5% for girls).<sup>120</sup> No secondary education is permitted; this year UNHCR described Bangladesh as the world’s “worst case” for refugee secondary education.<sup>121</sup>

60. The lack of proper education for young children is a grave concern of the Tula Toli Victims: *“Now we have young children who are not getting proper education here. They are just going to the learning centre and they are not learning a lot. They are losing their future here. We are very distressed because of this”*. Lack of any education for older children is also a huge concern: *“The teenagers have no opportunity to go to secondary school so they will be like cattle ... They are getting ruined; they are destroying their lives”*.

61. *Marriage*: In 2014 Bangladesh banned marriage between Bangladeshi nationals and Rohingyas<sup>122</sup> (Bangladeshis may still marry other non-nationals). In 2018, to reinforce the prohibition, officials were directed to check nationality before registering marriages in Cox’s Bazar and neighbouring districts.<sup>123</sup>

62. *Freedom of movement*: Since 2017, Bangladesh has imposed measures to confine Rohingyas to the camps.<sup>124</sup> They are prevented from traveling by security

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<sup>114</sup> HRW, [“Bangladesh Is Not My Country”](#), Aug 2018, p60.

<sup>115</sup> Children are provided with only a few hours of class per day in Burmese, English, mathematics and life skills. See HRW, [“Bangladesh Is Not My Country”](#), Aug 2018, p60-61; UNHCR, [Stepping Up: Refugee Education in Crisis](#), 2019, p33.

<sup>116</sup> Cox’s Bazar Education Sector, [Joint Education Needs Assessment](#), Jun 2018, p15.

<sup>117</sup> HRW, [“Bangladesh Is Not My Country”](#), Aug 2018, p60; UNHCR, [Stepping Up: Refugee Education in Crisis](#), 2019, p33; CGD and IRC, [Moving Beyond the Emergency](#), Oct 2019, pp16-17. Some Rohingya communities have organised teaching among themselves using the Burmese curriculum, but this too is informal and provides no certification: PRIO, [Preventing a Lost Generation](#), Jul 2019.

<sup>118</sup> BROUK, [The Right to Education Denied for Rohingya Refugees in Bangladesh](#), Dec 2018, pp10, 14.

<sup>119</sup> Cox’s Bazar Education Sector, [Joint Education Needs Assessment](#), Jun 2018, pp4, 18-19.

<sup>120</sup> Cox’s Bazar Education Sector, [Joint Education Needs Assessment](#), Jun 2018, p15.

<sup>121</sup> UNHCR, [Stepping Up: Refugee Education in Crisis](#), 2019, pp24, 33.

<sup>122</sup> Dhaka Tribune, [Bangladeshis can’t marry Rohingya refugees](#), 10 Jul 2014.

<sup>123</sup> Dhaka Tribune, [Ban on Bangladeshis marrying Rohingyas](#), 2 Jan 2018.

<sup>124</sup> BBC, [Rohingya crisis: Bangladesh to restrict movement of migrants](#), 16 Sep 2017.

checkpoints.<sup>125</sup> In September 2019 Bangladesh announced proposals to tighten restrictions by erecting a barbed wire fence around the camps.<sup>126</sup> These restrictions put refugees at risk in the event of extreme weather and prevent access to medical services.<sup>127</sup> One victim with serious health problems explained: *“I am suffering so many kinds of disease but I am not allowed to go outside”*. Obtaining permission to travel to a hospital can take significant time, making emergency hospitalisation effectively impossible. Refugees found outside the camps without permission are at risk of (potentially indefinite) detention under the Foreigners Act 194.<sup>128</sup>

63. *Mobile phone and data restrictions*: Since 2017 Rohingyas have not been permitted to buy Bangladeshi sim cards.<sup>129</sup> In practice many have obtained them illegally, and mobile phones have been an important form of communication.<sup>130</sup> However in September 2019 Bangladesh ordered that 3G and 4G services in the camps be shut down entirely (having previously limited data connectivity between 5pm and 8am<sup>131</sup>), and told phone companies to withdraw sim cards in circulation in the camps.<sup>132</sup> These restrictions limit Rohingyas’ ability to communicate with each other, to access information, and to share views and experiences with the outside world. The restrictions also impede the provision of assistance by aid agencies.<sup>133</sup>

64. *Security and access to justice*: The Tula Toli Victims are fearful of crime within the

<sup>125</sup> HRW, [“Bangladesh Is Not My Country”](#), Aug 2018, p43.

<sup>126</sup> HRW, [Clampdown on Rohingya Refugees](#), 7 Sep 2019; HRW, [“Bangladesh: Halt Plans to Fence-In Rohingya Refugees”](#), 30 Sep 2019; Radio Free Asia, [Bangladeshi Officials Await PM’s Approval for Barbed Wire Fencing at Rohingya Camps](#), 30 Sep 2019.

<sup>127</sup> Oxfam, [Rohingya people still trapped two years on from exodus](#), 23 Aug 2019.

<sup>128</sup> Equal Rights Trust, [Legal Protections for Rohingya in Bangladesh, Malaysia and Thailand](#), Dec 2016, pp65, 74-77; Anadolu Agency, [Bangladeshi police arrest 45 suspected Rohingya](#), 2 Oct 2019.

<sup>129</sup> Daily Star, [Action if mobile phone operators sell SIM cards to Rohingya refugees says Tarana Halim](#), 23 Sep 2017; BDNews24, [Bangladesh regulator bans selling mobile SIMS to Rohingya refugees](#), 23 Sept 2017.

<sup>130</sup> Internews, [Information Needs Assessment, Rohingya and Host Communities](#), Jan-Apr 2019, p24-25; Guardian, [Bangladesh imposes mobile phone blackout in Rohingya refugee camps](#), 5 Sept 2019.

<sup>131</sup> Internews, [Information Needs Assessment, Rohingya and Host Communities](#), Jan-Apr 2019, p27.

<sup>132</sup> Reuters, [Bangladesh blocks internet services in Rohingya refugee camps](#), 3 Sep 2019; Daily Star, [3G, 4G services restricted in Ukha-Teknaf until further notice](#), 10 Sep 2019; HRW, [Bangladesh: Internet Blackout on Rohingya Refugees](#), 13 Sep 2019.

<sup>133</sup> HRW, [Bangladesh: Internet Blackout on Rohingya Refugees](#), 13 Sep 2019; ISCG, [Situation Report Rohingya Refugee Crisis](#), Sep 2019.



camps, especially trafficking; violent crimes are a regular occurrence. Until recently there was no police presence in the camps at night, with security left instead to night watchmen appointed from among the refugees.<sup>134</sup> In recent months the security presence has increased: but rather than protecting refugees, it is said that police subject them to scrutiny and intimidation (including for mobile phone possession). Where Rohingyas are the victims of crime there is usually no recourse to formal justice; police and courts often refuse to respond to complainants on the basis of their Rohingya ethnicity.<sup>135</sup> The UN Committee Against Torture has expressed concern at reports that authorities are refusing to deal with cases of forced labour and trafficking of Rohingyas.<sup>136</sup> Even more alarming are the numerous reports of extrajudicial killings of Rohingya refugees by Bangladeshi security agencies.<sup>137</sup>

65. *Exposure to cyclones*: Major cyclones occur around once every 6 years in Cox's Bazar;<sup>138</sup> in 1991 Cyclone Gorky killed 139,000 people there. It is generally advised to shelter from cyclones in robust structures (brick, concrete, steel etc).<sup>139</sup> However such "permanent" buildings in the camps are prohibited;<sup>140</sup> the Prime Minister has said that they are "not at all a possibility [and] not acceptable".<sup>141</sup> There is also no policy to evacuate Rohingyas out of the camps in the event of a cyclone,<sup>142</sup> and there would in

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<sup>134</sup> ICG, [Building a Better Future for Rohingya Refugees in Bangladesh](#), 25 Apr 2019, pp3-4.

<sup>135</sup> Daily Asian Age, [Access to justice for Rohingyas](#), 13 Oct 2018; Daily Asian Age, [Rohingya crisis: Towards access to justice](#), 19 Jul 2019.

<sup>136</sup> UN Committee Against Torture, [Concluding observations on the initial report of Bangladesh](#), CAT/C/BGD/CO/1, 26 Aug 2019, para. 40.

<sup>137</sup> HRW, [Spate of Bangladesh 'Crossfire' Killings of Rohingya](#), 18 Sep 2019; Anadolu Agency, [Detained Rohingya couple killed in crossfire](#), 22 Sep 2019. Enforced disappearances and extrajudicial killings by state agents are increasing in Bangladesh generally: FIDH, [Vanished Without a Trace](#), Apr 2019. They have been made the subject of a communication to the ICC Prosecutor: see *ibid.* p67. One organisation documented more than 2000 extrajudicial killings between 2009 and 2019: [Civil Society Joint Alternative Report on Bangladesh Submitted to the Committee against Torture](#), 2019, p25.

<sup>138</sup> [2019 Joint Response Plan for Rohingya Humanitarian Crisis](#), p24.

<sup>139</sup> [Extreme Weather and Disaster Preparedness in the Rohingya Refugee Response](#), Mar 2019, p9.

<sup>140</sup> Amnesty International, [Bangladesh: International assistance urgency needed for Rohingya refugees](#), 20 Jun 2018; HRW, [Bangladesh: Rohingya Face Monsoon Floods, Landslides](#), 12 Jul 2019.

<sup>141</sup> Reuters, [Myanmar's delaying tactics blocking Rohingya return – Bangladesh PM](#), 26 Sep 2018.

<sup>142</sup> [Cyclones background: Rohingya crisis](#), Mar 2018, p5; [Rohingya crisis: Lessons learned about the impact of cyclones](#), Apr 2018, pp1-2; see also [Extreme Weather and Disaster Preparedness in the Rohingya Refugee Response](#), Mar 2019, p15.

any event be no space for them in nearby cyclone shelters.<sup>143</sup> Assessments show that current conditions leave the Rohingya “*extremely exposed to risk of injury and death*”.<sup>144</sup>

66. These conditions are combined with others of the sort listed in the Request, such as inadequate food, water, shelter, sanitation, health services and livelihoods. While some of these are less directly imposed, they are the consequence of the camp system and the restrictions on free movement and employment.

67. Since events in August 2019 there has been an escalation in the imposition of inhumane conditions: government officials considered too sympathetic to refugees were replaced; phone restrictions have increased; a hostile security presence has been imposed; and NGOs have been increasingly subjected to pressure.<sup>145</sup>

*The rationale for the imposition of increasingly inhumane conditions*

68. The question arises as to why Bangladesh increasingly imposes such inhumane and discriminatory conditions on the Rohingya. The alarming answer appears to be that this is a means of forcing the Rohingya back to Myanmar. Bangladesh maintains that providing essential services to Rohingyas creates a “pull factor” which increases entries into the country, and a “stay factor” that discourages repatriation. This justification was given for restricting basic humanitarian aid to those arriving in 2012-2013,<sup>146</sup> and again in 2016 (“*Distribution of relief among the refugees will encourage more Rohingyas to enter the country*”<sup>147</sup>). The same view was expressed this year by the State Minister for Foreign Affairs: “*These camps are already receiving more attention than some [Bangladeshi] host communities and far better than what they had in Myanmar...If we are offering them a better life than what they’re used to, they will not go back.*”<sup>148</sup> For the

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<sup>143</sup> [2019 Joint Response Plan for Rohingya Humanitarian Crisis](#), p24; see also [Cyclones background: Rohingya crisis](#), Mar 2018, p5.

<sup>144</sup> [Extreme Weather and Disaster Preparedness in the Rohingya Refugee Response](#), Mar 2019, p41.

<sup>145</sup> Radio Free Asia, [Bangladesh Takes Steps to control Movement of Rohingya](#), 6 Sep 2019.

<sup>146</sup> HRW, [Universal Periodic Review: HRW Submission on Bangladesh](#), 18 Apr 2013; UNHCR, [Submission by the UNHCR for the OHCHR’s Compilation Report – Universal Periodic Review: Bangladesh](#), Oct 2012, p2; HRW, [Bangladesh: Assist, Protect Rohingya Refugees](#), 22 Aug 2012.

<sup>147</sup> New Age, [Rohingyas starve as influx continues](#), 3 Dec 2016.

<sup>148</sup> Shahriar Alam, quoted in: Time, [‘We’re Not Allowed to Dream.’ Rohingya Muslims Exiled to Bangladesh Are Stuck in Limbo Without an End In Sight](#), 23 May 2019.

same reasons, Bangladesh has rejected offers of third country resettlement.<sup>149</sup>

69. Bangladesh appears intent on creating living conditions for the Rohingya that are worse than what they would face on return to Myanmar, and thus a “push factor” encouraging returns.<sup>150</sup> This is a deeply disturbing policy: the Rohingya are only in Bangladesh because mass atrocities drove them there; it would take extraordinarily inhumane conditions to drive them back to Myanmar while persecution continues there unabated. The danger therefore arises of Bangladesh imposing conditions – now or in the future – that are so inhumane as to amount to an international crime.

*Characterisation of discriminatory and inhumane conditions as crimes against humanity*

70. The systematic imposition of increasingly inhumane conditions on a million Rohingyas in Bangladesh may eventually reach the level of the crime against humanity of “other inhumane acts” under article 7(1)(k) of the Statute. There is clear potential for the crime’s specific material elements to be met: great suffering is being inflicted by acts of a character similar to others listed in article 7(1) of the Statute. These requirements may be met by the cumulative effect of measures each of which alone would be insufficiently severe.<sup>151</sup> One indication of severity is the violation of fundamental human rights.<sup>152</sup> Imposing brutal living conditions can constitute this crime.<sup>153</sup> Rohingya refugees in Bangladesh are subject to a range of serious human rights violations, including of rights to birth registration, education, marriage, protection of the law, free movement, and free expression. These violations are particularly grave given their discriminatory character and indefinite duration, and their cumulative effect is extraordinarily and increasingly severe.

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<sup>149</sup> Reuters, [Bangladesh silent on Canadian offer to take Rohingya refugees – officials](#), 9 November 2018; CGD and IRC, [Moving Beyond the Emergency](#), Oct 2019, p4.

<sup>150</sup> CGD and IRC, [Moving Beyond the Emergency](#), Oct 2019, p12.

<sup>151</sup> See ECCC, [Case 002/02 Trial Judgement](#), 18 Nov 2018, paras 705, 725; ECCC, [Case 002/01 Appeal Judgment](#), 23 Nov 2016, para. 590, referring to the need for a “holistic” assessment of the conduct.

<sup>152</sup> ECCC, [Case 002/02 Trial Judgment](#), 18 Nov 2018, para. 726; ECCC, [Case 002/01 Appeal Judgment](#), 23 Nov 2016, paras 584-585.

<sup>153</sup> ICTY, [Krnjelac Trial Judgment](#), 15 Mar 2002, paras 133-144; ICTY [Simić Trial Judgment](#), 17 Oct 2003, paras 97, 731-747. While the ICTY caselaw largely relates to detention centres, the ECCC applied the same approach to Khmer Rouge “cooperatives” and work sites: ECCC, [Case 002/02 Trial Judgment](#), 18 Nov 2018, paras 1193-1199; 1414-1421; 1698-1707; 1829-1837.

71. There is no lawful justification for the conditions imposed.<sup>154</sup> There can be no justification for refusing to register births, banning inter-ethnic marriage, prohibiting formal education and outlawing safe shelters. Nor is any reasonable justification advanced for increasingly severe restrictions on free movement and mobile phone use. These restrictions are so blanket and extreme that they cannot be justified as necessary or proportionate on security grounds. Nor can these conditions be excused by the supposedly temporary nature of the refugees' presence in Bangladesh; imposing inhumane conditions is not permissible even for a short time, much less for a period which has already exceeded two years and shows no sign of ending.

72. The racially discriminatory aspect of the measures raises the further possibility that they may also constitute persecution under article 7(1)(h) of the Statute.

73. The increasingly inhumane conditions are being imposed with the knowledge and intention of senior Bangladeshi officials, and on such a scale as to potentially amount to crimes against humanity. It is particularly alarming that many of the restrictions mirror persecutory practices used against the Rohingya in Myanmar: segregation; limits on movement; restrictions on education, healthcare, marriage, and internet access. Although the Tula Toli Victims are grateful to have refuge in Bangladesh, they now face increasingly harsh conditions, and have nowhere else to go. The LRVs therefore request the Chamber to include within the scope of the investigation potential future crimes borne of inhumane acts and persecution in Bangladesh. It is hoped that this will deter Bangladesh from following Myanmar's path, and encourage it to respect the fundamental rights of the Rohingya.

(vii) Persons potentially responsible

74. The Tula Toli Victims support the Prosecutor's approach regarding potential perpetrators. The Request correctly identifies the Tatmadaw as the primary target for investigations, followed by other security forces and civilians (including government

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<sup>154</sup> Most of these violations cannot be justified by reference to resource shortages, but in any event such shortages are no justification where authorities have themselves created the circumstances (eg of mass detention or forced transfer): ECCC, [Case 002/02 Trial Judgement](#), 18 Nov 2018, paras 739, 1197, 1418.

officials).<sup>155</sup> The Prosecutor is also right to insist that she be able to investigate the conduct of other persons.<sup>156</sup> This must include Bangladeshi officials who may be involved in the commission of the potential crimes discussed above.

75. Furthermore, the Prosecutor should not shy from investigating the conduct of officials of international organisations. Serious concerns have been raised about UN complicity in persecutory policies against Rohingya in both Myanmar<sup>157</sup> and Bangladesh.<sup>158</sup> While culpability may fall short of the high threshold of intentional wrongdoing required for individual criminal responsibility, this cannot be assumed. There should be a careful focus on the role of international agencies in any repatriation process, particularly given UNHCR's history of involvement in the coercive repatriation of Rohingya refugees.<sup>159</sup> The LRVs note that even in the unlikely event that such officials have an immunity from ICC jurisdiction,<sup>160</sup> applicable instruments would almost certainly require its waiver.<sup>161</sup>

76. Finally, the Prosecution should investigate other entities involved in facilitating crimes. The FFM has identified a number of companies (Burmese and foreign) whose

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<sup>155</sup> [Request](#), para. 82.

<sup>156</sup> [Request](#), para. 25.

<sup>157</sup> Among other concerns, the UN's role in enabling the maintenance of mass illegal detention is particularly troubling. See Liam Mahony, [Time to Break Old Habits: Shifting from Complicity to Protection of the Rohingya in Myanmar](#), Jun 2018; [FFM September 2018 Report](#), 17 Sept 2018, paras 1557-1562; Gert Rosenthal, [A brief and independent inquiry into the involvement of the United Nations in Myanmar from 2010 to 2018](#), 29 May 2019; see also Richard Horsey, [The Role of the United Nations in Rakhine State: Recommendations for Strategy and Next Steps](#), 8 May 2017 ([leaked copy](#)).

<sup>158</sup> Al Jazeera, [UN, NGOs accused of bungling effort to educate Rohingya children](#), 8 Oct 2019; The Atlantic, [No One Knows International Law's Failures Better Than the Rohingya](#), 19 Oct 2019.

<sup>159</sup> J. Crisp, ['Primitive people': the untold story of UNHCR's historical engagement with Rohingya refugees](#), *Humanitarian Practice Network*, Oct 2018; Katy Long, UNHCR, [Back to where you once belonged: A historical review of UNHCR policy and practice on refugee repatriation](#), Sep 2013, paras 4, 41-43, 51, 65-74; HRW, [Burmese Refugees in Bangladesh: Still No Durable Solution](#), 1 May 2000.

<sup>160</sup> Most international officials enjoy only *functional* immunities (see eg article 18, [Convention on Privileges and Immunities of the UN](#)) which do not prevent the exercise of jurisdiction over international crimes: [Pinochet \(No.3\)](#) [2000] 1 AC 147; ICJ, [Arrest Warrant Case \(DRC v Belgium\)](#), [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), para. 85. The question is likely to be more complex in respect of personal immunities enjoyed by more senior officials (article 19, [Convention on Privileges and Immunities of the UN](#)) since this would likely involve novel questions not specifically addressed by the Appeals Chamber in the [Jordan Al-Bashir Referral Appeal Judgment](#), ICC-02/05-01/09-397-Corr, 6 May 2019.

<sup>161</sup> Article 19, [Negotiated Relationship Agreement between the ICC and the UN](#) (approved by [GA Res 58/318](#), 20 Sep 2004); See also article 20, [Convention on Privileges and Immunities of the UN](#).

officers may be liable as accessories, including for knowingly funding criminal activities of the Tatmadaw; supplying weapons or equipment for those activities; or their involvement in construction projects preventing the return of refugees.<sup>162</sup> The objectives of accountability and deterrence require the Court to make plain that individuals involved in these activities may be held accountable.

## VI. JURISDICTION AND ADMISSIBILITY

77. The LRVs support the Prosecutor's submissions on jurisdiction and admissibility, and add only that the relevant requirements are established for the additional categories of crimes set out above. Regarding jurisdiction: all of the crimes (and potential future crimes) identified above involve at least one element occurring within Bangladeshi territory, and at least one element occurring or continuing after 1 June 2010.

78. The requirements of admissibility (gravity and complementarity) are also met.

79. Gravity is assessed by reference not only to qualitative and quantitative aspects of the acts and their impacts, but also the level of responsibility of likely suspects.<sup>163</sup> The crimes initiated in Myanmar prior to 2016 are clearly sufficiently grave. Evidence collected by the FFM suggests that responsibility rests at the highest levels of the Burmese military. The crimes were qualitatively and quantitatively horrific. Rohingya were killed, subjected to extreme physical and sexual violence, and arbitrarily detained based on their ethnicity. Hundreds of thousands were severely harmed; communities were destroyed; and thousands remain in Bangladesh today.

80. Although incomparable to the atrocities of the Burmese regime, the crimes that could potentially be committed in Bangladesh would also meet the gravity threshold. Decision-making as to the forced movement of Rohingya refugees and the discriminatory imposition of inhumane conditions occurs at the highest levels of the

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<sup>162</sup> [FFM Economic Interests Report](#), 5 Aug 2019, especially at paras 6, 105-127, 129-140, 150-165.

<sup>163</sup> [Comoros First Decision on Prosecutor's decision not investigate](#), ICC-01/13-34, 16 Jul 2016, para. 21; see also [Kenya Article 15 Decision](#), ICC-01/09-19-Corr, 31 Mar 2010, paras 60-62; [Côte D'Ivoire Article 15 Decision](#), ICC-02/11-14-Corr, 15 Nov 2011, paras 203-204.



Bangladesh government. Just as significantly, gravity must be heightened if complicity can be shown of the leadership of international agencies tasked with *alleviating* the refugees' suffering. The gravity of these potential crimes is also shown by the numbers of individuals who would be affected as well as their indirect consequences. Forced return to Myanmar could lead to further atrocities. Transfer to Bhasan Char, and/or the imposition of inhumane conditions in Bangladesh, could eventually create a state of apartheid within Bangladesh, with generations of Rohingya segregated and persecuted based on their ethnicity. The fact that such treatment occurs in the context of a refugee crisis is an aggravating rather than mitigating factor when assessing gravity: victims of mass atrocity deserve not only safety but also the protection of their most fundamental rights. If their flight from international crimes were used to diminish the seriousness of new crimes threatened against them, the Court's fundamental objectives would be gravely undermined.

81. Finally, there can be no doubt as to the requirements of complementarity. The Request analyses the various pretences at accountability in Myanmar since 2016, concluding that none amounts to a genuine criminal investigation into suspects at the appropriate levels, and that there is currently no prospect of such investigation.<sup>164</sup> Open source material reveals that the same is true of crimes committed in Myanmar prior to October 2016. National commissions established in 2012 and 2014 were not investigations carried out with a view to criminal prosecutions, and have been described by the FFM as fundamentally flawed.<sup>165</sup> The former Special Rapporteur commented in 2014 that there had been no independent credible investigation and no state officials prosecuted;<sup>166</sup> the Burmese government expressly refused to follow the Special Rapporteur's recommendation to investigate the 2014 crimes.<sup>167</sup> As for the potential *future* crimes discussed above, complementarity would have to be assessed

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<sup>164</sup> [Request](#), paras 233-275.

<sup>165</sup> [FFM September 2018 Report](#), 17 Sept 2018, paras 688, 1602-1604.

<sup>166</sup> [Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana](#), 2 Apr 2014, paras 46, 48.

<sup>167</sup> [Comments by the State](#), on the Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, 12 Mar 2014, para. 24.

if and when such crimes are committed.

## VII. THE INTERESTS OF JUSTICE

82. History has shown that the cycles of persecution and atrocities against the Rohingya in Myanmar will not end without accountability. The Tula Toli Victims strongly support the opening of an investigation *even if* cooperation challenges cause significant delay in the issue of warrants and/or arrest of suspects. An investigation is important because it creates the *possibility* of accountability; if there is no ICC investigation, individual criminal responsibility will remain impossible. Similarly, the issue of arrest warrants is of value even if arrests are delayed or never occur, because it provides recognition that there are “reasonable grounds to believe” that an individual has committed a crime within the Court’s jurisdiction.

83. The interests of justice require the scope of the investigation to be broad. The Tula Toli Victims emphasise that while criminal accountability is vital, it is not the only form of “justice”. Justice also entails acknowledgment of the extent of the crimes, and proactive deterrence of future ones, so as to ensure that the Victims can live *now* and *into the future* in safe and humane conditions, free from persecution.

## VIII. CONCLUSION

84. The LRVs therefore respectfully request that the Prosecutor be authorised to investigate: *any article 5 crimes involving at least one element within the territory of Bangladesh, committed or continued after 1 June 2010, by any person, in connection with the deportation of Rohingya people from Myanmar and/or their continuing mistreatment.*

Respectfully submitted,



Megan Hirst



James Kirk

Legal Representatives of Victims

At London, United Kingdom

Dated this 23<sup>rd</sup> of October 2019