

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

**Date: 18 June 2018**

**PRE-TRIAL CHAMBER I**

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

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

**Public Document**

**Joint Observations Pursuant to Rule 103 of the Rules**

**Source:** Women's Initiatives for Gender Justice; Naripokkho; Ms. Sara  
Hossain; and European Center for Constitutional and Human Rights

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

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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## I. Introduction

1. Women's Initiatives for Gender Justice ("WI"), Naripokkho, Ms Sara Hossain and the European Center for Constitutional and Human Rights ("ECCHR") (together "*amici curiae*") respectfully submit their observations on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ("Prosecution's Request").

## II. Relevant procedural background

2. On 9 April 2018, the Office of the Prosecutor filed the Prosecution's Request seeking a ruling on whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Republic of the Union of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh").<sup>1</sup>
3. On 7 May 2018, Pre-Trial Chamber I ("Chamber") issued its 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" ("Decision inviting observations from the authorities of the People's Republic of Bangladesh").<sup>2</sup>
4. The Chamber scheduled a status conference for 20 June 2018, to be held in closed session, only in the presence of the Prosecutor, to address certain issues raised in the Prosecution's Request.<sup>3</sup> Reasons for convening the conference in closed session have not been provided and the *amici* respectfully highlight the need for a transparent Court.

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<sup>1</sup> Prosecution's Request, para 1, 63.

<sup>2</sup> Decision inviting observations from the authorities of the People's Republic of Bangladesh, para 6-7.

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

5. On 7 June 2018, the *amici curiae* submitted their Joint Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules ("Joint Request").<sup>4</sup>
6. On 11 June 2018, Pre-Trial Chamber I granted the Joint Request.<sup>5</sup>

### III. Observations on relevant contextual background

7. The Rohingya are a predominantly Muslim minority group that live in the north of Rakhine (Arakan) state, Myanmar, where the majority are ethnically distinct Buddhist Rakhines. At the northern most part of the Rakhine state is the international border with Bangladesh. Approximately 60 kilometres from the south western most part of the border is the Naf river, ranging between 1.61 – 3.22 metres in width, and 39 – 120 metres in depth.<sup>6</sup> The Rohingya consider themselves to be indigenous to the region.<sup>7</sup>
8. Over the years, there has been a steady decrease in rights afforded by law to the Rohingya in Myanmar, and increase in acts of violence against them. Cycles of violence, rebellion and crackdown by the authorities have resulted in waves of Rohingya fleeing across the nearby western border of Myanmar to today's Bangladesh in the 1960s, 1980s and 1990s. While some went further to India, Pakistan, Thailand, Malaysia and elsewhere, and a small number remained in refugee camps in Cox's Bazar, Bangladesh,<sup>8</sup> most Rohingya that fled to Bangladesh during these waves subsequently returned to Myanmar, where Rohingya continued to be gradually and systematically deprived of their most basic rights, such as their rights to food and freedom of movement, and

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<sup>4</sup> Joint Request, para 1, 27.

<sup>5</sup> Decision on the "Joint Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules", ICC-RoC46(3)-01/18-15, 11 June 2018, p 5.

<sup>6</sup> "Naf River", *National Encyclopedia of Bangladesh*, available at: [http://en.banglapedia.org/index.php?title=Naf\\_River](http://en.banglapedia.org/index.php?title=Naf_River) (this and all websites cited below were last accessed on 18 June 2018).

<sup>7</sup> Minority Rights Group, World Directory of Minorities and Indigenous Peoples, available at: <http://minorityrights.org/minorities/muslims-and-rohingya/> ("MRG World Directory").

<sup>8</sup> According to UNHCR, 33,956 Rohingya were registered in refugee camps in Cox's Bazar prior to the recent influx: [http://data2.unhcr.org/en/situations/myanmar\\_refugees](http://data2.unhcr.org/en/situations/myanmar_refugees).

ultimately were not recognised in the 1982 Citizenship Law in Myanmar.<sup>9</sup> They were subjected to severe restrictions on their freedom to work,<sup>10</sup> and were also prevented from accessing basic services, such as health and education.<sup>11</sup> These efforts have particularly intensified since 2012. In 2015, for example, the Rohingya were refused the right to identify as Rohingya in a census, and prevented from voting in the elections.<sup>12</sup> In recent years, sexual violence against Rohingya women and girls have reportedly increased,<sup>13</sup> as have discriminatory cultural norms such as mobility restrictions, early and underage marriage, and frequent pregnancies which some have explained as protection measures against sexual violence.<sup>14</sup>

9. 2016-2017 estimates of Rohingya in Myanmar range between 1 and 1.2 million.<sup>15</sup> Since 25 August 2017, over 720,000 Rohingya, of who 80 % are women and children,<sup>16</sup> have again fled targeted violence in northern Rakhine state in Myanmar and crossed into Bangladesh, most forced to navigate across the Naf river.<sup>17</sup> The scale and nature of violence propelling such a large number to flee was markedly different from that which led to the previous waves of refugees into Bangladesh. The so-called "clearance operations" that began on 25 August 2017

<sup>9</sup> See, e.g., Joint Response Plan, March – December 2018 ("JRP"), p 7, available at: <http://reporting.unhcr.org/sites/default/files/JRP%20for%20Rohingya%20Humanitarian%20Crisis%20-%20March%202018.PDF>.

<sup>10</sup> See, e.g., JRP, p 11; Final Report of the Advisory Commission on Rakhine State, August 2017, p 37, available at: [http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport\\_Eng.pdf](http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf).

<sup>11</sup> See, e.g., JRP, p 7.

<sup>12</sup> See, e.g., "Myanmar publishes census, but Rohingya minority not recognized", 29 May 2015, *Reuters*, available at: <https://www.reuters.com/article/us-asia-migrants-myanmar-census/myanmar-publishes-census-but-rohingya-minority-not-recognized-idUSKBN0OE1S420150529>. See also "No vote, no candidates: Myanmar's Muslims barred from their own election", 3 November 2015, *The Guardian*, available at: <https://www.theguardian.com/world/2015/nov/03/no-vote-no-candidates-myanmars-muslims-barred-from-their-own-election>.

<sup>13</sup> UN Women, "Gender Brief on Rohingya Refugee Crisis Response in Bangladesh", October 2017, available at: <http://asiapacific.unwomen.org/en/digital-library/publications/2017/10/gender-brief-on-rohingya-refugee-crisis>.

<sup>14</sup> Andrew Gilmour, "Bangladesh and the international community must ensure support to victims of sexual violence", available at: <https://www.ohchr.org/EN/NewsEvents/Pages/Display-News.aspx?NewsID=23012&LangID=E>; "The real reason so many Rohingya girls are pregnant", 27 October 2017, *Dhaka Tribune*, available at: <https://www.dhakatribune.com/bangladesh/2017/10/27/mysteries-surrounding-pregnancy-rohingya-girls/>.

<sup>15</sup> MRG World Directory.

<sup>16</sup> ISCG Gender Profile No. 1, 3 December 2017, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/iscg\\_gender\\_profile\\_rohingya\\_refugee\\_crisis\\_response\\_final\\_3\\_december\\_2017.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/iscg_gender_profile_rohingya_refugee_crisis_response_final_3_december_2017.pdf).

<sup>17</sup> "Rohingya Emergency", UNHCR, available at: <http://www.unhcr.org/rohingya-emergency.html>.

were characterised by widespread and systematic State-led violence including sexual violence, murder, torture and destruction of property.<sup>18</sup> Women and girls, who are seen as the custodians and propagators of the Rohingya identity, were disproportionately affected by the clearance operations through brutal sexual violence. According to the UN Secretary-General, António Guterres, “[t]he violence is linked with an inflammatory narrative alleging that high fertility rates among the Rohingya community represent an existential threat to the majority population.”<sup>19</sup>

10. Documentation ongoing inside the refugee camps in Cox’s Bazar, Bangladesh, is exposing the grave nature and vast scale of sexual violence perpetrated against Rohingya in Myanmar. Survivors and witnesses have on their arrival described rape, gang-rape, and other forms of sexual violence, including those which have, in some cases, led to death and may amount to torture, such as sexual mutilation (cutting and shooting of genitals and breasts), and witnessing close family members being raped. In addition, survivors report on arrival in Bangladesh that many experienced sexual violence also during flight.<sup>20</sup> The Special Representative on Sexual Violence in Conflict, Pramila Patten reported to the Security Council after her visit to the Rohingya refugee camps in Cox’s Bazar, that every women or girl she had spoken with “had either endured or witnessed sexual violence”, including seeing other women being “literally raped to death”.<sup>21</sup> Similarly, the OHCHR’s Fact-finding Mission on Myanmar<sup>22</sup> declared that there is “ample and

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<sup>18</sup> See, e.g., Human Rights Council, “Fact-finding Mission on Myanmar: concrete and overwhelming information points to international crimes”, 12 March 2018, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22794&LangID=E;>

<sup>19</sup> S/2018/250, para 55.

<sup>20</sup> See, e.g., S/2018/250, para 56.

<sup>21</sup> “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar”, 12 December 2017, available at: [https://www.un.org/sexualviolenceinconflict/statement/statement-by-the-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-security-council-briefing-on-myanmar-12-december-2017/.](https://www.un.org/sexualviolenceinconflict/statement/statement-by-the-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-security-council-briefing-on-myanmar-12-december-2017/)

<sup>22</sup> Statement on the Report of the Fact-finding Mission on Myanmar, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22794&LangID=E>.

corroborated information on brutal gang rapes and other forms of sexual violence against women”.

11. A recent report of the UN Secretary-General, António Guterres, found that the widespread threat and use of sexual violence was integral to the Myanmar military’s strategy, “humiliating, terrorizing and collectively punishing the Rohingya community and serving as a calculated tool to force them to flee their homelands and prevent their return”.<sup>23</sup> *The amici curiae’s* interactions with recently arrived Rohingya refugees, familiarity with ongoing documentation of their experiences, as well as emerging reports of credible organisations, underscore this notion of such sexual violence being a key cause for the Rohingya to flee into Bangladesh from 25 August 2017,<sup>24</sup> and precluding their return: The forcibly deported Rohingya have legitimate fear of brutal sexual violence being again perpetrated against them and their family members should they return to Myanmar.

#### IV. Observations on the appraisal of sexual and gender-based violence within the crime of deportation or forcible transfer

12. This section sets out observations on how sexual and gender-based violence can be appraised within the crime of deportation or forcible transfer (1); how this appraisal informs both the nature, and the commencement and completion of the crime of deportation or forcible transfer (2); and implications for the clarification of international law beyond the immediate case (3).

##### *1. How sexual and gender-based violence can be appraised within the crime of deportation or forcible transfer*

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<sup>23</sup> S/2018/250, para 55.

<sup>24</sup> See, e.g., Human Rights Watch, “All of my body was in pain”, 16 November 2017, available at: <https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>.

13. It is respectfully submitted that sexual and gender-based crimes may constitute a coercive act underlying the crime of deportation or forcible transfer.
14. The Elements of Crimes (“Elements”) clarify that the *actus reus* of the crime of deportation or forcible transfer consists of the following four elements: (i) the forcible character of the displacement, *ie* an underlying coercive act leading to the displacement; (ii) the lawful presence of the displaced in the area from which they were transferred or deported; (iii) the displacement not being permitted under international law; and (iv) the displaced persons being deported or transferred to another state or location.<sup>25</sup>
15. Footnote 12 of the Elements specifies that “[t]he term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.
16. Interpreting these terms underlying the word “forcibly” in line with the provisions of the 1969 Vienna Convention on the Law of Treaties (“VCLT”) demonstrates that the Elements accommodate sexual violence including rape within the crime of deportation or forcible transfer: For example, in view of Article 31 VCLT and the ordinary meaning of the term “violence” in its context, “sexual violence”, by its very denomination, is a type of violence. Sexual violence is a particularly traumatising form of coercion: The Oxford dictionary defines coercion as “the action or practice of persuading someone to do something by using force or threats”.<sup>26</sup> The Elements require, *inter alia*, the presence of coercive circumstances both for rape and sexual violence. Thus, sexual violence is *ipso facto* coercive. It

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<sup>25</sup> Elements, p 6.

<sup>26</sup> Oxford Online Dictionaries, available at: <https://en.oxforddictionaries.com/definition/coercion>.

follows that sexual violence, including rape, constitutes a forcible act within the meaning of the Elements.<sup>27</sup>

17. This conclusion is further corroborated by case law: Pre-Trial Chamber II held in its decision on the confirmation of charges in the case against *Ruto and Sang* that “deportation or forcible transfer of population is an open-conduct crime”, meaning that “the perpetrator may commit several different conducts which can amount to ‘expulsion or other coercive acts’, so as to force the victim to leave the area where he or she is lawfully present [...]”.<sup>28</sup> Further to this, and more specifically addressing sexual violence, Pre-Trial Chamber II considered in its decision on the confirmation of charges in the *Kenyatta* case that rape, together with the destruction of homes and brutal killings and injuries, as well as specific public announcements, amounted to coercion within the meaning of the Elements.<sup>29</sup>
18. These holdings also align with the jurisprudence of the *ad hoc* tribunals: The ICTY’s Trial Chamber in *Stanišić and Simatović* found that acts of sexual violence in combination with other acts may cause duress and fear of violence such that they create a coercive environment where persons have no choice but to leave, thereby establishing forcible displacement.<sup>30</sup> This holding was not challenged on appeal.
19. Therefore, the sexual violence committed against Rohingya may be considered a coercive factor for purposes of establishing the crime of deportation.

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<sup>27</sup> Andrea Raab and Siobhan Hobbs, “The Prosecutor’s Request for a Ruling on the ICC’s Jurisdiction over the Deportation of Rohingya from Myanmar to Bangladesh: A Gender Perspective”, 18 April 2018, *EJIL talk!*, available at: <https://www.ejiltalk.org/the-prosecutors-request-for-a-ruling-on-the-iccs-jurisdiction-over-the-deportation-of-rohingya-from-myanmar-to-bangladesh-a-gender-perspective/>.

<sup>28</sup> *The Prosecutor v. William Samoei Ruto, Henry, Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, para 244.

<sup>29</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, para 244.

<sup>30</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Judgment, IT-03-69-T, 30 May 2013, paras 1094-1095.

2. *How this appraisal informs the nature and delineation of the crime of deportation or forcible transfer*

20. Prior to determining whether the Court has territorial jurisdiction pursuant to Article 12(2)(a) of the Rome Statute, it is necessary to establish whether part of the crime of deportation or forcible transfer has taken place on the territory of a State party to the Rome Statute, *ie* Bangladesh.
21. To this end, this sub-section sets out observations on how the appraisal of sexual and gender-based violence within the crime of deportation or forcible transfer informs the nature (i), and the delineation, *ie* commencement and completion (ii) of the crime of deportation or forcible transfer.
- (i) The nature of the crime of deportation or forcible transfer as a composite crime
22. It is respectfully submitted that the inclusion of sexual and gender-based violence within the crime of deportation or forcible transfer informs the nature of the crime of deportation or forcible transfer as a composite crime.
23. The term “composite crime” means that a crime “requires a plurality of acts and/or omissions to have been committed, which, taken as a whole, constitute a separate, composite crime.”<sup>31</sup>
24. That sexual and gender-based crimes may constitute a coercive act underlying the crime of deportation informs the notion of the crime of forcible transfer as a composite crime. Sexual and gender-based crimes in and of themselves constitute crimes against humanity under Article 7(1)(g) of the Rome Statute.<sup>32</sup> It

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<sup>31</sup> Alan Nissel, Continuing Crimes in the Rome Statute, *25 Michigan Journal of International Law* (2004), p 653 (p 662-663). See also ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (“ASR”), Article 15.

<sup>32</sup> The *amici curiae* emphasise that the *amici* do not purport to argue that sexual and gender-based crimes committed in their entirety fall on Myanmar territory may be brought before the Court as

is when these acts of sexual and gender-based violence lead to the displacement to another state or location of persons lawfully present in the respective area without grounds permitted by international law that the crime of deportation or forcible transfer is established.<sup>33</sup> It follows that, to establish the crime of deportation or forcible transfer, an interplay of various factors must be demonstrated, which, taken as a whole, constitute the crime of deportation or forcible transfer. The crime of deportation or forcible transfer is thus a composite crime.

25. The conclusion that the crime of deportation or forcible transfer is composite in nature is reinforced given that, if any of the above-listed components cannot be established, the conduct in question may not fall within the scope of the crime of deportation or forcible transfer, but rather that of a wholly different crime, such as other inhumane acts pursuant to Article 7(1)(k) of the Rome Statute.<sup>34</sup>
26. The consequences of classifying the crime of deportation or forcible transfer as a composite crime are two-fold: First, it follows that all elements of the crime must be of equal importance in establishing the crime of deportation or forcible transfer: The crime is only consummated if each of the acts and factors, *ie* the elements, underlying the crime of deportation or forcible transfer can be established—if one is lacking, the crime of deportation or forcible transfer is not completed.
27. Second, the crime continues for as long as the underlying acts are being committed. This is in line with Article 15(2) of the ASR, stating that a composite breach extends “over the entire period starting with the first of the actions or

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individual charges. Rather, the *amici curiae* argue that sexual and gender-based crimes constitute acts underlying the crime of deportation or forcible transfer.

<sup>33</sup> See *The Prosecutor v. William Samoei Ruto, Henry, Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, para 245.

<sup>34</sup> Vincent Chetail, *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 29 *Leiden Journal of International Law* (2016), p 917 (p 924); see also *Prosecutor v. Zoran Kupreškić et al.*, Judgment, IT-95-16-T, 14 January 2000, para 566.

omissions of the series and lasts for as long as these actions or omissions are repeated". Although this provision refers to composite breaches of international obligations between states, drawing an analogy to the issue at hand is permissible. First, and in accordance with Article 21 of the Rome Statute, the Court may apply general principles of international law. Second, there are no relevant structural differences between individual criminal responsibility and state responsibility apparent with respect to the issue at hand, which may warrant treating the composite crimes within the international criminal law paradigm differently.

28. In conclusion, sexual and gender-based crimes inform the nature of the crime of deportation or forcible transfer as a composite crime, with the consequences outlined above.

(ii) The commencement and completion of the crime of deportation or forcible transfer

29. It is respectfully submitted that the commencement and completion of the crime of deportation or forcible transfer is informed by sexual and gender-based crimes as underlying coercive acts in that the coercive acts which result in the deportation or transfer to another location or state commence the crime, and the arrival of the people who are deported or forcibly transferred at a different location or state completes the crime.

30. Given that sexual and gender-based crimes are also crimes in and of themselves, and in light of the conclusion that the crime of deportation or forcible transfer is a composite crime, the commission of sexual and gender-based crimes as coercive acts cannot be sufficient to complete the crime of deportation or forcible transfer but they rather *commence* the crime. Indeed, the coercive acts drive the crime of deportation or forcible transfer in that they compel persons to leave their homes in one territory or state, and thus trigger the crime.

31. This conclusion is in line with the Court’s jurisprudence: Interpreting the elements of the crime of deportation or forcible transfer, Pre-Trial Chamber II held in the case against *Ruto and Sang* that “in order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that one or more acts that the perpetrator has performed *produced* the effect to deport or forcibly transfer the victim”, and that “there must be a “link between the [underlying] conduct and the *resulting* effect of forcing the victim to leave the area to another State or location” (emphases added).<sup>35</sup>
32. In other words, the Chamber held that the coercive acts must have effected the displacement of persons to another location or territory. This holding invites the conclusion that the coercive act must, at least to some extent, have *caused* the displacement to another state or location. From this, it follows that the coercive act must precede the displacement of persons lawfully present<sup>36</sup> in an area to another state or location. This act preceding the displacement of persons to another state or location is then the act commencing the crime of deportation or forcible transfer. In this case, it is respectfully submitted that the sexual violence predominantly against Rohingya women and girls constitutes a key reason causing many Rohingya to flee into Bangladesh.<sup>37</sup>
33. It remains to be clarified what element completes the crime—in other words, it must be discerned whether the crime of deportation or forcible transfer is

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<sup>35</sup> *The Prosecutor v. William Samoei Ruto, Henry, Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, para 245.

<sup>36</sup> We understand that other *amicus curiae* observations will deal in depth with the other elements of the crime of deportation. Therefore, and to avoid any overlap, the *amici curiae* wish to only briefly comment on the lawful presence of the Rohingya in Rakhine State, a region with which the Rohingya have long-standing ties (*supra*, para 7). Various UN organs have criticised Myanmar’s Citizenship Law as discriminatory and called on Myanmar to abide by its international human rights obligations. The Special Rapporteur on the situation of human rights in Myanmar noted in this context that the discrimination against Rohingya is “framed as an immigration issue”. Finally, it is generally recognised that national law cannot be invoked as a justification for breaches of international law (*e.g.* Article 27 VCLT). See, *e.g.*, S/PRST/2017/22, p 3; A/65/368, para 73; A/HRC/13/48, para 86.

<sup>37</sup> *Supra*, para 11.

completed at the time when persons *leave* the area in which they are lawfully present, or only when they *reach* a different location or state.

34. It is respectfully submitted that the crime is only completed once persons reach a different location or state: As outlined above, sexual and gender-based violence as a coercive act triggers the process of leaving and commences the displacement. The Elements, however, not only require displacement, but that persons be displaced “to another state or location”. As such, and in line with the ordinary meaning of words in their context, the displacement to a different state or location is the element of the crime of deportation or forcible transfer that completes the crime.<sup>38</sup>

35. In view of the above, the coercive act commences, and the arrival at a different location or state completes the crime of deportation or forcible transfer.

### *3. Implications for the clarification of international law beyond the immediate case*

36. The *amici curiae* respectfully emphasise that sexual and gender-based crimes can, and should be, included within the crime of deportation or forcible transfer of the Rohingya from Myanmar to Bangladesh since 25 August 2017. This would not constitute an undue expansion of the Rome Statute, as the Rome Statute itself accommodates sexual and gender-based violence within as an element beyond sexual and gender-based crimes enlisted in Article 7(1)(g) and (h) and Article 8(2)(b)(xxii) and 8(2)(e)(vi). Indeed, the OTP Policy Paper compels the Prosecution

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<sup>38</sup> One author argues that the crossing of an international border is not an element of the crime of deportation or forcible transfer, but only the effect of the displacement. The *amici curiae* respectfully submit that this argument conflicts with the Elements: The Elements clearly state that the crime of deportation requires that persons be „displaced [...] to another location or state“. As such, the crossing of an international border indeed constitutes an element of the crime of deportation or forcible transfer, albeit an alternative one: The Elements require persons to be displaced either within a state *or* across an international border into another state. This is not the only place where the Elements contain such alternative elements of crimes: To establish the crime of rape, for example, it is necessary to show that *one* of the perpetrator used *either* force, *or* threat of force, *or* coercion. Thus, while the crossing of an international border is not a *conditio sine qua non* in establishing the crime of forcible transfer or deportation, it remains an element of the crime.

to take such gendered aspects into account when selecting charges, for crimes such as deportation and forcible transfer.<sup>39</sup>

37. By acknowledging the sexual and gender-based crimes committed against the Rohingya within the crime of deportation, the Court can encourage and set the expectation to draw out gendered elements of other crimes in the Rome Statute. In this particular case, the Chamber can draw the Prosecution's focus and resources toward adequately and effectively carving out the full extent of gender-based underpinnings and effects of the crime of deportation or forcible transfer committed against Rohingya since 25 August 2017.
38. The commission of sexual and gender-based crimes is often overlooked in international justice, as are the sexual and gendered underpinnings and effects of the most serious crimes as enshrined in the Rome Statute. It is, therefore, of utmost importance that the Court appropriately appraise the gendered aspects of many crimes of the Rome Statute, and the disproportionate residual effects of the gendered nature of serious crimes.
39. The determination of the issue at hand presents the Court with the unique opportunity to promote accurate legal and gender-sensitive interpretation of international law. In furtherance of the principle of complementarity, the Court can also encourage domestic practitioners prosecuting or investigating international crimes to adequately categorise *prima facie* gender-neutral crimes by acknowledging their gendered aspects.

**V. Observations on the questions posed to the authorities of the People's Republic of Bangladesh from a gendered perspective**

40. The *amici curiae* note the Decision inviting observations from the authorities of the People's Republic of Bangladesh, wherein the Chamber invited the

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<sup>39</sup> See, e.g., Office of the Prosecutor, Policy Paper on Sexual and Gender-based Crimes, June 2014, para 34.

Bangladeshi authorities to reply, *inter alia*, to the following questions: (i) the circumstances surrounding the presence of members of the Rohingya people from Myanmar on the territory of Bangladesh; and (ii) other matters in connection with the Prosecutor's Request that would assist the Chamber in its determination of the Request. The *amici* further recall the Chamber's Decision, granting leave to respond to these questions from a gendered perspective. With respect to question (i), we refer to our elaborations under sub-section (III). In regard to question (ii), the *amici* respectfully make the following observations on the gendered impacts of the deportation of the Rohingya into Bangladesh.

41. Approximately 80 % of the Rohingya forcibly deported into Bangladesh since 25 August 2017 are women and children.<sup>40</sup> Of the several thousand assumed to have been killed by Myanmar security forces,<sup>41</sup> survivors attest to men and boys being disproportionately targeted. In case studies, survivors have told of families fleeing after male family members had been killed, and also of women and children being sent ahead. Approximately 6,000 children have arrived in Bangladesh unaccompanied by an adult,<sup>42</sup> and consequently face difficulty in accessing services on their own without adults.
42. Within the Rohingya refugee camps, women and girls remain disproportionately affected by the consequences of the displacement as the confined environments with extremely traumatised populations,<sup>43</sup> and limited goods and services, perpetuate and exacerbate pre-existing gender inequalities, gender-based violence and discrimination. Generally, Rohingya women and girls are expected to stay in their "homes" and be close to their families, whereas men and boys are

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<sup>40</sup> ISCG Gender Profile No. 1, 3 December 2017, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/iscg\\_gender\\_profile\\_rohingya\\_refugee\\_crisis\\_response\\_final\\_3december\\_2017\\_.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/iscg_gender_profile_rohingya_refugee_crisis_response_final_3december_2017_.pdf).

<sup>41</sup> While there are not any reliable figures of those killed by Myanmar security forces, it is assumed to be several thousand. *See, e.g.* Andrew Gilmour, "Bangladesh and the international community must ensure support to victims of sexual violence", available at: <https://www.ohchr.org/EN/NewsEvents/Pages/Display-News.aspx?NewsID=23012&LangID=E>

<sup>42</sup> UNHCR and RRRC, RRRC Fact Sheet - Family Counting (as of 14 November 2017), available at: <https://reliefweb.int/report/bangladesh/rrrc-fact-sheet-family-counting-14-november-2017>.

<sup>43</sup> Service providers unanimously report the immense and urgent need for mental health and psychological support for all ages of Rohingya refugees. *See e.g.*, JRP p 11.

more present in public spheres. Practices such as "purdah"<sup>44</sup> further restrict the movement particularly for women and girls for whom it is not considered appropriate to be seen in public. Women have no role in decisions on family planning and face curbs from husbands in trying to access such services. These restrictions hamper women and girls from accessing available services in the camps, especially health services, due to expected language barriers, lack of confidence and concerns over the reactions of male family members. While women are reportedly preferred as recipients of relief, this has placed greater burden on women to collect relief, prepare meals for their families and undertake care work while men have no work and no activities but "sit around".<sup>45</sup> Infrastructure in the camps compounds daily difficulties women and girls face with insufficient lighting, toilets and bathing areas limiting access to hygiene facilities.<sup>46</sup>

43. Approximately 52% of the 720,000 Rohingya forcibly deported to Bangladesh are women and girl children, of which an estimated 53,266 arrived pregnant, and 16% are single mothers.<sup>47</sup> The husbands of many have died as a result of the violence in Myanmar or left in search of livelihoods for survival. In some female-headed households, the women and girls, affected by community norms restricting mobility, have been reluctant or unable to leave their "homes" or shelters to seek

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<sup>44</sup>Purdah, which literally means "curtain", is the practice of preventing women from being seen by any men other than their close male relatives.

<sup>45</sup> Jumma Net, "Qualitative Survey on Rohingya Refugee Camp Cox's Bazar, Bangladesh" 31 December 2017, p 24.

<sup>46</sup> Access to toilet and hygiene facilities poses particular obstacles and dangers to women and girls. Due to cultural norms, women and girls rarely access toilets during the day but wait until after dark. To avoid having to use toilets during the day, many women and girls are reported to restrict their fluid and food intake. The few sanitary facilities within the refugees' "houses" are poor and makeshift: They consist of little more than covered spaces next to the kitchen. After dawn, women and girls gather to jointly march to the toilets or fetch drinking water to avoid the dangers of the night: According to some reports, women and girls have been harassed by men while accessing the toilets, often situated in public places, besides shops, in open places or besides places where men gather. Women and girls are further restricted in their use of sanitary facilities, as many toilets do not function as a result of over-use. Due to reported insufficient provision of sanitary napkins, particularly adolescent girls experience challenges with their menstrual hygiene, and are forced to resort to used clothes and rags instead. The cleaning of these clothes and rags proves particularly difficult, as cultural norms prevent women and girls from drying them out in the open, leaving women and girls to let them dry near latrines.

<sup>47</sup> JRP, p 10.

services or relief. If no man is available to assist them to access goods and services, they forgo their needs. Without an adult male family member, female-headed householders also face difficulties in preparing and repairing their shelter homes. Additionally, households headed by females, children and older persons face additional barriers to obtain assistance due to a lack of access to information.

44. Girl children face additional restrictions, particularly after reaching puberty. In needs assessments conducted in the camps, parents routinely speak of their concerns for girl children, particularly in relation to security and marriage prospects. Families continue to seek to "protect" them within the camp environment by limiting their movement, preventing girls from going to school once they reach puberty, and encouraging or forcing early marriage. In addition to restrictions on their movement, adolescent girls are reportedly reluctant to seek any help on sexual and reproductive health rights issues.
45. The forcibly deported Rohingya women and girls in Bangladesh are disproportionately vulnerable to sexual violence, domestic violence, survival sex, trafficking, drug smuggling and forced labour. Volunteers and local host community members have also reported that child trafficking is high in the camp areas. A significant number of children have been reported as missing from the camp, parents do not know whether their child is lost or stolen.<sup>48</sup> Fear of abduction, harassment and sexual violence severely restricts movements of women and girls, which limits access to referral services, protection information, social support networks and safety alternatives for those trapped in harmful environments.<sup>49</sup>
46. The Government of Bangladesh and humanitarian actors have, critically, welcomed and sheltered the large numbers of deported Rohingya in camps.

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<sup>48</sup> Needs assessment conducted in Jamtoli Camp by an international NGO, dated 29 January.

<sup>49</sup> JRP, p 55.

Goods and services are reaching the majority within the camps, and systems are evolving to adapt to their concerns and needs, especially those of women and girls. Beyond their immediate needs, the refugees are likely to face significant long-term consequences, including inter-generational harms, as a result of the atrocities to which they were subjected. Long-term harms potentially facing survivors of sexual violence can be particularly devastating for individuals, their families and communities. These long-term harms and burdens will continue to be disproportionately be shouldered by women and girls.

47. The recently forcibly deported Rohingya have little prospect of obtaining justice for the atrocities suffered, including sexual violence, in a domestic court. Given the Myanmar Government's acts and the existing domestic legal framework, no justice for Rohingya women—or Rohingya generally—can be expected. Firstly, state agents are provided expansive immunity under the 2008 Myanmar Constitution "in respect of any act done in the execution of their respective duties".<sup>50</sup> Secondly, the Myanmar Penal Code addresses sexual and gender-based crimes to a very limited extent: The definition of rape is gender-specific, limited to vaginal penetration, and there is no presumption of non-consent in certain circumstances, making it much narrower than in international law.<sup>51</sup> Thirdly, the Myanmar Government has not demonstrated today the willingness to adequately and transparently investigate the alleged violations and crimes in the Rakhine, which triggered the Rohingyas' departure.<sup>52</sup>

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<sup>50</sup> Section 445 of the Myanmar Constitution states that "[n]o proceeding shall be instituted against the [State Law and Order Restoration Council and the State Peace and Development Council] or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties."

<sup>51</sup> See Section 375 of the Myanmar Penal Code.

<sup>52</sup> Despite overwhelming international pressure to permit independent investigators to investigate the atrocities in the Rakhine triggering the deportation of the Rohingya, the Government of Myanmar has not issued visas for members of a UN fact-finding mission. It mandated its own investigation that produced questionable results. Recently, the Government has announced the creation of a new Commission to "investigate the violation of human rights and related issues following the terrorist attacks by ARSA", however, the rhetoric continued to be used against the Rohingya in Myanmar does not paint a picture that domestic justice can be expected.

## VI. Conclusion

48. Against a long history of discrimination and persecution, the latest military campaign against Rohingya, instituted on 25 August 2017 and coined a "clearance operation", stood out for its targeted attacks against Rohingya women and girls. A key ingredient of this operation, the abhorrent sexual violence committed by Myanmar officials against many Rohingya women and girls constituted a key reason compelling the majority of the Rohingya population that once resided in northern Rakhine state to leave their homes and lands behind, take it upon them to navigate across the Naf river and cross the border into Bangladesh.
49. The *amici* have demonstrated in this submission that the legally accurate interpretation and categorisation of the crime of deportation or forcible transfer includes sexual and gender-based violence as an underlying coercive act. It is this coercive act that commences the crime of deportation or forcible transfer, and the crossing of the border into Bangladesh that completes it.
50. It is respectfully submitted that the inclusion of sexual and gender-based violence in the interpretation of the crime of forcible deportation is relevant, required, and necessary to bring justice to the survivors of these crimes, who currently find themselves compelled to stay within Cox's Bazar's refugee camps, where living conditions are dire and perpetuate entrenched gender inequalities and harms, for fear of being again subjected to sexual violence if they returned to their homes.



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Dated this 18th day of June 2018

At The Hague, The Netherlands and

Dhaka, Bangladesh