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PRE-TRIAL CHAMBER I

**Before: Judge Péter Kovács, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou**

Public with Public Annexes A, B and C

**Amicus Curiae Observations by the Bangladeshi Non-Governmental
Representatives (pursuant to Rule 103 of the Rules) on the “Prosecution’s
Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”**

Source: Bangladeshi Non-Governmental Representatives

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

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I. Introduction

1. On 14 June 2018, Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”), granted the Bangladeshi Non-Governmental Representatives (“BNGR”) leave to submit *amicus curiae* observations on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (the “Request”).¹
2. BNGR are an informal group of leading Bangladeshi civil society organisations, humanitarian agencies, eminent jurists, human rights advocates and respected scholars who have worked extensively with the Rohingya people allegedly deported from Myanmar into Bangladesh and on issues related to their deportation. A full list of all BNGR members is attached at Annex A. BNGR are assisted in this submission by international lawyers, including barristers from Red Lion Chambers, London, and a team of Bangladeshi researchers, including from among BNGR members, a list of whom is attached at Annex B.
3. BNGR files this *amicus curiae* brief on three areas of its expertise as per its request for leave: i) the circumstances surrounding the presence of members of the Rohingya people from Myanmar on the territory of Bangladesh; ii) the crimes, in addition to deportation, that commenced in Myanmar but were completed in Bangladesh that the Chamber may exercise territorial jurisdiction over; and iii) an overview of Bangladeshi law on territorial jurisdiction over cross-border crimes.

II. Procedural History

4. On 9 April 2018, the Prosecutor submitted her Request pursuant to regulation 46(3) of the Regulations of the Court and Article 19(3) of the Rome Statute (the “Statute”). The Prosecutor seeks a ruling from the Chamber on whether the Court may exercise

¹ “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, 14 June 2018 (“Decision on BNGR Request”).

jurisdiction in respect of the alleged deportation of more than 670,000 Rohingya people from Myanmar into Bangladesh.

5. On 11 April 2018, the President of the Pre-Trial Division assigned the Prosecutor's Request to the Chamber.² The specific legal matter arising from the Request is whether the Court may exercise jurisdiction over alleged acts of deportation of persons from the territory of Myanmar (a State not party to the Statute) into the territory of Bangladesh (a State party to the Statute) on the basis of articles 7(1)(d) and 12(2)(a) of the Statute.³
6. On 13 June 2018, BNGR submitted their application for leave to submit *amicus curiae* observations on the Prosecutor's Request pursuant to rule 103 of the Rules on areas within its expertise as stated at paragraph 2 above.⁴ On 14 June 2018, the Chamber granted BNGR's request.⁵

III. Submissions

Submission One: The circumstances surrounding the presence of members of the Rohingya people from Myanmar on the territory of Bangladesh

7. The forced displacement of approximately 700,000 Rohingya civilians from Myanmar to Bangladesh is the culmination of the institutionalised persecution of the Rohingya by the Myanmar State from the time of the military takeover in 1962, and against a background of tensions between the Rohingya and Rakhine communities which goes back much further than that. The forced displacement has

² President of the Pre-Trial Division, "Decision assigning the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' to Pre-Trial Chamber I", ICC-RoC46(3)-01/18-2, 11 April 2018.

³ Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 7 May 2018, ICC-RoC46(3)-01/18-3, paras.3, 6-7.

⁴ Request for Leave to Submit Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules), 12 June 2018.

⁵ Decision on BNGR Request, para.9.

taken place in the context of what has escalated into an allegedly genocidal campaign on the part of the Myanmar State.

8. On 25 August 2017, members of a Rohingya militant group, the Arakan Rohingya Salvation Army, allegedly attacked a number of security force outposts in northern Rakhine State, Myanmar. The Myanmar State used this incident to initiate the wholesale expulsion of the Rohingya from Myanmar. Amnesty International concluded that the military worked with the Border Guard Police and local civilians “to unleash a campaign of violence that has been systematic, organised and ruthless.”⁶
9. Human rights groups have documented the killing, torture, beating and enforced disappearance of Rohingya civilians, including children, and the rape and sexual mutilation of Rohingya women and girls, together with the organised and targeted burning of Rohingya villages, destruction and appropriation of livestock and crops, and threats of ongoing violence.⁷ These grave human rights violations, sanctioned by the Myanmar State, led to the deportation of tens of thousands of Rohingya to Bangladesh, where they join previously displaced Rohingya seeking safety in areas near Cox’s Bazar.
10. Human Rights Watch used satellite imagery to monitor and assess activity in over 1,000 villages and towns in the townships of Maungdaw, Buthidaung, and Rathiduang in northern Rakhine State, where the Burmese military and civilians engaged in attacks on Rohingya. Human Rights Watch found that the pattern of damage in 354 affected villages was consistent with burning carried out in the

⁶ Amnesty International, “My World is Finished” Rohingya targeted in crimes against humanity in Myanmar, 24.10.17, (“Amnesty International Report”) p. 6.

⁷ Ibid; Fortify Rights: “They tried to kill us all” Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar, November 2017 (“Fortify Rights Report”)

“http://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocity_Crimes_against_Rohingya_Muslims_Nov_2017.pdf; and Human Rights Watch: “All of my body was pain, sexual violence against Rohingya Women and Girls”, November 16 2017: <https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>. See also, Mission Report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh, 13-24 September 2017.

weeks after the military operations began in late August 2017. Of these villages, at least 118 were partially or completely destroyed after 5 September 2017, the date the Myanmar State Counsellor announced that clearance operations had ceased.⁸

11. Surveys conducted by Médecins Sans Frontières (MSF) in refugee settlement camps in Bangladesh indicate that in the four weeks following 25 August 2017, at least 6,700 Rohingya were killed, including at least 730 children below the age of five years.⁹

12. Ms Razia Sultana, a Rohingya lawyer working directly with Rohingya women and girls in refugee camps in Bangladesh, reported the findings of her research to the *United Nations Security Council Open Debate on Sexual Violence in Conflict*. Ms Sultana found evidence that more than 300 women and girls in 17 villages in Rakhine State were raped. Women and girls were caught and gang-raped in their homes, and as they fled or sought to cross the border into Bangladesh. There is evidence that rape victims' genitalia and private parts were mutilated as part of a co-ordinated attack intended to instil terror. Ms Sultana observed that the displacement of the Rohingya to Bangladesh is the largest movement of refugees since the Rwandan genocide.¹⁰

13. The *Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh* concludes that:

The manner in which the villages, home and property of the Rohingya across northern Rakhine State has been destroyed points to it being well-organised and coordinated, thereby challenging the assertion that it was merely collateral damage of the military security operations ... Myanmar security forces purposely destroyed the property of the Rohingyas ... not only to drive the

⁸ See: Human Rights Watch, *Burma: 40 Rohingya Villages Burned Since October*, <<https://www.hrw.org/news/2017/12/17/burma-40-rohingya-villages-burned-october>>, 17 December 2017.

⁹ Médecins Sans Frontières, <<http://www.msf.org/en/article/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks>>, 12 December 2017.

¹⁰ <http://www.womenpeacesecurity.org/resource/statement-unsc-sexual-violence-open-debate-april-2018/>.

population out in droves but also to prevent the fleeing Rohingya victims from returning to their homes. The destruction by the Tatmadaw of houses, fields, food-stocks, crops, livestock and even trees, render the possibility of the Rohingya returning to normal lives and livelihoods in the future in northern Rakhine almost impossible.”

14. The *OHCHR Mission Report* refers to further evidence of forceful deportation in the form of witness accounts that, before and during the attacks, megaphones were used by the security forces instructing the victims to go to Bangladesh on pain of death.¹¹
15. A Human Rights Watch investigation into events which occurred in Tula Toli (also known as Min Gyi) in Maungdaw Township, Rakhine State, on 30 August 2017, concludes that the Myanmar military committed crimes against humanity against the civilian population. The few survivors gave accounts of the systematic mass murder and rape of the villagers.¹² This was one of many mass killing episodes that was allegedly carried out by Myanmar security forces.
16. An investigation by Reuters reports that on 2 September 2017, Buddhist villagers and Myanmar soldiers killed ten Rohingya men in the coastal village of Inn Din in northern Rakhine, before burying them in a mass grave. The investigation obtained photographic evidence, and reports that, “Members of the paramilitary police gave Reuters insider descriptions of the operation to drive out the Rohingya from Inn Din, confirming that the military played the lead role in the campaign.”¹³ The two Burmese journalists who reported this event have been charged with offences under Myanmar Official Secrets legislation for allegedly obtaining confidential

¹¹ Mission Report Office of the High Commissioner of Human Rights, 2017, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>

¹² See *Massacre by the River*, 19 December 2017, <https://www.hrw.org/report/2017/12/19/massacre-river/burmese-army-crimes-against-humanity-tula-toli>; *Fortify Rights Report*, pp.10-11.

¹³ See the *Reuters Investigates* report at <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/>

documents. The Myanmar military issued a state on 10 January 2018 through the *Tatmadaw True News Information Team* asserting that action would be taken against those responsible for the killings,¹⁴ and on 10 April 2018 announced they had sentenced seven Myanmar soldiers to 10 years' imprisonment with hard labour for the killings.¹⁵

17. Bangladesh has received the overwhelming majority of the Rohingya refugees fleeing from Myanmar due to this violence. Rohingya refugees previously sought asylum in Bangladesh in large numbers in 1978, 1991-92, 2012 and 2016. The violence since 25 August 2017 is reported to have displaced 693,000 Rohingya to Bangladesh as of April 2018,¹⁶ resulting in the world's largest refugee camp in Cox's Bazar. Bangladesh hosted a total of 883,785 Rohingya refugees as of 25 February 2018,¹⁷ and has registered 1.07 million people through biometric registration: "The speed and scale of the influx has resulted in a critical humanitarian emergency."¹⁸

18. Many Rohingya who entered Bangladesh did so with injuries sustained in Myanmar, including bullet and burn wounds. These victims were admitted to hospitals in Bangladesh, with the most seriously injured being taken to the Chittagong Medical College Hospital (CMCH) about six to seven hours away from the border. The *Bangladesh Post* reported on 29 October 2017 that 221 Rohingya received treatment from CMCH; among them 139 were released after treatment, and 13 died from their injuries at the hospital.¹⁹

19. Jonab Ali of Gonoshasthaya Kendra (GK), a Bangladeshi non-governmental organization, was posted in the border area while the Rohingya were arriving in

¹⁴ At <https://www.facebook.com/Cincds/posts/1568727529914773> see also BBC report at <https://www.bbc.co.uk/news/world-asia-42956176>

¹⁵ *Seven Myanmar Soldiers Sentenced to 10 Years for Rohingya Massacre* (Reuters), 10 April 2018, <https://www.reuters.com/article/us-myanmar-rohingya-military/seven-myanmar-soldiers-sentenced-to-10-years-for-rohingya-massacre-idUSKBN1HH2ZS>.

¹⁶ UNICEF, *Rohingya Crisis*, https://www.unicef.org/emergencies/bangladesh_100945.html.

¹⁷ Inter Sector Coordination Group, *Situation Report: Rohingya Refugee Crisis* (Cox's Bazar, 25 February 2018) https://reliefweb.int/sites/reliefweb.int/files/resources/180225_weeklyiscg_sitrep_final.pdf

¹⁸ *Ibid.*

¹⁹ <http://www.thebangladeshpost.com/national/12820/pdf>.

late August 2017. He sent a report to the GK management in Dhaka, observing:

Everyone is hungry, tortured, frightened and weak. They only have the clothes they were wearing. They need urgent food relief. Some of them need treatment for various cuts and bullet wounds, diarrhoea, and fatigue. They said that their houses were burnt, their relatives were killed and they have been physically tortured. Smoke from fire can still be seen from Bangladesh side.²⁰

20. Documentary video footage from Action Aid Bangladesh, whose director is a member of BNGR, contains direct victim testimony of atrocities and the conditions in which the refugees now live, as illustrated in the video clip accessible below.²¹ A selection of photographs taken at Cox's Bazar by a member of BNGR in early September 2017 illustrates the humanitarian emergency.²² Image 1, taken on 6 September 2017 from the Bangladesh side of the border at zero point, Tumburu, shows Rohingya dwellings burning.²³ Image 2, taken on 7 September 2017 at Palongkhali border, depicts a Rohingya who has just crossed the border, carrying his elderly mother.²⁴ The refugees' journey takes from 3-15 days. It is undertaken on foot and by boat in extremely difficult conditions. Image 3 taken on 7 September 2017 at Kutupalong, a refugee camp in Ukhiya, Cox's Bazar, Bangladesh, depicts accommodation put together by refugees with plastic and bamboo.²⁵ This photograph was taken as the flow of refugees continued unabated.

²⁰ His full report is in Bangla. The section quoted above has been translated into English by Ashraful Azad, Assistant Professor, Department of International Relations, University of Chittagong, Bangladesh and PhD student, Faculty of Law, University of New South Wales, Sydney, Australia.

²¹ <https://drive.google.com/file/d/1VNthIMNodEGVnKCvwr79MmBvVo69sw2x/view?usp=sharing>

²² The photographs below were taken by Bangladeshi Non-Governmental Representatives who visited the refugee camps and the descriptions thereof have been provided by Prof. Ashraful Azad, referred to above, of the Bangladeshi Non-Governmental Representatives.

²³ Image 1: <https://drive.google.com/file/d/1FEmNSY4SuJOaCFHIpQY2hjhrmNAPMsu0/view>

²⁴ Image 2: <https://drive.google.com/file/d/1tZzGK9K0njRnz-0bBAKrTxVm9OiS4Eyd/view>

²⁵ Image 3: https://drive.google.com/file/d/1xyK1tGvwFPWDHPU2ppwdOOrODcKpb_ES/view

Submission Two: Crimes, in addition to deportation, that commenced in Myanmar but were completed in Bangladesh over which the Chamber may exercise territorial jurisdiction

21. BNGR endorses the ICC Prosecutor’s 9 April 2018 request to the Pre-Trial Chamber that it be authorised to exercise jurisdiction over the offence of deportation of the Rohingya population on the basis of Articles 7(1)(d) and 12(2)(a) of the ICC Statute, on the grounds that commission of this crime commenced in the territory of Myanmar (a State not party to the Statute) but concluded or continued in the territory of Bangladesh (a State party to the ICC Statute).
22. BNGR has not made submissions on the crime against humanity of deportation (save in the context of persecution), mindful that the Prosecutor has covered the issue extensively in her Request and the International Commission of Jurists and the Canadian Partnership for International Justice have been granted leave of the Court to make detailed submissions on the nature and definition of the crime of deportation.²⁶ BNGR is conscious that the Chamber does not want its amici to address the same issues and that it was granted leave to address alleged crimes “in addition to deportation” that were commenced in Myanmar and completed in Bangladesh.²⁷
23. In support of the Prosecutor’s Request, BNGR further submits that the ICC’s jurisdiction may on the same basis exist over crimes of murder, torture, and sexual and gender-based violence (principally under Article 7 of the Statute); acts of persecution pursuant to Articles 7(1)(h); and genocide pursuant to Article 6.
24. There is consistent and credible information to suggest that these crimes also

²⁶ Decision on the “Request for Leave to Submit Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules), 29 May 2018, ICC-RoC46(3)- 01/18-7; Decision on the “Request for Leave to Submit an Amicus Curiae brief 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”), 29 May 2018, ICC RoC46(3)- 01/18-8.

²⁷ Decision on BNGR Request.

continued or were completed in Bangladesh. Accounts from credible sources indicate, for instance, that numerous deaths occurred *inter alia* in refugee camps in Bangladesh due to injuries or conditions of life inflicted on Rohingya, following the well-documented campaign of persecution and deportation inflicted on the Rohingya in Myanmar. Pregnancy and other deleterious consequences of the systematic sexual violence inflicted on Rohingya women and girls in Myanmar have in many instances manifested themselves only in Bangladesh.

25. BNGR endorses the submission of the Prosecution and others that territorial jurisdiction under the ICC Statute exists when one element (or part) of the conduct or consequence in question is consummated within the territory of a State Party. As murder requires, as an essential element, the death of the victim, in these cases, the crime of murder can be said to have been completed only in Bangladesh. Consequential elements of other crimes, including sexual and gender-based violence, have also occurred in Bangladesh, or in any event are by nature continuing crimes.

26. BNGR therefore submits that a part of other crimes in addition to deportation, whether through conduct based or consequential elements, occurred in the territory of Bangladesh (a State Party), such the jurisdiction of the Court is also engaged under Article 12(2)(a) of the Statute.

Killings

27. BNGR submits that the Court may exercise jurisdiction over acts of murder (or, where mass killings are entailed, extermination) pursuant to Articles 7(1)(a) and (b) and 12(2)(a) of the ICC Statute.

28. As has been eloquently submitted by others, the jurisdiction of the Court may also be based upon Article 6(c) (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part). This offence has been correctly characterised as a continuing crime, originating in the systematic

persecutions and expulsion of the Rohingya in Myanmar, and culminating or continuing in Bangladesh.²⁸ It is contrasted with offences which are instead committed in an instant, whose physical elements are finalised in a single moment or which do not extend over time, even if their effects might.²⁹

29. In BNGR's submission, the various elements of murder proscribed elsewhere by the ICC Statute may in some instances expand over time and need not occur instantaneously. While the death of the victim may – and in the case of the Rohingya frequently did – follow immediately from a singular act, there is no legal requirement that this be so. It follows that jurisdiction in relation to killings resulting from conditions of life deliberately inflicted on the Rohingya are not dependent on the existence of the threshold conditions for genocide under Article 6 of the Statute; this same conduct may also be characterised as murder (or, where multiple deaths occurred, extermination) pursuant to Articles 7(a) and (b).

Legal ingredients of murder and extermination in Articles 7(1)(a) and (b) of the Statute

30. The offences under Articles 7(a) and (b) require that the perpetrator killed or caused the death of one or more persons, and that these crimes take place as part of a widespread or systematic attack against a civilian population. The existence of these threshold conditions for crimes against humanity have been convincingly argued by the Prosecution and other amici, and BNGR endorses these submissions.

31. According to international jurisprudence, while an accused's acts or omissions must cause death, the legal ingredients of the crime of murder do not require that death be instantaneous. Death may be caused directly or indirectly, and through omission. Life-endangering conduct such as deprivation of food, water and resources indispensable for survival such as medical services, have all been held to

²⁸ Global Rights Compliance, Submissions on Behalf of the Victims pursuant to Article 19(3) of the Statute ('GRC Amicus'). It is implicit both in the GRC Amicus and the present submission that where these thresholds are established, the Court's jurisdiction may further be based upon Articles 6(a) (killing members of the group).

²⁹ GRC Amicus, para. 65.

satisfy the *actus reus* of murder.³⁰

32. Extermination also includes, but is not limited to, the direct act of killing. It may comprise acts, omission or combination of the two which contribute directly or indirectly to the deaths of a large number of individuals and encompasses a variety of direct and indirect forms or methods of killing or causing death.³¹ Extermination thus encapsulates the creation of conditions of life that lead to mass death such as the deprivation of food, inadequate protection from extreme weather, and denial of medical care.³² The ECCC Trial Chamber has in this context referred to factors such as a subsistence diet and the reduction of essential medical services below minimum requirements, or otherwise inflicting conditions on the deportees where they lack food, water, medical assistance, shelter or hygiene facilities. The ECCC further found that the conditions inflicted on the deportees from Phnom Penh in April 1975 were severe enough to qualify as extermination, as the evacuees were forced to leave their homes at gunpoint without being able to take adequate supplies and without being provided with food, water or any assistance whatsoever.³³

33. The *Stakić* Trial Judgement described the required *mens rea* of murder as satisfied where the accused engages in life-endangering behaviour, with awareness that death will ensue, and acts with “manifest indifference to the value of human life.”³⁴ Where for example someone severely beats an elderly victim over an extended period of time and leaves him without medical treatment with awareness that he might die from his injuries, and he actually dies therefrom, then the perpetrator

³⁰ See e.g. *Stakić* Trial Judgement, para. 587.

³¹ *Rutaganda* Trial Judgement, para. 81. *Kayishema* Trial Judgement, para. 146; *Brdjanin* Trial Judgement, para. 380.

³² *Brdjanin* Trial Judgement, para. 380; *Rutaganda* Trial Judgement, para. 81.

³³ ECCC, Case 002/01, Case No. 002/10-09-2007/ECCC/TC, Judgment, 7 August 2014, para. 562, where the Chamber found that the evacuation of Phnom Penh constituted conditions of life that led to the death of the victims, constituting extermination. The Chamber held that these conditions during the evacuation included lack of food, water, medical assistance and shelter, or hygiene facilities.

³⁴ *Stakić* Trial Judgement, para. 587.

may be guilty of murder.³⁵ Article 30 of the ICC Statute similarly links the *actus reus* of offences with intent, as well as requiring awareness or knowledge of any consequence or a circumstance integral to the offence in question.

34. Unlike the crime of deportation, a cross-border element is not an integral feature of either murder or extermination. However, the death of the victim(s) is a *sine qua non* for both crimes.³⁶ Where death occurs later in time from the above causes, the possibility inevitably exists for this death also to occur in a territory other than where the offence originated.

35. For the reasons elaborated below, this scenario is, in BNGR's submission, a likely part of the factual matrix before the Court in the present case. As will be shown, the victims of acts perpetrated against the Rohingya in Myanmar, which were known and intended to be fatal, actually resulted in the deaths of some victims in Bangladesh; the crimes of murder and extermination in relation to these victims were completed in Bangladesh.

36. BNGR endorses the Prosecution's contention that manifest absurdity would result if the Court's jurisdiction over an act clearly causing death, and intended to do so, could be frustrated merely because the death of the victim occurred across State boundaries. Absurd consequences become particularly repugnant where these victims have been deliberately propelled across those borders as part of a systematic campaign of persecution or genocide.

Information in support of the contention that an essential legal ingredient of the crimes of murder and extermination (deaths of the victims) occurred in Bangladesh

37. There is credible information to indicate that multiple victims who fled mass

³⁵ Čelebići Trial Judgement, paras. 842, 845.

³⁶ See e.g. Jelisić Trial Judgement, para. 35 (the elements of murder are that the victim is dead as a result of an act of the accused and the act was committed with the intention to cause death); Kupreškić Trial Judgement, paras. 560-61; Krnojelac Trial Judgement, para. 324 ("the victim named in the indictment is dead"). Before the ICC, the Elements of Crime require that the perpetrator killed one or more person. This is synonymous with 'caused death'.

violence and deleterious conditions of life in Myanmar arrived in Bangladesh severely injured or fatally weakened by these crimes, succumbing to their injuries soon afterwards. Further, some killings occurred on or at the border itself and thus with the likelihood that some victims shot while crossing the border died on Bangladeshi territory.

38. Consistent and credible accounts document numerous victims presenting with severe injuries such as stabbing or gunshot wounds, or in a severely weakened state in consequence of the conditions and violence inflicted upon them in Myanmar. Reliable media accounts speak of “more than a million people clinging to life” in Bangladeshi refugee camps and of “children who made it this far only to die, or who died along the way - their bodies carried by their parents until they could be buried.”³⁷ On 29 October 2017, the *Bangladesh Post* reported that 221 Rohingya received hospital treatment, with 13 dying from their injuries at that hospital.³⁸
39. These reports and other public information appear credible and consistent, and emanate from *prima facie* reliable sources which corroborate other accounts of the violence perpetrated against the Rohingya in Myanmar and their perilous transit, all of which resulted in continuing loss of life among victims amassed at or crossing the border, as well as among those managing to reach comparative safety in Bangladesh.
40. At the crossing to Bangladesh, the Rohingya confronted continued risks while fleeing Myanmar security forces or in transit. For example, the security forces shot indiscriminately at crowds gathered on the beach in Tula Toli, a village at the border between Myanmar and Bangladesh, killing many of them. Some of the villagers attempted to swim across the fast-moving river to seek safety, and over the course of the day, hundreds of men, women and children unable to flee to safety were

³⁷ Tim Costello, Chief Advocate at World Vision, Huffington Post, 31 October 2017 (https://www.huffingtonpost.com.au/tim-costello/ive-visited-many-terrible-refugee-camps-but-coxs-bazar-felt-like-the-gates-of-hell_a_23260127/?guccounter=1)

³⁸ <http://www.thebangladeshpost.com/national/12820/pdf>.

gunned down.³⁹ On 29 September 2017, at least 14 refugees, among them nine children, drowned when a packed boat capsized in the Bay of Bengal.⁴⁰ Systematic attacks on or near the border create the likelihood that many of these deaths occurred on Bangladeshi territory.

41. Reliable public reports also indicate, for instance, that many individuals seen by humanitarian organisations and local NGOs in Bangladesh bore life-threatening and serious injuries, often requiring surgical intervention. Amnesty International, for example, describes patients arriving with serious gunshot wounds, and rape survivors with burn injuries consistent with witness accounts of having been shot at or immolated in their houses.⁴¹

42. MSF reported that, between 25 August and 12 September 2017, it had treated 147 Rohingya refugees with gunshot wounds. Cox's Bazaar District Sadar Hospital, one of three government-run hospitals receiving patients in the region, had statistics as of 30 September showing that its surgical ward had treated 187 Rohingya patients, including 126 for gunshot wounds.⁴² Reliable epidemiological reports prepared by the International Organisations such as the World Health Organisation indicate significant mortality in the refugee camps. While these reports do not ascribe a precise cause of death to individual victims, they illustrate that many individuals able to reach comparative safety from the violence and conditions of life inflicted against them in Myanmar succumbed to the impact of these crimes soon afterwards in Bangladesh.⁴³

³⁹ Human Rights Watch, *Massacre by the River – Burmese Army Crimes against Humanity in Tula Toli*, 19 December 2017, p. 14.

⁴⁰ UNHCR, *100 days of horror and hope: A timeline of the Rohingya crisis*, 10 December 2017; Statement by Mr. Marzuki Darusman, 12 March 2018.

⁴¹ Amnesty International Report, pp. 15, 24.

⁴² World Health Organisation, *Mortality and Morbidity Weekly Bulletin (MMWB)*, Cox's Bazar, Bangladesh, Volume 5: 12 November 2017 (deaths attributed mainly to the impact of malnutrition and disease, although these reports also mention that some refugees required surgery).

⁴³ Amnesty International, *"Caged without a roof": Apartheid in Myanmar's Rakhine State, 2017*, page 60 (referring to 87 male, 57 female, and 43 minor surgical patients). Other clinics, including one run by the International Organization for Migration (IOM), have treated additional patients (Amnesty International,

43. In BNGR's submission, the above features indicate that an element of the crimes of murder and extermination – and indeed their consummation or completion – likely occurred within Bangladeshi territory.

Conclusion in relation to Killings

44. As there is information to suggest that crimes committed against the Rohingya in Myanmar have resulted in the death of some victims in Bangladesh, it follows that an essential element of the crimes of murder or extermination occurred in an ICC State party. Given the nature of the above crimes and of the territorial jurisdiction accorded to the Court under Article 12(2)(a) of the Statute, BNGR submits that jurisdiction exists in relation to these offences vis-à-vis those victims.

Sexual and gender-based violence

45. In BNGR's submission, the Court may also exercise jurisdiction over crimes of sexual and gender-based violence, in particular, forced pregnancy, criminalised pursuant to Article 7(1)(g) of the Statute, on grounds that one key ingredient of this offence – namely, pregnancy – manifested or at least continued in Bangladesh.⁴⁴

46. Further, the effects of these and other crimes of sexual and gender-based violence continued long after the arrival of its victims in Bangladesh. While BNGR concedes

pp. 12, 81).

⁴⁴ While some credible public sources suggest that some Rohingya females have also been subjected to sexual slavery and enforced prostitution (*see e.g.* https://www.bbc.com/news/video_and_audio/headlines/36301692/rohingya-women-tell-of-rape-and-trafficking-in-bangladesh) - offences which are also continuing crimes and thus with the potential to possess cross-border elements – BNGR does not currently possess information which demonstrates that this was the case. For authority for the proposition that enforced prostitution and sexual slavery constitute continuing crimes, see Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*, Oxford University Press, 2013, p. 101. (noting that enforced prostitution contains an element of continuity and may qualify as a continuing offence since the victim may be 'forced' for a prolonged period of time) and Joseph Powderly and Niamh Hayes, "Article 7", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016, p. 215 (recognising the possible continuing character of enforced prostitution as a distinguishing criteria from offences of sexual violence, including rape). The Special Court for Sierra Leone has The SCSL have attributed a continuing nature to the following offences: enslavement, sexual slavery, use of child soldiers and forced marriage.

that this may stop short of creating a jurisdictional nexus to Bangladesh on the ground that the traumatic effects of a crime do not automatically equate with the legal ingredients of an offence, an exception may exist in terms of Article 6(c) of the Statute (genocide by causing serious bodily and mental harm). Serious mental harm may certainly emanate from unwanted pregnancy following rape: insofar as pregnancy is discovered only once the victim has left Myanmar, this harm *ipso facto* also manifests in Bangladesh. Further, unwanted pregnancies resulting in termination, particularly if carried out in insanitary or medically substandard conditions, risk long-term impact on future reproductive capacity and these, and other, crimes of sexual and gender-based violence undoubtedly cause serious physical and mental harm, destroy family life, and otherwise create conditions that undermine the ability of the Rohingya to survive as a group, see below paragraphs 88-89.

47. The Court's jurisdiction over genocide has already been argued by other amici and below at paras. 80 to 98.

Enforced Pregnancy

Legal ingredients of enforced pregnancy under Article 7(g) of the Statute

48. BNGR submits that it would be open to the ICC judges to conclude that the crime of enforced pregnancy under Article 7(g) of the Statute is a further instance of an offence that commenced in Myanmar but was completed in Bangladesh, and thus over which that the Chamber may also exercise territorial jurisdiction.

49. The Elements of Crime emphasise, in relation to this offence, the notion of confinement of one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. In the sole case to adjudicate this offence to date before the ICC, *Prosecutor v. Ongwen*, the ICC Pre-Trial Chamber also focused on the act of confinement rather than the act of forcible impregnation as the crux of this

offence, stating that

[i]ndeed, the crime of forced pregnancy does not depend on the perpetrator's involvement in the woman's conception; it is only required that the perpetrator knows that the woman is pregnant and that she has been made pregnant forcibly. It is apparent that the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy'.⁴⁵

50. It would be open to the ICC Trial Chamber to determine that this offence is committed when the victim has been made pregnant forcibly, and when the Accused forces her to continue the pregnancy. It is submitted that the necessary legal ingredients of enforced pregnancy may also be satisfied where the circumstances in which the victim found herself gives rise to no meaningful choice other than to continue the pregnancy against her will, and that the Accused is aware of these circumstances.⁴⁶ The latter proposed legal ingredient, if accepted, may give rise to the Court's territorial jurisdiction over this offence pursuant to Article 12(2)(a) of the Statute, insofar as it takes place in Bangladesh.

Information in support of the contention that an essential legal ingredient of the crime of enforced pregnancy occurred in Bangladesh

⁴⁵ *The Prosecutor v. Dominic Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red, 23 March 2016.

⁴⁶ This offence is subject to numerous qualifications in Article 7(2)(f) of the Statute, including that it "shall not in any way be interpreted as affecting national laws relating to pregnancy". However, events since 1998 arguably show the progressive development of the laws in many states toward greater reproductive autonomy (see e.g. <https://www.theguardian.com/world/2018/may/27/ireland-to-start-abortion-law-reform-after-historic-vote>). Further, it was arguably not the intent of those urging the adoption of this qualification in Rome to compel victims of widespread and systematic sexual violence to bear the children born to them as a result of these crimes. For a discussion of some of the conceptual and practical challenges entailed by the crime of enforced pregnancy, see Kristen Boon, Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent, 32 *Columbia Human Rights Law Review*. 625, 656 (2001) and Marko Milanovic, "Vessels of Reproduction: Forced Pregnancy and the ICC", <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?referer=https://www.google.com.au/&httpsredir=1&article=1162&context=facscholar>

51. Sexual and gender-based violence has been a characterising and dominant theme of the violent campaign against the Rohingya. Even prior to August 2017, Rohingya women and young girls were regularly subjected to sexual violence. During the August 2017 attacks, whilst the men and boys were separated for execution, women and girls were systematically raped, as well as being tortured and killed.⁴⁷
52. There is consistent and credible information to suggest that many women raped in Myanmar discovered they were pregnant in Bangladesh and have since given birth there to children conceived as a result of these rapes.⁴⁸ Further, many rapes occurred while the victims were *en route* to Bangladesh, and close in time to when the victims crossed the border, giving rise to indeterminacy as to exactly where conception occurred.⁴⁹ It is likely, however, that conception in some instances occurred within Bangladeshi territory; at a minimum, pregnancies certainly continued there.
53. In the light of the foregoing, BNGR submits that there is room for the view that (a) the legal elements of the crime of enforced pregnancy can be satisfied by the factual matrix currently before the Court and (b) that indispensable ingredients of this crime occurred in Bangladesh, thus giving rise to the Court's territorial jurisdiction over this offence pursuant to Article 12(2)(a) of the Statute.

Persecution

54. BNGR submits that the Court may exercise jurisdiction over acts of persecution

⁴⁷ Statement by Ms. Yanghee Lee, 12 March 2018; Statement by Mr. Marzuki Darusman, 12 March 2018; Report of the Special Rapporteur on the situation of human rights in Myanmar, 9 March 2018, para 48

⁴⁸ Amnesty International, Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya, as Ethnic Cleansing Continues, February 2018 ('Amnesty International, 2018'), p. 5; Mission report of OHCHR, 13-24 September 2017, p. 8-9; Statement by Mr. Marzuki Darusman, 12 March 2018; *see also* <https://www.independent.co.uk/news/world/asia/rohingya-refugee-crisis-muslim-pregnant-women-myanmar-midwives-burma-unfpa-a8242516.html>

⁴⁹ *See e.g.* UNICEF, 'More than 60 Rohingya babies born in Bangladeshi Refugee Camps every day' Press Release of 17 May 2018: <https://www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day%E2%80%93unicef> (mentioning births by sexual violence survivors); *see also* Washington Post, 22 May 2018, 'Rohingya Camps Brace for Wave of Babies Conceived in Rape' https://www.washingtonpost.com/gdpr-consent/?destination=%2fworld%2fasia_pacific%2fa-lot-of-shame-rohingya-camps-brace-for-wave-of-babies-conceived-in-rape%2f2018%2f05%2f21%2f8bf9be3c-45b4-11e8-b2dc-b0a403e4720a_story.html%3f&utm_term=.2a03754e2bd6

pursuant to Articles 7(1)(h) and 12(2)(a) of the Statute.

Legal ingredients of the offence of persecution in Article 7(1)(h) of the Statute

55. Persecution is a crime against humanity pursuant to Article 7(1)(h) of the Statute which provides:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

...

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

56. Article 7(2)(g) defines persecution in the following terms:

"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

57. The elements of the crime are defined as follows:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international

law.

4. *The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.*

5. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*

6. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*⁵⁰

58. It is well established in international criminal law that the following acts may constitute persecution when committed with the requisite discriminatory intent: infringement upon individual freedom; murder; deportation or forcible transfer; comprehensive destruction of homes and property; the destruction of towns, villages, and other public or private property and the plunder of property; attacks upon cities, towns, and villages; and sexual violence.⁵¹

Evidence of the persecution of the Rohingya as a crime against humanity

59. There is extensive evidence that persecution of the Rohingya has been committed by the Myanmar army and security forces as part of a widespread and systematic attack directed against the civilian population with knowledge of the attack.⁵²

60. Amnesty International documented how: “The attack on the Rohingya population has been both systematic and widespread, constituting serious human rights violations and crimes against humanity under international law. The violations and crimes have been committed within a context of decades of systematic, state-led

⁵⁰ Elements of Crimes, Article 7(1)(h).

⁵¹ *Kvočka et. al*, Trial Judgement, ICTY, IT-98-30/1-T, 2 November 2001, para.186.

⁵² Definition of the elements of a crime against humanity can be found in: *Prosecutor v. Bosco Ntaganda*, Case no. ICC-01/04-02/-6, decision pursuant to art. 61(7)(a) and (b) of the Rome Statute on the charges of the prosecutor against Bosco Ntaganda, para. 24 (June 9, 2014). *Prosecutor v Tihomir Blaškić*, IT-95-14-T, Trial Judgement, 3 March 2000, para 206.

discrimination and persecution of the Rohingya population and occasional large-scale outbursts of violence.”⁵³ Human rights groups have documented how the military have killed hundreds of Rohingya civilians including children, raped and tortured Rohingya women and girls.⁵⁴ Amnesty International have documented the deliberate, organized and targeted burning of villages and persecution based on ethnic and religious grounds, through the burning of homes, whole villages, looting and denial or severe restrictions on humanitarian aid.⁵⁵ These attacks were perpetrated as part of state policy, by members of the Myanmar security forces and armed civilians.⁵⁶

61. It has been documented that at least four Myanmar Army battalions comprising an estimated 2,000 soldiers were reportedly involved in the attacks in October and November 2017 and used sophisticated weapons, including rocket propelled grenades (RPGs). The large deployment of troops as well as the use of RPGs would have required detailed planning and coordination and the strategic allocation of significant financial resources and arms—the widespread use of such weaponry demonstrated “the organized nature of the acts of violence and the improbability of their random occurrence.”⁵⁷

62. The *Bearing Witness Report* documents how:

“Fortify Rights and the Simon-Skjodt Center documented and analyzed the mass movement of Myanmar Army battalions into at least 40 villages across a relatively vast geographic area in Maungdaw

⁵³ Amnesty International Report, p.6

⁵⁴ Ibid; Fortify Rights Report.

http://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocities_Crimes_against_Rohingya_Muslims_Nov_2017.pdf; and Human Rights Watch: “All of my body was pain, sexual violence against Rohingya Women and Girls”, November 16 2017: <https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>. See also, Mission Report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh, 13-24 September 2017.

⁵⁵ Ibid, p.43

⁵⁶ “They Tried to Kill Us All” Atrocities Crimes Against Rohingya Muslims, November 2017, Bearing Witness Report, pp.13, 14

⁵⁷ Ibid, p.g 15.

Township between October and December 2016, committing targeted attacks on a large number of Rohingya civilians. The attacks resulted in the displacement of at least 94,000 Rohingya civilians from Maungdaw Township over a three-month period. The Myanmar Army-led attacks in August and September 2017 spread across all three townships in northern Rakhine State, targeting hundreds of Rohingya villages and hundreds of thousands of civilians, displacing more than half a million".⁵⁸

63. A documentary by COAST Trust, whose Executive Director, is one of the BNGR petitioners, entitled "*Genocide Survivors: Stories of survivors of Mass Genocide in Myanmar*", describes widespread and systematic criminality including but not limited to beheadings, indiscriminate shooting by the military, neighborhoods being burned, Rohingya being beaten, and direct victim testimony of being shackled for multiple days and nights.⁵⁹

64. A documentary by the COAST Trust, "*No Women's Land*",⁶⁰ details interviews conducted at the Balukhali refugee camp in Bangladesh. It describes rape by the military of women in front of their children, degrading and inhumane treatment of women being forced to kneel for 3-4 days at a time, and torture. It provides direct visual evidence of the conditions in which the Rohingya now live in the refugee camp as a direct consequence of being deported or through circumstances whereby they were forced to leave.

65. A documentary by COAST Trust, "*The Persecuted*",⁶¹ describes hundreds of refugees dying in boats that capsized. One witness describes "suffering beyond description" and being forced to walk for days on end. The documentary contains

⁵⁸ Ibid, p.14

⁵⁹ COAST Trust, *Genocide Survivors: Stories of survivors of Mass Genocide in Myanmar* <https://www.youtube.com/watch?v=dlhR3LM8vnc>

⁶⁰ COAST Trust, "*No Women's Land*" https://www.youtube.com/watch?v=9_qQ0SM0AwM

⁶¹ COAST Trust "*The Persecuted*" <https://www.youtube.com/watch?v=hyuGwN3gptw>

witness evidence describing houses being torched and bulldozed, and how Rohingyas were told by the military that “*Bengalese are not allowed in the country*”. Victims request that criminals who have killed to be brought to justice according to international law.

The Court’s jurisdiction over persecution

66. It is submitted that:

- Jurisdiction over “conduct” includes jurisdiction over both the acts and the results of the crime;
- Persecution is a continuing crime, consisting of both acts and results; and
- The Court has jurisdiction over conduct, namely persecution, where the acts and/or the results extend into the territory of a State Party, Bangladesh.

67. As correctly recognised by the Prosecutor, exercising jurisdiction where some of the conduct occurs upon the territory of the State Party is uncontroversial (Prosecution’s Request for a Ruling, paras.28-29). Pursuant to Article 12(2)(a), the Court may exercise jurisdiction where the “conduct in question” occurred within the territory of one of the State Parties to the Rome Statute.

68. It is submitted that the notion of “conduct” includes both the act and result elements of the crime. This accords with the purpose of the Statute, which is to end impunity for international crimes.⁶² It further accords with the principles set out in the Draft Articles on State Responsibility for Internationally Wrongful Acts: namely that the breach of an international obligation by an act of State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation (Article 14(2)); and the breach of an international obligation through a series of actions or omissions defined in aggregate as wrongful extends over the entire period starting with the first of the

⁶² Preamble, Rome Statute: See Article 31, Vienna Convention on the Law of Treaties 1969.

actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation (Article 15(2)).⁶³

69. The crime of persecution can be properly characterised as a “continuing crime”. In his dissenting opinion on the Decision on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, Judge de Gurmendi expressly held that persecution was a continuing crime.⁶⁴

70. Black’s Law Dictionary defines a “continuing crime” as:

*“1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] 2. A crime (such as driving a stolen vehicle) that continues over an extended period.”*⁶⁵

71. The ICTR Appeals Chamber has defined continuing crimes in these same terms, adopting this definition in Black’s Law Dictionary.⁶⁶ Although the ICTR Appeals Chamber was considering temporal jurisdiction in that case, it is submitted that the definition of a continuing crime is relevant to territorial jurisdiction.

72. The concept of a continuing crime was also explored by the ICC in the *Lubanga* case, where it was held that the crime of enlisting and conscripting child soldiers only ceases when the child leaves the force or group (or reaches the age of 15). As such, the crime continues for the duration of the deprivation of the rights of the child.⁶⁷

⁶³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.

⁶⁴ Situation in Republic of Côte d’Ivoire Corrigendum to Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, paras. 68-69.

⁶⁵ Black’s Law Dictionary, Byran A. Garner, 10th Edition.

⁶⁶ Nahimana v Prosecutor ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 720.

⁶⁷ Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 248; Prosecutor v Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012 para. 618.

73. It must therefore be the case that where the harm resulting from the perpetuation of the crime accumulates as a result of its continued perpetuation, that crime must be said to be continuing.

Elements of persecution committed in Bangladesh

74. Two elements of the crime of persecution are manifestly committed in the territory of Bangladesh:

- the deprivation of fundamental rights (the first element)
- the “underlying offence” of deportation (the fourth element)

The deprivation of fundamental rights (the first element)

75. The deprivation of fundamental rights is a continuing phenomenon. It continues until those rights have been restored as per the Decision in *Lubanga*. The harm of persecution continues for as long as the victim is deprived of their fundamental rights.

76. The Myanmar military intentionally and severely deprived the Rohingya of their fundamental rights by reason of the identity of their group on racial, national, religious and ethnic grounds through murder, deportation, sexual violence and the destruction of their homes and their homes and villages. This persecution is detailed above at paragraphs 59 to 65.

77. The consequences of this deprivation of the Rohingya peoples’ fundamental rights continues into Bangladesh because the harm and effects of the persecution through the deprivation of fundamental rights continues, and will continue for as long as the Rohingya remain deported in Bangladesh having been driven out of Myanmar by the Myanmar army because of the fact they are Rohingya. This persecution will continue until they are allowed to return and their full citizenship rights are recognised/restored.

The underlying offence – deportation – is itself a continuing crime (the fourth element)

78. Persecution is a crime that consists of other underlying crimes. It can therefore be described as a composite crime, requiring a plurality of acts that, taken together, constitute the single crime of persecution.

79. The structure of the crime is such that an underlying crime is taking place, which has become aggravated by the systemic and discriminatory nature of the perpetrator's action to deprive the victims of fundamental rights. The aggregate character of a composite crime means that it can be committed over a period of time, and is therefore continuous, rather than instantaneous.⁶⁸

80. In this case, one of the underlying offences that is an element of the persecution perpetrated on the Rohingya by the Myanmar State, is itself a continuing crime: deportation. The Prosecutor correctly submits that deportation is only completed when the victim has been forced across an international border, in this case into Bangladesh.⁶⁹ As submitted by the prosecutor, as an element of deportation is only committed when the Rohingya are forced across into Bangladesh – an element of the crime is perpetrated in Bangladesh and thus the Court can seize jurisdiction over it.

81. Deportation is recognised in international criminal law as being an act capable of constituting persecution if committed with the requisite discriminatory intent.⁷⁰ If deportation is recognised as a continuing crime, only complete when the victim has been forced across an international border, then the persecution of which deportation is a constituent element, must also only be completed when the victim has crossed the international border. Thus, it is submitted that the Court can seize

⁶⁸ A Nissel, "Continuing Crimes in the Rome Statute" (2004) 25 Mich. J. International Law 653, p663.

⁶⁹ Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, B1

⁷⁰ Kvočka et. al, ICTY, IT-98-30/1-T, Trial Judgement, 2 November 2001, para. 186.

jurisdiction over persecution as a crime against humanity as it is not completed until the victims cross the international border into Myanmar.

82. In anticipation of possible concerns about the Court adopting too broad an approach to territorial jurisdiction, the approach suggested raises no issues about retroactivity or the principle of legality. No questions relating to temporal jurisdiction are raised. The nature of the crimes that are alleged to be taking place, in part within a State Party's territory, mean that this is not a situation where criminal prohibitions are being applied in unforeseen ways so as to offend any principles of legality.

Genocide

83. BNGR submits that the Court may exercise jurisdiction over acts of persecution pursuant to Article 6 and 12(2)(a) of the ICC Statute.

84. The crime of genocide, described as "a denial of the right of existence of entire human groups,"⁷¹ is defined in Article 6 of the Statute. The Statute enumerates five acts, any of which, when committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"⁷², constitutes genocide. Those acts include:

6 (a): killing members of the group

6 (b): causing serious bodily or mental harm

6 (c): deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

85. The Statute follows the wording and form of article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 ("the 1948 Genocide

⁷¹ UN General Assembly, 96(1) The Crime of Genocide, 11 December 1946, p.188.

⁷² Rome Statute, Article 6.

Convention”). Article 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (“the ICTY Statute”) and Article 2 of the Statute of the International Criminal Tribunal for Rwanda (“the ICTR Statute”) have adopted the same definition of genocide.

Genocide by killing

86. In respect of article 6 (a), the ICC *Elements of Crimes* sets out the following elements⁷³:

- The perpetrator killed one or more persons.
- Such person or persons belonged to a particular national, ethnical, racial or religious group, as such.
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

87. Genocide requires a specific intent, namely “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.⁷⁴ It is possible to infer the intent inherent in a particular act charged from the context of the perpetration of other culpable acts systematically directed against the same group. Other factors such as the scale of atrocities, their general nature, in a region or a country, or the fact of deliberately and systematically targeting victims on account of their membership of a particular group, are instrumental in enabling the Court to draw that inference.⁷⁵

⁷³ ICC *Elements of Crimes*, 2013, p.2.

⁷⁴ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, para 498; *Prosecutor v Seromba*, Case No. ICTR-2001-66-I, 13 December 2006, paras 175, 319;

⁷⁵ *Prosecutor v Akayesu*, Trial Judgement, para 523.

88. Amnesty International have presented evidence that the Myanmar military has killed “at least hundreds of Rohingya women, men and children” in the context of a “campaign of violence that has been systematic, organized and ruthless”.⁷⁶ In late August 2017, the Myanmar military, from time to time working alongside vigilante civilian mobs, surrounded Rohingya homes throughout the northern part of Rakhine State. As the victims fled their homes, soldiers and police officers opened fire, killing hundreds. Homes were then burned to the ground, often with people inside them who burned to death. This was repeated in hundreds of villages, providing a pattern of organised and systematic behaviour.⁷⁷ Médecins Sans Frontières reported that, at a conservative estimate, more than 6,700 Rohingya civilians, including at least 730 children, were killed in the first month of these actions. The majority were shot, while others were burned or beaten to death.⁷⁸ Eyewitnesses report soldiers entering villages and opening fire, massacring hundreds with the survivors fleeing and fired upon as they fled, and the elderly or infirm unable to flee burned to death in their homes, with the entire village razed to the ground.⁷⁹ Eyewitnesses report soldiers entering villages and opening fire, massacring hundreds with the survivors fleeing and fired upon as they fled, and the elderly or infirm unable to flee burned to death in their homes, with the entire village razed to the ground.⁸⁰ Human Rights Watch reports that more than 350 villages were torched to the ground over a three-month period from late August 2017.⁸¹

89. Refugees arriving in Bangladesh had injuries consistent with these eyewitness accounts. Médecins Sans Frontières treated gunshot wounds, including children.⁸²

⁷⁶ Amnesty International Report, p.6.

⁷⁷ Ibid, p.9

⁷⁸ The Guardian, Interview with MSF Medical Director Dr Sidney Wong, 14.12.17, <https://www.theguardian.com/world/2017/dec/14/6700-rohingya-muslims-killed-in-attacks-in-myanmar-says-medecins-sans-frontieres>

⁷⁹ Amnesty International Report, p.13.

⁸⁰ Amnesty International Report, p.13.

⁸¹ <https://www.hrw.org/news/2017/12/17/burma-40-rohingya-villages-burned-october>

⁸² MSF, “Ongoing Military Operations in Rakhine State Have Resulted In More Than 400,000 People

Reuters reported that “Bangladeshi hospitals...are struggling to provide medical care for all the refugees, many of whom have suffered horrific injuries and psychological trauma”.⁸³

90. The scale of these mass killings, the manner in which they were conducted, the multiple instances of them and the systematic way in which they were carried out, indicating a pattern of similar conduct, are all factors to take into account when assessing whether these acts are capable of being genocidal. It is submitted that there is evidence on a *prima facie* basis to indicate that these acts were carried out with a view to the physical destruction of the group, in a context of a manifest pattern of similar conduct against the group, thus meeting the definition of genocide.

91. In addition, some Rohingya died in Bangladesh as a result of being attacked in Myanmar as described above. As of 20 November 2017, Chittagong Medical College Hospital, Bangladesh, had received 261 casualties suffering wounds from gunshots or explosions. Sixteen died from their wounds in the territory of Bangladesh.⁸⁴

92. It is submitted that in these circumstances, genocide by killing is a continuing crime, one element of which, namely death, has occurred in Bangladesh. As a result, the Court can seize jurisdiction over the crime of genocide as a constituent element, namely death, has occurred in the territory of a State Party.

Genocide by causing serious bodily and mental harm

93. With respect to Article 6(b) of the Statute, the ICC Elements of Crimes sets out the requisite contextual elements:⁸⁵

- The perpetrator caused serious bodily or mental harm to one or more persons.

Fleeing To Bangladesh”, 20 September 2017.

⁸³ Jorge Silva, Reuters, “Bullets and burns: injured Rohingya refugees”, 20.11.17, <https://widerimage.reuters.com/story/bullets-and-burns-injured-rohingya-refugees>

⁸⁴ *Ibid.*

⁸⁵ ICC Elements of Crimes, 2013, p.2.

- Such person or persons belonged to a particular national, ethnical, racial or religious group.
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

94. Conduct giving rise to serious bodily and mental harm includes torture, rape, sexual violence and inhuman or degrading treatment.

95. As set out above and below, sexual violence, genital and other mutilation, and pregnancies from rapes resulting in births of children in Bangladesh, among other acts perpetrated on the Rohingya, undoubtedly cause serious physical and mental harm, destroy family life, and otherwise create conditions that undermine the ability of the Rohingya to survive as a group.

Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

96. In respect of article 6(c), the ICC *Elements of Crimes* document sets out the following contextual elements:⁸⁶

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

⁸⁶ ICC Elements of Crimes, 2013, p.3.

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

97. The term “conditions of life” in Element 4 may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.⁸⁷

98. The underlying acts which inflict these conditions on the group are “methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction”. Examples of such acts include, *inter alia*, “subjecting the group to a subsistence diet, failing to provide adequate medical care, systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.”⁸⁸

99. For the Rohingya Muslims fleeing the campaign of violence into Bangladesh, the “slow death” of the protected group does not just occur in Myanmar, but across the border in the territory of a State Party and thus it is submitted the Court can seize jurisdiction.

⁸⁷ ICC, Elements of Crimes, 2013, p.3.

⁸⁸ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Public Judgment, 8 April 2015, para 225. See also *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, 12 December 2012, para 740; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Public Judgment, 1 September 2004, para 691; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Public Judgment, 2 September 1998, paras 505-506; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Public Judgment, 31 July 2003, paras 517-518; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Public Judgment, 21 May 1999, paras 115-116; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, para 157; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, para 52; *Prosecutor v. Popović et al.* Case No. IT-05-88-T, para 814; *Croatia v. Serbia and Montenegro (Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Public Judgment, 3 February 2015, para 161 (judgment based on ICTY trial jurisprudence and approved in *Tolimir*).

100. Acts that the ICTY Appeals Chamber in *Prosecutor v Karadzic* found capable of being evidence of conditions of life calculated to bring about the physical destruction of that protected group were conditions of detention that included severe overcrowding, deprivation of nourishment and lack of access to medical care.⁸⁹ The Appeals Chamber also noted evidence of “cruel and inhumane treatment, torture, physical and psychological abuse, rape and sexual violence, inhumane living conditions [and] forced labour”.⁹⁰ It is evident that underlying acts could include rape⁹¹ and sexual violence. Forcible transfers may be an additional means by which to bring about the physical destruction of a group if, when analysed, the totality of the circumstances were calculated to bring about the physical destruction of the group.⁹²

101. Eyewitness reports gathered by Fortify Rights show the use of rape and sexual violence against Rohingya women and girls. Medical staff reported injuries caused by sexual violence.⁹³ Human Rights Watch gathered testimonies from victims who described what amounts to a “widespread rape against women and girls as part of a campaign of ethnic cleansing”.⁹⁴ Sexual violence used in a targeted manner is central to the campaign against the Rohingya and it is submitted that this constitutes a central part of the infliction of conditions of life calculated to bring about the physical destruction of the protected group. The use of sexual violence is an attack on the health and the lives of the women and girls targeted, causing death, illness and disease to the refugees fleeing across the border into Bangladesh. Its systematic nature and its severity constitutes an attempt to cause the “slow death”

⁸⁹ *Prosecutor v. Karadzic*, Case No. IT-95-5/18-AR89bis.1, Public Judgment, 11 July 2013, para 49.

⁹⁰ *Prosecutor v. Karadzic*, Case No. IT-95-5/18-AR89bis.1, Public Judgment, 11 July 2013, para 47.

⁹¹ *Prosecutor v. Kayishema and Ruzindana Trial Judgement*, para 116.

⁹² *Tolimir Appeals Chamber Judgement*, para 233; *Stakić Trial Judgement* para 519; *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Public Judgment, 26 February 2007, paras 315, 346, 347, 348, 349, 350, 352; *Croatia v. Serbia*, para 163.

⁹³ Simon Lewis and Tommy Wilkes, UN Medics See Evidence of Rape in Myanmar Army ‘Cleansing’ Campaign, Reuters, 24 September 2017.

⁹⁴ Human Rights Watch, [All My Body Was Pain: Sexual Violence Against Rohingya Women and Girls in Burma](#), 16 November 2017.

referred to in *Tolimir*. The view of the Trial Chamber in *Prosecutor v Kayishema* was that “deliberately inflicting on the group conditions of life calculated to bring about its destruction” included methods of destruction that did not immediately lead to the death of members of the group and that “the conditions of life envisaged include rape...provided the above would lead to the destruction of the group in whole or in part”. Rape and sexual violence is one of the conditions of life which, when considered with other factors, constitutes an attempt to destroy the protected group. The “slow death” of the group does not stop when the refugees reach Bangladesh.

102.A contextual element to the Statute’s article 6(c) is that the acts represent a “manifest pattern of similar conduct or was conduct that could itself effect such destruction”. Eyewitness reports suggest that there was a clear pattern of similar conduct, revealing “patterns in how these crimes were carried out”.⁹⁵ Eyewitnesses reported soldiers acting in a systematic manner, going house to house, forcing residents to gather in outdoor spaces and then raping women and girls and often mutilating their bodies, on occasion in the context of interrogation.⁹⁶ Human Rights Watch found that security forces “raped and sexually assaulted women and girls both during major attacks on villages but also in the weeks prior to these major attacks, sometimes after repeated harassment”.⁹⁷

103.A careful analysis of the circumstances of the forced displacement is required to assess whether these acts are capable of being genocidal. Utilising a systematic approach, soldiers carried out arson attacks in the first round of clearance operations in October 2016, the evidence indicating attacks on at least 42 villages in Maungdaw Township and systematic arson attacks on at least 31 villages in Maungdaw, Buthidaung and Rathedaung Townships during the clearance

95 Fortify Rights Report, p.10.

96 Fortify Rights Report, p.10.

97 Human Rights Watch, [All My Body Was Pain: Sexual Violence Against Rohingya Women and Girls in Burma](#), 16 November 2017.

operations beginning August 2017. Several hundred villages were attacked in a Myanmar-Army led attack beginning 25 August 2017, with soldiers destroying food stocks and some 200 villages destroyed.⁹⁸

104. Amnesty International described Rohingya villages burned down in “what appears to be an organized, targeted and coordinated effort by the Myanmar military to permanently drive the Rohingya out of their homes”.⁹⁹ Myanmar Army soldiers razed to the ground villages, burning dozens of mosques and homes of tens of thousands of civilians. Many of these were forced across the border to Bangladesh. More than half the Rohingya population in Myanmar was displaced in less than 11 months, and many were forced across the border into Bangladesh.¹⁰⁰

105. The deliberate deprivation of resources vital to survival, that is, the targeting of food stores, and the systematic expulsion from homes, bearing in mind the level of destruction and the scale of the displacement, are both factors which are referred to in the Court’s Elements of Crimes and, it is submitted, indicate that these actions were calculated to bring about the physical destruction of the protected group and that in the circumstances, the forced displacement into Bangladesh constitutes the crime of genocide.

Submission Three: Objective Territorial Jurisdiction - An Overview of Bangladeshi Law

106. Article 21 of the Statute sets out the applicable law at the ICC. It provides, at Article 21(1) that the Court shall apply:

In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

⁹⁸ Fortify Rights Report, p.12.

⁹⁹ Amnesty International Report, p.27.

¹⁰⁰ Fortify Rights Report, p.12.

In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

107. BNGR sets out below an overview of Bangladeshi law on objective territorial jurisdiction to assist the Court in its interpretation of the scope of territorial jurisdiction under Article 12(2)(a) of the Statute as a “general principle of law” pursuant to Article 21(1)(c) of the Statute. Pursuant to Article 21 (1)(c), the Court can take into account Bangladesh law and practice regarding extra-territorial jurisdiction over crimes that have manifested themselves as being ‘committed’ in Bangladesh territories despite their extra-territorial origin.

108. Section 3 of the *Penal Code 1860* of Bangladesh provides that:

Any person liable, by any Bangladesh Law, to be tried for an offence committed beyond Bangladesh shall be dealt with according to the provisions of this Code for any act committed beyond Bangladesh in the same manner as if such act had been committed within Bangladesh.

109. Therefore, if the criminal conduct takes place across Bangladesh’s international borders, that is also a crime in Bangladesh. For example, in the case of deportation, murder, and killings, the defendants are liable to be prosecuted in Bangladesh, even though the alleged offences commenced in Myanmar. This is because there is no prohibition in Bangladesh law to the exercise of objective territorial jurisdiction.

110. Moreover, the *International Crimes (Tribunals) Act 1973* (“ICTA”), establishes jurisdiction over deportation as a crime against humanity committed before or after commencement of the ICTA in the territory of Bangladesh. Bangladeshi legislation has expressly incorporated the principle of objective territoriality in a number of legislative provisions, including in Section 4 of the *Information and Communication Technology Act 2006*, section 5 of the *Counter-Terrorism Act 2009*, section 22 of the *Competition Act 2012*, section 2 of the *Money Laundering Act 2012*, and section 5 of the *Prevention and Suppression of Human Trafficking Act 2012* [see Annex C for the text of these sections].

111. Since the laws of Bangladesh accommodate the principles of objective territoriality, and deportation is criminalised, it is possible to initiate criminal proceedings for deportation, murder, killings and rape under Bangladesh law. The Court’s finding of jurisdiction under the Article 12(2)(a) of the Statute, applying objective territorial jurisdiction, is therefore consistent with the assertion of objective jurisdiction under Bangladesh law.

IV. Procedure

112. The Pre-Trial Chamber intends to convene a status conference on 20 June 2018, in closed session, only in the presence of the prosecutor.¹⁰¹ The Regulations of the Court, Regulation 20, state as follows:

“Regulation 20 – Public hearings

All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

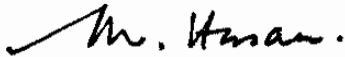
When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.

¹⁰¹ Request under Regulation 46(3) of the Regulations of the Court, Pre Trial Chamber, https://www.icc-cpi.int/CourtRecords/CR2018_02522.PDF

A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist."

113. It is noted that there have been no reasons provided to date as to why this status conference will be in closed session, contrary to Regulation 20(2).

114. If the status conference is purely considering a matter of law, it is respectfully submitted that the status conference on 20 June 2018 should be held in public, ideally with arrangements to be made for interested persons (or their representatives) to be able to attend in person or by video link. In the alternative, the BNGR submits that the Chamber should make public the reasons for the status conference to be held in closed session, so as to comply with the Court's own regulation.



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On behalf of the **Bangladeshi Non-Governmental Representatives**
(Full membership of BNGR listed in Annex A)

Dated 18 June 2018 in Dhaka, Bangladesh.