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Pénale
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**International
Criminal
Court**

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

Date: **18 June 2018**

PRE-TRIAL CHAMBER I

Before:

**Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Rein Adélaïde Sophie Alapini-Gansou**

REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE COURT

Public

Observations on behalf of victims from Tula Toli

Source: Legal Representative of Victims

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

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I. INTRODUCTION

1. These submissions are made pursuant to article 19(3) of the Rome Statute (the “Statute”) on behalf of victims from the village of Tula Toli in Myanmar (“the victims”). The victims request Pre-Trial Chamber I (the “Chamber”) to make a positive ruling regarding its jurisdiction under article 12(2)(a) of the Statute.

II. PROCEDURAL HISTORY

2. On 9 April 2018 the Prosecutor’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (the “Request”)¹ was filed.
3. On 7 May 2018 the Chamber invited the Competent Authorities of the People’s Republic of Bangladesh to submit observations.²
4. On 11 May 2018 the Chamber ordered that a status conference be held on 20 June 2018, in closed session with only the Prosecutor represented.³
5. On 30 May 2018 submissions were filed by lawyers at Global Rights Compliance on behalf of a group of victims from Myanmar (the “GRC Victims’ Submissions”).⁴
6. On 11 June 2018 it was reported in some media outlets that Bangladesh had filed submissions to the Court confidentially.⁵
7. The Chamber has granted five requests for leave to present *amicus curiae* submissions pursuant to rule 103, allowing until 18 June 2018 for the submissions.⁶

¹ Prosecutor’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018.

² 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”, ICC-RoC46(3)-01/18-3, 7 May 2018.

³ Order Convening a Status Conference, ICC-RoC46(3)-01/18-4, 11 May 2018.

⁴ Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ICC-RoC46(3)-01/18-9, 30 May 2018, notified on 31 May 2018.

⁵ [“Rohingya Crisis: Dhaka uses confidential mode of submission to ICC”](#), *Dhaka Tribune*, 11 June 2018; [“Rohingya Crisis: Dhaka for Confidential mode of submission to ICC”](#), *The New Indian Express*, 11 June 2018.

⁶ Decision on the “Request for Leave to Submit Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules)”, ICC-RoC46(3)-01/18-7, 29 May 2018; Decision on the “Request for leave to submit an Amicus Curiae brief pursuant to Rule 103(1) of the

8. On 12 June 2018 the legal representative of the victims provided victim application documents from 10 individual victims to the Registry.

III. OVERVIEW OF SUBMISSIONS

9. The victims strongly support the Request and the GRC Victims' Submissions. The present submissions seek to complement rather than to repeat arguments made in those filings. The following matters are dealt with:

- (1) First, a number of factual matters are addressed from the perspective of the victims, based on their own accounts rather than open source materials.
- (2) Secondly, the submissions complement the arguments on jurisdiction already made by addressing the continuing nature of the crimes in light of the facts, and the relevance of the Statute's deterrence objective.
- (3) Thirdly, arguments are presented relating to the appropriate approach to victims' participation in the current proceedings.
- (4) Finally, remaining procedural matters are addressed.

10. These submissions are based on first hand discussions with the victims, all of whom are former residents of the village of Tula Toli. They have experienced a litany of persecutory crimes at the hands of Burmese authorities over many years, including the massacre committed at Tula Toli on 30 August 2017. The victims include men and women, ranging in age, and including some leaders of the community. While funding and assistance has been provided by organisations and individuals who have been working with the victims, these organisations and individuals have not sought to supplant their views for those of the victims.

Rules of Procedure and Evidence on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"', ICC-RoC46(3)-01/18-8, 19 May 2018; Decision on the "Joint Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules", ICC-RoC46(3)-01/18-15, 11 June 2018; Decision on the "Request for Leave to Submit Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)", ICC-RoC46(3)-01/18-17, 14 June 2018; Decision on the "Request for Leave to Submit Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules)", ICC-RoC46(3)-01/18-18, 14 June 2018.

11. The victims' views and their accounts of their experiences are important factors to be considered by the Chamber in its consideration of the Request. These views are to be distinguished from positions expressed by or attributed to "civil society". While some civil society organisations may be well placed to provide useful input to the Court, their views plainly cannot be equated with those of the victims.⁷
12. The Request rightly emphasises that "*this is not an abstract question but a concrete one.*"⁸ Not only is the question not a hypothetical one; it is also not a theoretical legal exercise. For the victims the subject matter of the Request is the ongoing perpetration against them of a calculated and brutal series of international crimes, which has led to them becoming refugees unable to safely return to their homes. As will be explained, the victims believe that the continuation of these crimes can only be prevented by the involvement of the international community, including this Court. The Chamber's determination of the Request may therefore fundamentally shape the course of their lives.

IV. FACTUAL MATTERS

A. *Background*

13. Before addressing jurisdiction, these submissions set out additional detail regarding: the decades of persecution which led up to the events of August 2017; the events of August 2017 themselves; and the victims' circumstances since those events. This is material not contained in the Request or the GRC Victims' Submissions, and it is relevant to understanding the nature of the crimes and therefore to the jurisdictional issue which is before the Court.
14. There is also a further reason why the following factual material is provided. Both the Request and the GRC Victims' Submissions make reference to the terrible

⁷ Regrettably it is often assumed or asserted that views ascribed to "civil society" are the same as those of victims, this claim even having been made in one of the rule 103 requests in these proceedings.

⁸ Request, para.4.

events that occurred in Tula Toli on 30 August 2017.⁹ Through media and NGO reporting¹⁰ the massacre has become emblematic of the atrocities committed against the Rohingya people in Myanmar. To the survivors of the massacre it is much more: it was a pivotal event in the escalating persecution they experienced over many years, and a real, personal and defining moment of trauma in their lives. It is right and proper that when this event is put before the Chamber, the victims themselves play a role in its telling. Quite aside from ensuring the authenticity of the account, this provides some small restoration of agency for people who have been repeatedly silenced and marginalised.

B. The village of Tula Toli

15. Tula Toli¹¹ is situated in the bend of a river within the boundaries of Maungdaw township, in northern Rakhine State, Myanmar. Before August 2017 the village included both Rohingya and Rakhine hamlets, with an estimated population of around 4700 people (4360 Rohingya; 350 Rakhine).¹² Rohingya were able to vote for members of a village council, but since 2012 they could neither vote in the election of the village council's chair nor hold that position. This meant that despite the population differential, the village chair was Rakhine.

C. The history of persecution and apartheid

16. The events of August 2017 cannot be properly understood without reference to their context, namely decades of persecution against Rohingya people. While the Request acknowledges this background, it does so only briefly.¹³ Further useful detail is provided in the GRC Victims' Submissions, based on extensive open source material, which focuses particularly on the types of extreme discrimination

⁹ Request, para.10; GRC Victims' Submissions, paras 26-28.

¹⁰ Request, fn.21; GRC Victims' Submissions, fn.46-47.

¹¹ Also known as Min Gyi in the Burmese language.

¹² Human Rights Watch, [Massacre by the River: Burmese Army Crimes against Humanity in Tula Toli](#), December 2017, p11 fn.12; BBC, [Newshour: "Documentary suggests military operation against Rohingya Muslims was pre-planned"](#), 27 October 2017, at 1:35.

¹³ Request, para.9.

imposed on the Rohingya by the Burmese regime.¹⁴ The following additional material, gathered from the personal experiences of the Tula Toli victims, elaborates on the ways in which persecutory measures – many of which appear to be informal measures not established by law – were implemented on the ground, and how they were experienced by the Rohingyas themselves.

17. At the core of the apartheid system has been the systematic removal of citizenship from Rohingya people; repeated denials of the genuineness of their ethnicity; and the claim that they are in fact illegal Bangladeshi immigrants. This is the basis for all other forms of discrimination and persecutory treatment, and the ideology which underpins the deportation of the Rohingya to Bangladesh. The great majority of Rohingya in Myanmar became stateless following the implementation of the 1982 Citizenship Law. Their current path to citizenship involves accepting a “National Verification Card” (“NVC”). This has been widely rejected by Rohingya because it does not provide citizenship or recognise their ethnicity and is seen as reinforcing the false claim that they are immigrants from Bangladesh.
18. The Advisory Commission on Rakhine State, which was established by the Burmese government and headed by Kofi Annan, itself recognised that the current approach to citizenship violates international law.¹⁵
19. The deprivation of citizenship seriously harms the Rohingya in many ways. It underlies differential treatment in law and practice, some aspects of which are detailed below. However it is also linked to the denial of ethnic identity. Even the Advisory Commission on Rakhine State, which *itself* refused to use the term “Rohingya” at the “request” of Aung San Suu Kyi,¹⁶ recognised that “*a sense of identity, pride and belonging is important in all societies*”.¹⁷ The centrality of this

¹⁴ GRC Victims’ Submissions, paras 12-15.

¹⁵ Advisory Commission on Rakhine State, [Toward a peaceful, fair and prosperous future for the people of Rakhine: Final Report of the Advisory Commission on Rakhine State](#), August 2017, p29.

¹⁶ *Ibid.*, p12.

¹⁷ *Ibid.*, p26.

question is made clear by the victims. When asked about justice, they refer not only to trials and fundamental freedoms, but first and foremost to recognition of their identity: *“We want peace in our country. They should accept us as Rohingya. They were accusing us that we were not from Myanmar. They should never say it to us again. We should get this kind of justice.”* (a/60015/18)

20. Identity is also fundamentally linked to religion, and another way in which Myanmar has suppressed Rohingya identity is by severely restricting religious activities. Imams were unable to play their roles in the community or espouse Islam. If they wore their religious clothes or beards they were subjected to harassment and intimidation. With the 2012 closure of mosques and madrasas, and prohibitions on prayer, the most fundamental and personal religious activities became a source of great risk. Islamic practices could not openly be passed on to children; praying and attending mosques could happen only covertly or by paying off the village chair. The devout continued these activities, but if caught could be subjected to extortion or severe punishment. Men were known to have been jailed for years when caught praying. One victim described the deep impact of these prohibitions: *“Allah sent us to perform our prayers... we need to perform our religious activities, but they were not letting us do that. I can't describe in words the kinds of feelings we had at that time.”* (a/60016/18)

21. Not only has religious education been prevented, access to basic secular education has been limited, and attendance at universities prohibited to non-citizens. Rohingya people have been prevented from holding certain jobs or entering certain professions. They are not able to become teachers, doctors or lawyers. They cannot serve in the military. For some of the younger victims this was a particular concern: what future opportunities could they look forward to in Myanmar?

22. Reference has been made in the GRC Victims' Submissions to the restrictions on the movement of Rohingya people. As well as formal restrictions imposed by law on travelling significant distances (between townships), additional informal

measures were applied which prevented travel even for short distances. Victims recounted the many ways in which this impacted their daily lives: it prevented them from seeing friends and family; from attending personal events such as funerals; and from accessing medical treatment. The movement restrictions also hindered the most basic economic activity: farmers were unable to access their land; shopkeepers could not run their shops. To do any of these things money had to be paid to the village chair. Curfews were imposed preventing Rohingya from leaving their homes at night, as well as prohibitions on gathering in groups. Shops were made to close at night. Villagers were not to light their houses, and this compounded barriers to education by preventing reading or study at night.

23. The system of apartheid has also rendered the process of marriage expensive and burdensome for Rohingya; and stripped weddings of their joy. Victim a/60014/18 explained that: *“Now I am married in this country, but if I wanted to marry in Myanmar I had to pay to the government... you had to go through a long process for around three months and pay a lot of money to the government. Only in this way were we able to get married. In Bangladesh if a person gets married there is music and enjoyment. But in Myanmar we were not allowed to enjoy our weddings.”*
24. The regulations, prohibitions and procedures imposed on Rohingya in Myanmar, only some of which are set out above, would be shocking enough on their own if simply implemented consistently or according to law. But they have also been used as a basis for intimidating and terrorising the Rohingya people, by creating a constant threat of extortion, arrest, torture or death.
25. The military, and the village chair who served as its go-between, would impose informal taxes and fines – in effect a system of extortion – in many circumstances. Victim a/60013/18 explained: *“If we slaughter a cow we had to give them money; if there was a new baby born we had to give them money; if we went to the forest to cut trees we had to pay money to them ...”*. Another victim explained the simple but devastating impact of these measures: *“in this way they were making us helpless.”* (a/60018/18)

26. As well as for everyday or economic activities, the village chair would collect money from people to allow them to undertake prohibited activities (such as praying during Ramadan). At the same time, minor infractions could also be used against the villagers as a pretext for detention, or lead to imprisonment on fabricated charges. The victims speak of men being jailed for years in this way. Others were taken and did not return: *"There were also people who were disappeared by them. Even their wife and children don't know where they are."* (a/60011/18)
27. Where men were detained in this way their release could only be secured by payment of money. a/60011/18's husband was twice detained, the first time for two and a half years. The second time, in 2017, the family managed to have him released, but had to pay K1,200,000 [around US\$880]. She explained: *"If you went to ask for your husband to be released, they would charge you money. They could charge K400,000-500,000 [approximately US\$300-370]. They never care about what we had, so we would have to borrow money from others, sell our belongings, our cows, to collect the money so they would release our men."* (a/60011/18)
28. Identifying which Rohingya families were the best targets for financial profit through extortion was not difficult: in addition to having a regular source of information from the village chair, government officials had catalogued Rohingya assets, forcing villagers to give details of their real and personal property.
29. As well as the direct financial impact of having to pay money to the chair and the military as demanded, or to secure the release of detainees, the mere threat of such measures had its impact on the Rohingya. They frequently had to hide from the military and consequently could not effectively manage their farms or businesses. Several of the victims spoke about how it had become commonplace to spend sleepless nights in fear that the military would come to inflict harassment or worse.
30. During previous periods when persecution intensified many Rohingya fled to Bangladesh. This occurred particularly in 1978, 1991-92 and 2012. Following the early displacements large scale repatriations occurred, but these were not entirely

voluntary: in the 1970s Bangladesh limited food provision in camps as a means to hasten returns under a program agreed with the UN and Myanmar; and in the 1990s refugees were pressured and/or misled into returning.¹⁸ Some victims described these previous deportations and returns: *“Earlier in 1978 I came here to Bangladesh and I stayed for 8 months. Again in 1992 I came and that time I stayed for three years. And that time the Myanmar government was assuring us that we will give you your land, your properties, your house, so by that assurance we went back to Myanmar. But again they tortured us. One thing I want to say is that I want our rights back. If they assure us that they will give us property, land, for that we will not go. They need to assure us that they will give us our proper rights back. Only then will we go.”* (a/60020/18)

D. The events of 30 August 2017 in Tula Toli

31. In the days before 30 August 2017 the military began attacking and burning Rohingya villages near Tula Toli, including the village of Dual Toli which lay across the river. Residents of these villages took shelter in Tula Toli. The community were fearful: would their village be next? On 29 August 2017 the Rakhine village chair gathered the people, telling them that he would ensure their safety if they remained in the village: they must not flee as it would put them in more danger; if they stayed in the village the military may burn their homes but would not kill them.
32. On the morning of 30 August 2017 the Myanmar military entered Tula Toli. They started burning houses. They shot at villagers. People fled in terror. Some took shelter in the rice paddies or nearby vegetation, but most gathered by the river, hoping that as promised, the military would leave once the houses were destroyed.
33. They did not. The villagers gathered by the riverside were surrounded by the military, who shot directly at them, hacked them with blades, and beat them with sticks. A victim described how the village’s oldest and most revered imam was viciously singled out: *“They killed him in a very brutal way. First they shot bullets in his*

¹⁸ Human Rights Watch, [Burmese Refugees in Bangladesh: Still No Durable Solution](#), May 2000.

body but he did not die and after that they cut him with a knife and then they set him on fire.” (a/60016/18) Those who sought to swim across the river were targeted with gunfire even as they fled: *“Men could not even get the chance to scream.”* (a/60014/18)

34. The women were separated and made to sit in the water at the river’s edge. They watched helplessly as their fathers, husbands, brothers, and sons were slaughtered. One victim recounted: *“My husband was sitting next to me and the military shot him in the leg. My eleven year old son told me: ‘mother, papa got shot in his leg.’ I saw my husband was suffering and he was asking for water from the military and at that time the military shot him again, twice, in his chest. And instantly he died.”* (a/60013/18) By the end of that day this victim’s mother and three of her four children had also been killed before her eyes.
35. Ditches were dug and the bodies of the men – dead and injured alike – were thrown in. They were covered with flammable belongings taken from the villagers or their homes, and with petrol delivered in barrels by helicopter; then set alight.
36. The separation of men from women and children has already been noted in the Request and the GRC Victims’ Submissions.¹⁹ The victims’ accounts make painfully clear that this was not an attempt to spare women and children from the atrocities. Babies and young children were snatched from their mothers and thrown into the flames or into the river. Members of the military took the women in groups to empty houses, where they tortured and raped them. The women recount being held down by soldiers who took turns to rape them. They then beat the women viciously so as to kill them or render them unconscious, and set the houses alight with the women, and in many cases their children, inside.
37. These events are described consistently by the victims who managed to escape by swimming across the river, or by fleeing burning houses, and by those who had hidden elsewhere and saw the atrocities unfold from their hiding places. One man escaped across the river and then waited for two days, in the hope that he could at

¹⁹ Request, para.10; GRC Victims’ Submissions, para.27.

least recover the bodies of his family members to carry with him to Bangladesh. Not even this was possible: he watched as the military returned to hide the evidence of their crimes by disposing of the victims' remains.

38. The scale of the violence meant that entire families were slaughtered. Victims speak of losing twenty or thirty family members during the space of one day, or of being the only member of their families left alive. Some of the younger survivors, two of them under the age of 20, speak with particular pain about being left utterly alone in the world: without parents, family or anybody to guide them in life. One said: *"Before this attack, from my family I saw only my grandfather die. Now I am 18 years old and I have lost all of my family members."* (a/60014/18)
39. It is impossible, in written submissions, to adequately convey the pain experienced by these victims. Many wept continuously as they spoke. One explained how he is still unable to earn an income – nine months later – because he cries uncontrollably all day. Several spoke of feeling as though they had already died inside: *"Our souls already died in Myanmar; we came to Bangladesh only with our bodies"* (a/60018/18) *"All my family died. I also died in my soul; my soul also burned."* (a/60020/18)
40. The victims' suffering continued after the massacre, as they sought refuge. Tula Toli is less than 15km from the Bangladesh border, and in good conditions the distance could be covered on foot in a few hours. Yet it took some of the victims days to make the journey: traumatised, fearful and in many cases seriously injured, they carried their children through the monsoonal mud and with little or nothing to eat. *"It took three days for me to come here. I suffered a lot. I could not see properly. From my eyes the tears kept falling."* (a/60020/18) When they finally reached the river marking the border with Bangladesh many then found themselves at the mercy of people smugglers who charged more money than they could afford to take them across.
41. Many had no money with them. Some had tried to carry precious belongings with them as they fled to the rivershore, and described how the military snatched these

from them. Items taken from the victims' persons and from their homes were cruelly used as fuel to set alight the dead and dying who had been thrown into mass graves. In addition to having lost their land and their homes, most of the victims have lost all or almost all of their personal property. As one victim put it "*I came to Bangladesh with only the clothes I was wearing: my lungi and T-shirt.*" (a/60020/18) Another said that he was left with no identity documents or deeds for his property because "*they used those papers to burn my family members.*" (a/60014/18)

42. The Request refers to the "initiation" of Myanmar's "clearance operation" on 25 August 2017.²⁰ In fact, 25 August was the start date of the *active implementation* of that operation. It may mark the date on which the military began burning Rohingya villages, issuing express orders for Rohingya to leave the country, and (as in Tula Toli) carrying out murderous acts of physical and sexual violence. However to the villagers in Tula Toli it is clear that the operation had been *initiated* well before 25 August 2017.
43. Villagers remember that matters became worse at least a few months before August 2017. In the period before the events, they noticed new military forces being deployed to the area. Detention of Rohingya men by the security forces increased.
44. A few days before 25 August 2017, the military came to Tula Toli in large numbers in the middle of the night. Terrified, the men fled. The military gathered the women and demanded to know where their husbands were. They said that the villagers would not be spared if the men were found to be absent again.
45. Also in the days before the violence, the Rakhine village chair called a meeting and told the Rohingya villagers that they must accept NVCs. They responded that they were from Myanmar; that their parents were from Myanmar; that they were not from Bangladesh. They would not accept the cards. The chair responded that if

²⁰ Request, para.9.

they did not accept NVCs their village would be made “like Kiladong”, a reference to a notorious attack on Rohingya civilians in 2014.²¹

46. That the violence and deportations were planned before 25 August is important because it gives lie to Myanmar’s outrageous protestations that its activities were merely a response to alleged attacks against security forces on that day by a group referred to as the Arakan Rohingya Salvation Army (ARSA). Were they not being repeated internationally as a justification for crimes against humanity, such claims might be thought so absurd as to warrant no reply. The very suggestion that attacks on security posts alleged to have caused 12 military deaths²² could justify “clearing” hundreds of thousands of Rohingya civilians from their homes is telling: it shows just how little value the Myanmar government places on Rohingya lives.

47. When asked what is the real reason why Myanmar’s government and military would do this to them, the victims themselves are in no doubt:

“The main objective is that they say we are not from Myanmar, that we are Bangladeshi, so we can’t live in Myanmar anymore. This is because we had much land, we had our shops, cattle. They felt like it was their land and their shops – they didn’t want us to have all this property. They were jealous of our wealth. But the main thing is that they say we are not from Myanmar.” (a/60018/18)

“They wanted us to leave the country. They were trying to give us some Bengali card and as we didn’t take this card from them that is why they were killing the people. They have done this kind of thing before also.” (a/60017/18)

“They were saying that we are Bangladeshi and that we went there from Bangladesh. But I am 56 years old, I was born in Myanmar. My parents were from Myanmar also. It makes no sense that they were saying that we were from Bangladesh. They were asking us to take

²¹ On the killings and forcible transfers in Kiladong, also known as Du Char Yar Tan, see for example: Fortify Rights, [“Myanmar: End Mass Arrests of Muslim Men and Boys in Rakhine State, Protect At-Risk Communities”](#), 23 February 2014; OHCHR, [“Pillay calls for killings in northern Rakhine State to be investigated”](#), 23 January 2014.

²² [“Arakan Rohingya Salvation Army \(ARSA\) declared as terrorist group”](#), The Republic of the Union of Myanmar, Anti-terrorism Central Committee, Order No. 1/2007, 25 August 2017.

the NVC card. So I think for this reason as we were not taking the NVC card and we were not agreeing that we were Bangladeshi they were doing this kind of torture. Their intention was to get rid of all the Muslim people from Myanmar. Taking the NVC card was just an excuse to kill all the Muslim people in Myanmar” (a/60020/18)

E. The current situation of the victims and their views on return

48. There can be no doubt that the Rohingya refugees in Bangladesh want to return home. The victims’ views in this respect are unambiguous: *“As Myanmar is my country, if I can go back any time again then I will be very happy from the bottom of my heart. This [Bangladesh] is not our country, so we are not very happy here. If we can go back to our country it will be like daylight to us and we can give a better future to our children also.” (a/60011/18)*

49. However the victims maintain that they are unable to return home because of the certainty that persecution, including violence, will continue there: *“I will only go back to Myanmar if they accept us as Rohingya. ... They need to give us our rights back. They have to promise us that they won’t do any kind of harm and they will not again kill our people... If we can’t be assured of those things then please don’t send us back to Myanmar. I am asking forgiveness from the Bangladesh people: I rather die here than go back if these things can’t be assured. If we go back to Myanmar they will kill us.” (a/60014/18)*

50. Research shows that the victims’ views in this respect are consistent with those of the wider Rohingya refugee population. The latest survey conducted by Xchange in the Bangladesh camps, in April-May 2018,²³ found that the overwhelming majority of Rohingya refugees want to return home. 96.94% said they did not want to remain in Bangladesh. 97.53% said they want to return to Myanmar.²⁴

²³ The survey considered the views of more than 1700 Rohingya refugees who had arrived in Bangladesh after 25 August 2017: Xchange, [Rohingya Repatriation Survey](#), 23 May 2018, p6.

²⁴ *Ibid.*, p33.

51. The Xchange survey also showed that the refugees fear returning to Myanmar, and will do so only under conditions which guarantee their safety and dignity. Almost all of the refugees (97.77%) were fearful of returning to Myanmar.²⁵ Unsurprisingly, 99.69% said they would return to Myanmar only if certain conditions were met.²⁶
52. For most of the victims these conditions go beyond personal safety, and relate most fundamentally to securing 'justice'. They say, for example that: *"we will not go home unless there is justice first"* (a/60012/18) and *"if there is no justice we would rather die"* (a/60016/18). They describe 'justice' as including most importantly their recognition as Rohingya (a "Rohingya card") and their enjoyment of the same fundamental rights and freedoms as other ethnic communities. One victim said: *"There are 135 ethnic communities in Myanmar. Like them we want our freedom and our recognition. We want to live the way that they do."* (a/60020/18); another said: *"if justice happens, if they give us our rights back, if they accept us as Rohingya, only then will we go back to Burma, otherwise without justice we will not go there."* (a/60019/18)
53. Several victims specifically mention the need for international involvement or an international force to protect them on return: *"you need to give us some UN persons to be with us so that the Myanmar government can't harm us"* (a/60018/18) and *"If we go to Myanmar again without this [a UN force] then they will again kill us"* (a/60012/18). They also demand trials and the punishment of those responsible for crimes. These and other requirements mentioned by the victims reflect the demands given by Rohingya refugees to the UN Security Council and the Myanmar government.²⁷
54. However current circumstances fall drastically short of meeting these demands. Most fundamentally, Myanmar continues to deny that crimes have even occurred, attempting to shift blame for the refugee crisis variously to ARSA and/or

²⁵ *Ibid.*, p36.

²⁶ *Ibid.*, p33.

²⁷ [Letter to UN Security Council Delegation](#), 29 April 2018; ["Only those with Myanmar residency will be taken back"](#), *Dhaka Tribune*, 11 April 2018; ["Rohingya refugees present Burma with repatriation demands"](#), *Asian Correspondent*, 12 April 2018.

Bangladesh.²⁸ As long as Myanmar maintains this outrageous denial, neither the Rohingya nor the international community can have any confidence that the crimes will cease and will not recur.

55. Myanmar's denial of the crimes is compounded by its statements on repatriation, which evidence a clear intention to continue with racist and persecutory practices. Far from reconsidering its approach to citizenship (as the Advisory Commission on Rakhine State had recommended even before the deportations) Myanmar speaks of applying the NVC process and the 1982 Citizenship Law to the refugees on their return.²⁹ In so doing it entirely ignores the Rohingya objections to these fundamentally discriminatory procedures. No guarantees of citizenship recognition have been made and no indication given of what will happen to those ultimately categorised as non-citizens. No recognition has been given to the cruel reality that many Rohingya who could have proved their pre-1982 citizenship before August 2017 are no longer able to do so because of the intentional destruction of their documents. At the highest levels, and internationally, Burmese officials continue to refer to the Rohingya as Bengali immigrants and to insist that the term "Rohingya" is unacceptable.³⁰ Far from guaranteeing that refugees will be able to return to their own land, Myanmar appears intent on intensifying ethnic segregation through the use of "repatriation camps"³¹ or "reception centres"³²

²⁸ See for example: ["Myanmar Permanent Representative made a statement on the UN Security Council's visit to Myanmar"](#), The Republic of the Union of Myanmar, President's Office, 15 May 2018; Commander-in Chief of Defence Services, ["Discussions between Senior General Min Aung Hlaing and permanent envoys of UNSC"](#), 5 May 2018.

²⁹ See for example: ["Dr. Win Myat Aye, U Nyi Pu, Japanese Ambassador discuss Rakhine State"](#), The Republic of the Union of Myanmar, President's Office, 28 May 2018; see also ["Interfaith delegation visits Maungdaw"](#), The Republic of the Union of Myanmar, President's Office, 27 May 2018.

³⁰ For example, the comments published last week of the Commander-in Chief of Defence Services, Senior General Min Aung Hlaing on his website: ["UN's stand needs the trust of small countries including Myanmar; all assistance should be constructive"](#), 15 June 2018; Aung San Suu Kyi also refuses to use the term "Rohingya": see for example [Interview on ANI](#), 20 September 2017.

³¹ ["Diplomats, UN officials witness true situation in Rakhine State"](#), *The Global New Light of Myanmar*, 16 February 2018.

³² ["The first returnees from the Camps in Cox's Bazaar arrived in Reception Centres"](#), Press Release, Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor,

which sound alarmingly like the internment camps where approximately 120,000 Rohingya have been living since being forcibly transferred in 2012.³³ Statements that “[t]here is no need [for the returnees] to be worried about their security if they stay in the areas designated for them”³⁴ show that security fears may be used to force further segregation and thus tighten the system of apartheid.

56. Indeed there are also strong indications that despite public rhetoric on the international level, the Burmese authorities are actively taking steps to prevent the return of Rohingya refugees, or at least to ensure that they return only to controlled and segregated locations. There are reports, for example, that landmines have been laid in border areas to prevent refugees from returning outside the government-controlled channels.³⁵ Land where the (now razed) Rohingya villages stood is already being appropriated by the government for other uses such as security bases, infrastructure projects and settlements by other ethnic groups.³⁶

57. None of these concerns is mitigated by the announcement that the UN High Commissioner for Refugees and the UN Development Program have agreed a Memorandum of Understanding (“MoU”) with Myanmar on repatriation.³⁷ Press-

27 May 2018; [“Interfaith delegation visits Maungtauw”](#), The Republic of the Union of Myanmar, President’s Office, 27 May 2018.

³³ [“Myanmar must ‘allow Rohingya to leave camps’”](#), Al Jazeera, 16 March 2017; Advisory Commission on Rakhine State, [Toward a peaceful, fair and prosperous future for the people of Rakhine: Final Report of the Advisory Commission on Rakhine State](#), August 2017, pp35-37.

³⁴ Commander-in Chief of Defence Services, [“Discussions between Senior General Min Aung Hlaing and permanent envoys of UNSC”](#), 5 May 2018.

³⁵ [“Exclusive: Bangladesh protests over Myanmar's suspected landmine use near border”](#), Reuters, 6 September 2017; On 27 September Bangladesh’s Prime Minister complained of this in a speech to the UN General Assembly saying: “We are horrified to see that the Myanmar authorities are laying landmines along their stretch of the border to prevent the Ronhingyas from returning to Myanmar”, [Address by H. E. Sheikh Hasina Hon'ble Prime Minister, Government of the People's Republic of Bangladesh](#), 21 September 2017.

³⁶ International Crisis Group, [The Long Haul Ahead for Myanmar's Rohingya Refugee Crisis](#), 16 May 2018, p13; Amnesty International, [Remaking Rakhine State](#), 12 March 2018; Human Rights Watch, [Burma: Scores of Rohingya Villages Bulldozed, New Satellite Images Show Destruction Indicating Obstruction of Justice](#), 23 February 2018

³⁷ [“UNHCR and UNDP sign MOU with Myanmar to support the creation of conditions for the return of refugees from Bangladesh”](#), UNDP Press Release, 6 June 2018; [“UNHCR and UNDP agree on text of MoU with Myanmar to support the creation of conditions for the return of Rohingya refugees”](#), UNHCR Press Release, 31 May 2018; [“Government of Myanmar and United Nations Agencies sign](#)

releases claiming that the MoU will contribute to a process which is not only “safe” and “dignified”, but also “voluntary”, provide no reassurance, given that Rohingya refugees were not involved in the MoU’s drafting and have not even been permitted to see its contents, which remain confidential.

V. SUBMISSIONS ON JURISDICTION

A. *The continuing nature of the crimes*

58. As the GRC Victims’ Submissions make clear,³⁸ the crime of deportation will not end until the conditions which forced the victims to Bangladesh no longer persist. The factual material above demonstrates that those conditions do still exist today. The extreme violence of August 2017 may not be currently continuing, but there remains an immediate threat of its repetition.

59. None of the circumstances in which this violence occurred have changed. Endemic racism against the Rohingya persists at every level of Burmese society including at the highest levels of government. Discriminatory laws are retained and continue to be used by security forces to justify the mistreatment people who are seen as nothing more than unwelcome immigrants. The leadership of key institutions responsible for the violence has not changed. Despite some pretence of facilitating returns, Myanmar’s actions overall show that it intends to maintain the Rohingya’s displacement in Bangladesh, and in any event to subject any returnees to enhanced segregation and continued persecution. In the absence of international sanctions, or the involvement of this Court, Myanmar and its leaders appear to have no incentive to cease the crimes against the Rohingya.

60. The crimes of apartheid, persecution and genocide also continue to be perpetrated against the Rohingya. As the GRC Victims’ Submissions rightly argue, the ongoing

[MoU on assistance to the repatriation process of displaced persons from Rakhine State](#)”, Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, Press Release, 6 June 2018.

³⁸ GRC Victims’ Submissions, paras 81-87.

deportation of the Rohingya forms an important part of the conduct constituting those crimes. In addition, and regardless of the location of the Rohingya, it is clear from the above that Myanmar continues its regime of systematic segregation and oppression over the Rohingya, of severely depriving them of fundamental rights (including citizenship), and of imposing genocidal conditions.

61. Even if the refugees *were* returned to Myanmar in circumstances which ended the crime of deportation, this would not necessarily suffice to end the crimes of apartheid, persecution and genocide. As identified in the GRC Victims' Submissions, those continuing crimes will only end when the respective conduct constituting them is ended: the regime of systematic oppression and domination; the severe deprivation of fundamental rights; and the imposition of genocidal conditions.
62. History suggests that Myanmar is unlikely to treat the Rohingya differently in the event that they return from Bangladesh. Many Rohingya (including some of the individual victims represented by these submissions) have fled to Bangladesh repeatedly because of the persecution they suffered in Myanmar in recent decades. In the past they have been induced to return by assurances by Myanmar which were not honoured. It is therefore understandable that they do not have confidence in any recent suggestions that Myanmar will facilitate safe and dignified returns, particularly given the strong indications to the contrary and Myanmar's continuing denial of the crimes and massacres detailed above. The international community and this Court should likewise have no confidence in any such suggestions.
63. There is therefore currently nothing to suggest that the repatriation of refugees would bring an end to the conduct which continues the crimes of apartheid, persecution and genocide. Such crimes may therefore continue even after returns to Myanmar. Consistent with the submissions made in the Request, so long as any *part* of the crimes of apartheid, persecution and genocide occurred in Bangladeshi

territory, the Court will retain jurisdiction over them, even in respect of any continuation in Myanmar after returns occur.

B. *Interpreting the Statute consistently with its deterrence objective*

64. As recognised in the Request, the Statute must be interpreted in light of its object and purpose. It is submitted that a fundamental consideration in this regard is the Court's deterrence objective. The preamble to the Statute confirms that deterrence of international crimes is one of its key objectives, by emphasising that the States Parties to the Statute are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.³⁹
65. Several chambers have affirmed the centrality of deterrence as an objective of the Court.⁴⁰ The deterrence objective has also been recognised as relevant to the interpretation of the Statute. In a decision concerning the gravity requirement for admissibility under article 17(1)(d), Pre-Trial Chamber I reasoned that the provision should be interpreted so as to maximise the Court's deterrent effect. It considered that this would be achieved by limiting the Court's reach to the most senior persons involved in the commission of crimes.⁴¹ The Appeals Chamber disagreed, pointing out that deterrence could actually be undermined if the Court were prevented from dealing with less senior perpetrators.⁴² In doing so it implicitly endorsed the proposition that the Statute should be interpreted in a manner which maximises its deterrent effect.

³⁹ Preamble to the Statute, fifth paragraph.

⁴⁰ *Situation in the Democratic Republic of Congo*, 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”, ICC-01/04-169 (reclassified as public on 23 September 2008), 13 July 2006, paras 73-75; *Prosecutor v Germain Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 23 May 2014, paras 37-38; *Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 67.

⁴¹ See: *Situation in the Democratic Republic of Congo*, 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”, ICC-01/04-169 (reclassified as public on 23 September 2008), 13 July 2006, paras 73-75.

⁴² *Ibid.*

66. The deterrence objective plays a particular role in relation to the crime of deportation. By definition this crime results in large-scale transboundary displacements. Such displacements inevitably give rise to pressing and difficult questions about how to enable the repatriation of the displaced population. Unless there has been a dramatic transition in the country of origin questions will arise regarding the likelihood that the conditions causing deportation will continue or be repeated after repatriation. In such a situation, the existence of an investigation by the Court into the events in question can provide a means by which to change these conditions. By establishing a mechanism for accountability, a contribution can be made to the cessation or prevention of deportation, thereby facilitating the repatriation of refugees.
67. The current situation in Bangladesh is a paradigmatic example of how this dynamic operates in a case of deportation. As explained above, the crimes will continue until there is a fundamental change in the conditions facing the Rohingya in Myanmar. The victims fear that returning to Myanmar would put their lives at risk, and that they would in any event continue to face persecution. Their fear is clearly well founded having regard to the factual background set out above, including Myanmar's outrageous denials of the crimes and its statements suggesting that if the Rohingya were to return to Myanmar they would face the same persecutory conditions that they have suffered for decades.
68. Currently there is simply nothing to suggest that the conduct constituting the international crimes against the Rohingya will cease; instead, all the indications are that that conduct will continue, just as it did when Rohingya returned to Myanmar following previous flights to Bangladesh. There is therefore a clear and urgent need for the international community to take steps to deter the ongoing and future perpetration of international crimes against the Rohingya. The Court may do so by ruling that its jurisdiction covers these crimes, and in due course by the opening of an investigation. In the context of complete domestic impunity for these crimes,

an international accountability mechanism such as the Court is one of the few measures (perhaps along with financial or economic sanctions) which can give Myanmar reason to cease the commission of international crimes.

69. Action by the Court also forms part of the international involvement demanded by the victims. They explain the need for criminal accountability as follows:

“They killed our people in a very bad way. ... Our people are innocent. We did nothing wrong. So I want punishment. The way they killed our people, I want them to be punished in the same way. ... What was the fault of our little children?” (a/60013/18)

“Without any fault they killed my father, my mother, my aunties, my cousins, my neighbours. What did they do? I want to know why they did these kinds of things to us. I want justice. I want a trial.” (a/60014/18)

70. As explained above, jurisprudence from the Court confirms that the Statute should be interpreted so as to maximise its deterrent effect. Therefore, where any doubt arises as to the interpretation of jurisdiction under article 12, that provision should be interpreted in such a manner as to maximise the deterrence objective. In the present case this means confirming that article 12(2)(a) includes instances where only part of a crime occurs in the territory of a State Party.

71. In the Request the Prosecutor states that *“potential concern about competing claims of jurisdiction ... is the only potential reason arguendo to consider taking a narrow view of territorial jurisdiction as such”*.⁴³ This statement appears to reflect a concern that considerations regarding the Court’s jurisdictional reach may have a bearing on the interpretation of the relevant provisions of the Statute. There may be a view in some quarters that granting the Request will unduly expand the jurisdiction of the Court; but any concern as to opening the “floodgates” of jurisdiction would be misplaced for at least the following reasons.

⁴³ Request, para.50.

72. First, as the Prosecutor has rightly explained, fears about the Court's jurisdiction becoming too expansive fail to recognise that that jurisdiction will only ever be *exercised* within the restrictions of the admissibility framework of the Statute, including the complementarity principle.⁴⁴ An expansive jurisdiction that can only be exercised within that framework is only seen as problematic by those seeking impunity. Complementarity is likewise the answer to misplaced references about "sovereignty". State sovereignty does not imply a right to commit international crimes. At most it implies the possibility to have such crimes, when committed in the state's territory, tried in national courts. This is precisely the possibility which is guaranteed by complementarity.
73. Secondly, to acknowledge that the Court has jurisdiction over the crimes perpetrated against the Rohingya now in Bangladesh is not to imply the existence of jurisdiction in relation to all international crimes which lead to cross-border refugee flows into the territory of a State Party. These Rohingya are victims of mass forced transboundary displacement that was not merely the consequence of conflict, but rather the *calculated and intended result* of the conduct in the originating state.
74. By specifically and violently forcing the victims and other Rohingya out of their country and into Bangladesh, the Myanmar military has intentionally involved the territory of a State Party in its commission of international crimes. For Myanmar to complain in such circumstances that a recognition of jurisdiction by the Court would interfere with its sovereignty⁴⁵ is not only disingenuous; it is also deeply ironic given the ongoing impact of Myanmar's actions on Bangladesh.
75. It is painfully clear that what is at stake in the present proceedings is not merely the theoretical defence of the Court's fundamental objectives. The Chamber's

⁴⁴ Request, para.50.

⁴⁵ ["Press Release"](#), Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, 13 April 2018; ["As non-member, Myanmar will not accept ICC referrals"](#), The Republic of the Union of Myanmar, President's Office, 23 May 2018.

decision will also determine the future and indeed the very lives of a large group of victims of one of the most calculated and brutal series of international crimes in memory. A failure by the Court to act would amount to a tragic abdication of its mandate to seek to deter the most serious international crimes.

VI. SUBMISSIONS ON VICTIMS' PARTICIPATION

A. *Victims' standing under article 19(3)*

76. The legal representative agrees with the GRC Victims' Submissions that the position expressed in the Request regarding victim participation⁴⁶ is unreasoned and would unfairly and unjustifiably limit victims' role.

77. Article 19(3)'s second sentence allows victims to submit observations in proceedings on jurisdiction. Rule 59 regulates the procedure for this. Nothing in the wording of these provisions suggests that victims' standing should be limited to proceedings occurring *after* an investigation is opened. Nor does the wording suggest that victims can only be heard when a situation has been referred under article 13(a) or (b) (as opposed to initiated by the Prosecutor *proprio motu*). Rather, article 19(3) and rule 59 indicate a clear intention to provide standing to both victims and any referring party *that might exist*. Moreover, the evident object and purpose of each of the two provisions is to enable victims to be heard on a matter which fundamentally affects their personal interests. Such interests arise regardless of whether there is a referring party.

78. In support of the contention that victims should not be heard, and that instead the Office of Public Counsel for Victims ("OPCV") should represent their interests, the Request cites two decisions. Both involved *ex parte* proceedings where confidentiality would have prevented victims from providing views.⁴⁷ Moreover,

⁴⁶ Request, para.61

⁴⁷ *Situation in the Democratic Republic of Congo*, 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", ICC-01/04-169 (reclassified as public on 23 September 2008), 13 July 2006; *Situation*

neither related to article 19 proceedings. This is clearly why, in the first referenced decision, the Appeals Chamber specifically stated that it was unnecessary to rule on the meaning of article 19(3).⁴⁸

79. The Chamber certainly has the power to invite observations from the OPCV under regulation 81(4)(b) of the Regulations of the Court (“RoC”). However that procedure is distinct from, and should not be treated as supplanting, the standing given to victims under article 19(3). Regulation 81(4)(b) is a general power. In contrast, article 19(3) arises specifically – and therefore additionally – in proceedings on jurisdiction or admissibility.

80. More fundamentally, a distinction must be drawn between hearing the OPCV on the abstract, assumed interests of victims, and hearing from specific victims regarding their actual interests. Had the Statute’s framers intended for the former to suffice, they would not have expressly created mechanisms for actual victims to be heard. In some instances, such as where confidentiality constraints make it impossible to obtain instructions from victims, it will be entirely appropriate to rely on submissions from the OPCV.⁴⁹ A different situation arises where proceedings are public. Hearing from an in-house lawyer who has never met the victims or obtained their instructions achieves none of the objectives of the victim participation scheme: it is unlikely to provide insights which the judges could not themselves have guessed at; and it gives no agency, voice or natural justice to the persons harmed by the most serious crimes. Indeed, it treats victims as a homogenous mass, whose interests can be known without meeting them or asking their views. The Statute provides very few express avenues for victims to submit

in [REDACTED], Judgment on the appeal of the Prosecutor against the decision of [REDACTED], ICC-ACRed-01/16.

⁴⁸ *Situation in the Democratic Republic of Congo*, 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”, ICC-01/04-169 (reclassified as public on 23 September 2008), 13 July 2006, para.30; referred to in Request, para. 61, fn. 126.

⁴⁹ This was, for example, the case in the example given in footnote 127 of the Request.

their observations or representations as of right, without caveats requiring judicial determinations of appropriateness. These should not be curtailed.

B. Procedural considerations concerning victim participation

81. As others have noted, this is the first time that a Prosecutor has made use of article 19(3). However previous proceedings on jurisdiction have been brought via challenges under article 19(2). In those proceedings, the second sentence of article 19(3) has been applied.⁵⁰ *Dicta* concerning the second sentence of article 19(3), and rule 59, has also been provided in other key decisions on victims' participation.⁵¹
82. Those decisions clearly establish that where victims provide observations under article 19(3) and rule 59, the procedure in rule 89 does not apply.⁵² (That rule requires that for article 68(3) participation a formal process must be followed of written application, observations from the parties and a judicial decision).
83. A consequential question then arises: as article 19(3) standing is not limited to those who have been the subject of a judicial determination under rule 89, which "victims" do have such standing? In previous article 19 procedures the view appears to have been taken that only "victims who have already communicated

⁵⁰ *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, ICC-02/04-01/05-320, 21 October 2008, p7; *Prosecutor v Callixte Mbarushimana*, Decision requesting observations on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10-377, 16 August 2011, pp3-4; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-31, 4 April 2011, para. 12; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-02/11-40, 4 April 2011, para. 12.

⁵¹ Most importantly by the Appeals Chamber in: *Situation in the Democratic Republic of the Congo*, Judgment on victim 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, ICC-01/04-556, 19 December 2008, para. 47.

⁵² *Ibid.*, especially at paras 46-49; *Situation in Uganda*, Decision on victims' applications for participation a/0010/06, a/0064/06, a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, paras 93-94. See also the decisions and paragraphs referred to *supra* note 50, all of which permitted observations from victims who were yet to complete a rule 89 process, without ordering such a procedure to occur.

with the Court” may submit observations; and this phrase was read restrictively, as meaning only those who had submitted written applications for participation.⁵³

84. With respect, this approach is flawed. The words “victims who have already communicated with the Court” from rule 59(1) should not be read as limiting victims’ standing under article 19(3). The second sentence of article 19(3) is directed at the question of which individuals may submit observations. Rule 59(1) is directed at identifying which individuals must be notified of article 19 proceedings. Given the possible number of victims in a situation, the rationale for limiting the Registry’s minimum notification obligations in a specific proceeding is evident. The same logic underlies the notification procedure set out in rule 50(1) in respect of article 15(3) proceedings. It does not follow from these rules on notification that victims who become aware of the proceedings in other ways may not submit observations. More generally, the Rules of Procedure and Evidence are a subsidiary text, and should therefore not be read as limiting rights granted under the Statute, particularly without a clearly expressed intention to do so. There is therefore no reason to treat the standing afforded under article 19(3) as limited to “victims who have already communicated with the Court”. The plain meaning of article 19(3) is that any victim (as defined in rule 85) should be permitted to submit observations.
85. The closest analogue to the article 19(3) victim observation procedure is that for victim representations under article 15(3) where the Prosecutor has, by her own initiative, requested the opening of an investigation.⁵⁴ In article 15 proceedings, the opportunity to make representations has been afforded to all persons meeting the definition of “victim” under rule 85, with the Registry undertaking an internal

⁵³ *Ibid.*

⁵⁴ Indeed the provisions were dealt with together in the Appeals Chamber’s analysis in *Situation in the Democratic Republic of the Congo*, Judgment on victim 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, ICC-01/04-556, 19 December 2008, para. 47.

assessment of whether the rule 85 requirements were met “*on the basis of the intrinsic coherence of the information given by the victim(s).*”⁵⁵

86. It is submitted that this established approach to victims’ representations in article 15 procedures is appropriate in the current proceedings. Article 15(3) and 19(3) each provide for observations from victims outside the usual article 68(3) framework in a particular type of proceeding which by its nature inherently affects victims’ personal interests. Both relate to proceedings which inherently or usually occur at an early stage of the Court’s work in a given situation or case, when there may not have been time to receive or determine rule 89 applications. There is no material difference between article 19(3) and rule 59, as compared to article 15(3) and rule 50, which would warrant a narrower approach in jurisdiction and admissibility proceedings than in article 15 proceedings.

87. Out of an abundance of caution, victim application forms have been completed and submitted to the Registry for ten individuals on whose behalf these submissions are made. However on the basis of the reasoning above, it is submitted that this filing should be received by the Chamber as victims’ observations under article 19(3), without requiring a rule 89 procedure. The Registry should be directed to verify that the victims meet the requirements of rule 85 based on the internal coherence of the information provided by them. This would also ensure the most efficient and expeditious disposal of the proceedings.

⁵⁵ *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, 10 December 2009, paras 7-9; *Situation in the Republic of Côte D’Ivoire*, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, ICC-02/11-6, 6 July 2011, para.10; *Situation in the Islamic Republic of Afghanistan*, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations, ICC-02/17-6, 9 November 2017, para.14.

VII. SUBMISSIONS ON OTHER PROCEDURAL MATTERS

A. *Publicity of the proceedings*

88. The Chamber is respectfully requested to ensure that these proceedings are conducted to the greatest extent possible in conformity with the principle of publicity of proceedings as demanded by article 67(1) of the Statute and regulation 20 of the RoC.

89. As set out in the procedural history above,⁵⁶ media reporting suggests that Bangladesh has made submissions, but has done so on a confidential basis. The Chamber itself has ordered an *ex parte*, Prosecutor-only status conference.

90. The legal representative endorses the request made in the GRC Victims' Submissions that the status conference of 20 June 2018 be made public and include representatives of the victims and *amicus curiae*. For the same reasons, any submissions made by Bangladesh should be made public, at least in redacted form, and reasons for any material kept confidential should be given, in conformity with regulation 23bis(1) of the RoC. Recent apparent leaks concerning the contents of Bangladesh's submissions⁵⁷ only add to the reasons for removing confidentiality.

B. *Page limit*

91. The legal representative notes that a response to an article 19(3) request may be up to 30 pages in length.⁵⁸ She infers that in this context "responses" includes "observations" under article 19(3). Should the Chamber determine that this is not the case, leave is respectfully requested pursuant to regulation 37(2) to exceed the usual 20 page limit, given the importance and complexity of the matters addressed.

⁵⁶ See above at para.6.

⁵⁷ ["Response to ICC: Bangladesh for accountability for atrocities"](#), *The Daily Star*, 12 June 2018.

⁵⁸ Regulations of the Court, reg. 38(3)(b). The cover page and notification page are not counted in calculating this limit: Regulations of the Court, reg. 36(2)(c).

VIII. CONCLUSIONS AND RELIEF SOUGHT

92. For all the above reasons, the Chamber is respectfully requested to:

- i) Receive these submissions as victims' observations under article 19(3), subject only to verification by the Registry that the victims meet the requirements of rule 85 based on the internal coherence of the information provided by them;
- ii) Order, in respect of any submissions filed confidentially by Bangladesh, that a public redacted version be filed as soon as possible, together with an explanation of the factual and legal basis for the confidentiality of any redacted material;
- iii) Determine that the Court has jurisdiction over the crimes of deportation, apartheid, persecution and genocide committed in connection with the deportation of the Rohingya from Myanmar to Bangladesh.

Respectfully submitted,



Megan Hirst

Legal Representative of Victims

Dated this 18th day of June 2018

At London, United Kingdom