



Situation in the People's Republic of Bangladesh/Republic of Myanmar¹

Summary of the Prosecutor's request for authorisation of an investigation pursuant to article 15 of the Rome Statute

4 July 2019

¹ *Caveat lector*: This document serves as a summary of the Prosecutor's request seeking authorisation to open an investigation pursuant to article 15 of the Rome Statute in the situation of Bangladesh/Myanmar. The authoritative official document is the request itself, referenced: ICC-01/19-7 04-07-2019 1/146 RH PT.

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests, under article 15(3) of the Rome Statute (“Statute”), that the Pre-Trial Chamber authorise an investigation into the situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (“Situation in Bangladesh/Myanmar”) in the period since 9 October 2016. Specifically, the Prosecution requests authorisation to investigate crimes within the jurisdiction of the International Criminal Court in which at least one element occurred on the territory of the People’s Republic of Bangladesh (“Bangladesh”), and which occurred within the context of two waves of violence in Rakhine State on the territory of the Republic of the Union of Myanmar (“Myanmar”), as well as any other crimes which are sufficiently linked to these events.
2. Information reviewed by the Prosecution during its preliminary examination provides a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed by the Myanmar armed forces (“*Tatmadaw*”) jointly with the Border Guard Police (“BGP”) and/or Myanmar Police Force (“MPF”) (“other Security Forces”), and by other Myanmar authorities, within the context of a wave of violence that started on or about 25 August 2017 (“the 2017 wave of violence”). These are the crimes against humanity of deportation, other inhumane acts and persecution contrary to article 7 of the Statute. There is a reasonable basis to believe that at least 700,000 Rohingya people were deported through a range of coercive acts from Myanmar to Bangladesh and that great suffering or serious injury has been inflicted on them, along with an estimated 87,000 Rohingya deported in the context of an earlier wave of violence starting on or around 9 October 2016, through violating their right to return to Myanmar, their State of origin.

3. On the basis of the preliminary examination, the Prosecution also concluded that the 2017 wave of violence was closely related to an earlier wave of violence starting on or around 9 October 2016 (“the 2016 wave of violence”), which resulted in the deportation of an estimated 87,000 Rohingya to Bangladesh. The 2016 wave of violence is sufficiently linked to the events surrounding the 2017 wave of violence to be included in the geographical and temporal parameters of the requested investigation, even if, for the purpose of article 53(1), the Prosecution has focused on the 2017 wave of violence.
4. The Prosecution is aware that a number of acts of violence have also allegedly been committed in Myanmar by the Arakan Rohingya Salvation Army (“ARSA”) armed group, and will keep these allegations under review, as well as the question whether or not these acts amount to a crime or crimes under the Statute and were committed in part on the territory of a State Party.

Discrimination and violence against the Rohingya

5. The Rohingya have suffered decades of severe discrimination by the Myanmar authorities. The vast majority of Rohingya in Rakhine State do not have citizenship. The UN Independent International Fact-Finding Mission on Myanmar (“UN IIFMM”) has described the lack of legal status of the Rohingya as the “cornerstone” of a system of severe and institutionalised oppression affecting the Rohingya. For decades the Rohingya have been subjected to large-scale and severe violations of fundamental human rights. Allegedly, they have also been subjected to periodic waves of violence (including in 1978, 1991-1992, 2012) at the hands of the Myanmar authorities. The Prosecution’s request is mainly concerned with the two most recent waves of violence.
6. On 9 October 2016, the Arakan Rohingya Salvation Army (“ARSA”) allegedly attacked three BGP headquarters. In response, the *Tatmadaw*, jointly with other

Security Forces and with some participation of non-Rohingya civilians, launched “clearance operations” and allegedly engaged in large-scale and systematic violence—known in this document as the 2016 wave of violence. This wave of violence resulted in an estimated 87,000 Rohingya fleeing to Bangladesh.

7. Less than a year later, on 25 August 2017, ARSA allegedly carried out another attack. The *Tatmadaw*—jointly with other Security Forces and with some participation of non-Rohingya civilians— launched another “clearance operation” that resulted in a new wave of violence. The 2017 wave of violence allegedly encompassed: the destruction of hundreds of Rohingya villages; the killing of up to 10,000 Rohingya; the perpetration of rape and other forms of sexual violence; and the infliction of serious injuries. These violent, coercive acts led to the deportation of over 700,000 Rohingya into Bangladesh.
8. As of September 2018, over 1 million Rohingya from Myanmar — including over 700,000 Rohingya deported within the context of the 2017 wave of violence, and an estimated 87,000 deported in the context of the 2016 wave of violence—were living in dire conditions in refugee camps in Bangladesh, with no reasonable expectation of being permitted a safe and humane return to Rakhine State.

II. Jurisdiction

9. On 6 September 2018, Pre-Trial Chamber I in its Jurisdiction Decision decided that the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute “if at least one element of a crime within the jurisdiction of the Court [...] is committed on the territory of a State Party to the Statute.”² The Pre-Trial Chamber also found that the Court may exercise jurisdiction over the alleged

² Jurisdiction Decision, para. 72 (emphasis added).

deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under the Statute “[i]f it were established that at least an element of another crime within the jurisdiction of the Court [...] is committed on the territory of a State Party”.³

10. Guided by the jurisdictional parameters identified by Pre-Trial Chamber I, in its preliminary examination the Prosecution has reviewed over a hundred reports, academic articles, legal submissions and documents, by intergovernmental, governmental and non-governmental organisations, academic institutions and media agencies. To date, the Government of Myanmar has declined to provide any information to the Prosecution.
11. The information reviewed provides a reasonable basis to believe that, in the context of the 2017 wave of violence, the following crimes were committed, in part on the territory of Myanmar and in part on the territory of Bangladesh. This is without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of any authorised investigation.

) **Deportation** under article 7(1)(d) of the Statute. Although the coercive acts forcing the Rohingya population to flee took place on the territory of Myanmar, the victims crossed the border—an essential element for the crime of deportation—by entering into the territory of Bangladesh.

) **Other inhumane acts** under article 7(1)(k) of the Statute, namely, the infliction of great suffering or serious injury by means of intentional and severe violations (colloquially, violation or deprivation) of the customary international law right of displaced persons to return

³ Jurisdiction Decision, paras. 74. *See also* paras. 73, 76, 78.

safely and humanely to the State of origin with which they have a sufficiently close connection (colloquially, right to return). Although steps to unlawfully prevent the exercise by the Rohingya of their right to return were taken on the territory of Myanmar, these steps caused further grave harm—an essential element for the crime of other inhumane acts—to the recently displaced Rohingya persons on the territory of Bangladesh.

J **Persecution** on ethnic and/or religious grounds under article 7(1)(h) of the Statute by means of deportation and intentional and severe deprivation of the customary international law right to return.

Deportation

12. There is a reasonable basis to believe that the crime against humanity of deportation under article 7(1)(d) of the Statute took place in the context of the 2017 wave of violence. By means of a range of coercive acts, members of the *Tatmadaw*, jointly with other Security Forces, and with some participation in the field by non-Rohingya civilians forcibly displaced at least 700,000 Rohingya from Myanmar, where they were lawfully present, into Bangladesh.
13. Although the 2016 wave of violence is less documented than the 2017 wave of violence, the available information suggests that the *Tatmadaw* and other Security Forces, with some participation of non-Rohingya civilians, had in 2016 likewise committed the crime against humanity of deportation under article 7(1)(d).
14. The 2017 wave of violence allegedly took place across hundreds of villages throughout the townships of Rathedaung, Buthidaung and Maungdaw in northern Rakhine State, and encompassed the coercion of Rohingya persons from these locations to cross into Bangladesh. The alleged coercive acts

included: killings, rapes and other forms of sexual violence, acts of physical and psychological violence intentionally causing great suffering, or serious injury to body or to mental or physical health, and the destruction of property, including homes, livestock and entire villages.

15. An allegedly “conservative” estimate suggests that up to 10,000 Rohingya were *killed* within the context of the 2017 wave of violence. Forms of killing allegedly included mass executions, the shooting of Rohingya as they tried to flee and burning people within their homes. Victims included children, women and the elderly. The burning of villages particularly affected children, too slow or too frightened to leave the houses.
16. *Rape and other forms of sexual violence* were allegedly committed against Rohingya victims on a massive scale during the 2017 wave of violence. Victims included pregnant women, girls as young as seven and boys. Numerous victims reported sexual violence by multiple perpetrators. Rapes were often committed in public spaces and in front of relatives and/or members of the local community. In many cases, women and girls were reportedly detained in military and police compounds, where they were raped or gang-raped.
17. The *Tatmadaw* and others also allegedly engaged in the deliberate, organised and targeted burning and destruction of Rohingya villages, crops, livestock, and homes, to force the population into Bangladesh. At least 392 villages, corresponding to more than 40% of all villages in northern Rakhine State, were partially or totally destroyed. An allegedly “conservative” estimate indicates that at least 37,700 structures were destroyed including homes, religious schools (madrassas), marketplaces, and mosques. Non-Rohingya settlements were left unscathed.

18. As a result of the 2017 wave of violence, some 700,000 (as of November 2018) Rohingya lawfully present in Myanmar were allegedly displaced (with no justification under international law) across the border into Bangladesh. They had no genuine choice but to leave Myanmar.
19. The Prosecution notes that perpetrators allegedly made verbal threats to force the Rohingya to leave: including: “[i]f you do not leave, we will torch your houses and kill you”; “This is not your country. If you stay we will rape your women, burn you, leave Bengali!”; “Kalars, why are you living here. You must live with your people. You must go.”
20. The available information shows striking similarities between the 2017 and the 2016 waves of violence. Within the context of the 2016 wave of violence, an estimated 87,000 Rohingya were allegedly forced to flee to Bangladesh through a range of coercive acts. These coercive acts included: killing—including of children; rape and other forms of sexual violence; and damage to or destruction of buildings in Rohingya villages, by burning. The Rohingya were lawfully present in Myanmar, and there is no indication that their displacement was permissible under international law.

Other inhumane acts

21. The available information provides a reasonable basis to believe that the crime against humanity of other inhumane acts under article 7(1)(k) of the Statute, based on the violation of the Rohingya’s right to return to Myanmar, was committed in the context of the 2017 wave of violence, serving to secure and consolidate the enforced displacement of Rohingya people. The alleged other inhumane acts took the form of the intentional and severe deprivation of the right of recently displaced Rohingya persons in Bangladesh to return to Myanmar, their State of origin, causing them great suffering or serious injury to body or to mental or physical health.

22. The Prosecution considers that there is a sufficient basis for the purpose of its request for authorisation to consider that, by at least the material times, a fundamental right had crystallized in customary international law, at least to the extent that displaced persons have a right to return safely and humanely to the State of origin with which they have a sufficiently close connection. In the Prosecution's view, intentional violations of this right by State agents—if they occur sufficiently close in time to the victim's initial displacement, and this conduct is not otherwise authorised under international law—can constitute other inhumane acts under article 7(1)(k) of the Statute, provided that the conduct (1) causes great suffering or serious injury to body or to mental or physical health; and (2) is also similar in its gravity—having in mind the perpetrator's own circumstances, conduct and potential culpability—to any other act referred to in article 7(1) of the Statute.
23. There is a reasonable basis to believe that at least one element of this crime occurred on the territory of Bangladesh—such that the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are fulfilled, in this instance. The Prosecution notes, however, that this potential crime is a complex one as a matter of law and fact, and further that the political, military, and humanitarian situation on the ground in both Bangladesh and Myanmar is evolving. In particular, due to the heavy influence of the *Tatmadaw* in civilian affairs, more investigation is needed into the exact role the civilian agencies played in this potential crime. The Prosecution will keep the situation under review in the course of any authorised investigation.
24. The UN FFM and several other observers have concurred – including as recently as March 2019 – that despite signed repatriation agreements, the conditions for a voluntary, safe, dignified and sustainable return of Rohingya refugees do not exist in Myanmar. As of 12 November 2018, it was reported

that no Rohingya refugees had returned through official channels, while some 16,000 additional Rohingya had in fact left Myanmar for Bangladesh in 2018.

25. There is a reasonable basis to believe that the steps taken, in Myanmar, to prevent the safe and humane return of recently displaced Rohingya persons in Bangladesh to Myanmar, has caused them great suffering or serious injury to body or to mental or physical health, as a consequence of the circumstances in which they remain forced to live there. As of September 2018 over 1 million Rohingya live in “dire” conditions in refugee camps in Bangladesh, including the world’s largest refugee camp hosting more than 600,000 refugees. Of these, at least 787,000 were forcibly displaced in the context of the 2016 and 2017 waves of violence. The Rohingya are housed in temporary, inadequate shelters in densely populated camps dependant on humanitarian aid and without meaningful access to work. Women and girls are particularly vulnerable to harm from physical and sexual assault, trafficking in persons, and other exploitation. Mental health is one of the biggest and most neglected needs in the camps. Recently displaced Rohingya wish to exercise their right to return, but expressed concerns about safety and basic citizenship rights.
26. There is a reasonable basis to believe that the Myanmar authorities have taken, and continue to take steps to prevent the safe and humane return of recently displaced Rohingya to Myanmar through conduct allegedly including the following. First, the targeted burning and destruction of Rohingya villages, structures and livestock—which continued after the Rohingya’s flight from Myanmar, made their return more difficult, if not impossible. Second, the *Tatmadaw* is reported to have planted landmines in the border regions and in northern Rakhine State within two weeks of the start of the 2017 wave of violence, after thousands of Rohingya had already fled to Bangladesh and in areas that had been previously used as crossing points without incident; and to

have taken steps to construct a more robust border fence on the border with Bangladesh, fortified with additional troops and military posts. Third, Rohingya land appears to have been subsequently cleared with the use of heavy machinery, and used for the construction of new security facilities, for developing new infrastructure projects, and for constructing new “model villages”. The available information also suggests that new villages are planned or being constructed to resettle primarily non-Rohingya persons. On the information presently available, the extent to which new villages have been built and non-Rohingya displaced persons resettled is not clear.

27. The identified conduct, integral to securing the crime of deportation, is sufficiently serious that it is of comparable gravity to other acts punished under article 7(1) of the Statute. It is also of prolonged duration and great scale, and caused a high degree of victimisation. Furthermore, it is sufficiently proximate to the harm inflicted on displaced Rohingya persons in Bangladesh, in the sense that, if the conduct were to cease, this would be likely to substantially and directly ameliorate their suffering.

Persecution on grounds of ethnicity and/or religion

28. The available information provides a reasonable basis to believe that the crime against humanity of persecution under article 7(1)(h) of the Statute, based on ethnic and/or religious grounds, by means of deportation and intentional and severe violations of the customary international law right to return, was committed in the context of the 2017 wave of violence.
29. The available information provides a reasonable basis to believe that the victims were targeted because of their membership in the Rohingya group, which may be characterised potentially in ethnic and/or religious terms. This targeting is demonstrated by the composition of the victimised population, the

patterns of coercive acts and the methods employed — in particular, perpetrators appear to have distinguished between Rohingya and non-Rohingya persons. The targeting of Rohingya victims is also demonstrated by the construction on formerly Rohingya land of new security-related infrastructure and “model villages” predominantly for use by other ethnic and/or religious groups.

30. The perpetrators’ discriminatory intent is further reflected in public statements and social media posts made by *Tatmadaw* officials and members of other Security Forces. Numerous physical perpetrators on the ground reportedly uttered discriminatory statements and slurs, indicating that they intended to target the victims on the basis of their ethnicity and/or religion.
31. The same discriminatory intent appears to have been present in the context of the 2016 wave of violence, when victims of deportation were similarly targeted because of their membership in the Rohingya group. The information reviewed suggests that the crime against humanity of persecution, based on ethnic and/or religious grounds under article 7(1)(h), by means of deportation, was committed in the context of the 2016 wave of violence.

Contextual elements of crimes against humanity

32. There is a reasonable basis to believe that the identified crimes were committed as part of a widespread and systematic attack directed against any civilian population pursuant to a State policy. The violent acts perpetrated in the context of the 2017 wave of violence, whether or not in combination with the violent acts perpetrated in the context of the 2016 wave of violence, constituted an “attack” for the purpose of article 7 — a course of conduct (multiple acts under article 7(1)) directed against Rohingya persons in Rakhine State (a civilian population), pursuant to or in furtherance of a State policy.

33. The available information provides a reasonable basis to believe that the 2017 wave of violence against the Rohingya civilian population comprised or encompassed a *course of conduct* in which multiple acts under article 7(1) were committed. The acts described above are not the mere aggregate of a few isolated and random incidents. Rather, they share common features in terms of the nature and characteristics of the acts, the population targeted and the alleged perpetrators.
34. Such course of conduct was carried out pursuant to a *State policy* to attack the Rohingya civilian population. This policy is suggested by a variety of indicators including: the clear patterns of violence involving Myanmar State actors and resources; the long-standing system of State-sponsored and institutionalised oppression against the Rohingya people in Myanmar; public statements by high-level senior officials portraying the Rohingya population as a whole as a terrorist threat; and the failure to take meaningful measures to bring members of the *Tatmadaw* and other Security Forces to justice and/or to prevent or deter the repetition of crimes.
35. The attack directed against the Rohingya civilian population was also both *widespread and systematic*. It was large-scale in nature, because it involved a massive number of acts under article 7(1), as well as a very large number of perpetrators and victims. The patterns of conduct, as well as the amount and type of resources employed further shows the highly-organised nature of the attack. The available information indicates that up to 11,000 *Tatmadaw* soldiers and an estimated 900 police were involved in the attack.
36. Striking analogies between the 2017 and 2016 waves of violence further suggest that the violent acts perpetrated in the context of the 2016 wave of violence (whether or not in combination with the violent acts perpetrated in the context of the 2017 wave of violence) constituted an attack for the purpose of article 7—

a course of conduct (multiple acts under article 7(1)) directed against Rohingya persons in Rakhine State (a civilian population), pursuant to or in furtherance of a State policy. The information reviewed also suggests that the alleged crimes were committed as part of such widespread and systematic attack.

III. Admissibility

37. At least the following potential case(s) would be admissible against: senior members of the *Tatmadaw* and other Security Forces for the crimes against humanity of deportation, other inhumane acts (based on violation of the right to return) and persecution (based on deportation and violation of the right to return), and other Myanmar authorities for other inhumane acts and persecution (based on violation of the right to return)..

Complementarity

38. The available information does not indicate that any investigations or prosecutions are being, or have been undertaken by the Myanmar authorities or in relevant third States, in relation to the potential case(s) identified. For these reasons, the potential case(s) would be admissible pursuant to the complementarity criteria in article 17(1)(a) and (b) of the Statute.
39. On 7 September 2018, the Office of the President of Myanmar issued a press release where the Government of Myanmar “resolutely reject[ed] the [Jurisdiction Decision]”. The Government noted that “allegations of deportation cannot be further from the truth”, as Myanmar “has not deported any individuals in the areas of concern and in fact has worked hard in collaboration with Bangladesh to repatriate those displaced from their homes”. By a letter dated 12 December 2018, the Prosecution expressly invited the Myanmar authorities to provide any relevant information. However,

Myanmar's embassy in Belgium refused to accept receipt of this letter, and to date the Myanmar authorities have not provided any information to the Prosecution.

40. Nevertheless, the available information indicates that a few inquiries, investigations or prosecutions may have been initiated at the national level. The Prosecution has identified in particular: i) the investigation by the *Tatmadaw* Investigation Team into alleged misconduct of the *Tatmadaw* and other Security Forces in Rakhine State in 2017, seemingly resulting in subsequent proceedings and in the recent formation of a military investigation court; and ii) the setting up of the Independent Commission of Enquiry ("ICOE") to investigate allegations of human rights violations following the ARSA attacks.
41. It does not seem that the *Tatmadaw* Investigation Team examined the conduct of those who appear most responsible for the alleged crimes. Neither the investigation nor subsequent proceedings revealed any past criminal process seeking to establish the criminal responsibility of those who appear to bear the greatest responsibility for the alleged crimes. Similarly, the ICOE's establishment, mandate and powers do not show that it meets the admissibility requirements. To the extent that the ICOE is considered relevant to the complementarity determination, there is no indication that it has taken tangible, concrete and progressive investigative steps since its establishment. Finally, a number of statements made by Myanmar officials point to the Myanmar authorities' unwillingness to genuinely carry out the investigation with which the ICOE has been tasked.
42. Similarly, in the assessment of the UN FFM and the UN Special Rapporteur on the situation of human rights in Myanmar, and of several NGOs (Human Rights Watch, Amnesty International, and the International Commission of

Jurists) the domestic initiatives established following the 2016 wave of violence did not result in effective investigations leading to criminal accountability. The information currently available suggests that there are extremely limited prospects that senior officials of the *Tatmadaw* and other Security Forces will be held accountable for the alleged crimes.

43. To the extent that the work of the ICOE is ongoing, and with respect to any activity of the recently-formed military investigation court, the Prosecution will continue to review its assessment in light of new information.

Gravity

44. The potential case(s) identified in the Request are sufficiently grave to justify further action by the Court, pursuant to article 17(1)(d) of the Statute. First, the identified potential case(s) concern persons or groups of persons who may bear the *greatest responsibility* for the alleged crimes committed.
45. Second, the crimes alleged are very serious in *nature*. The coercive acts underpinning the crime of deportation allegedly committed during the 2017 wave of violence include the use of physical violence in armed attacks, such as killings, rapes, and the burning of homes and properties. The conduct involved in the violation of the right to return as another inhumane act allegedly included the destruction of property, and the discriminatory resettlement of other ethnicities on burnt and/or cleared Rohingya land.
46. Third, the alleged crimes were committed on a very *large scale*, with at least 700,000 Rohingya forcibly displaced to Bangladesh during the 2017 wave of violence, and being caused great suffering or serious injury through violation of the right to return to Myanmar, along with the estimated 87,000 Rohingya displaced in the context of the 2016 wave of violence.

47. Fourth, *the manner* of their commission further demonstrates the gravity of the alleged crimes. Victims were targeted on ethnic and/or religious grounds and the alleged acts underpinning the crime of deportation included acts of particular cruelty.
48. Finally, the alleged crimes have had a severe *impact* on both individual victims and the entire Rohingya community of Rakhine State. Up to 10,000 Rohingya were allegedly killed and for those who survived, the enduring and devastating impact of the alleged crimes can be seen in life-long physical injuries (including mutilations), as well as documented psychological injuries such as post-traumatic stress disorder, depression and anxiety. As a result of the 2017 wave of violence in Rakhine State, 700,000 (as of November 2018) Rohingya (from a population of approximately 1 million living in Myanmar) fled across the border into Bangladesh where, along with the estimated 87,000 Rohingya deported in the context of the 2016 wave of violence, they face personal security concerns, public health issues, limited access to food and major environmental threats.

IV. Interests of Justice

49. The Prosecution has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice.
50. The alleged crimes are sufficiently grave to justify further action by the Court. Victims of alleged crimes have manifested their interest in seeing justice done in various ways, and human rights organisations representing victims have, in their consultations with the Prosecution and through communications and public reports, repeatedly stressed the desire for justice expressed by Rohingya refugees present in Bangladesh and other surviving victims of the violence

committed in Myanmar. The Prosecution has not received any view that the interests of justice would not be served by an investigation.

51. In light of the mandate of the Prosecution, as well as the object and purpose of the Statute, and taking into account the gravity of the crimes and the interests of victims, based on the information available, the Prosecution has identified no substantial reasons to believe that the opening of an investigation into the situation would not be in the interests of justice. | OTP

