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PRE-TRIAL CHAMBER III

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

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

PUBLIC

**With Confidential *EX PARTE* Annexes 1, 5, 7 and 8, and Public Annexes 2, 3, 4, 6, 9
and 10**

Request for authorisation of an investigation pursuant to article 15

Source:

Office of the Prosecutor

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I. INTRODUCTION

1. The Prosecution hereby requests, pursuant to article 15(3) of the Rome Statute (“Statute”), authorisation from the Pre-Trial Chamber (“Chamber”) to proceed with an investigation into the situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (“Situation in Bangladesh/Myanmar”) in the period since 9 October 2016. Specifically, the Prosecution seeks authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of the People’s Republic of Bangladesh (“Bangladesh”), and which occurred within the context of two waves of violence in Rakhine State on the territory of the Republic of the Union of Myanmar (“Myanmar”), as well as any other crimes which are sufficiently linked to these events.
2. On 6 September 2018, Pre-Trial Chamber I issued a decision confirming that the Court may exercise jurisdiction over “acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State)”,¹ as well as potentially other crimes under the Rome Statute “[i]f it were established that at least an element of another crime within the jurisdiction of the Court [...] is committed on the territory of a State Party”.²
3. On 18 September 2018, the Prosecution proceeded to the second phase of its preliminary examination process and formally communicated that it would carry out a full-fledged preliminary examination of this situation. The preliminary examination has focused on crimes in respect of which “one element” was

¹ [Jurisdiction Decision](#), para. 73.

² [Jurisdiction Decision](#), paras. 74.

committed on the territory of a State Party to the Statute³ — in this case, Bangladesh.

4. On the basis of the preliminary examination, the Prosecution submits that there is a reasonable basis to believe that crimes against humanity under the jurisdiction of the Court have been committed by the Myanmar armed forces (“*Tatmadaw*”)⁴ jointly with the Border Guard Police (“BGP”) and/or Myanmar Police Force (“MPF”) (“other Security Forces”) with some participation of non-Rohingya civilians, and by other Myanmar authorities, since at least 25 August 2017. These crimes — in particular, deportation, other inhumane acts, and persecution contrary to article 7 of the Statute — were committed within the context of a wave of violence that started on or about 25 August 2017 (“2017 wave of violence”).
5. On the basis of the preliminary examination, the Prosecution also concluded that the 2017 wave of violence was closely related to another wave of violence that started on or about 9 October 2016 (“2016 wave of violence”). While for the purpose of article 53(1) the Prosecution has focused on the 2017 wave of violence, information concerning the less-documented 2016 wave of violence is also addressed to support the broader narrative and the relationship between the two waves. This relationship forms the basis of the Prosecution request to investigate the period since 9 October 2016.
6. The Prosecution further submits, on the information presently available, that at least one if not all of the potential case(s) against senior members of the *Tatmadaw*, other Security Forces and other Myanmar authorities, would be admissible.

³ [Jurisdiction Decision](#), para. 72. *See also* para. 64.

⁴ The official Burmese name for the Myanmar armed forces, encompassing the army, navy and air force, is the *Tatmadaw* – in English, the “Defence Services”. Myanmar 2008 Constitution, [BGD-OTP-0001-4085](#) at 4243, articles 337-338; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0513, para. 1522.

7. Lastly, the Prosecution has identified no substantial reasons to believe that the opening of an investigation would not be in the interests of justice.
8. This application (“Request”) addresses first, an overview of the scope of the requested investigation and the available information analysed (“Overview”); second, the context in Myanmar and in Rakhine State, in particular from at least 9 October 2016 to date (“Context”); third, whether or not there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed (“Jurisdiction”); fourth, whether or not potential cases arising out of the situation would be admissible under article 17 of the Statute (“Admissibility”); and finally whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (“Interests of Justice”).
9. The Prosecution appends to this Request (a) a list of the factual sources supporting this Request (confidential *ex parte* Annex 1); (b) a chronology of the relevant events⁵ (Annex 2); (c) a map of Rakhine State⁶ (Annex 3); (d) a map of northern Rakhine State⁷ (Annex 4); (e) an indicative list of the most serious incidents within the context of the events from at least 25 August 2017 during which crimes within the jurisdiction of the Court were allegedly committed (“Indicative List of Incidents”) (confidential *ex parte* Annex 5); (f) two maps showing the destruction of villages in northern Rakhine State⁸ (Annex 6); (g) a preliminary list of persons or groups that appear to be the most responsible for the most serious crimes (“Preliminary List of Persons/Groups Most Responsible”) (confidential *ex parte* Annex 7); (h) additional information relevant to the complementarity criterion under admissibility (confidential *ex parte* Annex 8); (i)

⁵ Pursuant to regulation 49(3)(a) of the Regulations of the Court.

⁶ Pursuant to regulation 49(3)(b) of the Regulations of the Court.

⁷ Pursuant to regulation 49(3)(b) of the Regulations of the Court.

⁸ Pursuant to regulation 49(3)(b) of the Regulations of the Court.

an explanatory glossary of relevant names of institutions and of other acronyms⁹ (Annex 9); and (j) a list of legal authorities relied upon (Annex 10).

II. LEVEL OF CONFIDENTIALITY AND REQUESTED PROCEDURE

10. The Prosecution submits Annexes 1, 5, 7 and 8 as confidential *ex parte* pursuant to regulation 23*bis* of the Regulations of the Court (“Regulations”). For Annexes 5 and 7, this is due to the existence of potential risks to the success and integrity of any future investigation if the information in these annexes is made public. For Annex 8, this is due to the inclusion of information which the information provider requests be kept confidential, as explained in more detail in that annex. Annex 1 reflects the confidential factual sources contained in Annex 8 and for that reason it is requested that it also be received as confidential *ex parte*.

III. PROCEDURAL HISTORY

11. On 9 April 2018, the Prosecution filed a Request pursuant to regulation 46(3) of the Regulations and article 19(3) of the Statute, seeking a ruling from the Pre-Trial Chamber on the question whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.¹⁰ On 11 April 2018, the President of the Pre-Trial Division assigned the Prosecution’s Request for Ruling on Jurisdiction to Pre-Trial Chamber I.¹¹

12. On 11 June 2018, following the Chamber’s invitation,¹² Bangladesh submitted confidentially its observations on the Prosecution’s Request for Ruling on

⁹ Pursuant to regulation 49(3)(c) of the Regulations of the Court. While under this regulation, the explanatory glossary should also include relevant names of persons and locations “if possible”, relevant names of persons - with a description of their role – and of locations can be found largely in confidential *ex parte* annexes 5 and 7. While this Request and accompanying annexes include only the names of locations in the Burmese language, a number of locations referred to herein also have a name in the Rohingya language.

¹⁰ [Prosecution’s Request for Ruling on Jurisdiction.](#)

¹¹ [Decision Assigning Request to a Pre-Trial Chamber.](#)

¹² [Decision inviting observations from Bangladesh authorities.](#)

Jurisdiction, pursuant to rule 103(1) of the Rules of Procedure and Evidence (“Rules”).¹³ On 14 June 2018, the Registry submitted to the Chamber information regarding 21 victim applications received in relation to the Prosecution’s Request for Ruling on Jurisdiction.¹⁴ Between 29 May 2018 and 14 June 2018, the Chamber granted leave to several organisations and persons to submit *amici curiae* observations on the Prosecution’s Request for Ruling on Jurisdiction,¹⁵ receiving their written observations on 18 June 2018.¹⁶

13. On 20 June 2018, a status conference took place in closed session, only in the presence of the Prosecution. The transcript of the status conference was made public in redacted form on 26 July 2018.¹⁷

14. On 31 May 2018 and 19 June 2018, respectively, the Chamber received a submission filed by Global Rights Compliance on behalf of 400 Rohingya women and children, who were allegedly victims of the crime against humanity of deportation,¹⁸ and “Observations on behalf of victims from Tula Toli” village in Myanmar.¹⁹ In the Jurisdiction Decision, the Chamber found that it was appropriate in the circumstances to hear from the victims at that stage.²⁰

15. On 5 July 2018, the Registry submitted its report on the implementation of the Chamber’s decision²¹ inviting the competent authorities of Myanmar to submit observations on the Prosecution’s Request for Ruling on Jurisdiction.²² The Registry informed the Chamber that the Embassy of Myanmar in Belgium had

¹³ [Jurisdiction Decision](#), para. 6.

¹⁴ [Information on Victims’ Applications](#), with one confidential *ex parte* annex, only available to the Registry.

¹⁵ [Jurisdiction Decision](#), para. 8 (referring to the International Commission of Jurists; members of the Canadian Partnership for International Justice; the Women’s Initiatives for Gender Justice, Naripokkho, Ms. Sara Hossain and the European Centre for Constitutional and Human Rights (jointly); Guernica 37 International Justice Chambers; and the Bangladeshi Non-Governmental Representatives).

¹⁶ [Jurisdiction Decision](#), para. 8. *See* fn. 14 for a list of the relevant submissions.

¹⁷ [Status Conference](#).

¹⁸ [GRC Submissions](#).

¹⁹ [Tula Toli Observations](#).

²⁰ [Jurisdiction Decision](#), para. 21.

²¹ [Decision inviting observations from Union of Myanmar](#).

²² [Registry Implementation Report](#), with three confidential annexes.

refused to accept the delivery of either the Chamber's invitation or the Prosecution's Request.²³

16. On 11 July 2018, the Prosecution filed its observations on the *amici curiae* observations and on the submissions of the two groups of alleged victims.²⁴ On 17 August 2018, the Prosecution filed a "Notice of the Public Statement Issued by the Government of Myanmar",²⁵ which information became part of the record.²⁶
17. On 6 September 2018, Pre-Trial Chamber I issued a decision ("Jurisdiction Decision") confirming that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under article 7 of the Statute.²⁷
18. On 18 September 2018, the Prosecutor formally communicated that the Prosecution would carry out a full-fledged preliminary investigation of this situation.²⁸ The Prosecution has reviewed 56 article 15 communications related to the Rohingya in Myanmar and/or Bangladesh.
19. By a memorandum dated 12 June 2019, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations, of her intention to submit a request for authorisation of an investigation into the Situation in Bangladesh/Myanmar. On 25 June 2019, the Presidency of the Court assigned the Situation in Bangladesh/Myanmar to Pre-Trial Chamber III.²⁹ On 26 June 2019, the Prosecutor submitted a request, pursuant to regulation 37(2) of the Regulations, for extension of the applicable page limit under regulation 38, which was granted

²³ [Registry Implementation Report](#), para. 4.

²⁴ [Prosecution Response to Observations](#).

²⁵ [Myanmar Public Statement Notice](#).

²⁶ [Jurisdiction Decision](#), para. 23.

²⁷ [Jurisdiction Decision](#), paras. 73, 76, 78.

²⁸ [Statement of ICC Prosecutor on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh](#), 18 September 2018.

²⁹ [Decision on assignment of the Situation in Bangladesh/Myanmar to Pre-Trial Chamber III](#) (notified on 26 June 2019).

on 28 June 2019.³⁰ Also on 26 June 2019, the Registry applied for an extension of time for victims to make representations under article 15(3) of the Statute and rule 50(3) of the Rules.³¹ On 28 June, the Chamber granted the Registry an extension of time limits for the transmission of victims' representations, as well as its Final Consolidated Report, until 31 October 2019, and, *inter alia*, ordered the Prosecution to inform victims pursuant to Rule 50(1) of the Rules that they may submit their representations until 28 October 2019.³² The Prosecution notes this extension of time, and respectfully submits that this Request should be determined as soon as possible after 31 October 2019 — that is, upon transmission to the Chamber of the last of the victims' representations — both in the interests of the victims to proceed expeditiously, and to ensure the efficiency and integrity of the investigation, if it is authorised.

IV. OVERVIEW

A. Overview of scope of requested investigation

20. The Prosecution requests authorisation to proceed with an investigation of the Situation in Bangladesh/Myanmar in the period since 9 October 2016. Specifically, the Prosecution seeks authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of neighbouring Myanmar, as well as any other crimes which are sufficiently linked to these events.³³ As explained earlier, the two waves of

³⁰ [Prosecution Request for Extension of the Page Limit](#); [Decision on the Prosecution's Request for Extension of the Page Limit](#).

³¹ [Registry's Request of 26 June 2019](#).

³² [Decision on the Registry's Request of 26 June 2019](#), p. 8.

³³ [Georgia Article 15 Decision](#), para. 64 (“events which did not occur in or around South Ossetia or which occurred outside the time period indicated in the Request would not fall into the parameters of the present situation unless they are sufficiently linked thereto, and obviously, fall within the Court's jurisdiction”); [Kenya Article 15 Decision](#), paras. 74-75, 205; [Mbarushimana Decision](#), paras. 21 (“[c]rimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis”) and 27 (“as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated”); [Burundi Article 15 Decision](#), para.

violence in Rakhine State are the 2016 wave of violence and the 2017 wave of violence.

21. This Request relies upon information made available to the Prosecutor which provides a reasonable basis to believe that hundreds of thousands of the Rohingya people were deported from Myanmar to Bangladesh. While the following submissions are predominantly concerned with the events taking place in the context of the 2017 wave of violence, the Prosecution has also examined allegations of crimes in the context of the 2016 wave of violence, in the interest of providing a fuller narrative concerning the scope of the requested investigation. The Prosecution submits that the 2016 wave of violence is sufficiently linked to the events surrounding the 2017 wave of violence to be included in the geographical and temporal parameters of the requested investigation.
22. The potential case(s) identified in this Request (and accompanying confidential *ex parte* Annexes 5 and 7) focus on what currently appear to be the most serious crimes committed during the 2017 wave of violence, and those most responsible for them. Consequently, the admissibility assessment has been carried out with respect to those cases. Yet, this should not limit the scope of the authorised situation. This is because crimes identified at the article 15 stage as meeting the reasonable basis standard should be considered as examples of relevant criminality within the situation, in light of the threshold requirement of determining whether “a crime within the jurisdiction of the Court has been or is being committed”.³⁴ Once that threshold is met, the Chamber should authorise an investigation into the situation as a whole and not just the particular acts or

193 (allowing the Prosecution to extend its investigation “to other crimes against humanity or other article 5 crimes, i.e. war crimes and genocide, as long as they remain within the parameters of the authorized investigation.”) On 7 June 2019, the Prosecution sought leave to appeal the [Afghanistan Article 15 Decision](#), including Pre-Trial Chamber II’s understanding of the scope of any investigation it may authorise, in light of article 15 and other material provisions of the Statute, and specifically how an authorised investigation is defined. See [Afghanistan Request Leave to Appeal](#), paras. 3, 24-27.

³⁴ Article 53(1)(a) of the [Rome Statute](#). See also [Kenya Article 15 Decision](#), paras. 74-75; [Côte d’Ivoire Article 15 Decision \(Judge Gurmendi’s separate and partially dissenting opinion\)](#), paras. 32-34.

incidents brought forward to substantiate that threshold.³⁵ To do otherwise would be to pre-determine the direction, and narrow the scope of a future investigation based on the limited information available at the preliminary examination stage, and to convert the facts provisionally identified as meeting this threshold into binding parameters that regulate the scope of future case-specific investigative inquiries. Such an approach would be inconsistent with the Prosecutor's duty of independent and objective investigation and prosecution, as established by articles 42, 54 and 58 of the Statute.

23. Furthermore, bearing in mind the nature and circumstances of the crimes identified in this application, and the volatile environment in Myanmar, the Prosecution specifically requests authorisation to investigate any alleged crimes that may be committed and/or completed *after* the filing of this Request,³⁶ provided that they occur within the context of the waves of violence in Rakhine State or are sufficiently linked to these events.

24. The Prosecution is aware that a number of acts of violence have also allegedly been committed in Myanmar by the Arakan Rohingya Salvation Army ("ARSA") armed group, and will keep these allegations under review, as well as the question whether or not these acts of violence amount to a crime or crimes under the Statute, and were committed in part on the territory of a State Party. Similarly, the Prosecution is aware of allegations of armed confrontations between the *Tatmadaw* and ARSA. Thus, while it is unnecessary for the purpose of the present application to determine whether an armed conflict may have existed at some or all of the material times, this possibility is not precluded. The Prosecution will, in any authorised investigation, keep under review the legal and factual prospects of

³⁵ See [Kenya Article 15 Decision](#), paras. 74-75, 205; [Georgia Article 15 Decision](#), paras. 63-64.

³⁶ [Burundi Article 15 Decision](#), para. 192 ("in the light of the continuous nature of certain crimes, the Prosecutor may also extend her investigation to crimes even if they continue after 26 October 2017"); [Côte d'Ivoire Article 15 Decision](#), para. 179 ("[b]earing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into 'continuing crimes' – those whose commission extends past the date of the application.")

investigating the conduct of the *Tatmadaw* and other Security Forces, as well as ARSA, as war crimes — in particular the war crime of ordering forcible displacement under article 8(2)(e)(viii) of the Statute.³⁷

25. Accordingly, for all these reasons, the authorised investigation should encompass the possibility that the Prosecution will address the alleged acts or incidents described herein or others falling within the same overall parameters, as well as the persons or groups described herein or others, and adopting the same or different legal qualifications as necessary.

B. Examination of the available information

26. A list of the factual sources relied upon in support of this Request is provided at confidential *ex parte* Annex 1.

27. In the course of the preliminary examination, the Prosecution has reviewed over a hundred reports, academic articles, legal submissions and documents, press releases and public statements by intergovernmental, governmental and non-governmental organisations (“NGOs”), academic institutions and media agencies. The sources reviewed cover the period from October 2016 to the end of March 2019. Specifically for the admissibility assessment and the ongoing repatriation process, they cover to the end of May 2019. The sources reviewed also cover any issue pre-dating this period relevant for the Prosecution’s subject-matter

³⁷ The Prosecution notes that article 8(2)(e)(viii) of the [Rome Statute](#), unlike similar provisions of the Statute, does not expressly differentiate between forcible transfer and deportation but merely refers generally to “forcible displacement”. However, when this particular crime is read in the context of the Statute as a whole, the Prosecution does not consider that this confines the Court’s war crimes jurisdiction in non-international armed conflict, under article 8(2)(e)(viii), to forcible transfer *alone*, to the exclusion of deportation. This would be inconsistent *inter alia* with: footnote 13 of the [Elements of Crimes](#), which expressly states that the concept of forcible displacement is equivalent to “[d]eportation or forcible transfer”; the position in customary international law, which recognises that both deportation and forcible transfer are prohibited, including as war crimes in non-international armed conflict; and Pre-Trial Chamber I’s recent acknowledgement of the distinct value(s) protected by the crime of deportation. Similarly, nothing in the Statute establishes any basis to consider that the drafters intended the formulation of article 8(2)(e)(viii) to exclude the possibility of charging deportation as a forcible displacement in non-international armed conflict. *See also* [Jurisdiction Decision](#), paras. 55, 60.

assessment. The Prosecution has also reviewed and considered communications received, to the beginning of July 2019, pursuant to article 15 of the Statute.

28. As explained below, to date, the Government of Myanmar has declined to provide any information to the Prosecution.³⁸ However, as is apparent from the list of factual sources at confidential *ex parte* Annex 1, the Prosecution has taken into account public statements and press releases by the Myanmar authorities, to the extent relevant to this Request.

29. The sources relied upon in this Request are amongst those considered by the Prosecution to be sufficiently reliable and credible for the proposition for which they are relied on. The Prosecution has relied extensively on the *Report of the detailed findings of Independent International Fact-Finding Mission on Myanmar* (“UN FFM”), which was issued on 17 September 2018.³⁹ The UN FFM was established by the UN Human Rights Council (“UN HRC”) on 24 March 2017 — following the 2016 wave of violence — with a mandate to “establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular Rakhine State”.⁴⁰ The Report’s findings are said to “follow[] the best practices established for commissions of inquiry and fact-finding missions”.⁴¹

30. Otherwise, both international and regionally-based human rights NGOs have produced a number of reports with relevant information regarding alleged crimes as well as pertinent contextual information, and some of these are also referenced in this Request. In addition, the Prosecution relies upon surveys conducted in refugee camps in Bangladesh by medical and other NGOs. The August 2017 final

³⁸ See paras. 231-232 below.

³⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#).

⁴⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0134, paras. 1, 4.

⁴¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0135, para. 9. See also at 0135-0139, paras. 8-32 (describing the UNFFM’s methodology).

report of the Advisory Commission on Rakhine State⁴² is also referenced mainly for aspects related to the context in Rakhine State. The Advisory Commission, a Myanmar national entity chaired by former UN Secretary-General, the late Kofi Annan, with the majority of its members from Myanmar, was established in September 2016 by the Kofi Annan Foundation and the Office of the State Counsellor of Myanmar, and mandated “to examine the complex challenges facing Rakhine State and to propose responses to those challenges.”⁴³ Other key sources include media reports, including international and regional media, and academic work on issues related to the legal status of the Rohingya and their place in Myanmar’s society.

31. Relevant to any future, authorised investigation, on 27 September 2018, the UN HRC voted to establish, “an ongoing independent mechanism to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law”.⁴⁴ On 22 December 2018 the UN General Assembly (“UNGA”) adopted a resolution calling for the “expeditious entry into operation” of the Independent Investigative Mechanism for Myanmar (“IIMM”).⁴⁵ The UN HRC has requested the IIMM to “cooperate closely with any of [the Court’s] future investigations pertaining to human rights violations in Myanmar”.⁴⁶

⁴² Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#).

⁴³ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5036, 5038. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0229, para. 409.

⁴⁴ UN HRC Res. 39/2 (2018), [BGD-OTP-0001-0612](#) at 0616, para. 22.

⁴⁵ UNGA Resolution of 22 December 2018, [BGD-OTP-0002-0518](#) at 0522, para. 5.

⁴⁶ UN HRC Res. 39/2 (2018), [BGD-OTP-0001-0612](#) at 0617, para. 24. *See also* IIMM’s Terms of Reference, [BGD-OTP-0001-5148](#) at 5152, para. 18.

C. Activities of the Office of the Prosecutor

32. Since opening the second phase of its preliminary examination, the Prosecution's activities have included engaging in direct consultations with organisations representing Rohingya victims and conducting a first visit to Bangladesh. The visit to Bangladesh was supported by the Government of Bangladesh, and meetings were facilitated with the relevant national authorities. As part of this visit, a Prosecution delegation travelled to the refugee camps in Cox's Bazar, meeting with government authorities there, as well as humanitarian agencies, NGOs and a number of victims' representatives.

D. Reasonable basis to proceed

33. The information available to the Prosecution is sufficient in volume and quality, overall, to enable a determination at the reasonable basis standard. The Prosecution has borne in mind the nature of the proceedings under article 15, the relatively low threshold applicable, as well as the object and purpose of the authorisation procedure.⁴⁷ While the Prosecution agrees that the information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'"⁴⁸ and need not necessarily "point towards only one conclusion",⁴⁹ it remains necessary to "evaluate the available information" in context and as a whole in order to determine whether positive conclusions on the required matters are "rational or sensible".⁵⁰

⁴⁷ See [Kenya Article 15 Decision](#), paras. 73-75; [Burundi Article 15 Decision](#), paras. 28, 30. See also [Côte d'Ivoire Article 15 Decision](#), paras. 24-25.

⁴⁸ [Kenya Article 15 Decision](#), para. 27; see also paras. 28-35; [Burundi Article 15 Decision](#), para. 30; [Côte d'Ivoire Article 15 Decision](#), para. 24. See also, at a more advanced stage in the proceedings, [Al Bashir Arrest Warrant Appeal Decision](#), para. 33.

⁴⁹ [Kenya Article 15 Decision](#), para. 34. See also [Burundi Article 15 Decision](#), para. 30.

⁵⁰ See [Union of Comoros Annex to Prosecution's Final Decision](#), paras. 19-32. See further Cross, pp. 217-238, 243-247, 251-253.

V. CONTEXT

A. Geographic location and ethnic composition of Myanmar and Rakhine State

34. Bangladesh, which shares a border with Myanmar to its east, signed the Statute on 16 September 1999, and has been a State Party to the Statute since 1 June 2010.⁵¹ Myanmar is not a State Party to the Statute.
35. Myanmar has an ethnically diverse population of more than 51 million people, with 135 officially recognised ethnic groups, and an ethnic Bamar majority. Most of the population is Buddhist — including the predominantly Bamar ethnic group.⁵² The Myanmar Constitution of 2008 recognises the “special position” of Buddhism in Myanmar, whilst also recognising other religions.⁵³
36. As is shown in the map attached at Annex 3, Rakhine State, situated in the west of Myanmar, borders Chin State to the north, and Bangladesh to the northwest. The Naf River, a long estuary of approximately two kilometres wide, separates the Cox’s Bazar District of Bangladesh (on the western bank of the river) from Rakhine State (on the eastern bank).⁵⁴ The Prosecution also attaches, at Annex 4, a map showing the three townships in northern Rakhine State — Maungdaw, Buthidaung and Rathedaung — where the 2017 wave of violence allegedly took place.

⁵¹ See Assembly of States Parties, Bangladesh https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx (last accessed end May, 2019).

See also Article 126(2) of the [Rome Statute](#).

⁵² Census Atlas Myanmar, [BGD-OTP-0002-0113](#) at 0155; Myanmar Population and Housing Census 2014 – Provisional Results, [BGD-OTP-0001-4988](#) at 4999; Fortify Rights, “They gave them long swords” report [BGD-OTP-0001-2415](#) at 2449; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0153-0154, paras. 84-85, 87. Note that the Myanmar census (Census Atlas Myanmar) was originally published in August 2014, in a different form (without data on religion) (Myanmar Population and Housing Census 2014). See also UNFPA press release of 30 August 2014, [BGD-OTP-0001-0597](#) at 0597; Irrawaddy article of 21 July 2016, [BGD-OTP-0002-0508](#) at 0509.

⁵³ Myanmar 2008 Constitution, [BGD-OTP-0001-4085](#) at 4247, sections 361-362.

⁵⁴ Irish Centre for Human Rights 2010 Report, [BGD-OTP-0001-4318](#) at 4332. See also Annex 4, Map of northern townships of Rakhine State, showing Naf River – as mentioned, for e.g., at UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0339, para. 900.

37. Rakhine State is composed of several ethnic and religious groups⁵⁵ and, according to the Myanmar Government census conducted in 2014, had a population of approximately 3.2 million at that time.⁵⁶
38. The Rohingya are an ethnic minority group of predominantly Muslim faith thought to constitute the second largest group in Rakhine State after the ethnic Rakhine majority, who are predominantly Buddhist.⁵⁷ It is estimated that approximately 1.1 million Rohingya were living in Rakhine State in 2014.⁵⁸ In particular, according to statistics allegedly collected in 2016 by Myanmar's General Administration Department ("GAD"), Rohingya accounted for 93% of the population in Maungdaw Township in 2016, 84% of the population in Buthidaung Township, and 6% of the population in Rathedaung Township.⁵⁹
39. There are a number of other minority groups in Rakhine State, including the (predominantly Muslim) ethnic Kaman, as well as Chin, Mro, Daingnet, Thet, Maramagyi and Hindus.⁶⁰

⁵⁵ Fortify Rights, "They gave them long swords" report, [BGD-OTP-0001-2415](#) at 2449; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0228-0229, para. 406; AI "Caged without a roof" report, [BGD-OTP-0001-1743](#) at 1761.

⁵⁶ Census Atlas Myanmar, [BGD-OTP-0002-0113](#) at 0157; Myanmar Population and Housing Census 2014 – Provisional Results, [BGD-OTP-0001-4988](#) at 5001.

⁵⁷ Fortify Rights, "They gave them long swords" report, [BGD-OTP-0001-2415](#) at 2449; AI "Caged without a roof" report, [BGD-OTP-0001-1743](#) at 1761; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0228-0229, para. 406.

⁵⁸ This figure is based on the number who were left out of an official census conducted in 2014 by the Myanmar Government: controversially, the Rohingya population did not participate in the census because they were not permitted to self-identify on the data collection forms as "Rohingya", but the government released figures of the number who were left out of the official count based on "information collected during the enumeration mapping exercise prior to the actual enumeration." Census Atlas Myanmar, [BGD-OTP-0002-0113](#) at 0157; Myanmar Population and Housing Census 2014 – Provisional Results, [BGD-OTP-0001-4988](#) at 4998-4999, 5007; UNFPA press release of 30 August 2014, [BGD-OTP-0001-0597](#) at 0598. For the controversy around the census, see ICG "2014 census" report, [BGD-OTP-0002-0268](#) at 0268-0269, 0278-0280; AI "Caged without a roof" report, [BGD-OTP-0001-1743](#) at 1761; Fortify Rights, "They gave them long swords" report, [BGD-OTP-0001-2415](#) at 2449; Irrawaddy article of 21 July 2016, [BGD-OTP-0002-0508](#) at 0508-0509.

⁵⁹ Irrawaddy article of 23 February 2018, [BGD-OTP-0001-0773](#) at 0774.

⁶⁰ AI "Caged without a roof" report, [BGD-OTP-0001-1743](#) at 1761; Fortify Rights, "They gave them long swords" report, [BGD-OTP-0001-2415](#) at 2449; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0228-0229, para. 406.

B. Myanmar's political and constitutional context

40. Following its independence from the United Kingdom in 1948, Myanmar (formerly known as Burma) became an independent republic and parliamentary democracy. In 1962, following years of civil conflict and perceived mismanagement of the State, General Ne Win led a military *coup*, purportedly to protect the territorial integrity of the country.⁶¹ According to the UN FFM, the *Tatmadaw* has “used the alleged ‘ethnic’ threat to national sovereignty and territorial integrity as the excuse for its control over the country ever since”.⁶²

41. In the following years, Myanmar was subject to military rule, characterised by the suppression of political dissent, widespread human rights violations and high levels of corruption and economic mismanagement.⁶³ Over time, popular uprisings and growing internal and international pressure led to the gradual introduction of some apparent democratic reforms.⁶⁴ In 2010, the military-backed Union Solidarity and Development Party (“USDP”) won the general election – although this was boycotted by the National League for Democracy (“NLD”) and other pro-democracy parties, objecting to electoral laws that were perceived as unfair. As a result, retired General Thein Sein – then leader of the USDP – became President,⁶⁵ succeeding Senior General Than Shwe who had led the military junta (latterly the State Peace and Development Council or “SPDC”)⁶⁶ since 1992.⁶⁷ Shortly after the 2010 elections, NLD leader Daw Aung San Suu Kyi was released from house arrest.⁶⁸

⁶¹ PILPG Report, [BGD-OTP-0001-3307](#) at 3321; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0150, para. 71.

⁶² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0150, para. 71.

⁶³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0150-0152, 0155-0157, paras. 71-79, 93-99.

⁶⁴ PILPG Report, [BGD-OTP-0001-3307](#) at 3321-3322.

⁶⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0151, para. 77.

⁶⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0150-0151, para. 74.

⁶⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0151, para. 77; Irish Centre for Human Rights 2010 Report, [BGD-OTP-0001-4318](#) at 4343.

⁶⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0151, para. 78.

42. In April 2012, the NLD successfully contested parliamentary by-elections, winning seats, and Daw Aung San Suu Kyi entered parliament as leader of the new NLD group.⁶⁹ Likewise, the NLD participated in the November 2015 general election, and this time won a majority (about 60%) of the total number of seats in the Assembly of the Union (*Pyidaungsu Hluttaw*)⁷⁰ — or 86% of the seats not reserved for members of the *Tatmadaw*.⁷¹ The NLD-led government took office in March 2016.⁷² While Daw Aung San Suu Kyi is constitutionally barred from the position of President, she was appointed on 6 April 2016 to the position of State Counsellor (said to be the *de facto* “head of the country”), which had been created for her.⁷³

43. Nevertheless, Myanmar’s 2008 Constitution still preserves much of the *Tatmadaw*’s dominance over the government.⁷⁴ Amendments to the Constitution must be approved by at least 75% of both houses of the *Pyidaungsu Hluttaw*, giving the *Tatmadaw* effective veto power over constitutional changes.⁷⁵ The *Tatmadaw* also selects candidates for (and effectively controls) the Ministries of Defence, Border Affairs and Home Affairs.⁷⁶

⁶⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0151, para. 78; PILPG Report, [BGD-OTP-0001-3307](#) at 3321-3322.

⁷⁰ See Myanmar 2008 Constitution, [BGD-OTP-0001-4085](#) at 4093, section 12.

⁷¹ PILPG Report, [BGD-OTP-0001-3307](#) at 3322; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0152, para. 80. Under Myanmar’s 2008 Constitution, 25% of the seats in each house of parliament (*Pyithu Hluttaw* and *Amyotha Hluttaw*), and in the state and regional assemblies (State or Region *Hluttaws*) are reserved for *Tatmadaw* personnel: see Myanmar 2008 Constitution, [BGD-OTP-0001-4085](#) at 4093, section 12, at 4094, section 13, at 4119, section 74.

⁷² PILPG Report, [BGD-OTP-0001-3307](#) at 3322.

⁷³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0151-0152, paras. 76, 78, 80. See also Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2452.

⁷⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0152, para. 81; PILPG Report, [BGD-OTP-0001-3307](#) at 3322; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1767.

⁷⁵ Myanmar 2008 Constitution, [BGD-OTP-0001-4085](#) at 4273-4274, section 436.

⁷⁶ Myanmar 2008 Constitution, [BGD-OTP-0001-4085](#) at 4179-4180, sections 232(b)(ii), (c), (j)(ii). See also AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1767; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0152, para. 81.

C. Context of discrimination and violence against the Rohingya in Myanmar

1. Discrimination, human rights violations and hostility against the Rohingya

44. Rakhine State is one of Myanmar's poorest, with an estimated 44% of the population living below the poverty line.⁷⁷ Amnesty International ("AI") has reported that, "[a]ll communities" in Rakhine State have "suffered to one degree or another from decades of discrimination and other human rights violations, including economic and social marginalization, at the hands of the Myanmar authorities. This situation has led to and often exacerbated intercommunal tensions, which at times have erupted into violence".⁷⁸

45. In this context, the Rohingya have suffered decades of particularly severe discrimination by the Myanmar Government, coupled with — in recent years — rising anti-Muslim sentiment in Myanmar. The UN FFM has described the lack of legal status of the Rohingya as the "cornerstone" of a system of severe and institutionalised oppression, which is compounded by restrictions on movement, subsistence and development, as well as "numerous other human rights violations". According to the UN FFM, the "life of Rohingya in Rakhine State has gradually become more and more untenable".⁷⁹

(a) *Legal status and identity*

46. The Rohingya self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State. Successive Myanmar Governments have rejected these claims.⁸⁰ Instead, the Rohingya are

⁷⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0228, para. 405.

⁷⁸ AI "We will destroy everything" report, [BGD-OTP-0001-2649](#) at 2668. *See also* UN HRC report of 28 June 2016, [BGD-OTP-0002-0567](#) at 0569, para. 9.

⁷⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0239, para. 459.

⁸⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0240, 0247, paras. 460, 491; AI "Caged without a roof" report, [BGD-OTP-0001-1743](#) at 1762; UN HRC report of 28 June 2016, [BGD-OTP-0002-0567](#) at 0568, para. 3. *See also* Ware and Laoutides book, [BGD-OTP-0001-4667](#) at 4757-4789; ICG "Dark side of transition" report, [BGD-OTP-0002-1355](#) at 1361.

widely regarded as “illegal immigrants” from neighbouring Bangladesh, and are often referred to as “Bengalis”.⁸¹ Even use of the term “Rohingya” is contested.⁸² However, the reality is that the overwhelming majority of Rohingya in Rakhine State — including those who have recently fled — were born in Myanmar, as were their parents.⁸³

47. The vast majority of Rohingya in Rakhine State do not have citizenship.⁸⁴ The 1982 Citizenship Law (“1982 Law”)⁸⁵ — which repealed the 1948 Union Citizenship Act (“1948 Act”)⁸⁶ — establishes a hierarchy of different categories of citizenship, distinguishing between “full citizens”,⁸⁷ “associate” citizens, and “naturalized” citizens. As the UN FFM has stated, the law’s “extreme and narrow focus on ethnicity, and its arbitrary application in practice, has been profoundly discriminatory in intent, purpose and impact.”⁸⁸ Membership of a “national race” (or “national ethnic group”) has been made the key criterion for citizenship,⁸⁹ as well as a key criterion for “membership in Myanmar’s political community.”⁹⁰ The Advisory Commission on Rakhine State noted, “the law — and the way it was

⁸¹ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1762; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0240, para. 460; PILPG Report, [BGD-OTP-0001-3307](#) at 3324. *See also* Reuters article of 15 August 2018, [BGD-OTP-0001-0902](#) at 0927.

⁸² Ware and Laoutides book, [BGD-OTP-0001-4667](#) at 4680; ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3806. *See for e.g.* Inquiry Commission Report of July 2013, [BGD-OTP-0002-1214](#) at 1220; Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5042.

⁸³ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1762.

⁸⁴ Ware and Laoutides book, [BGD-OTP-0001-4667](#) at 4707; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0240, para. 460; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1762.

⁸⁵ And its implementing regulations, the 1983 Procedures. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5059-5060.

⁸⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477, fn. 1053; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4313, article 76. On the regime under the previous law, *see e.g.* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0242-0244, paras. 472-476; Irish Centre for Human Rights 2010 Report, [BGD-OTP-0001-4318](#), at 4411-4412.

⁸⁷ Specifically “citizens” or “citizens by birth”. *See* AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1770.

⁸⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0248, para. 492.

⁸⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0248, para. 492.

⁹⁰ Ware and Laoutides book, [BGD-OTP-0001-4667](#) at 4707-4708; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0247-0248, paras. 489-490, 496.

implemented—significantly narrowed the prospects of citizenship for the [Rohingya]”.⁹¹

48. Under the 1982 Law, full citizens are only (i) the members of “national ethnic groups,” defined as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan, and ethnic groups which permanently settled in the territory of what is now Myanmar before 1823⁹² (in 1990, an official list of 135 “national races” was made public⁹³); and (ii) those with both parents holding a category of citizenship, including at least one full citizen,⁹⁴ third generation offspring of citizens in the two other categories of citizenship,⁹⁵ and persons who were citizens when the law entered into force.⁹⁶ The Rohingya are not among the recognised national ethnic groups.⁹⁷ Associate citizenship may be granted to those whose application for citizenship under the previous law was pending when the 1982 Law took effect,⁹⁸ and naturalised citizenship to persons who provide “conclusive” evidence of entry into and residence in Myanmar before 1948 and of the birth of their children in Myanmar and also, under certain circumstances, by marriage or descent.⁹⁹

⁹¹ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5060. Note that the report explicitly does not call the Rohingya by their name. Rather, “[i]n line with the request of the State Counsellor”, the Rohingya are referred to as “Muslims” or “the Muslim community in Rakhine” – but not including the Kaman Muslims who are referred to as “Kaman”: *see* Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5042.

⁹² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5060; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4299, articles 3, 5.

⁹³ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5060; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1770, fn. 54; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477, fn. 1056.

⁹⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4299, article 7(a)-(c).

⁹⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4299-4300, article 7(d)-(f).

⁹⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4299, article 6.

⁹⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477.

⁹⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4303, article 23.

⁹⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244, para. 477; Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4306-4307, articles 42-43. Other requirements include that naturalised citizens must be fluent in one of the listed national languages (Translation of 1982 Citizenship Law, [BGD-OTP-0001-4298](#) at 4307, article 44(c)) but Rohingya is not recognised as a national language (*see* AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1772, fn. 69).

Associate citizenship and naturalised citizenship can be difficult to acquire, and few Rohingya are in possession of the necessary documents that would satisfy the requisite criteria.¹⁰⁰

49. Moreover, whilst not all Rohingya are necessarily fully excluded from citizenship by this legal framework,¹⁰¹ in reality, the law has been implemented in a discriminatory and arbitrary manner.¹⁰² For example, in a nationwide citizenship scrutiny exercise carried out in 1989, those found to meet the new requirements under the 1982 Law had their “national registration cards” (“NRCs”) replaced with new “citizenship scrutiny cards” (“CSCs”). Of those Rohingya who had NRCs, the majority reportedly surrendered them, but were never issued with CSCs,¹⁰³ thus depriving them of the citizenship status to which they would seem to have been legally entitled under the 1982 Law.

50. Likewise, from 1995, the authorities began issuing “Temporary Registration Cards” (“TRCs” or “white cards”) to Rohingya who did not have identity documents, as well as to returning refugees.¹⁰⁴ These interim white cards became the *de facto* identification documentation for the 700,000 Rohingya to whom they were issued for the next 20 years.¹⁰⁵ Yet in early 2015, the Myanmar Government invalidated all TRCs, and the Constitutional Tribunal ruled that TRC-holders were ineligible to vote. In the democratic elections in November 2015, Rohingya were not allowed to participate as candidates or as voters.¹⁰⁶ Prior to these

¹⁰⁰ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1772.

¹⁰¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0244-0245, para. 478.

¹⁰² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0245, para. 479. *See* for e.g. AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1770 (and fn. 57).

¹⁰³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0245, para. 479.

¹⁰⁴ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5060.

¹⁰⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0245, para. 479; ICG “Politics of Rakhine State” report, [BGD-OTP-0001-3880](#) at 3894.

¹⁰⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0246-0247, paras. 483, 490.

elections, the Rohingya were able to vote in and run in every election since independence in 1948.¹⁰⁷

51. It is in this context that the Advisory Commission on Rakhine State observed in its August 2017 final report, that only 4,000 of the (then) around 1 million Rohingya people in Rakhine state — less than 0.5% — had been recognised as citizens or naturalised citizens.¹⁰⁸ Likewise, in her most recent report on the human rights situation of the Rohingya in Rakhine State issued in March 2019, the UN High Commissioner for Human Rights has stated that Myanmar has, under the current legal framework, “systematically denied the right of citizenship to members of the Rohingya community, effectively rendering them stateless.”¹⁰⁹

(b) *Restrictions against Rohingya*

52. Aside from being effectively denied citizenship in Myanmar, for decades the Rohingya have also allegedly been subjected to large-scale and severe violations of various internationally recognised human rights, including: freedom of movement;¹¹⁰ access to healthcare, education, food and livelihood opportunities;¹¹¹ private and family life (including related to housing, marriage, and children);¹¹² liberty;¹¹³ labour for due remuneration;¹¹⁴ private property;¹¹⁵ and non-discrimination.¹¹⁶

¹⁰⁷ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5060; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0245, para. 489. *See also* Irish Centre for Human Rights 2010 Report, [BGD-OTP-0001-4318](#), at 4409.

¹⁰⁸ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5056.

¹⁰⁹ UN High Commissioner for Human Rights report of 11 March 2019, [BGD-OTP-0002-0599](#) at 0603-0604, para. 22.

¹¹⁰ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1784-1799; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0249-0256, paras. 500-530.

¹¹¹ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1801-1821; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0257-0266, paras. 533-540, 544-555, 558-572.

¹¹² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0267-0273, paras. 580-606.

¹¹³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0273-0274, paras. 607-612.

¹¹⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0275, paras. 614-615.

¹¹⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0275-0276, paras. 617-619.

¹¹⁶ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1822-1828.

53. Taking restrictions on movement as an example, Rohingya travelling between townships in Rakhine State require a temporary travel permit.¹¹⁷ In northern Rakhine, Rohingya also require permission to travel from one village to another. This may typically involve a fee¹¹⁸ — which is inconsistent with any potentially legitimate restriction of free movement — and restrictions are enforced through security checkpoints maintained by the *Tatmadaw* and other Security Forces, where Rohingya travellers allegedly face questioning, vehicle searches and harassment.¹¹⁹ In Maungdaw and Buthidaung, curfew orders have been in place since June 2012.¹²⁰ The Advisory Commission on Rakhine State has described the detrimental impact of movement restrictions, “including reduced access to education and health services, strengthened communal segregation, and reduced economic interaction”.¹²¹

2. Waves of violence against the Rohingya and rising incidence of hate speech

(a) *Waves of violence over decades*

54. In addition to discriminatory policies, the Rohingya have been subjected to waves of violence at the hands of the Myanmar authorities, often forcing many to flee Myanmar and take refuge in neighbouring countries, mainly Bangladesh.¹²² In 1978, up to 200,000 Rohingya were allegedly forced to flee Myanmar because of a major military “crackdown”. In 1991-1992, a further 250,000 Rohingya are estimated to have fled “after another campaign of violence by the Myanmar

¹¹⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0249-0250, para. 503; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1785-1786.

¹¹⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0250, para. 508; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1786. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0251, para. 511; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1789.

¹¹⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0251, para. 510; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1788-1789.

¹²⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0251, 0290-0291, paras. 509, 680-684; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1786-1787.

¹²¹ Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5063.

¹²² AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1762. For a “History of Violence and Abuse against Rohingya”, *see* HRW “All you can do is pray” report, [BGD-OTP-0001-1505](#), Appendix I at 1648-1655.

security forces”.¹²³ Anti-Muslim riots across Myanmar in 2001 also affected Rakhine State and again led to the displacement of Rohingya.¹²⁴

55. In 2012, violence allegedly erupted in Rakhine State between Buddhists on the one hand, and Rohingya and other Muslim groups on the other, with a subsequent major escalation of violence in October 2012. Tens of thousands of people, mostly Rohingya, but also ethnic Rakhine, Maramagyi and Kaman, were allegedly displaced;¹²⁵ one estimate suggests that, by July 2013, about 140,000 people (Rohingya, Rakhine, Kaman and Maramagyi) were displaced within Rakhine State as a result of the violence, of which about 95% were allegedly Muslim, and the great majority of them Rohingya.¹²⁶ In addition, “tens of thousands” of Rohingya allegedly fled Myanmar “in rickety boats, seeking asylum in Thailand, Malaysia or Bangladesh”.¹²⁷

56. According to the Final Report of the Inquiry Commission on Sectarian Violence in Rakhine State — established by the then-President of Myanmar in August 2012 — 192 people died in the 2012 violence, more than 265 were injured and 8,614 houses were destroyed.¹²⁸ While the Inquiry Commission’s report is said to contain “fundamental flaws that undermine its credibility”¹²⁹—including a “general anti-Rohingya bias”¹³⁰—and its figures are believed to be “well below the

¹²³ AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2669-2670. *See also* Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5059 (“in both 1978 and 1991, large-scale, heavy-handed government campaigns pushed more than 200,000 Muslims [meaning Rohingyas] across the border into Bangladesh [...].”)

¹²⁴ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1762.

¹²⁵ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1764; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0277-0278, paras. 624-629; HRW “All you can do is pray” report, [BGD-OTP-0001-1505](#) at 1518-1521, 1532-1533; PILPG Report, [BGD-OTP-0001-3307](#) at 3324-3325.

¹²⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0292, para. 689. *See also* HRW “All you can do is pray” report, [BGD-OTP-0001-1505](#) at 1517; PILPG Report, [BGD-OTP-0001-3307](#) at 3324-3325; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1764.

¹²⁷ HRW “All you can do is pray” report, [BGD-OTP-0001-1505](#) at 1559. *See also* PILPG Report, [BGD-OTP-0001-3307](#) at 3325.

¹²⁸ Inquiry Commission Report of July 2013, [BGD-OTP-0002-1214](#) at 1228.

¹²⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0292, para. 688. *See, more specifically,* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0534-0535, para. 1603. *See also* ICG “Dark side of transition” report, [BGD-OTP-0002-1355](#) at 1367.

¹³⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0534, para. 1603.

actual scale of the violence,”¹³¹ the detailed breakdown of these figures still seems to show that Rohingya communities suffered the biggest impact.¹³²

57. The UN FFM concluded that the violence between Rohingya and Rakhine groups in 2012 did not amount to “spontaneous outbursts of hostility”. Rather, these attacks resulted from a “plan to instigate violence and build tensions” which was facilitated and amplified by a hate campaign that had started earlier in the year and intensified significantly after an incident in May 2012 (when an ethnic Rakhine woman was allegedly murdered).¹³³ The UN FFM further stated that it had “reasonable grounds to conclude that the 2012 and 2013 violence in Rakhine State was pre-planned and instigated and that the Myanmar security forces were actively involved and complicit.”¹³⁴ This conclusion finds support in other reporting, to the effect that the violence was systematically planned and coordinated against the Rohingya, with Myanmar “security forces” playing an active role in the violence in some areas and failing to protect the Rohingya in others.¹³⁵

58. In apparent response to the violence, “security forces” separated the Muslim and Buddhist communities, and the Rohingya and other Muslims were moved to displacement camps.¹³⁶ As of July 2018, 128,000 of these people – mainly Rohingya along with a small number of Kaman – still remained in 23

¹³¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0278, para. 628.

¹³² Inquiry Commission Report of July 2013, [BGD-OTP-0002-1214](#) at 1247-1248; ICG “Dark side of transition” report, [BGD-OTP-0002-1355](#) at 1366. For example, of the 8,614 houses allegedly destroyed, 7,422 belonged to Rohingya (Inquiry Commission Report of July 2013, [BGD-OTP-0002-1214](#) at 1247-1248). Note that the report describes Rohingya as “Bengali” (see Inquiry Commission Report of July 2013, [BGD-OTP-0002-1214](#) at 1220).

¹³³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0303, para. 728. See also at 0297-0298, paras. 701-703 (on inciting anti-Rohingya sentiment).

¹³⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0307, para. 747.

¹³⁵ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1764; HRW “All you can do is pray” report, [BGD-OTP-0001-1505](#) at 1558-1560. For detailed allegations, see UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0303-0305, 0307, paras. 729-740, 745-747; and HRW “All you can do is pray” report, [BGD-OTP-0001-1505](#) at 1560-1574.

¹³⁶ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1764.

displacement camps and sites across central Rakhine State.¹³⁷ These persons have remained confined in camps for over six years with severe restrictions on their freedom of movement. Residents are unable to go outside and access is strictly controlled by MPF checkpoints.¹³⁸ The UN Assistant Secretary-General for Humanitarian Affairs described the conditions of these camps as being “beyond the dignity of any people”, without any freedom of movement, access to sufficient food, adequate health care, education or livelihood.¹³⁹ While the Myanmar authorities have committed to closing these camps (according to Minister Win Myat Aye in December 2018), and more permanent housing has been built next to the camps, Rohingya residents remain subject to the same severe restrictions on their basic rights, including freedom of movement.¹⁴⁰

(b) *Context of rising Buddhist nationalism and incidence of hate speech*

59. In recent years, discrimination against the Rohingya may coincide with a wider context of anti-Muslim sentiment and religious intolerance.¹⁴¹ The International Crisis Group (“ICG”) has reported that Buddhist nationalism in Myanmar has become significantly more visible since the start of the political transition in 2011.¹⁴² The UN FFM reported that, since reforms began in 2011, a vocal component of the monkhood has responded to perceived threats to Buddhist culture through increased nationalist and/or anti-Muslim rhetoric.¹⁴³ In a report dated August 2018, Reuters identified “more than 1,000 examples” of “posts, comments, images and videos” then viewable on Facebook attacking the Rohingya or other Muslims, including posts referring to them in extremely

¹³⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0294, para. 691. *See also* AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1764.

¹³⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0252-0256, paras. 517-530; UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0590, para. 17.

¹³⁹ Video interview of 4 April 2018, [BGD-OTP-0002-1082](#) at 00:00:51–00:01:10.

¹⁴⁰ Reuters article of 6 December 2018, [BGD-OTP-0002-0908](#) at 0909-0910.

¹⁴¹ AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2669.

¹⁴² ICG “Buddhism and state power” report, [BGD-OTP-0001-3993](#) at 4002.

¹⁴³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0154, para. 89.

derogatory terms and threatening them with violence. Almost all the material was in the Myanmar language.¹⁴⁴ The ICG has noted that “[n]ewly available telecommunications combined with access to social media accelerated the spread of narratives, rumours (often of sexual violence perpetrated by Muslims against Buddhist women) and hate speech.”¹⁴⁵

60. A campaign of hate and dehumanisation of the Rohingya was reportedly underway for months prior to the 2012 violence in Rakhine State,¹⁴⁶ and the violence in itself reportedly hardened anti-Muslim sentiment and led to increases in Buddhist nationalist hate speech.¹⁴⁷ Thus, according to the UN FFM more recently, “[t]here is no doubt that hate speech against Muslims in general, and Rohingya in particular, is extremely widespread in Myanmar.”¹⁴⁸ The UN FFM’s analysis of documents, publications, statements, Facebook posts and audio-visual materials concluded that a “carefully crafted hate campaign has developed a negative perception of Muslims among the broad population in Myanmar”.¹⁴⁹ The UN FFM found that this campaign was “the work of a few key players: nationalistic political parties and politicians, leading monks, academics, prominent individuals and members of the Government”, who continue to portray the Rohingya and other Muslims as an existential threat to Myanmar and to Buddhism.¹⁵⁰ In the case of the Rohingya, the UN FFM concluded, the campaign has gone a step further: it is accompanied by dehumanising language and the branding of an entire community as “illegal Bengali immigrants.”¹⁵¹

¹⁴⁴ Reuters article of 15 August 2018, [BGD-OTP-0001-0902](#) at 0906.

¹⁴⁵ ICG “Buddhism and state power” report, [BGD-OTP-0001-3993](#) at 4002.

¹⁴⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0449, para. 1302. For further detail, *see* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0276-0300, paras. 636, 701-716.

¹⁴⁷ ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3810.

¹⁴⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0451, para. 1310. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0449, para. 1302.

¹⁴⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0296, para. 696.

¹⁵⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0296, para. 696.

¹⁵¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0296, para. 696.

3. Recent waves of violence and attacks by ARSA

(a) *Formation of ARSA and attacks on security posts in Rakhine State*

61. ARSA emerged following the 2012 violence but first came to public attention in October 2016, when it launched three coordinated attacks on security posts in northern Rakhine State.¹⁵² At that moment, it revealed its (then) official name, *Harakah al-Yaqin* (“the faith movement”).¹⁵³ Detailed open source information about this group is currently limited, so this Request substantially relies upon the analysis offered by the UN FFM report, including of the group’s organisation and structure.¹⁵⁴

62. In March 2017, the organisation reportedly opened a Twitter account, and issued its first public statements, using the English name Arakan Rohingya Salvation Army.¹⁵⁵ These statements reportedly reiterated ARSA’s goal to “defend” the Rohingya and their rights.¹⁵⁶ According to the UN FFM, ARSA has claimed that its target was the *Tatmadaw*, rather than civilians or members of other ethnic groups.¹⁵⁷ Again, according to the UN FFM, ARSA has both military and political wings. The Commander-in-Chief is reportedly known as Ata Ullah¹⁵⁸ although he may also operate under other pseudonyms.¹⁵⁹

63. On 9 October 2016, ARSA allegedly launched three attacks on the BGP headquarters in Kyee Kan Pyin village tract (Maungdaw Township), on the BGP

¹⁵² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0371, para. 1009, at 0384, para. 1069.

¹⁵³ ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3817; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0371, para. 1011.

¹⁵⁴ *See*, on the group’s organisation, structure and resources, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0371-0374, paras. 1009-1028. *See also*, on the group’s training and weaponry, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0375-0376, paras. 1029-1035.

¹⁵⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0371, para. 1012.

¹⁵⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0371-0372, paras. 1012-1013.

¹⁵⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0372, para. 1013.

¹⁵⁸ *See also* ICG reporting that on 16 August 2017 ARSA uploaded a video of Ata Ullah — identified as the Commander-in-Chief — flanked by armed fighters, warning the *Tatmadaw* to demilitarise northern Rakhine State and end abuses of Rohingya (ICG “Dangerous new phase” report, [BGD-OTP-0001-3527](#) at 3535). For the video cited in ICG’s report, *see* ARSA Commander Address of 16 August 2017, [BGD-OTP-0002-1213](#) at 00:00:20-00:00:27, at 00:12:50-00:13:52, at 00:17:38-00:18:38.

¹⁵⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0372, paras. 1015-1016.

camp in Nga Khu Ya (Maungdaw Township) and on a BGP camp in Koe Tan Kauk (Rathedaung Township), killing nine policemen.¹⁶⁰ On the same day, the military and the BGP launched the initial “area clearance operations”, described further below.¹⁶¹ The Government has also alleged that a number of further ARSA attacks involving detonations of improvised explosive devices (“IEDs”) and ambushes of “security force” convoys took place on 12 and 13 November 2016, killing two soldiers.¹⁶²

64. Less than a year later, in the early hours of 25 August 2017, ARSA allegedly launched attacks on some 30 BGP posts and an army base in northern Rakhine State.¹⁶³ The UN FFM reports that a majority of attacks took place in the early hours of 25 August 2017, with a number of reported subsequent attacks on 27 and 28 August 2017.¹⁶⁴ The attacks were carried out by ARSA members, aided by local villagers.¹⁶⁵ The ICG describes the attacks on 25 August as “human wave attacks”, involving potentially “hundreds of people, mostly untrained local villagers armed with farm tools as well as some hand-held and remote-detonated IEDs.”¹⁶⁶ The UN FFM suggested it had “corroborated” evidence of 17 separate attacks — including the attack against the army base — and further referred to “credible information” of an “additional 17 attacks”.¹⁶⁷ While the UN FFM was unable to verify the numbers involved, the Myanmar authorities reportedly originally estimated the number of assailants as ranging from 10 to 20 in some locations, 100

¹⁶⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0376, para. 1036; ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3811.

¹⁶¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0376, para. 1036; at 0384, para. 1069; ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3811-3812.

¹⁶² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0376, para. 1037 (the UN FFM was unable to corroborate these incidents). *See also* ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3814-3815 (referring to clashes between troops and the armed group, and attacks on Government forces, on 12 November 2016).

¹⁶³ ICG “Dangerous new phase” report, [BGD-OTP-0001-3527](#) at 3536; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0377, para. 1038.

¹⁶⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0377, para. 1038.

¹⁶⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0377, para. 1039.

¹⁶⁶ ICG “Dangerous new phase” report, [BGD-OTP-0001-3527](#) at 3536.

¹⁶⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0377, para. 1039.

to 300 in others, and up to 1,000 in relation to the attack on Myin Hlut police station, in Maungdaw Township. The *Tatmadaw's* Investigation Team later referred to between 6,200 and “more than 10,000” ARSA participants on 25 August.¹⁶⁸ The UN FFM noted that the objectives of the ARSA attacks in August 2017 “may not have been military, but aimed at eliciting a response by the *Tatmadaw* (as in October 2016), with the broader goal of drawing renewed global attention to the Rohingya situation.”¹⁶⁹ As further described below, “clearance operations” were launched following these ARSA attacks.¹⁷⁰

65. Allegations that ARSA has committed abuses against both the Rohingya population and other ethnic minority groups in Rakhine State are examined in some detail in the UN FFM report.¹⁷¹ For example, the available information suggests that ARSA committed grave abuses against other ethnic groups in Rakhine State in 2017, including killings and the burning of villages.¹⁷² ARSA is alleged to have perpetrated the massacre of a Hindu community in Kha Maung Seik village tract on 25 August 2017.¹⁷³ However, most of these alleged crimes do not appear to have been committed in part on the territory of Bangladesh or on the territory of another State Party to the Statute, and therefore appear to fall outside the personal and territorial jurisdiction of the Court.

66. As for the allegation that a number of surviving Hindus were taken to Bangladesh by ARSA attackers,¹⁷⁴ the information presently available does not meet the requisite standard under article 53(1)(a) of the Statute. However, in the

¹⁶⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0377, para. 1039. For the *Tatmadaw's* investigation team figures: Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 5; GNLM article of 14 November 2017, [BGD-OTP-0002-0024](#), para. 5. See also AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2671 (estimating ARSA was likely able to mobilise several thousand Rohingya villagers in total).

¹⁶⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0378, para. 1047.

¹⁷⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751.

¹⁷¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0379-0384, paras 1050-1067.

¹⁷² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0309, para. 757, at 0380-0384, paras. 1056-1065.

¹⁷³ AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2661-2662; AI article of 22 May 2018, [BGD-OTP-0001-4043](#) at 4044, 4048; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0381, para. 1059.

¹⁷⁴ AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2661.

event that this Request is granted, the Prosecution will examine any further information and evidence regarding alleged crimes committed by ARSA during the course of its investigation.

(b) *2016 wave of violence*

67. On 9 October 2016, the day of the initial ARSA attacks, the *Tatmadaw* immediately declared the initiation of “clearance operations” across an area between Taungpyoletwa and Maungdaw, in central Maungdaw Township.¹⁷⁵ These further escalated after the alleged subsequent ARSA attacks on 12 November 2016.¹⁷⁶ As described in more detail below,¹⁷⁷ following the initial ARSA attacks, the *Tatmadaw*, jointly with other Security Forces and with some participation of non-Rohingya civilians,¹⁷⁸ allegedly engaged in large-scale and systematic violence — known in this document as the 2016 wave of violence.¹⁷⁹ This wave continued into January or February 2017.¹⁸⁰ As a consequence, an estimated 87,000 Rohingya fled to Bangladesh.¹⁸¹

¹⁷⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384, para. 1069. Among the villages that were allegedly more affected are Boro Gozibil, Keyeari Para/Prang, Zambinnya, Nichapro, Chali Para/Prang, Choto Gozibil, Rabillya and Wabeg, *see* OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0373-0374. *See also* Myanmar Office of President press release, undated “Tatmadaw ends clearance operation”, [BGD-OTP-0002-0020](#); Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453.

¹⁷⁶ ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3814-3815; AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1691-1692. *See above* para. 63.

¹⁷⁷ *See below* paras. 84, 88, 93, 101, 105, 111, 180.

¹⁷⁸ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0347-0349; ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3813; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384, paras. 1069-1070.

¹⁷⁹ ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3814-3815; OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0343, 0345-0346; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384, paras. 1069-1070; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453.

¹⁸⁰ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0344. The Government officially declared the end of the operation on 16 February 2017, *see* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384, para. 1070.

¹⁸¹ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1765; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1383; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453 (claiming that the attacks displaced more than 94,000 Rohingya and more than 74,000 fled to Bangladesh). On 5 January 2017, the International Organisation for migration (“IOM”) reported 65,000 refugees while on 20 January 2017 the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) updated the number to 66,000 (OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342). *See also* in general, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384-0388, paras. 1069-1095

(c) *2017 wave of violence*

68. Following the ARSA attacks on 25 August 2017, the *Tatmadaw* — jointly with other Security Forces and with some participation by non-Rohingya civilians — embarked on another “clearance operation” of Rohingya villages, occurring on an even larger scale.¹⁸² As described in full at section VI below, the *Tatmadaw* — again supported by other Security Forces and non-Rohingya civilians — engaged in violence on a vast scale, known in this document as the 2017 wave of violence and allegedly encompassing: the destruction of hundreds of Rohingya villages; the killing of up to 10,000 Rohingya; the perpetration of rape and other forms of sexual violence; the infliction of serious injuries; and the deportation of over 700,000 Rohingya into Bangladesh.

4. The suffering of displaced Rohingya in Bangladesh and failed agreements to repatriate them

69. As of September 2018, over 1 million Rohingya from Myanmar were living in dire conditions in refugee camps in Bangladesh.¹⁸³ Amongst this population are included over 700,000 Rohingya deported within the context of the 2017 wave of violence,¹⁸⁴ along with an estimated 87,000 Rohingya deported in the context of the 2016 wave of violence.¹⁸⁵ As further described below,¹⁸⁶ refugees in these camps experience substantial physical and mental suffering as a result of

¹⁸² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, paras. 751-752; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2454; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1383-1384; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3415. *See also* PILPG Report, [BGD-OTP-0001-3307](#) at 3326; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1766.

¹⁸³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174.

¹⁸⁴ ISCG situation report of 29 November 2018, [BGD-OTP-0001-0581](#) at 0582; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751; at 0407, para. 1174; at 0505, para. 1489.

¹⁸⁵ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1765; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1383; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453 (claiming that the attacks displaced more than 94,000 Rohingya and more than 74,000 fled to Bangladesh); UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384, para. 1070. On 5 January 2017 IOM reported 65,000 Rohingya refugees from Myanmar crossed into Bangladesh, while on 20 January 2017 OCHA updated the number to 66,000 (OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342).

¹⁸⁶ *See below* paras. 145-147.

overcrowding, disease, lack of hygiene, lack of access to food and clean water, and safety risks including exposure to sexual assault and trafficking in persons.¹⁸⁷

70. Recently displaced Rohingya persons in the refugee camps have informed documenters that they want to repatriate but have no reasonable expectation of being permitted a safe and humane return to Rakhine State.¹⁸⁸ As described below,¹⁸⁹ the Myanmar authorities have allegedly detained and abused those few Rohingya who physically attempted to return,¹⁹⁰ and prevented the return of other Rohingya by destroying their homes and villages, acquiring their land, resettling other ethnicities on that land, and constructing infrastructure and security buildings there.¹⁹¹ The UN FFM and several other observers have concurred — including as recently as March 2019 — that despite signed repatriation agreements, the conditions for a voluntary, safe, dignified, and sustainable return of Rohingya refugees do not exist in Myanmar.¹⁹² This state of affairs appears to be directly linked to the conduct of the Myanmar authorities, as

¹⁸⁷ PILPG Report, [BGD-OTP-0001-3307](#) at 3326; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174; ISCG situation report of 10 January 2019, [BGD-OTP-0002-0843](#) at 0848; House of Commons report, [BGD-OTP-0002-0640](#) at 0676-0677, paras. 64-65; BBC article of 20 March 2018, [BGD-OTP-0002-0624](#) at 0625-0628; HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0755, 0758-0763; UNOCHA Joint Response Plan, [BGD-OTP-0002-0992](#) at 1038; ISCG emergency preparedness and response, [BGD-OTP-0002-0841](#) at 0841. *See also* Xchange report 2018, [BGD-OTP-0002-1465](#) at 1470, 1477 (methodology), 1489-1490.

¹⁸⁸ Xchange report 2018, [BGD-OTP-0002-1465](#) at 1500-1501; PILPG Report, [BGD-OTP-0001-3307](#) at 3326-3327 (interviewees expressed concern about repatriation without guarantees for their safety and basic citizenship rights). *See also* HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0774 (noting that refugees they interviewed all expressed similar conditions for their return).

¹⁸⁹ *See* below paras. 155-167.

¹⁹⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0414, para. 1204; HRW article of 21 August 2018, [BGD-OTP-0002-0809](#) at 0809-0812.

¹⁹¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, para. 1182, at 0416-0436, paras. 1216-1244, at 0490, para. 1425; AI “Remaking Rakhine State” report, [BGD-OTP-0001-2835](#) at 2837-2838, 2857-2858; Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:00:00-00:01:20, 00:02:44-00:04:11, 00:06:03-00:08:35 (*see*, for a version focusing on the text, Reuters article of 18 December 2018 (text), [BGD-OTP-0002-0922](#)); UEHRD, website page of 6 December 2017, [BGD-OTP-0002-1160](#). *See also* UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0560.

¹⁹² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, paras. 1180-1182; UN HRC Res. 39/2 (2018), [BGD-OTP-0001-0612](#) at 0613 (expressing deep concern that despite the signing of repatriation agreements, no displaced Rohingya person has been able to return to Myanmar to date owing to the fact that no visible effort has been made to create a conducive environment for the safe, voluntary, dignified, and sustainable return of displaced Rohingya), at 1345-1346, paras. 13-15; UN Special Rapporteur report of 5 March 2019, [BGD-OTP-0002-0456](#) at 0465, para. 44; ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0819, 0822; HRW article of 15 November 2018, [BGD-OTP-0002-0803](#) at 0805-0806. *See generally* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408-0436, paras. 1180-1244.

opposed to independent factors beyond their control. Indeed, on 13 November 2018, the United Nations Office of the High Commissioner for Human Rights (“OHCHR”) confirmed that it continues to receive reports that the Rohingya who remained in Myanmar continue to suffer harm, including alleged killings, disappearances and arbitrary arrests, in addition to widespread restrictions on the rights to freedom of movement, health, and education.¹⁹³ Similarly, ICG noted, as of 12 November 2018, that no Rohingya refugees had returned through official channels, while some 16,000 additional Rohingya had in fact left Myanmar for Bangladesh in 2018.¹⁹⁴ On 25 January 2019, the UN Special Rapporteur on the situation of human rights in Myanmar (“Myanmar Special Rapporteur”) similarly concluded that the Rohingya cannot return to Myanmar in the near future, based in part on Myanmar’s continued campaign of violence, intimidation and harassment.¹⁹⁵

71. Although Myanmar and Bangladesh have signed a repatriation agreement regarding the displaced Rohingya, Pre-Trial Chamber I has already noted the potential difficulties in its implementation, as well as that of the Memorandum of Understanding (“MoU”) concluded by the United Nations Development Program (“UNDP”) and the United Nations High Commissioner for Refugees (“UNHCR”).¹⁹⁶ As of July 2018, Myanmar had verified only 1,387 of the names of

¹⁹³ OHCHR press release of 13 November 2018, [BGD-OTP-0002-0883](#) at 0884. The OHCHR also warned the Government of Bangladesh that returning refugees to Myanmar in these circumstances would put their lives and freedom at serious risk, contrary to the core principle of *non-refoulement*.

¹⁹⁴ ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0819.

¹⁹⁵ UN Special Rapporteur end of mission statement of 25 January 2019, [BGD-OTP-0002-0977](#) at 0980.

¹⁹⁶ [Jurisdiction Decision](#), fns. 52, 121. On 23 November 2017, the Governments of Bangladesh and Myanmar signed an agreement concerning “the repatriation of residents of Rakhine State who have crossed over to Bangladesh after 9 October 2016 and 25 August 2017” (Arrangement on return between Bangladesh and Myanmar, [BGD-OTP-0002-0050](#) at 0051). In January 2018 – by when the repatriations were supposed to have started (UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0409, para. 1183; ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0819), the Governments of Bangladesh and Myanmar signed a “Physical Arrangement” to facilitate the return of the Rohingya, and allegedly stated that repatriation would “preferably be complete within six months” (UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0588, para. 11). At a meeting with Security Council members on 1 May 2018 – as reported in a Press Release issued that day by the Ministry of the Office of the State Counsellor – State Counsellor Daw Aung San Suu Kyi, discussing the situation in Rakhine State, said that the “basis for return must be that it is safe, dignified, and voluntary” (Myanmar State Counsellor Office press release of 1 May 2018, [BGD-OTP-0002-0025](#)). On 31

8,032 Rohingya provided by the Government of Bangladesh for verification and return. The refugees included on these lists were not consulted on the process and had not applied for voluntary return to Myanmar,¹⁹⁷ and ultimately were not repatriated.¹⁹⁸ In the Prosecution's submission, the failure of the repatriation process may be relevant to assessing the nature and cause of the obstacles to the timely return of the Rohingya displaced persons, and any related criminal liability, as discussed in further detail below.¹⁹⁹

VI. JURISDICTION

72. On the basis of article 53(1)(a), the first criterion to be examined is whether the information available “provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”.

73. By its Jurisdiction Decision on 6 September 2018, Pre-Trial Chamber I decided that the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute “if *at least one element of a crime* within the jurisdiction of the Court [...] is committed on the territory of a State Party to the Statute.”²⁰⁰

74. Pursuant to regulation 49 of the Regulations, the Prosecution therefore provides the following information referring to crimes within the jurisdiction of the Court

May 2018, the Ministry of Labour, Immigration, and Population of the Government of Myanmar agreed a confidential MoU with the UNDP and UNHCR “to establish a framework for cooperation aimed at creating the conditions conducive to the voluntary, safe, dignified and sustainable repatriation of Rohingya refugees to their places of origin or of their choosing” (UNHCR Press Release of 31 May 2018, [BGD-OTP-0002-0983](#)). The MoU between the Government of Myanmar, UNDP and UNHCR was apparently extended for one year following an exchange of letters signed on behalf of all parties on 27 May 2019 (UNDP Press Release of 28 May 2019, [BGD-OTP-0001-5175](#)).

¹⁹⁷ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0588-0589, para. 12.

¹⁹⁸ UN HRC Res. 39/2 (2018), [BGD-OTP-0001-0612](#) at 0613 (expressing deep concern that despite the signing of repatriation agreements, no displaced Rohingya person has been able to return to Myanmar to date owing to the fact that no visible effort has been made to create a conducive environment for the safe, voluntary, dignified, and sustainable return of displaced Rohingya), at 1345-1346, paras. 13-15; ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0819; UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0588-0589, paras. 11-12.

¹⁹⁹ See below paras. 142-170.

²⁰⁰ [Jurisdiction Decision](#), para. 72 (emphasis added). See also para. 64

which are believed to have been, or to continue to be, committed partially on the territory of Bangladesh. The alleged facts provide a reasonable basis for this belief. The Prosecution also refers for this purpose to the Indicative List of Incidents (confidential *ex parte* Annex 5) occurring within the context of the 2017 wave of violence. As previously explained,²⁰¹ the Prosecution's analysis for the purpose of article 53(1) is focused on events occurring in the context of the 2017 wave of violence. Information concerning events occurring in the context of the 2016 wave of violence is described in order to support the broader narrative and to show the relationship between the two waves of violence.

A. Alleged crimes within the jurisdiction of the Court committed in the context of the 2017 wave of violence

75. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, there is a reasonable basis to believe that the following crimes against humanity were committed in the context of the 2017 wave of violence: (1) deportation under article 7(1)(d); (2) other inhumane acts under article 7(1)(k), namely, the infliction of great suffering or serious injury by means of intentional and severe violations (colloquially, violation or deprivation) of the customary international law right of displaced persons to return safely and humanely to the State of origin with which they have a sufficiently close connection (colloquially, right to return); and (3) persecution on ethnic and/or religious grounds under article 7(1)(h) by means of deportation and violation of the right to return.

²⁰¹ See above, paras. 20-21.

1. Places of alleged commission of the crimes

76. The crimes identified as falling under the Court’s jurisdiction for the purpose of the Pre-Trial Chamber’s assessment under articles 15(4) and 53(1) — deportation, other inhumane acts, and persecution under article 7 of the Statute — were committed in part on the territory of Myanmar and in part on the territory of Bangladesh, in the context of the 2017 wave of violence.²⁰²

77. The 2017 wave of violence allegedly took place across hundreds of villages throughout the townships of Rathedaung, Buthidaung and Maungdaw in northern Rakhine State,²⁰³ and encompassed the coercion of Rohingya persons from those locations to cross into Bangladesh. This cross-border conduct forms the basis for the identified crimes of deportation and persecution by means of deportation.

78. Steps to secure and consolidate the expulsion of the recently displaced Rohingya people by unlawfully preventing the effective exercise of their right to return were likewise taken on the territory of Myanmar, causing further grave harm to displaced Rohingya persons on the territory of Bangladesh. This cross-border conduct forms the basis for the identified crimes of other inhumane acts and persecution by means of violation of the right to return.

2. Time period of alleged commission of the crimes

79. The crimes identified in the context of the 2017 wave of violence — deportation, other inhumane acts, and persecution — appear to have commenced on or about 25 August 2017, when the *Tatmadaw* and others commenced the “clearance operations”, and to have continued to occur at varying levels of intensity until at least March 2018 or later.

²⁰² See for e.g. Indicative List of Incidents at confidential *ex parte* Annex 5.

²⁰³ See UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751.

80. Acts of violence seem to have peaked in the four weeks immediately following the start of the “clearance operations” until approximately 24 September 2017.²⁰⁴ While the Government of Myanmar claimed the “clearance operations” were completed on 5 September 2017,²⁰⁵ numerous violent acts continued to be reported thereafter. This suggests a sustained engagement beyond the official end-date of the operations, even if at lower levels of intensity.²⁰⁶

81. Likewise, while conduct to prevent the effective exercise of displaced Rohingya persons’ right to return — which in turn occasioned their great suffering or serious injury — may have commenced as part of the 2017 wave of violence, it extended beyond it. The burning and demolishing of Rohingya houses and structures continued until at least March 2018.²⁰⁷ However, other relevant conduct, such as the resettlement of other ethnicities onto land formally occupied by displaced Rohingya persons, appears to have continued thereafter.²⁰⁸

3. Persons or groups involved

82. The available information indicates that the crimes identified in the context of the 2017 wave of violence were primarily committed by members of the *Tatmadaw*, jointly with other Security Forces (namely the BGP and/or MPF), and with some participation in the field by civilians (mainly Rakhine civilians and to a lesser extent civilians from other minority ethnic groups, collectively “non-Rohingya

²⁰⁴ US Department of State Report, [BGD-OTP-0001-1226](#) at 1228, 1230, 1232 (the majority of the attacks and three-quarters of the reported killings by the refugees surveyed occurred between August and October 2017); MSF data show that the vast majority (84.8%) of those who reported violence said that it occurred in between 25 August and 24 September 2017. See MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3418, 3420-3421.

²⁰⁵ See UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751. See also Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 8 (“[e]ngagements and fights happened in the incidents of Rakhine State during 12 days only from 25 August 2017 to 5 September”).

²⁰⁶ AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2660. See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751, at 0342, para. 915; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2528-2529, fn. 564.

²⁰⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0354, para. 960; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0544, 0560.

²⁰⁸ See below paras. 157-167.

civilians”).²⁰⁹ At least 27 Myanmar army battalions, comprising up to 11,000 soldiers, and 3 police combat battalions, comprising an estimated 900 police, were involved in the 2017 wave of violence in northern Rakhine State.²¹⁰

83. Other Myanmar authorities may also be implicated in the crimes of other inhumane acts and persecution (based on violation of the right of Rohingya persons to return to Myanmar), in the context of the 2017 wave of violence.²¹¹

4. Allegations of additional crimes committed in the context of the 2016 wave of violence falling within the jurisdiction of the Court.

84. Although the 2016 wave of violence is less documented than the 2017 wave of violence, the available information suggests that the *Tatmadaw*, jointly with other Security Forces and with some participation of non-Rohingya civilians, had in 2016 likewise committed the crimes against humanity of deportation under article 7(1)(d) and persecution through deportation under article 7(1)(h).²¹² While the Prosecution does not consider it necessary to frame incidents related to the 2016 wave of violence as potential cases at this time, the striking similarities between the two most recent waves of violence demonstrate that the events surrounding the 2016 wave of violence are sufficiently linked to the events surrounding the 2017 wave of violence to be included in the geographical and temporal parameters of the requested investigation.

²⁰⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0437, para. 1245, at 0439, paras. 1255-1258, at 0513, para. 1521. *See also* AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2802-2814; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2545-2547; HRW “All of my body was pain” report, [BGD-OTP-0001-1437](#) at 1445-1448; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1384; PILPG Report, [BGD-OTP-0001-3307](#) at 3315 (covering the period 2012-2017).

²¹⁰ Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2545.

²¹¹ *See below* paras. 156-167.

²¹² For similar conclusions, *see for e.g.* AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1720.

B. Legal characterisation of the crimes falling within the jurisdiction of the Court

85. The available information provides a reasonable basis to believe that the following crimes against humanity were committed, in part on the territory of Bangladesh, in the context of the 2017 wave of violence: (1) deportation under article 7(1)(d); (2) other inhumane acts under article 7(1)(k), namely, the infliction of great suffering or serious injury by means of intentional and severe violations of the customary international law right of displaced persons to return safely and humanely to the State of origin with which they have a sufficiently close connection; and (3) persecution on ethnic and/or religious grounds under article 7(1)(h), by means of deportation and violation of the right to return.

86. These findings are without prejudice to the possible identification of other crimes which may arise from the authorised investigation.

1. Deportation

87. The available information provides a reasonable basis to believe that the crime against humanity of deportation under article 7(1)(d) formed part of the 2017 wave of violence. In particular, by means of a range of coercive acts,²¹³ members of the *Tatmadaw* and others forcibly displaced at least 700,000 Rohingya from Myanmar, where they were lawfully present,²¹⁴ into Bangladesh. The coercive acts included: killings; rapes and other forms of sexual violence; acts of physical and psychological violence intentionally causing great suffering, or serious injury to

²¹³ See [Rome Statute](#), articles 7(1)(d), 7(2)(d); [Elements of Crimes](#), article 7(1)(d), fn. 12 (the requirement for displacement to be “forcible” does not mean it is “restricted to physical force” but rather “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”). See also [Karadžić AJ](#), para. 585 (reaffirming that it is not necessarily required for a trial chamber to establish that the accused intended the *specific* acts of coercion, provided they nonetheless shared the intent to displace). See further [Jurisdiction Decision](#), para. 61 (“various types of conduct may, if established to the relevant threshold, qualify as ‘expulsion or other coercive acts’ for the purposes of the crime against humanity of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting”).

²¹⁴ [Elements of Crimes](#), article 7(1)(d), paras. 1-3. See also article 7(2)(d) of the [Rome Statute](#).

body or to mental or physical health; and the destruction of property including homes, livestock and entire villages.²¹⁵ The victims' departure to Bangladesh was not the result of a genuine choice.²¹⁶ Rather, the available information indicates that the Rohingya were forced to leave their places of residence as a result of the coercive acts.²¹⁷

88. As discussed above,²¹⁸ the available information shows striking similarities between the 2017 and the 2016 waves of violence. The information reviewed suggests that in the context of the 2016 wave of violence members of the *Tatmadaw* and other Security Forces, with some participation of non-Rohingya civilians, committed the crime against humanity of deportation under article 7(1)(d), through a range of coercive acts forcing Rohingya to flee.²¹⁹ As a result, an estimated 87,000 Rohingya fled to Bangladesh.²²⁰ The Rohingya were lawfully present on the territory of Myanmar in 2016 (for the same reasons analysed in relation to the 2017 wave of violence),²²¹ and there is no indication at this stage suggesting that their displacement was permissible under international law.

²¹⁵ See below section VI. B. 1. (a)

²¹⁶ See [Karadžić TJ vol.I](#), para. 489.

²¹⁷ See [Ruto CD](#), para. 245 (suggesting that deportation requires a causal link between the conduct of the perpetrator and the victims' departure from the place where they were lawfully present and then crossing an international border).

²¹⁸ See above para. 84.

²¹⁹ For a similar conclusion see for e.g. OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0378-0379 ("The information gathered by OHCHR raises serious concerns that what is occurring in [Northern Rakhine State] is the result of a 'purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group for certain geographic areas'").

²²⁰ AI "Caged without a roof" report, [BGD-OTP-0001-1743](#) at 1765; HRW, "Massacre by the river" report, [BGD-OTP-0001-1375](#) at 1383. On 5 January 2017, IOM reported 65,000 refugees while on 20 January 2017 OCHA updated the number to 66,000 (OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342, fn 7). See also in general, UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0384-0389, paras. 1069-1095; Fortify Rights, "They gave them long swords" report, [BGD-OTP-0001-2415](#) at 2453 (claiming that the attacks displaced more than 94,000 Rohingya and more than 74,000 fled to Bangladesh). Before reaching Bangladesh, many reported having been first internally displaced – moving between villages trying to avoid "Myanmar security forces" heavily present in the area. As of 20 January 2017, OCHA estimated that there were around 22,000 internally displaced persons (see OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342-0343, fn. 8; UNFMM detailed report, [BGD-OTP-0001-0129](#) at 1069-1095).

²²¹ See below section VI. B. 1. (d)

(a) *The coercive acts that forcibly displaced the Rohingya*

(i) Killings

89. Most unlawful killings occurred in the initial weeks of the 2017 wave of violence.²²² A “conservative” estimate suggests that up to 10,000 Rohingya were killed.²²³ Based on other estimates reviewed by the UN FFM, the total scale of victimisation is likely to be higher.²²⁴

90. Unlawful killings took many forms,²²⁵ including large-scale massacres and extrajudicial executions, shooting of people as they tried to flee and the burning of people within their homes.²²⁶ Victims were killed both in their homes and villages, and during their flight to Bangladesh.²²⁷ While many victims reportedly died of gunshot wounds,²²⁸ perpetrators also reportedly used knives and swords, including by beheading or slitting victims’ throats.²²⁹ Other victims were beaten to death.²³⁰ In some cases, victims were first shot at by members of the *Tatmadaw* or

²²² US Department of State Report, [BGD-OTP-0001-1226](#) at 1228, 1230, 1232. MSF data show that at least 21.5% of the recently displaced population experienced violence between 25 August and 24 September 2017, and that the vast majority (84.8%) of violent events experienced in Myanmar by recently arrived refugees happened during this period. See MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3420-3421.

²²³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0370-0371, paras. 1005-1008, at 0504, para. 1482. See also MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3415, fn. 6; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2708. See in general UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0343, paras. 884-919.

²²⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0370-0371, paras. 1007-1008, at 0504, para. 1482. See also Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2511.

²²⁵ MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3419.

²²⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0341, paras. 884-911; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2707-2735, especially at 2708.

²²⁷ MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3420; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0339, paras. 900-901. Some available information suggests that murders might have been committed across the border, potentially triggering the Court’s jurisdiction over these crimes. However, the information is insufficient to meet the article 53(1) standard. This assessment remains subject to review in light of any new information and evidence gathered during any authorised investigation.

²²⁸ MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3419, 3421-3422. For instance, MSF reported that of the estimated 730 children under the age of 5 killed between 25 August and 24 September 2017, 59.1% were shot: MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3427. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0337, paras. 884, 892.

²²⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0338, para. 896; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3419-3420; PILPG Report, [BGD-OTP-0001-3307](#) at 3368.

²³⁰ See for e.g. MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3419; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0314, para. 774.

other Security Forces, then attacked by non-Rohingya civilians using long knives or machetes.²³¹

91. Mass killings allegedly occurred in several villages, including Chut Pyin, Maung Nu, Gu Dar Pyin, and in Koe Tan Kauk village tract.²³² One of the largest documented massacres occurred on 30 August 2017 in the village of Min Gyi (Tula Toli) in Maungdaw Township,²³³ where *Tatmadaw* soldiers and others shot, stabbed, slit across the throat by knife, beat to death, drowned and burned at least 750 Rohingya people, including children.²³⁴ It was reported that about 70 soldiers fired repeatedly at the villagers, including women and children, until “[a]lmost everyone died”.²³⁵ Some small children were reportedly thrown into the river.²³⁶

92. Victims of killings included members of the Rohingya community such as children, women and the elderly.²³⁷ Children are reported to have been killed after being “grabb[ed]” from their mothers’ arms.²³⁸ *Médecins sans Frontières* (“MSF”) estimates that at least 730 children under the age of 5 were killed between 25 August and 24 September 2017, of which: 59.1% were shot, 14.8% burned to death and 6.9% beaten to death.²³⁹ The burning of villages, in particular,

²³¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0338, para. 897; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2470.

²³² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0318, para. 796 (Chut Pyin), at 0322, para. 815 (Maung Nu), at 0326, para. 833 (Gu Dar Pyin), at 0328, para. 843 (Koe Tan Kauk village tract); Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2469-2471 (referring to Chut Pyin, Tula Toli and Maung Nu).

²³³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0314, para. 774.

²³⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0309-0314, paras. 756-778, especially at 0314, para. 774; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2476-2477. See also generally, HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#).

²³⁵ Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2477. See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0311, paras. 766-770.

²³⁶ Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2477.

²³⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0348-0350, paras. 942-948; US Department of State Report, [BGD-OTP-0001-1226](#) at 1238-1239 (covering 2016 and 2017 waves of violence).

²³⁸ HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1397; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0312, para. 770; US Department of State Report, [BGD-OTP-0001-1226](#) at 1238 (covering 2016 and 2017 waves of violence, but stating that “[m]ost of these events occurred in August and September 2017”).

²³⁹ MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3427. MSF does not provide information regarding the cause of death of the remaining 19.2% of children who were killed.

disproportionately affected children, who were often sleeping, too slow and/or too frightened to leave.²⁴⁰

93. The conduct described above is similarly reflected in the context of the 2016 wave of violence. Within this context, witnesses allegedly reported that, during security sweeps, members of the *Tatmadaw* fired indiscriminately at civilians, including vulnerable members of the Rohingya group, such as children.²⁴¹ Perpetrators allegedly used firearms, grenades and, on some occasions, helicopters to fire bullets and drop grenades.²⁴² On other occasions, the attackers allegedly targeted and shot at close range influential and respected members of the Rohingya community, such as teachers, imams, scholars and community leaders.²⁴³ The information reviewed by the Prosecution indicates that, in some instances, victims were also stabbed, burned or beaten to death.²⁴⁴

(ii) Rape and other forms of sexual violence

94. The available information provides reasonable grounds to believe that rape and other forms of sexual violence were committed against Rohingya victims on a massive scale during the 2017 wave of violence, across the three townships of northern Rakhine State.²⁴⁵ The Indicative List of Incidents describes incidents committed in eight villages in Buthidaung, Rathedaung and Maungdaw townships.²⁴⁶ The Inter-Sector Coordination Group (“ISCG”) reported 6,097

²⁴⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0349, para. 946.

²⁴¹ AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1682, 1691; OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0350-0352, 0354-0355; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384-0387, paras. 1070, 1078, 1084-1085, 1087-1088; ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3815.

²⁴² OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0350-0352, 0375; AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1692-1694, 1702.

²⁴³ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0351-0352, 0365.

²⁴⁴ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0352-0355, 0363, 0375-0376.

²⁴⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343-0348, paras. 920-941 (*especially* at 0343, para. 920, at 0346, para. 932, at 0348, para. 941), at 0477, para. 1372; HRW “All of my body was pain” report, [BGD-OTP-0001-1437](#) at 1446 (and in general); MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3428-3429; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2736-2744, *especially* at 2737. *See in general Amici Curiae Observations.*

²⁴⁶ *See confidential ex parte* Annex 5.

incidents of gender-based violence since August 2017, including sexual violence.²⁴⁷

95. Several organisations have described the very extensive use of rape and other sexual violence, especially between 25 August and mid-September 2017.²⁴⁸ The available information suggests that this was a way to punish, humiliate, dehumanise, and terrorise victims, their families and their communities, and force them to leave their homes and villages.²⁴⁹

96. The main victims of rape and other forms of sexual violence were female, including pregnant women and girls as young as seven.²⁵⁰ However, the available information also shows that men and boys were subjected to rape and other forms of sexual violence, including genital mutilation, in the context of the 2017 wave of violence.²⁵¹

97. Numerous victims reported sexual violence by multiple perpetrators, with gang-rape being documented throughout northern Rakhine State.²⁵² In the Indicative List of Incidents at confidential *ex parte* Annex 5, the Prosecution describes incidents of gang-rape in several villages between 25 and 30 August 2017.²⁵³ In the village of Min Gyi (Tula Toli), members of the *Tatmadaw* allegedly took women and girls in groups to some larger houses in the village where they were beaten,

²⁴⁷ ISCG situation report of 25 March 2018, [BGD-OTP-0001-1354](#) at 1365.

²⁴⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 920, at 0477, para. 1372; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3428-3429.

²⁴⁹ SRSG statement of 12 December 2017, [BGD-OTP-0001-0619](#) at 0620-0621; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0348, para. 941, at 0477-0478, paras. 1372, 1374 (covering Rakhine, Kachin and Shan States since at least 2011); AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2744.

²⁵⁰ PILPG Report, [BGD-OTP-0001-3307](#) at 3354-3359 (*especially* at 3356, 3359); UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343-0348, paras. 920-938, 941 (*especially* at 0343, para. 920), at 0477, para. 1372.

²⁵¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 920, at 0348, paras. 939-940. *See also* PILPG Report, [BGD-OTP-0001-3307](#) at 3368. According to Women's Refugee Commission (“WRC”), 107 of 824 Rohingya refugee men and boys surveyed in September and October 2017 reported witnessing or experiencing sexual abuse. WRC report, [BGD-OTP-0001-3443](#) at 3462.

²⁵² MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3428-3429; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 921; PILPG Report, [BGD-OTP-0001-3307](#) at 3356. *See also* AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2743, reporting sexual violence during the flight to Bangladesh.

²⁵³ *See also* confidential *ex parte* Annex 5.

raped, and in many cases subsequently killed.²⁵⁴ In general, a large number of rape victims were allegedly killed after being raped, by having their throats slit or being burned to death, or died from injuries, including as a consequence of gang-rape.²⁵⁵

98. Rapes were often committed in public spaces such as schools, mosques, yards, or forested areas, in front of relatives of the victim(s) or the wider community, and victims left without clothes or with torn clothes, conscious or unconscious.²⁵⁶ It has been reported that women and girls were systematically abducted and in many cases detained in military and police compounds, where they were raped or gang-raped.²⁵⁷

99. Rape was often accompanied by other acts of violence, including biting, beating, kicking, punching, and invasive body searches.²⁵⁸ Personal valuables, such as jewellery and money, were reportedly taken from victims prior to the violence in numerous cases.²⁵⁹

100. Victims were often marked by deep bites, and some victims suffered serious injuries to reproductive organs, including from rape with knives and sticks.²⁶⁰ Many sources documented the recurrent mutilation of women's breasts and

²⁵⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0310, para. 761, 0312-0313, paras. 771-772.

²⁵⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0345, para. 927, at 0347, para. 934, at 0477, para. 1372. MSF "No one was left" report, [BGD-OTP-0001-3412](#) at 3429. MSF data indicates that at least 2.6% of women and girls died after or as a result of sexual violence in the month following the outbreak of the 2017 wave of violence: MSF "No one was left" report, [BGD-OTP-0001-3412](#) at 3429.

²⁵⁶ PILPG Report, [BGD-OTP-0001-3307](#) at 3356; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 921, at 0344-0345, paras. 925, 928; MSF "No one was left" report, [BGD-OTP-0001-3412](#) at 3429.

²⁵⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 921, at 0346, para. 929, at 0350, para. 951. *See also* AI "We will destroy everything" report, [BGD-OTP-0001-2649](#) at 2743-2744; Kaladan Press Network ("KPN") Rape by Command report, [BGD-OTP-0001-0695](#) at 0704, 0728-0729.

²⁵⁸ HRW "Massacre by the river" report, [BGD-OTP-0001-1375](#) at 1405; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0344-0345, paras. 925-926, at 0477, para. 1372; AI "We will destroy everything" report, [BGD-OTP-0001-2649](#) at 2737; PILPG Report, [BGD-OTP-0001-3307](#) at 3358.

²⁵⁹ *See for e.g.* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0312-0313, para. 772; AI "We will destroy everything" report, [BGD-OTP-0001-2649](#) at 2740.

²⁶⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0345, paras. 926-927; PILPG Report, [BGD-OTP-0001-3307](#) at 3357; OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0042.

genitals after rape.²⁶¹ Rohingya refugees provided accounts of soldiers killing pregnant women by slashing their stomachs open, including ripping out the foetus.²⁶² In several instances, victims also allegedly witnessed the murder of their young children before being abused.²⁶³ Children were also victims of sexual violence, some as young as seven years old.²⁶⁴

101. The conduct described above, is similarly reflected in the context of the 2016 wave of violence. Consistent information indicates that members of the *Tatmadaw* (and, to a more limited extent, members of other Security Forces and non-Rohingya civilians) committed rape and other forms of sexual violence against Rohingya women (including pregnant women) and girls.²⁶⁵ Most of the victims reported having been raped by more than one perpetrator.²⁶⁶ In some cases, the *Tatmadaw* rounded up women and girls, took several of them to nearby common spaces (such as schools, mosques or forest) and gang-raped them.²⁶⁷ Other forms of sexual violence were committed frequently — particularly during invasive body searches conducted in public during round-ups²⁶⁸ — and included forcing the victims to remain naked in front of other villagers.²⁶⁹

²⁶¹ See among others UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0477, para. 1372 (covering the 2016 and 2017 waves of violence); Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2482 (referring to post-rape body mutilation); PILPG Report, [BGD-OTP-0001-3307](#) at 3357, 3359, 3368; OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0042.

²⁶² PILPG Report, [BGD-OTP-0001-3307](#) at 3358-3359; OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0042.

²⁶³ HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1400-1408; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0344, para. 924, at 0345, para. 928.

²⁶⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0350, para. 951.

²⁶⁵ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0356-0361, 0364; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0386-0388, paras. 1079, 1091-1095; AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1698-1699.

²⁶⁶ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0357-0358; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0387-0388, paras. 1091-1092, 1094.

²⁶⁷ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0357-0358.

²⁶⁸ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0360-0361; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0388, para. 1095; AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1699.

²⁶⁹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0364.

(iii) Acts of physical and psychological violence causing great suffering or serious injury to body or to mental or physical health

102. The available information indicates that the 2017 wave of violence also saw the intentional infliction of acts causing great suffering, or serious injury to body or to mental or physical health, even rising to the level of other inhumane acts under article 7(1)(k).²⁷⁰ It is reported that such acts causing great suffering or serious physical injury were frequently associated with the killings, rapes and other sexual violence discussed above.²⁷¹

103. Although there is no consolidated data available regarding the number of victims who were treated for serious wounds upon their arrival in Bangladesh, or the physical injuries that they suffered,²⁷² many public and private clinics and hospitals in Bangladesh recorded large numbers of Rohingya patients — including women, children and elderly — with violence-related injuries.²⁷³ The information suggests that grave injuries were caused, *inter alia*, by gunshots, beatings, land-mine explosions, burnings, and bladed weapons.²⁷⁴ Beatings, mistreatment and mutilations, in this context, included the gouging of eyes, and the cutting out of tongues.²⁷⁵ The available information suggests that many were seriously injured by shootings, in particular.²⁷⁶

²⁷⁰ See for e.g. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0342-0343, paras. 915-919.

²⁷¹ See for e.g. Section VI. B. 1. (a) (i) VI. B. 1. (a) (ii)

²⁷² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 919.

²⁷³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0342-0343, paras. 915, 918, at 0350, para. 950; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3436.

²⁷⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0341-0343, paras. 912-913, 916-919; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3416, 3422.

²⁷⁵ PILPG Report, [BGD-OTP-0001-3307](#) at 3368; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0338, para. 896, at 0340-0341, para. 904, at 0344, para. 925.

²⁷⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0336, paras. 884-885, 888, at 0342-0343, paras. 917-919; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3422-3423.

104. Victims were also forced to witness the commission of serious violent crimes (such as killings and rapes) against close relatives, including children and/or parents,²⁷⁷ occasioning great suffering or serious injury to mental health.

105. The conduct described above is similarly reflected in the context of the 2016 wave of violence, during which members of the *Tatmadaw* and other Security Forces subjected hundreds of Rohingya men, women and children to beatings and other treatment, causing great suffering or serious injury to body or to mental or physical health.²⁷⁸ It is alleged that mass beatings took place during round-ups, including with sticks, gun butts, metal rods and slingshots. Many victims reported being stabbed.²⁷⁹ Victims were systematically forced to sit in a stress position — in some cases for several hours and without food or water.²⁸⁰ On some occasions, perpetrators forced victims to watch their family members suffer acts of violence.²⁸¹ Some of the victims were allegedly beaten to obtain information regarding the presence of “insurgents”; others were beaten for the reason alone that they were Rohingya. The victims of beatings were frequently threatened with death and told to leave Myanmar because they did not belong to the country.²⁸²

(iv) Destruction of property

106. The available information indicates that the *Tatmadaw* and other Security Forces with some participation of non-Rohingya civilians, engaged in the deliberate, organised and targeted burning and destruction of Rohingya’s

²⁷⁷ See for e.g. para. 98. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0336-0338, paras. 894, 896, at 0349, para. 943; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2559-2560; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3422, 3429.

²⁷⁸ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0354-0355, 0361-0364, 0372. In particular regarding beatings of children see OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0363. Victims allegedly included the elderly, physical disabled persons and pregnant women, see OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0363.

²⁷⁹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0362-0363.

²⁸⁰ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0363-0364.

²⁸¹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0364.

²⁸² OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0361, 0363.

property, crops, livestock, and homes — at times destroying entire villages to force the population into Bangladesh.²⁸³

107. The United Nations Institute for Training and Research – Operational Satellite Applications Program (“UNOSAT”),²⁸⁴ analysed satellite imagery at the request of the UN FFM.²⁸⁵ UNOSAT concluded that imagery for the period spanning August 2017 through March 2018 indicates “clearly identifiable widespread destruction, debris clearing and construction patterns” across the townships of Maungdaw, Buthidaung, and Rathedaung.²⁸⁶ At least 392 villages, corresponding to more than 40% of all villages in northern Rakhine State, had been partially (214 villages) or totally (178 villages) destroyed.²⁸⁷ 277 destroyed villages (over 70% of the destroyed villages) were located in Maungdaw Township, where the majority of the Rohingya population in northern Rakhine State resided.²⁸⁸ A conservative estimate indicates that at least 37,700 structures were destroyed including homes, religious schools (*madrassas*), marketplaces, and mosques.²⁸⁹

108. While much of the destruction took place before 16 September 2017, it continued until at least March 2018.²⁹⁰ UNOSAT concluded that during the initial

²⁸³ See Annex 6, Maps showing the destruction of villages in northern Rakhine State; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751, at 0352, para. 959; PILPG Report, [BGD-OTP-0001-3307](#) at 3363-3365; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2760-2771; OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0036.

²⁸⁴ See UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0538.

²⁸⁵ See UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0538-0542, discussing the data and methodology adopted, including satellite image analysis, fire direction data analysis, settlement locations and estimation of the destroyed structures.

²⁸⁶ See UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0560.

²⁸⁷ See Annex 6, Maps showing the destruction of villages in northern Rakhine State; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0543; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751, at 0352, para. 959. See also HRW’s analysis of satellite imagery and their findings that as of December 2017, more than 354 villages were partially or totally destroyed in northern Rakhine State since 25 August 2017: HRW article of 17 December 2017, [BGD-OTP-0001-1418](#) at 1418.

²⁸⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0352, para. 959; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0543.

²⁸⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0354, para. 960; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0543-0544, 0560. See also US Department of State Report, [BGD-OTP-0001-1226](#) at 1235-1236.

²⁹⁰ UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0544, 0560. Based on image collection later in April 2018, UNOSAT concluded that destruction operations were still ongoing: UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0546, 0560.

“wave of destruction” between 25 August and 16 September 2017, the damage was mostly caused by fire, while in the subsequent months (especially after November 2017) the pattern of destruction was progressive and caused either by fire or by more organised forms of demolition.²⁹¹

109. The satellite imagery analysis is supported by witness accounts. Mosques and *madrassas* were often burned first, but shops, fields, rice paddies, food-stock, crops, livestock, and even trees were also destroyed.²⁹² Usually the destruction was carried out by *Tatmadaw* soldiers or members of other Security Forces either manually with petrol or with flamethrowers (hand-held or shoulder-mounted weapons, described by most victims as “launchers”).²⁹³ Non-Rohingya civilians reportedly participated in the destruction, including by carrying petrol tanks used by the soldiers.²⁹⁴

110. The available information shows that the attackers specifically targeted Rohingya-populated areas, whereas adjacent or nearby non-Rohingya settlements were left unscathed.²⁹⁵ In mixed-ethnicity villages, such as in Inn Din or Min Gyi, only areas populated by the Rohingya were targeted, with non-Muslim areas remaining unaffected.²⁹⁶ The specific targeting of the Rohingya population in those areas, and the link with deportation, is further confirmed by reports of *Tatmadaw* soldiers allegedly using megaphones to force the Rohingya population to leave by announcing: “You do not belong here—go to Bangladesh. If you do

²⁹¹ UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0544.

²⁹² PILPG Report, [BGD-OTP-0001-3307](#) at 3363-3364; OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0036.

²⁹³ OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0039; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0309-0310, para. 758, fn. 1624; PILPG Report, [BGD-OTP-0001-3307](#) at 3364.

²⁹⁴ PILPG Report, [BGD-OTP-0001-3307](#) at 3364. *See for e.g.* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0324, para. 822.

²⁹⁵ PILPG Report, [BGD-OTP-0001-3307](#) at 3352.

²⁹⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0361-0363, paras. 972-976; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0545; AI “My world is finished” report, [BGD-OTP-0001-2861](#) at 2892-2896. Information gathered by PILPG indicates that precautions were taken to avoid accidental burning of non-Rohingya houses, with shovels and other means being used to destroy Rohingya homes in some mixed villages (*see* PILPG Report, [BGD-OTP-0001-3307](#) at 3352).

not leave, we will torch your houses and kill you”; and chanting phrases like “[y]ou are Bengali! This is not your home, you do not belong here.”²⁹⁷

111. The conduct described above is similarly reflected in the context of the 2016 wave of violence. Within this context, around 1,500 buildings in Rohingya villages were reportedly damaged or destroyed, mostly by burning.²⁹⁸ Witnesses’ accounts suggest that buildings were targeted on an ethnic and/or religious basis.²⁹⁹ Perpetrators reportedly used rocket-propelled grenades, hand grenades, petrol bombs and petrol to set houses on fire.³⁰⁰ The *Tatmadaw* is also alleged to have destroyed food and food sources including: burning paddy fields, confiscating farming and fishing tools, destroying food stocks and killing or confiscating livestock.³⁰¹ The destruction allegedly led many families to move first from village to village, then finally to Bangladesh.³⁰²

(b) *The Rohingya had no genuine choice but to flee to Bangladesh*

112. As a result of the 2017 wave of violence, some 700,000 (as of November 2018) Rohingya (from an estimated population of approximately 1 million living in

²⁹⁷ OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0040. In one alleged incident, the local heads of the military and the police reportedly called together 25 Muslim leaders from the surroundings villages to tell them to leave or otherwise they would be killed or burned (*see* US Department of State Report, [BGD-OTP-0001-1226](#) at 1232-1233).

²⁹⁸ According to AI, over 1,200 Rohingya buildings were destroyed in 12 villages in October and November that year. These findings are consistent with those of HRW which found that about 1,500 buildings in Rohingya villages had been destroyed between 10 October and 23 November 2016. Satellite imagery from UNOSAT, HRW, and AI reviewed and analysed by OHCHR support the witnesses’ accounts and show the extensive destruction and burnings of homes, particularly in ten locations. *See* AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1700-1704, 1725-1734; HRW article of 13 December 2016, [BGD-OTP-0001-3622](#) at 3622; HRW satellite imagery assessment of 10 November 2015, [BGD-OTP-0002-0253](#); OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0367-0369, 0373-0375. *See also* UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0384-0387, paras. 1069-1071, 1077, 1080, 1090.

²⁹⁹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0367-0368.

³⁰⁰ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0368.

³⁰¹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0369-0370. Consistent information indicates that during the 2016 wave of violence, the *Tatmadaw* looted property belonging to the Rohingya and arbitrarily confiscated Rohingya identity documents (*see* OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0370-0371; AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1704-1705; UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0386-0388, paras. 1080, 1090, 1092).

³⁰² OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0368.

Rakhine State in 2014)³⁰³ were displaced across the border into Bangladesh.³⁰⁴ This mass movement echoes the exodus of 2016, when around 87,000 Rohingya were displaced into Bangladesh, as a result of the 2016 wave of violence.³⁰⁵ The available information shows that the displaced Rohingya people did not exercise a genuine choice to leave Myanmar.³⁰⁶ Rather, the displacement of Rohingya civilians *en masse* resulted from the coercive acts of the *Tatmadaw* and others, as previously described.³⁰⁷

113. The vast majority of Rohingya arrived in Bangladesh during the first four months of the 2017 wave of violence (between 25 August and 31 December 2017), with mass arrivals reportedly increasing sharply from 31 August 2017 onwards.³⁰⁸ Within the first month — by 22 September 2017 — it was reported that over 400,000 Rohingya had already crossed into Bangladesh.³⁰⁹ This is the period when the 2017 wave of violence against the Rohingya in Myanmar reached its peak.³¹⁰ The coincidence in time between the peak of the violence and large numbers of Rohingya crossing into Bangladesh may, of itself, show a causal link between the coercive acts and the victims' displacement to Bangladesh.

³⁰³ See above para. 38. See also Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5056; AI “Caged without a roof” report, [BGD-OTP-0001-1743](#), at 1761 stating that “1,090,000 people, all believed to be Rohingya/Muslims”, were not enumerated out of the total population for Rakhine State”; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#), at 2449.

³⁰⁴ ISCG situation report of 29 November 2018, [BGD-OTP-0001-0581](#) at 0582. See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751, at 0407, para. 1174, at 0505, para. 1489.

³⁰⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0505, para. 1489.

³⁰⁶ For similar conclusions see UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0505, para. 1489; PILPG Report, [BGD-OTP-0001-3307](#) at 3383 (in the context of findings covering violations from 2012 to 2017).

³⁰⁷ See above paras. 89-111.

³⁰⁸ UNHCR population factsheet, [BGD-OTP-0001-0647](#) at 0647; Xchange report 2017, [BGD-OTP-0001-3651](#) at 3666.

³⁰⁹ OCHA Humanitarian Bulletin Issue 2 of 2017, [BGD-OTP-0002-1385](#) at 1385; HRW article of 26 September 2017, [BGD-OTP-0001-1422](#) at 1424.

³¹⁰ US Department of State Report, [BGD-OTP-0001-1226](#) at 1230, 1232; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3418-3419, 3421. See also the table showing the temporal connection between the peak of violence and the peak of movement of refugees across the border in Xchange report 2017, [BGD-OTP-0001-3651](#) at 3666. See also above para. 80.

114. Rohingya reportedly continued to leave Myanmar at an average rate of 1,733 a month as of August 2018.³¹¹ The UNHCR recorded 14,922 new arrivals from 1 January to 10 November 2018 in Cox's Bazar.³¹² The violence, including burning and demolishing, continued in Myanmar, albeit with a lower intensity, until at least March 2018.³¹³
115. A senior member of the *Tatmadaw* claimed that the number of people who have fled is much lower and that “ARSA extremist Bengali terrorists’ fled out of fear of a counterattack and took their families with them”.³¹⁴ In particular, he suggested that civilians did not flee at all, but might have voluntarily returned because “the native place of Bengali is really Bengal.”³¹⁵ Yet having regard to all the information — including the extent and extreme brutality of the acts perpetrated during the 2017 wave of violence — the *Tatmadaw* statements do not in these circumstances preclude a reasonable basis to believe that the Rohingya were in fact coerced into leaving their homes, communities and country, and that their decision to leave was not the result of a genuine choice.³¹⁶ The Rohingya victims’ choice to flee the violence inflicted upon them appears to have been neither voluntary nor free. People were deported “as a result of violence or as a consequence of threats of violence”.³¹⁷
116. In drawing this conclusion at this stage, the Prosecution notes in particular the available information showing that:

³¹¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, para. 1180.

³¹² UNHCR operational update, [BGD-OTP-0001-0573](#) at 0578 (indicating the 10 November 2018 as the end of the “reporting period”).

³¹³ See above paras. 107-108.

³¹⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0467, para. 1339.

³¹⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0466-0467, para. 1338.

³¹⁶ As observed by the UNFFM on Myanmar, “[o]n its face, the appalling conditions awaiting in the Bangladesh camps, as well as the circumstances of the journey itself, undermine any such argument”, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0505, para. 1489.

³¹⁷ See [Kenya Article 15 Decision](#), para. 162.

a. Threats and the extensive use of rape and other sexual violence served as a driver and coercive factor for deportation.³¹⁸

b. The destruction of entire villages was designed and functioned as a coercive measure to force the Rohingya out of the country — but also to make it particularly difficult for them to return. A Rohingya woman reportedly quoted an attacker saying “[d]on’t return back. We have burned down your house. If you return we will kill you.”³¹⁹

c. Criminal perpetrators made verbal threats. As explained earlier,³²⁰ megaphones were used before and during attacks to threaten the population that “[i]f you do not leave, we will torch your houses and kill you.”³²¹ Likewise many victims reported similar threats or insults during the attacks, such as:

(i) “You are Bengali! This is not your home, you do not belong here”;³²²

(ii) “This is not your country. If you stay we will rape your women, burn you, leave Bengali!”;

(iii) “Leave our country, you will never be citizens”;

(iv) “You must leave this land because it is our land. You are Rohingya, not citizens of Myanmar”;

³¹⁸ For similar conclusions, *see* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0348, para. 941; SRSB statement of 12 December 2017, [BGD-OTP-0001-0619](#) at 0621; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2744.

³¹⁹ PILPG Report, [BGD-OTP-0001-3307](#) at 3363.

³²⁰ *See* above para. 110.

³²¹ OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0040. In one alleged incident, the local heads of the military and the police reportedly called together 25 Muslim leaders from the surroundings villages to tell them to leave or otherwise they would be killed or burned (*see* US Department of State Report, [BGD-OTP-0001-1226](#) at 1232-1233).

³²² OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0040.

(v) “Kalars, why are you living here. You must live with your people. You must go”;

(vi) “You are a Bengali, Kalar, not a citizen of Myanmar”;

(vii) “You are the Bengali Kalar, a thief. You must go to your country. It is time to leave”;

(viii) “Kalars, Bengalis, why are you enjoying our land? This is not your country. Go to your country”;

(ix) “You are homeless in Myanmar. Go back to your motherland”;

(x) “You are not citizens of this land. Why are you taking advantage of our land? Just leave”;

(xi) “[...] Bengali, you have to go to Bangladesh, what you have here is not yours, it’s ours”.³²³

(c) *These displacements were impermissible under international law*

117. While international law permits displacement in certain limited circumstances, nothing in the information available indicates that the mass displacement of Rohingya was justified under international law.

118. Deportation by a State of its own nationals is usually prohibited absolutely, and even the permissible grounds for the deportation of aliens are restricted and generally subject to a requirement of due process.³²⁴ Where international humanitarian law (“IHL”) applies, deportation and forcible transfer are likewise

³²³ PILPG Report, [BGD-OTP-0001-3307](#) at 3351-3352. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0339, para. 903.

³²⁴ [ICCPR](#), article 12(3); Chetail, pp. 926-928 (international law generally prohibits collective expulsion of aliens, arbitrary deportation of aliens without due process, or expulsions which severely infringe basic rights); [ICCPR](#), article 13; [HRI/GEN/1/Rev.9](#), p. 191, para. 10; [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), article 22; [ACHR](#), article 22; [ACHPR](#), article 12; [ECHR](#), Protocol 4, articles 2, 3, 4.

prohibited, although involuntary displacements (“evacuations”) of a civilian population may be justified if necessary for the “security of the population” or for “imperative military reasons”.³²⁵

119. Nothing in this situation suggests that an “evacuation” of the civilian population was required — or effected — due to genuine reasons of security of the population or for “imperative” military reasons.³²⁶ To the contrary, the available information, including the sheer numbers of people displaced, the coercive acts employed to displace them, and the discriminatory context provides a reasonable basis to believe that the arbitrary and discriminatory displacement of the Rohingya population was impermissible under international law.

(d) *The Rohingya were lawfully present on the territory of Myanmar*

120. The available information shows that the Rohingya victims deported to Bangladesh were “lawfully present” in the areas from which they were removed.

121. This question is not just a matter of domestic law, but rather requires consideration of international law,³²⁷ in order to avoid situations where a government may arbitrarily declare that certain persons are not “lawfully present” in a particular area and thus escape responsibility for their forcible displacement.³²⁸ Nor does lawful presence mean lawful residence — rather, the term should simply be given its common meaning.³²⁹ Thus what matters is

³²⁵ [Geneva Convention IV](#), article 49; [Additional Protocol II](#), article 17. See also e.g. [Stakić AJ](#), paras. 284-287; [Karadžić TJ vol.I](#), para. 492; [Popović TJ vol.I](#), paras. 901-903; [Martić TJ](#), para. 109; [Krajišnik TJ](#), para. 725; [Blagojević TJ](#), paras. 597-600.

³²⁶ See also [Stakić AJ](#), para. 287 (displacements cannot be justified as legitimate evacuation “where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity”); [Blagojević TJ](#), paras. 597 (observing that the justification must be more than a “pretext”), 598 (suggesting that the trier of fact should look *inter alia* to “whether there was in actual fact a military or other significant threat to the physical security of the population”).

³²⁷ See Hall and Stahn, pp. 263-264 (mn. 125), 267 (mn. 128); Cryer *et al.*, p. 248, fn. 147.

³²⁸ Hall and Stahn, pp. 263-264 (mn. 125), 267 (mn. 128). See also Cryer *et al.*, p. 248, fn. 147 (similarly suggesting that any other interpretation would undermine the underlying purpose of the provision and permit a government to circumvent application of the crime through an arbitrary legislative act declaring certain persons or members of a group to be transferred not lawfully present); Schmid, p. 103; Werle, p. 316, para. 853.

³²⁹ [Popović TJ vol.I](#), para. 900. See also [Tolimir TJ](#), para. 797.

whether the victim has “come to ‘live’ in the community — whether long term or temporarily” — and the lawful presence requirement is thus “intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for ‘residency’ to be demonstrated as a legal standard.”³³⁰

122. The available information indicates that, over the decades, Myanmar has sought to permit its Rohingya population different levels of participation in Myanmar’s national life, ranging from full citizen, to illegal immigrant.³³¹ It has also sought to restrict apparent legal entitlements by arbitrary or extra-legal means, such as the confiscation of legal documentation.³³² In the wake of the 2017 wave of violence the Myanmar authorities have described the Rohingya as “Bengali”, further implying they are illegal immigrants from Bangladesh.³³³ Considering all this information together, there is at least a reasonable basis to believe that the Rohingya “lived” in their homes and communities in Rakhine State within the common meaning of the term, and thus were indeed lawfully present within the meaning of article 7(2)(d), notwithstanding the position ostensibly taken by the Myanmar authorities.³³⁴

2. Other inhumane acts

123. In its Jurisdiction Decision, Pre-Trial Chamber I has found that “preventing the return of members of the Rohingya people falls within article 7(1)(k) of the

³³⁰ [Popović TJ vol.I](#), para. 900.

³³¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0240, para. 460, at 0248, para. 496. *See also* in general at 0240-0249, paras. 460-498. *See further* above paras. 47-51.

³³² *See* above paras. 48-49.

³³³ *See* for e.g. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0240, para. 460, at 0466-0467, para. 1338; Ware and Laoutides book, [BGD-OTP-0001-4667](#) at 4808. In previous instances of mass displacements into Bangladesh, Rohingya refugees were later repatriated to Myanmar (*see* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0248, para. 496; Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5059-5060).

³³⁴ *See* for e.g. Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2520; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0506, para. 1490.

Statute”³³⁵ and that “the preconditions for the exercise of the Court’s jurisdiction pursuant to article 12(2)(a) of the Statute might be fulfilled” if the relevant allegations in this respect “are established to the required threshold”.³³⁶ For this reason, the Prosecution examines in this section both the applicable law and the factual allegations relevant to this potential crime.

124. The available information provides a reasonable basis to believe that the crime against humanity of other inhumane acts under article 7(1)(k), based on the violation of the Rohingya’s right to return, was committed in the context of the 2017 wave of violence — in the sense *inter alia* that it served to secure and consolidate the enforced displacement of Rohingya people which was an integral part of that violence. Persons responsible for this conduct include members of the *Tatmadaw* and other Security Forces, as well as members of other Myanmar authorities. In particular, the alleged other inhumane acts took the form of the intentional and severe deprivation of the right of recently displaced Rohingya persons in Bangladesh to return to their State of origin, causing them great suffering or serious injury to body or to mental or physical health.

125. The Prosecution submits that there is a reasonable basis to believe that at least one element of this crime³³⁷ occurred on the territory of Bangladesh — such that the preconditions for the exercise of the Court’s jurisdiction pursuant to article 12(2)(a) of the Statute are fulfilled, in this instance.³³⁸ As further explained below, steps to secure and consolidate the expulsion of the recently displaced Rohingya people by preventing the effective exercise of their right to return were taken on the territory of Myanmar, causing grave harm to displaced Rohingya persons on the territory of Bangladesh. This cross-border conduct forms the basis for the crime of other inhumane acts by means of violation of the right to return.

³³⁵ [Jurisdiction Decision](#), para. 77.

³³⁶ [Jurisdiction Decision](#), para. 78.

³³⁷ [Jurisdiction Decision](#), para. 72.

³³⁸ *See also* [Jurisdiction Decision](#), para. 78.

126. The Prosecution notes that this potential crime is a complex one as a matter of law and fact, and further that the political, military, and humanitarian situation on the ground in both Bangladesh and Myanmar is evolving.³³⁹ In addition, due to the heavy influence of the *Tatmadaw* in civilian affairs,³⁴⁰ more investigation is needed into the exact role the civilian authorities played in this potential crime. The Prosecution will keep the situation under review in the course of any authorised investigation.

(a) *The legal basis for the violation of the right to return as an other inhumane act under article 7(1)*

127. The Prosecution recalls the Pre-Trial Chamber's recent observation that arbitrary deprivation of the "right to enter one's own country" may constitute conduct "of a character similar to the crime against humanity of persecution, which 'means the intentional and severe deprivation of fundamental rights contrary to international law'", and may in principle therefore "fall within article 7(1)(k) of the Statute".³⁴¹

128. Consistent with the Court's case law and the Elements of Crimes,³⁴² the Pre-Trial Chamber has found that crimes against humanity are (among other factors) characterised by intentional and severe violations of fundamental rights³⁴³ — at

³³⁹ See for e.g. that Myanmar and Bangladesh have signed a repatriation agreement and the difficulties in its implementation, above at para. 71, fn. 196 and below at paras. 142, 157. More recently, an MoU between the Government of Myanmar, UNDP and UNHCR has been extended for one year following an exchange of letters signed on behalf of all parties on 27 May 2019 (UNDP Press Release of 28 May 2019, [BGD-OTP-0001-5175](#)).

³⁴⁰ For example, the *Tatmadaw* controls a number of civilian governmental structures, including the Ministry of Home Affairs, to which the GAD (*see* below at paras. 160, 163, 164) was subordinated until late December 2018, when it was transferred to civilian authority under the Ministry of the Office of the Union Government. *See* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0152-0153, para. 83; Irrawaddy article of 21 December 2018, [BGD-OTP-0002-0971](#) at 0971; Irrawaddy article of 3 January 2019, [BGD-OTP-0002-0967](#) at 0968.

³⁴¹ [Jurisdiction Decision](#), para. 77. *See also* [Prosecution Response to Observations](#), para. 30.

³⁴² *See* for e.g. [Kenyatta et al. CD](#), paras. 269, 278-279 (observing that article 7(1)(k) should be interpreted "conservatively"); [Bemba AJ \(Separate opinion Judge Van den Wyngaert and Judge Morrison\)](#), para. 63 (observing that article 7(1)(k) requires the *ejusdem generis* rule). Adherence to the [Elements of Crimes](#) applicable to article 7(1)(k) ensures that the Court complies in this respect with the requirements of article 22(2): *see also* below fns. 361-362.

³⁴³ These are not necessarily limited to infringements of the "physical integrity or liberty of persons": *contra* [Bemba AJ \(Separate opinion Judge Van den Wyngaert and Judge Morrison\)](#), para. 63. *See* for e.g. [Rome Statute](#),

least insofar as this amounts to “conduct which is impermissible under generally applicable international law, as recognised by the principal legal systems of the world.”³⁴⁴ Intentional violations of certain fundamental rights may constitute “other inhumane acts” under article 7(1)(k) if they are *also* distinguished by the sufficiently grave conduct of the perpetrator *and* the great suffering or serious injury caused to the victim(s).

129. While it may be unusual for conduct relating to the return of recently displaced persons to attract criminal liability, and this warrants due caution, it is not unprecedented. In *Gotovina*, “restrictive and discriminatory measures with regard to housing and property, considered in conjunction with deportation and other crimes”, were found to constitute “persecution.”³⁴⁵ Such measures included a deliberate policy to “invite and encourage” settlement by one ethnic group in “homes abandoned” by members of another ethnic group, whose return was deliberately “limited to a minimum”.³⁴⁶

(i) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act

130. According to the Statute and the Elements of Crimes, the perpetrator of an other inhumane act must have inflicted, by means of an “inhumane act”, a sufficient degree of harm upon a person, qualified as “great suffering, or serious injury to body or to mental or physical health”.³⁴⁷ This assessment will usually be

articles 7(1)(d), 7(1)(h) and 7(1)(j). See also [Ongwen CD](#), paras. 91-95; [Ntaganda CD](#), para. 58; [Brdanin AJ](#), paras. 296-297; [Stakić TJ](#), para. 773; Ambos, pp. 115-116.

³⁴⁴ [Elements of Crimes](#), Introduction to Crimes against Humanity, para. 1.

³⁴⁵ [Gotovina TJ vol.II](#), para. 1843. See also paras. 1846, 2308, 2312. While the overall verdict was reversed on appeal, by majority, the Trial Chamber’s legal assessment in this respect was undisturbed: see [Gotovina AJ](#), paras. 85-88, 91-97 (considering that the finding of a JCE, including on the basis of “[e]vidence of policy and legal attempts to prevent the return of Serb civilians who had left”, could not be sustained on the facts if the initial acts of deportation could not also be sustained). *But see* Dissenting Opinion of Judge Pocar, paras. 21-22, 25, 28 (finding that the majority “mischaracterize[d]” the factual findings, including with regard to the discriminatory policy concerning the return of refugees).

³⁴⁶ [Gotovina TJ vol.II](#), para. 2057. See further paras. 2090-2098, 2308, 2312.

³⁴⁷ [Rome Statute](#), article 7(1)(k); [Elements of Crimes](#), article 7(1)(k), Element 1.

conducted on a case-by-case basis, being fact sensitive. In past cases, conduct which caused this threshold of harm included: beatings;³⁴⁸ rape;³⁴⁹ sexual violence by means of forced nudity;³⁵⁰ confinement in inhumane conditions;³⁵¹ forced observation of killings of family members;³⁵² forced observation of mutilation;³⁵³ forcible transfer;³⁵⁴ and forced marriage.³⁵⁵

131. In its Jurisdictional Decision, Pre-Trial Chamber I had already anticipated that “preventing a person from returning to his or her own country” may meet this threshold due to the aggravation of “the anguish of the persons uprooted from their own homes and forced to leave their country” and the potential consequence of “render[ing] the victims’ futures even more uncertain and compel[ing] them to continue living in deplorable conditions.”³⁵⁶

132. In light of the applicable customary international law concerning displaced persons’ right to return to the State of origin with which they have a sufficiently close connection,³⁵⁷ the Prosecution further submits that the requisite degree of harm to the victim may be shown in circumstances in which:

- a. the victim was himself or herself the victim of enforced displacement, or may otherwise be considered a *bona fide* refugee; and

³⁴⁸ See e.g. [Kvočka TJ](#), paras. 208-209; [Tadić TJ](#), para. 730.

³⁴⁹ See e.g. [Case 002/01 Decision](#), para. 154. Distinct from the position under article 7(1)(g) of the Statute of this Court, this finding was made in the context of the view that rape did not at the material time exist as a crime against humanity in its own right.

³⁵⁰ See e.g. [Akayesu TJ](#), paras. 688, 693, 697; [Kvočka TJ](#), paras. 208-209. Distinct from the position under article 7(1)(g) of the Statute of this Court, these findings were made in the context of the view that “any other form of sexual violence of comparable gravity” did not at the material time exist as a crime against humanity in its own right.

³⁵¹ See e.g. [Krnjelac TJ](#), paras. 133-134; [Kvočka TJ](#), paras. 208-209; [Case 001 TJ](#), para. 372.

³⁵² See e.g. [Kupreškić TJ](#), paras. 819-820.

³⁵³ See e.g. [Kajelijeli TJ](#), para. 936.

³⁵⁴ See e.g. [Case 002/01 AJ](#), paras. 656-657; [Stakić AJ](#), para. 317 (“acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts”). See also [Krajišnik AJ](#), para. 331 (acknowledging that “specific acts of forcible transfer” can “amount to ‘other inhumane acts’ under Article 5(i) of the Statute”).

³⁵⁵ See e.g. [Brima AJ](#), paras. 192-196, 199-200; [Ongwen CD](#), paras. 91-95.

³⁵⁶ [Jurisdiction Decision](#), para. 77 (emphasis added).

³⁵⁷ See below paras. 133-137.

b. the victim's connection with the State of origin is sufficiently close (having regard to the victim's nationality, prior residence, community and family links, the relatively brief time elapsed since their displacement, and their subjective desire to return to that State); *and*

c. the victim is unable to return to the State of origin as a consequence of the perpetrator's conduct, and this has resulted in great suffering or serious injury (having regard to factors such as: residence in temporary and inadequate accommodation; disruption of family ties; unemployment; extreme poverty; hunger and malnutrition; ill health; loss of legal status and associated rights; and secondary victimisation through other criminal activity, including trafficking in persons and sexual or gender based crimes).

(ii) The perpetrator's act was of a character similar to any other act referred to in article 7(1)

133. According to the Statute and the Elements of Crimes, an "inhumane act" is an "act of a character similar to any other act referred to in article [7(1)] of the Statute",³⁵⁸ having regard both "to the nature and gravity of the act."³⁵⁹ Both the nature and gravity requirements must be satisfied *in addition* to the showing of a sufficient degree of harm to the victim(s).³⁶⁰

³⁵⁸ [Rome Statute](#), article 7(1)(k); [Elements of Crimes](#), article 7(1)(k), Element 2.

³⁵⁹ [Elements of Crimes](#), article 7(1)(k), Element 2, fn. 30.

³⁶⁰ See above paras. 130-132 (Element 1).

- a. The perpetrator's conduct is similar in nature to any other act referred to in article 7(1)

134. The drafters of article 7(1)(k) intended to delimit “other inhumane acts” by the *ejusdem generis* rule.³⁶¹ The common factor in the nature of the conduct proscribed by article 7(1)(a) to article 7(1)(j) is the intentional and serious or severe violation of fundamental rights protected by law (including international human rights law and IHL).³⁶² In the context of this situation, the Pre-Trial Chamber likewise drew attention to the basis of “the right to enter one’s own country” in international treaties such as the International Covenant on Civil and Political Rights (“ICCPR”), the International Convention on the Elimination of All Forms of Discrimination (“CERD”), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”).³⁶³

135. The Prosecution notes that the right to leave and to enter one’s “own country” is highly nuanced and complex but seems, in at least some core respects, to have been universally accepted. Every UN member State appears to have, by international treaty, accepted at least one material obligation in this regard, including: Protocol 4 to the European Convention on Human Rights (“ECHR”) (43 ratifications);³⁶⁴ the CERD (179 ratifications);³⁶⁵ the ICCPR (172 ratifications);³⁶⁶

³⁶¹ See von Hebel and Robinson, p. 102. See also Black’s Law Dictionary, “*ejusdem generis*” (where a general kind or class of things follows a specific enumeration of things, the general kind or class is to be interpreted as applying only to things of the same general kind or class as those specifically enumerated).

³⁶² See also [Katanga and Ngudjolo CD](#), para. 448. The conduct need not itself previously have been recognised as a crime against humanity as such: [Case 002/01 TJ](#), para. 436. See also Cassese, p. 354 (recalling that the prohibition of “other inhumane acts” in article 6(c) of the Nuremberg Charter was said to reflect the fact that such acts “constitute to a large extent offences already covered by all national legal systems”); Witschel and Rückert, p. 108 (noting that specific concerns as to the scope of article 7(1)(k) were resolved in light of the discussion concerning paragraph 1 of the Introduction to Crimes against Humanity in the [Elements of Crimes](#)), and footnote 30 (relating to Element 2) of the [Elements of Crimes](#) for article 7(1)(k). See further [Case 002/01 AJ](#), paras. 584-585; and above para. 128.

³⁶³ [Jurisdiction Decision](#), para. 77. See also above para. 123.

³⁶⁴ [ECHR](#), Protocol 4, articles 2-3. But see also article 6. One State (Austria) has entered a material reservation, and one State (the Netherlands) has made a material interpretive declaration.

³⁶⁵ [CERD](#), article 5(d)(ii). See also article 2.

³⁶⁶ [ICCPR](#), article 12. But see also article 4. Two States (Austria and the United Kingdom) have entered material reservations, which appear to continue to be effective. Two other States (Italy and Pakistan) appear to have withdrawn material reservations. One State (the Netherlands) has made a material interpretive declaration.

the American Convention on Human Rights (“ACHR”) (23 ratifications);³⁶⁷ the Apartheid Convention (109 ratifications);³⁶⁸ the African Convention on Human and Peoples’ Rights (“ACHPR”) (53 ratifications);³⁶⁹ the Convention on the Rights of the Child (“CRC”) (196 ratifications);³⁷⁰ the Arab Charter on Human Rights (“ArCHR”) (13 ratifications);³⁷¹ and the Convention on the Rights of Persons with Disabilities (“CRPD”) (177 ratifications).³⁷² While these treaty provisions are not identical,³⁷³ they may unite around some core principles — commentators tend to agree that customary international law thus reflects some similar norm, even if its precise contours may remain uncertain.³⁷⁴

136. For the immediate purpose of this Request, the Prosecution notes the State practice and *opinio juris* illustrated by these treaties, and the recent practice of the UN Security Council (among other bodies) in affirming “the right of refugees and displaced persons to return to their homes”,³⁷⁵ in accordance with international law, and requiring States to respect, enforce and facilitate this right in at least some instances where the displacement is sufficiently recent in time.³⁷⁶ The Prosecution likewise acknowledges the view of the International Committee of

³⁶⁷ [ACHR](#), article 22. *But see also* article 27.

³⁶⁸ [Apartheid Convention](#), article 2(c).

³⁶⁹ [ACHPR](#), article 12(2).

³⁷⁰ [CRC](#), article 10. Three States (the Cook Islands, Liechtenstein and Switzerland) entered potentially material reservations, which appear to continue to be effective. One State (Japan) has made a material interpretive declaration.

³⁷¹ [ArCHR](#), articles 21 and 22.

³⁷² [CRPD](#), article 18.

³⁷³ In particular, these treaty regimes may vary in the nature and proximity of the required link between the right-holder and the responsible State, the degree to which the right may be subject to exceptions or derogations, and whether the right applies exclusively to individuals or also to “mass” groups of persons.

³⁷⁴ *See e.g.* Barrett, p. 65; Katselli Proukaki, pp. 48, 78-81; Haslam, p. 352 (mns. 24-25); Bracka, p. 310; Ullom, pp. 137-138, 144-145; Rosand, pp. 230-231, 234, 239-240; Quigley, pp. 70, 125; Lawand, pp. 544, 546; Rosand2, pp. 1097, 1121, 1127; [Mubanga-Chipova Report](#), paras. 88, 116-119; Hannum, pp. 433-434. *Cf.* Benvenisti, p. 5.

³⁷⁵ *See e.g.* [UNSC Res. 876 \(1993\)](#), para. 5.

³⁷⁶ *See e.g.* [UNSC Res. 859 \(1993\)](#), para. 6; [UN Doc. S/1994/397](#), Annex II; [UNSC Res. 1031 \(1995\)](#), para. 8 (welcoming the “parties’ commitment to the right of all refugees and displaced persons freely to return to their homes of origin in safety”); [UNSC Res. 1036 \(1996\)](#); [UNSC Res. 1088 \(1996\)](#), para. 11; [UNSC Res. 1096 \(1997\)](#), para. 8; [UN Doc. S/1999/648](#), Article 2, paras. 3-4; [UNSC Res. 1239 \(1999\)](#), para. 4; [UNSC Res. 1244 \(1999\)](#), paras. 9, 11. *See also* [The General Framework Agreement for Peace in Bosnia and Herzegovina](#), Annex 7, article 1. *But see also* [UN Doc. S/2003/398](#), paras. 99, 101, 108-111; [UN Doc. S/2004/302](#), paras. 2, 4-6, 10; [UN Doc. S/2004/437](#), paras. 1, 43, 48-51, 73-76, 80, 91.

the Red Cross (“ICRC”) that “[d]isplaced persons have a right” under customary IHL “to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist”,³⁷⁷ and the approving reference to this interpretation by the Grand Chamber of the ECHR.³⁷⁸

137. Consequently, the Prosecution considers that there is a sufficient basis for the purpose of this Request to consider that, by at least the material times, a fundamental right had crystallised in customary international law, at least to the extent that displaced persons have a right to return safely and humanely³⁷⁹ to the State of origin with which they have a sufficiently close connection (in the sense at least that the displaced person is a national of the State of origin, or they are a long-term prior resident of the State of origin and their nationality is arbitrarily denied).³⁸⁰ In the Prosecution’s view, intentional violations of this right by State agents — if they occur sufficiently close in time to the victim’s initial

³⁷⁷ Henckaerts and Doswald-Beck, p. 468 (rule 132). The ICRC considers this rule “applicable in both international and non-international armed conflicts”, and to apply “to those who have been displaced, voluntarily or involuntarily, on account of the conflict and not to non-nationals who have been lawfully expelled.” See also [Geneva Convention IV](#), article 49 (providing that evacuated persons “shall be transferred back to their homes as soon as hostilities in the area in question have ceased”); [Mubanga-Chipoya Report](#), para. 120. *But see also* Piotrowicz, pp. 350-352.

³⁷⁸ [Sargsyan v. Azerbaijan](#), paras. 95, 232. See also e.g. [Cyprus v. Turkey](#), paras. 174-175.

³⁷⁹ Consistent with the principle of effectiveness, the “right to return”, as understood herein, necessarily entails a threshold assurance of a reasonable prospect of safety and humane treatment for the displaced person(s) in the State of origin. Otherwise, the right would be wholly illusory. This standard has a basis in both IHL and international human rights law, as described above. IHL requires the safe and prompt return of displaced persons to their homes or habitual places of residence as soon as the reasons for their displacement cease to exist. See Henckaerts and Doswald-Beck, p. 468 (rule 132); See also [Geneva Convention IV](#), article 49; [Sargsyan v. Azerbaijan](#), paras. 95, 232 and [Cyprus v. Turkey](#), paras. 174-175. International human rights law considers that the right of return should include a voluntary, safe, dignified and sustainable return. See e.g. [UNSC Res. 859 \(1993\)](#), at para. 6(d) (affirming the “recognition and respect for the right of all displaced persons to return to their homes in safety and honour”); [UN Doc. A/51/18](#) at Annex VIII(C), CERD *General Recommendation XXII* (emphasising at paragraph 2(a) that refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety); [UN Doc. A/50/18](#) at chapter II(A) (citing 17 August 1995 CERD Decision on the situation in Bosnia and Herzegovina and at paragraph (c) demanding a safe return of displaced persons as well as their effective participation in the conduct of public life), and para. 219 (urging “the immediate reversal of ethnic cleansing which must begin with the voluntary return of displaced people”); [CRC/GC/2005/6](#), paras. 84-88. See also [UNHCR Handbook](#), sections 2.3-2.4 (describing the importance of a safe, dignified, voluntary, and sustainable return). Notably, according to the UNHCR, the purpose of their (confidential) MoU signed with UNDP and the Government of Myanmar on the resettlement of the Rohingya was to establish a framework for cooperation aimed at creating the conditions conducive to their voluntary, safe, dignified, and sustainable repatriation. See UNHCR Press Release of 31 May 2018, [BGD-OTP-0002-0983](#) at 0983.

³⁸⁰ The Prosecution stresses that this analysis applies only for the purpose of this application, and for the purpose of the execution of its mandate under the Statute, and should not be interpreted as expressing a position on broader questions under public international law or international human rights law more generally.

displacement, and this conduct is not otherwise authorised under international law³⁸¹ — constitute conduct which is similar in nature to other acts referred to in article 7(1) of the Statute.

- b. The perpetrator's conduct is similar in gravity to any other act referred to in article 7(1)

138. The conduct of the perpetrator must not only be similar in nature to any other act referred to in article 7(1), but also similar in its gravity. This satisfies the concern that “not every human rights violation qualifies as an other inhumane act” and that “[v]iolations of basic human rights may serve as a point of departure” only if they are otherwise “of a character similar to the enumerated inhumane acts”.³⁸² As a matter of law, this criterion cannot be satisfied simply by occasioning great suffering or serious injury to the victims (Element 1), since this would render this aspect of Element 2 superfluous. Accordingly, the Prosecution understands this requirement to relate primarily to an assessment of the perpetrator's own circumstances, conduct, and potential culpability. This may turn to a significant extent on the facts of the case,³⁸³ informed by particular considerations appropriate to the right which is violated by the perpetrator's conduct.³⁸⁴

139. In light of the applicable customary international law concerning displaced persons' right to return to the State of origin with which they have a sufficiently

³⁸¹ For example, the Prosecution notes that the right to return may potentially be subject to derogation (within the context of specific treaty regimes), or permissibly restricted to the extent defined by duly constituted national law, that is not arbitrary, and that IHL may otherwise justify restrictions while hostilities in the material area continue.

³⁸² See Hall and Stahn, pp. 235 (mn. 95), 237 (mn. 98), 238-239 (mn. 99). See also Ambos, pp. 115-116; Robinson, pp. 69-70. See further [Kupreškić TJ](#), paras. 565-566; [Stakić TJ](#), para. 721. While the SCSL Appeals Chamber did not formally adopt such an approach, its reasoning in practice reveals that it took into account that the conduct not only violated international human rights law but also was “clearly criminal in nature”, as well as the gravity of the “effects of the perpetrators' conduct”: [Brima AJ](#), paras. 194, 198, 200.

³⁸³ See also [Ongwen CD](#), para. 88 (whether conduct qualifies as an other inhumane act is a question of mixed fact and law).

³⁸⁴ See above paras. 134-VI. B. 2. (a) (ii) b. 137 (perpetrator's conduct must be similar in nature to other article 7(1) acts).

close connection,³⁸⁵ the Prosecution considers that the requisite degree of gravity of the perpetrator's conduct may be shown with reference to factors such as:

- a. the formal seniority of the perpetrator in the State hierarchy;
- b. the extent to which the perpetrator materially had the power to make the "right to return" effective for the victim(s);
- c. whether the relevant conduct of the perpetrator was an act of commission or a culpable omission in breach of a legal duty with the power to act;
- d. whether the perpetrator exercised personal discretion in their conduct;
- e. whether the perpetrator's conduct was otherwise unlawful or unconscionable (for example, use of violent or criminal means, such as torture or other violence, arbitrary detention, illegal property expropriation or destruction, etc.);
- f. the duration and scale of the perpetrator's conduct; and
- g. the proximity of the perpetrator's conduct to the harm occasioned to the victims, including with regard to whether the victim(s) had actually attempted to return, and the presence of other causal factors.

(iii) The perpetrator was aware of the factual circumstances that established the character of the act

140. According to the Statute and the Elements of Crimes, the perpetrator of an other inhumane act must have knowledge concerning the facts establishing the character of their act,³⁸⁶ in the sense of Element 2. Having regard to the material

³⁸⁵ See above para. 137.

³⁸⁶ [Rome Statute](#), article 7(1)(k); [Elements of Crimes](#), article 7(1)(k), Element 3.

right under customary international law,³⁸⁷ the Prosecution understands that the perpetrator must therefore at least have known: that the victim(s) were displaced persons who claimed a sufficiently close connection to the State of origin; and that the perpetrator's own conduct served to prevent or materially impede the exercise of the right by the victim(s) to return.³⁸⁸

(iv) The perpetrator otherwise acted with intent and knowledge, according to article 30

141. According to the Statute, and the Elements of Crimes, the perpetrator of an other inhumane act must, unless otherwise provided, generally act with intent and knowledge.³⁸⁹ Having regard to the material right under customary international law,³⁹⁰ the Prosecution understands that the perpetrator must therefore have meant to engage in the conduct described in Element 2,³⁹¹ and meant to cause the harm described in Element 1 or was at least aware that it will occur in the ordinary course of events.³⁹²

(b) *The factual basis underlying violation of recently displaced Rohingya persons' right to return as an other inhumane act under article 7(1)*

142. As previously explained, there is a reasonable basis to believe that hundreds of thousands of Rohingya people have been deported from Myanmar to Bangladesh, where they now reside in refugee camps. Moreover, the Myanmar

³⁸⁷ See above para. 137.

³⁸⁸ In accordance with Pre-Trial Chambers' decisions considering that the mental elements of crimes cannot be adequately addressed at the article 15 stage, the Prosecution does not specifically address the facts relevant to the mental elements of this, or any other crime (save for discriminatory intent for persecution), in this Request. See [Kenya Article 15 Decision](#), paras. 79, 140; [Côte d'Ivoire Article 15 Decision](#), para. 29, fn.31.

³⁸⁹ [Rome Statute](#), articles 7(1)(k), 30; [Elements of Crimes](#), General Introduction, para. 2.

³⁹⁰ See above para. 137.

³⁹¹ See above paras. 128, 138-139.

³⁹² See above paras. 130-132. In accordance with Pre-Trial Chambers' decisions considering that the mental elements of crimes cannot be adequately addressed at the article 15 stage, the Prosecution does not specifically address the facts relevant to the mental elements of this, or any other crime (save for discriminatory intent for persecution), in this Request. See [Kenya Article 15 Decision](#), paras. 79, 140; [Côte d'Ivoire Article 15 Decision](#), para. 29, fn.31.

Special Rapporteur, the UN HRC, and the UN FFM have all recently confirmed their view that the displaced Rohingya people cannot presently return to Myanmar because the conditions for a voluntary, safe, dignified, and sustainable return of Rohingya refugees do not exist.³⁹³ This is allegedly due, at least in part, to the continued campaign of violence, intimidation and harassment against the Rohingya who remain in Myanmar,³⁹⁴ as well as the restriction of points of entry from Bangladesh (through border fencing and landmines)³⁹⁵ and extensive operations to clear land formerly occupied by displaced Rohingya, in combination with the construction and development of new buildings and infrastructure³⁹⁶ – including new “model villages” which, according to the UNFFM, are “predominantly, possibly exclusively, for non-Rohingya communities,”³⁹⁷ and security or military-related infrastructure.³⁹⁸

143. There is a reasonable basis to believe that recently displaced Rohingya persons in Bangladesh wish to exercise their right to a safe and humane return, if practicable. A randomised survey of over 1,000 Rohingya refugees in 34 refugee camps in Bangladesh found that in general the refugees wanted to return to their homes in Rakhine State, but expressed concerns about safety and basic citizenship rights.³⁹⁹ Many said they would only return if they could be treated with dignity, including respect for their religion, their ethnic identity (to be recognised as “Rohingya”), the return of their possessions, and a sustainable future for their

³⁹³ UN Special Rapporteur report of 5 March 2019, [BGD-OTP-0002-0456](#) at 0464-0465, paras. 42, 44; UN Special Rapporteur report of 25 January 2019, [BGD-OTP-0002-0977](#) at 0980; UNHRC Res. 39/2 (2018), [BGD-OTP-0001-0612](#) at 0613, 0615, paras. 13-15; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408-0436, paras. 1180-1181. *See above* para. 70.

³⁹⁴ UN Special Rapporteur report of 25 January 2019, [BGD-OTP-0002-0977](#) at 0980. *See also* the UN FFM’s finding’s regarding the lack of conditions “conducive to return”, including the Myanmar “security forces” continued violent oppression in the form of killings, sexual and gender-based violence, property violations, a tightening on restrictions of freedom of movement, severe lack of food, and restrictions on access on all humanitarian food aid: UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0412-0413, paras. 1193-1201.

³⁹⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0414-0416, para. 1182.

³⁹⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, para. 1182, at 0416-0436, paras. 1216-1241.

³⁹⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0416, para. 1216.

³⁹⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0427-0434, paras. 1233-1238; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0549-0552.

³⁹⁹ PILPG Report, [BGD-OTP-0001-3307](#) at 3326-3327, 3328 (methodology).

children.⁴⁰⁰ Similar findings were repeated in another survey in 12 camps of 1,700 refugees who arrived after 25 August 2017.⁴⁰¹

144. Considering this information as a whole, and in light of its close connection with the alleged deportation campaign and the State policy to attack the Rohingya civilian population, there is a reasonable basis to believe that members of the *Tatmadaw*, other Security Forces and other Myanmar authorities, have thus also committed other inhumane acts within the meaning of article 7(1)(k) of the Statute. As the following paragraphs explain, there is a reasonable basis to believe that preventing the safe and humane return of displaced Rohingya persons is similar in character to other acts under article 7(1), and this conduct has inflicted great suffering on or serious injury to those persons who are presently located in Bangladesh.

(i) The identified conduct inflicted great suffering on or serious injury to recently displaced Rohingya in Bangladesh

145. There is a reasonable basis to believe that the steps taken, in Myanmar, to prevent the safe and humane return of displaced Rohingya persons inflicted great suffering on or serious injury to those persons in Bangladesh, as a consequence of the circumstances in which they remain forced to live there.

146. The UN FFM reports, as of September 2018, that over 1 million Rohingya from Myanmar were living in “dire” conditions in refugee camps in Bangladesh,⁴⁰²

⁴⁰⁰ PILPG Report, [BGD-OTP-0001-3307](#) at 3326-3327. See also HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0774; OHCHR rapid response mission report, [BGD-OTP-0001-0035](#) at 0045 (noting that, in September 2017, some of the Rohingya would be willing to return to their villages if similar conditions are met).

⁴⁰¹ Xchange report 2018, [BGD-OTP-0002-1465](#) at 1470, 1477 (methodology), 1497-1498. See also HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0775 (Bangladesh’s refugee relief and rehabilitation commissioner confirmed there could only be safe and voluntary repatriation if these concerns were met).

⁴⁰² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174.

including the world’s largest refugee camp hosting more than 600,000 refugees.⁴⁰³ Of these 1 million refugees, there is a reasonable basis to believe – as described above⁴⁰⁴ – that at least 700,000 were deported in the context of the 2017⁴⁰⁵ wave of violence. In addition, the information reviewed by the Prosecution suggests that a further 87,000 Rohingya (amongst the 1 million refugees now in Bangladesh) were deported in the context of the 2016 wave of violence.⁴⁰⁶

147. Rohingya refugees are housed in temporary, inadequate shelters in densely populated camps dependant on humanitarian aid and without meaningful access to work.⁴⁰⁷ Conditions in the biggest camp are reportedly “difficult, at best”.⁴⁰⁸ Seventy percent of one thousand and seven hundred refugees surveyed in twelve camps listed health issues as among the most difficult aspects of life in Bangladesh; and sixty-five percent cited providing the family with adequate food, water, and shelter as a critical issue.⁴⁰⁹ Women and girls are particularly vulnerable to harm from physical and sexual assault, trafficking in persons, and other exploitation.⁴¹⁰ Although increased outreach and service provision to survivors of sexual violence has improved their situation, overcrowding in medical facilities, and limited access to long-term trauma care still prevent

⁴⁰³ HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0743.

⁴⁰⁴ See above, para. 112.

⁴⁰⁵ ISCG situation report of 29 November 2018, [BGD-OTP-0001-0581](#) at 0582; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751, at 0407, para. 1174, at 0505, para. 1489.

⁴⁰⁶ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1765; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1383; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453 (claiming that the attacks displaced more than 94,000 Rohingya and more than 74,000 fled to Bangladesh). On 5 January 2017 the IOM reported 65,000 refugees, while on 20 January 2017 OCHA updated the number to 66,000 (OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342). See also in general, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384-0388, paras. 1069-1095.

⁴⁰⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174; HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0745-0747.

⁴⁰⁸ HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0753.

⁴⁰⁹ Xchange report 2018, [BGD-OTP-0002-1465](#) at 1470, 1477 (methodology), 1489-1490.

⁴¹⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174; ISCG situation report of 10 January 2019, [BGD-OTP-0002-0843](#) at 0848; House of Commons report, [BGD-OTP-0002-0640](#) at 0676-0677, paras. 64-65; BBC article of 20 March 2018, [BGD-OTP-0002-0624](#) at 0625-0628. See also HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0755.

survivors from receiving the full degree of care needed.⁴¹¹ A humanitarian affairs officer for MSF reportedly indicated that mental health is one of the biggest and most neglected needs in the camps, and that the trauma from Myanmar is compounded by the stresses of life in the camps.⁴¹²

(ii) Preventing the safe and humane return of recently displaced Rohingya from Bangladesh is similar in character to other acts under article 7(1)

148. The available information suggests that the conduct of members of the *Tatmadaw*, other Security Forces, and other Myanmar authorities preventing the safe and humane return to Myanmar of recently displaced Rohingya persons in Bangladesh, is of a nature and gravity similar to other acts referred to in article 7(1). This is because this conduct violates a fundamental right under customary international law and is factually comparable in its gravity to an article 7(1) act.

a. The identified conduct violates a fundamental right under customary international law

149. As previously set out, the Prosecution considers that customary international law at least recognises a fundamental right of displaced persons to return safely and humanely to their State of origin, provided they have a sufficiently close connection, such as citizenship or long-term prior residence if that citizenship is arbitrarily denied.⁴¹³ In this sense, conduct intentionally violating this right is

⁴¹¹ ISCG situation report of 29 November 2018, [BGD-OTP-0001-0581](#) at 0589 (noting that at least 115 additional GBV case management service entry points are required to achieve full coverage for life-saving care for the total population in need); HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0763.

⁴¹² HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0762-0763.

⁴¹³ See above para. 137.

similar in nature to other acts under article 7(1).⁴¹⁴ Myanmar is subject to this customary law obligation, which has bound its agents at all material times.⁴¹⁵

150. The customary law obligation may be subject to some narrow exceptions, but there is a reasonable basis to believe that these do not presently apply in this situation.⁴¹⁶ While IHL may permit a State to deny or postpone the return of displaced persons, at least for such time as those same persons could lawfully be evacuated from their homes,⁴¹⁷ the circumstances here do not justify such an evacuation in the first place.⁴¹⁸ Preventing the return of displaced Rohingya persons is neither justified by the security of the civilian population, nor by imperative military reasons; indeed, there appears to be no real threat other than that emanating from the Myanmar authorities themselves.⁴¹⁹

b. The identified conduct is of comparable gravity to an article 7(1) act

151. There is a reasonable basis to believe that the identified conduct — preventing displaced Rohingya persons from safely and humanely returning to Myanmar — is sufficiently serious in its characteristics that it is of comparable gravity to other acts punished under article 7(1) of the Statute. This is for four reasons. First, the identified conduct is integral to securing and consolidating the harm caused by the prior deportation, a crime against humanity. Second, the identified conduct not only includes administrative measures, but also means which are criminal in

⁴¹⁴ See above para. 137.

⁴¹⁵ There is no basis upon which to consider Myanmar a persistent objector. Furthermore, while it has not ratified all of the international human rights treaties, it is a party to the CRC and the CRPD — both of which contain a provision concerning the right to leave and enter “one’s own country”: see above fns. 370, 372.

⁴¹⁶ Any restriction *arguendo* under the law of Myanmar apparently permitting the further exclusion of displaced Rohingya persons from returning to Myanmar would appear to be invalid for these purposes as discriminatory and arbitrary. As such, it would fail the “quality of law” test set out in the international treaties provisions which may be regarded as somewhat analogous to the customary international law right: see e.g. [ICCPR](#), article 12(4); [CRPD](#), article 18(1)(d). See also e.g. [ACHPR](#), article 12(2).

⁴¹⁷ This follows, *a contrario*, from the ICRC’s recognition that displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for the displacement cease to exist: see above para. 136.

⁴¹⁸ See above para. 119.

⁴¹⁹ [Geneva Convention IV](#), article 49; [Additional Protocol II](#), article 17. See also e.g. [Stakić AJ](#), paras. 284-287; [Popović TJ vol.I](#), paras. 901-903; [Blagojević TJ](#), paras. 597-600. See above para. 119.

and of themselves. Third, the identified conduct is of prolonged duration and great scale. Fourth, the identified conduct is sufficiently proximate to the harm inflicted on displaced Rohingya persons in Bangladesh, in the sense that, if the conduct were to cease, this would be likely to substantially and directly ameliorate their suffering.

- i. The identified conduct is integral to securing and consolidating the crime of deportation

152. First, while preventing displaced Rohingya persons from safely and humanely returning to Myanmar, as an other inhumane act, is a distinct conduct from the act of deportation,⁴²⁰ the *actus reus* of the other inhumane act (violating the right to return) may well, in some circumstances, be integral to securing the ulterior objective of the act of deportation. This factor enhances the gravity of the perpetrator's conduct.

153. The ambition of certain persons not only to eject Rohingya people from Myanmar but also to *lock the door behind them* is apparent from the fact that the two identified crimes share key perpetrators, notably, members of the *Tatmadaw*. In itself, this overlap suggests a link between the deportation and the subsequent prevention of the displaced persons' safe and humane return. Furthermore, early measures to assist in preventing the return of displaced Rohingya persons appear to have been taken even as the acts of deportation were being carried out.

154. For example, the targeted burning and destruction of Rohingya livestock, homes and structures — at times resulting in the destruction of entire villages⁴²¹ — made the return more difficult if not impossible. One direct perpetrator was quoted as saying to a Rohingya woman: "Don't return back. We have burned

⁴²⁰ Deportation does not require the intent that the victims be displaced permanently. See [Karadžić TJ vol.I](#), para. 493.

⁴²¹ See above paras. 106-110. Similar targeted destruction of Rohingya livestock, homes and villages took place in the context of the 2016 wave of violence. See above para. 111.

down your house. If you return we will kill you.”⁴²² Further, the *Tatmadaw* is reported to have planted landmines in the border regions and in northern Rakhine State within two weeks of the start of the 2017 wave of violence, after thousands of Rohingya had already fled to Bangladesh and in areas that had been previously used as crossing points without incident.⁴²³ As a result, several were injured and killed.⁴²⁴ In the view of the UN FFM, this was allegedly done with the “intended or foreseeable effect of injuring or killing Rohingya civilians fleeing to Bangladesh”, and as part of a “deliberate and planned strategy of dissuading Rohingya refugees from attempting to return to Myanmar.”⁴²⁵ Similarly, the *Tatmadaw* has also taken steps to construct a more robust border fence on the border with Bangladesh, as confirmed by public statements of Commander-in-Chief Senior-General Min Aung Hlaing.⁴²⁶ As of March 2018, this new fencing — built by the Ministry of Home Affairs — was reportedly completed along all but a 60 kilometre portion. It was fortified with additional troops and military posts.⁴²⁷

- ii. The identified conduct encompasses administrative measures and potentially unlawful means

155. Second, there is a reasonable basis to believe that the identified conduct encompasses conduct which is violent and/or criminal in and of itself.

156. The available information indicates that Rohingya villages and property continued to be destroyed, not only to coerce victims into fleeing but also after their flight.⁴²⁸ Burnt Rohingya land appears to have been subsequently cleared

⁴²² PILPG Report, [BGD-OTP-0001-3307](#) at 3363.

⁴²³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0414-0416, paras. 1205, 1213-1214; Reuters article of 6 September 2017, [BGD-OTP-0002-0857](#) at 0859.

⁴²⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0414-0415, paras. 1206-1208; Reuters article of 6 September 2017, [BGD-OTP-0002-0857](#) at 0859.

⁴²⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0415-0416, para. 1214; *see also* at 0415, para. 1210.

⁴²⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0416, para. 1215.

⁴²⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0416, para. 1215.

⁴²⁸ AI “Remaking Rakhine State” report, [BGD-OTP-0001-2835](#) at 2837-2838, 2857-2858; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0417, para. 1182, at 0427-0434, paras. 1233-1238, at 0490, para. 1425; Reuters

with the use of heavy machinery, and used for the construction of new security facilities, for developing new infrastructure projects, and for constructing new “model villages”.⁴²⁹ In this respect, it is notable that on 26 August 2017, the Union Minister for Social Welfare, Relief, and Resettlement, Dr Win Myat Aye, invoked a natural disaster law under which, he said, “burnt land becomes government-managed land.”⁴³⁰ It is not clear, on the information presently available, whether the *Tatmadaw* — and/or other Myanmar authorities — carried out this terrain clearance, or which groups or entities have carried out the construction.⁴³¹

157. Myanmar’s Permanent Representative to the UN in Geneva, as quoted by the Office of the President, suggested that at least some of the “bulldozing” was done in preparation for Rohingya returnees.⁴³² However, as explained earlier, there are no credible reports of Rohingya returnees having been processed in accordance with the agreements Myanmar signed with Bangladesh and the UN.⁴³³ The links between the institutions and persons potentially responsible for the clearances, and the institutions and persons potentially responsible for the initial deportation, may also call the credibility of this assertion into doubt. Information suggesting the re-settlement of non-Rohingya persons on cleared Rohingya land also seems inconsistent with this official explanation.⁴³⁴

article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:00:00-00:01:20, 00:02:44-00:03:43. *See also* UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0546-0556, 0560.

⁴²⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, para. 1182, at 0416, para. 1216; *see also* 0416-0436, paras. 1216-1244. *See further* Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:00:00-00:01:20, 00:02:44-00:06:03; AI “Remaking Rakhine State” report, [BGD-OTP-0001-2835](#) at 2837-2838, 2857-2858; UEHRD, website page of 6 December 2017, [BGD-OTP-0002-1160](#).

⁴³⁰ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:02:50; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0417, para. 1217.

⁴³¹ *See e.g.* UEHRD, website page of 6 December 2017, [BGD-OTP-0002-1160](#); Myanmar Office of President press release of 11 January 2018, [BGD-OTP-0002-0018](#).

⁴³² Myanmar Office of President press release of 13 March 2018, [BGD-OTP-0002-0013](#), stating that the Permanent Representative, “explained that in preparing facilities for the repatriation, bulldozing the ground is part of the process”.

⁴³³ *See above* para. 70.

⁴³⁴ *See below* paras. 159-165.

158. Construction has not been limited to building houses and villages. The UN FFM analysed satellite images showing the construction of new roads across land where Rohingya houses and compounds previously stood, including in Kyauk Pan Du village tract.⁴³⁵ In other locations, satellite imagery shows the construction of new security and military facilities, for example, in Maung Nu village in Buthidaung Township, where a new BGP post has been constructed on land where Rohingya structures previously stood,⁴³⁶ as well as in Inn Din village tract, and Kan Kya village (South), both in Maungdaw Township, where large, new security structures were built directly on previously destroyed areas.⁴³⁷

159. The available information shows that new villages are planned or being constructed to resettle primarily non-Rohingya displaced persons.⁴³⁸ On the information presently available, the extent to which new villages have been built and non-Rohingya displaced persons resettled is not clear.

160. However, Rakhine State Secretary and senior GAD official⁴³⁹ Tin Maung Swe has publicly stated — according to the UN FFM — that Government departments, led by the *Tatmadaw*-controlled Ministry of Home Affairs, would reclassify or re-zone land previously occupied by Rohingya villages for agriculture or forestry, with new villages being built close-by for settlers. He also said that returning refugees would not be entitled to return to their home villages.⁴⁴⁰ The Myanmar Government has, according to the UN FFM, announced that Rohingya, if repatriated, will be housed in repatriation centers before being sent to “one of 11

⁴³⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0434, para. 1239.

⁴³⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0428-0430, para. 1234; UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0550.

⁴³⁷ UNOSAT analysis of Rakhine State, [BGD-OTP-0002-0537](#) at 0549.

⁴³⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, para. 1182, at 0416, para. 1216; *see also* 0421-0427, paras. 1225-1232. *See further* Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:00:00-00:01:20, 00:03:10-00:08:32; AI “Remaking Rakhine State” report, [BGD-OTP-0001-2835](#) at 2837-2838, 2857-2858; UEHRD, website page of 6 December 2017, [BGD-OTP-0002-1160](#).

⁴³⁹ GAD is a country-wide agency that oversees local governance in Myanmar and is responsible for a range of administrative functions including tax collection, land and property ownership issues, as well as the registration of births, deaths, and marriages (UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0152-0153, para. 83).

⁴⁴⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0422, para. 1229.

designated resettlement areas”.⁴⁴¹ Senior-General Min Aung Hlaing similarly stated to visiting members of the United Nations Security Council (“UNSC”) in April 2018 that “there is no need to be worried about [the refugees’] security if they stay in the areas designated for them.”⁴⁴²

161. Public-private enterprise, the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (“UEHRD”), is reportedly leading resettlement efforts in Rakhine State.⁴⁴³ On 11 January 2018, the Office of the President announced that UEHRD had prepared “three repatriation and assessment camps to resettle ethnic nationals, hindus and muslims”, and that “[h]ouses for Muslims were also built in villages.”⁴⁴⁴

162. The UN FFM noted that a December 2017 resettlement plan announced by UEHRD — supposedly “part of the resettlement programme of the Rakhine State Government” and spanning approximately 26 villages in Maungdaw Township — included only 3% of its nearly 800 houses for displaced Rohingya (who are referred to derogatorily as “Bengali”) — despite the fact that Rohingya make up the vast majority of displaced persons.⁴⁴⁵ The rest were allocated to other ethnic communities.⁴⁴⁶

163. As to whether these proposed or planned resettlements have taken place, the UN FFM’s review of satellite imagery suggested that — as at September 2018 —

⁴⁴¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0410, para. 1189.

⁴⁴² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0410, para. 1189; Senior General Hlaing website article of 5 May 2018, [BGD-OTP-0002-0030](#).

⁴⁴³ Myanmar Office of President press release of 11 January 2018, [BGD-OTP-0002-0018](#); Union Enterprise website page of 4 March 2019, [BGD-OTP-0002-0031](#). *See also* Myanmar Office of President press release of 16 February 2018, [BGD-OTP-0002-0033](#) at 0033, para. 49(e).

⁴⁴⁴ Myanmar Office of President press release of 11 January 2018, [BGD-OTP-0002-0018](#); UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0421-0422, para. 1225.

⁴⁴⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, paras. 1174-1175 (noting that by September 2018, over 725,000 Rohingya had crossed the border into Bangladesh as a consequence of the 2017 clearance operations, whereas, according to Myanmar media reports, 30,000 non-Rohingya civilians were displaced by the violence in Rakhine State).

⁴⁴⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0421-0422, paras. 1225-1229; Union Enterprise website page of 6 December 2017, [BGD-OTP-0002-1160](#).

construction was “continuing” in the majority of the 26 villages.⁴⁴⁷ With respect to specific villages, the December 2017 plan included the construction of 73 houses (holding approximately 352 people) in Min Gyi village; these houses were allocated to ethnic Rakhine.⁴⁴⁸ On 14 May 2018, the President of Myanmar announced that the construction in Min Gyi would include more than 80 houses, a school, and a monastery for “displaced ethnic people of Rakhine State,” thereby excluding Rohingya (who are not considered as one of Myanmar’s ethnic nationalities).⁴⁴⁹ As of 26 July 2018, satellite imagery analysis by the UN FFM showed the construction of a new “model village” in the south of Min Gyi village tract, including 72 new structures.⁴⁵⁰ The UN FFM alleges that the building of “new villages” close to the sites of previous Rohingya villages “appears to be an attempt to change the demographic landscape of northern Rakhine State” — referencing the statement by GAD official Tin Maung Swe, referred to above,⁴⁵¹ that government departments would reclassify or re-zone land previously occupied by Rohingya villages, for purposes such as agriculture or forestry, with new villages being built close by for settlers.⁴⁵²

164. In Inn Din and Koe Tan Kauk villages — both of which had Rohingya majorities before they fled as a result of the 2017 wave of violence — a Buddhist nationalist group, authorised by the Myanmar authorities, has reportedly built homes for and resettled Buddhist families from elsewhere in Rakhine State.⁴⁵³ Indeed, a senior official in the GAD in Rakhine State confirmed this group was

⁴⁴⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0421-0422, paras. 1225-1226.

⁴⁴⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0421-0422, paras. 1225, 1227; Union Enterprise website page of 6 December 2017, [BGD-OTP-0002-1160](#).

⁴⁴⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0422, para. 1227.

⁴⁵⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0422, para. 1228.

⁴⁵¹ See above para. 160.

⁴⁵² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0422, para. 1229.

⁴⁵³ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:03:43-00:04:11.

operating with the approval of his office and the Government, to resettle Buddhists in Rakhine State.⁴⁵⁴

165. Similarly, a resettlement map shown to Reuters journalists by the Ministry of Social Welfare, Relief, and Resettlement, in or around December 2018, plots the location of new settlements to be built for the Rohingya — who are referred to as “Bengali” on the map and who appear to be concentrated outside their villages of origin and in a smaller number of settlements. The Ministry reportedly said there would be 42 of these settlements.⁴⁵⁵ This map does not include resettlement of any “Bengali” in Rathedaung Township, despite this being one of three townships subject to the 2017 wave of violence and home to tens of thousands of “Muslims” before they were deported.⁴⁵⁶ Reuters reported that “Myanmar is planning to concentrate Rohingya refugees who return in a smaller number of what the government calls new “Bengali” settlements [than village tracts previously inhabited by the Rohingya].”⁴⁵⁷

166. Finally, the Myanmar authorities’ original proposal for the repatriation of displaced Rohingya persons contemplated their “temporar[ly]” housing in a transit centre in Hla Phoe Khaung.⁴⁵⁸ This facility — designed to accommodate 30,000 returnees — has been constructed in a village tract where an estimated 2,500 Rohingya lived before the 2017 wave of violence before “security forces burned and the government bulldozed the area”.⁴⁵⁹ Returnees were to come here

⁴⁵⁴ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:03:43-00:04:11.

⁴⁵⁵ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:06:03-00:08:32.

⁴⁵⁶ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:08:09.

⁴⁵⁷ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:07:28.

⁴⁵⁸ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0588-0589, para. 12; Myanmar State Counsellor Office Facebook post of 27 May 2018, [BGD-OTP-0002-0012](#); Myanmar Times article of 15 January 2018, [BGD-OTP-0002-0010](#). *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0410-0411, para. 1190.

⁴⁵⁹ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0588-0589, para. 12. *See also* HRW article of 15 November 2018, [BGD-OTP-0002-0803](#) at 0806; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0410-0411, paras. 1189-1191.

only after being processed in two reception centers in Maungdaw Township at Nga Khu Ya and Taung Pyo Latwe which could allegedly process three hundred returnees a day, if operating five days a week.⁴⁶⁰ As the UN High Commissioner for Human Rights has noted, at this rate, it would take over 10 years to process the approximately 815,000 people who have arrived in Cox's Bazar since October 2016.⁴⁶¹ Furthermore, these facilities are surrounded by a perimeter fence and staffed at least in part by BGP and *Tatmadaw* soldiers.⁴⁶²

167. These ongoing construction and resettlement measures and plans provide further indication that, rather than facilitating the return of Rohingya refugees, the Myanmar authorities have taken, and continue to take steps to prevent their return. This is further shown by the fate of those who are known to have physically attempted to return to Myanmar from Bangladesh. In the period April to May 2018, the BGP detained 62 Rohingya refugees who had crossed the border from Bangladesh, and brought criminal charges against 58 of them.⁴⁶³ These persons were subsequently pardoned by the President and transferred to the Nga Khu Ya camp,⁴⁶⁴ intended as a "reception center" for returning Rohingya.⁴⁶⁵ Detainees in this camp reported inadequate food, water and sanitation,⁴⁶⁶ and further alleged abuse and mistreatment while in the custody of the BGP.⁴⁶⁷

⁴⁶⁰ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0589, para. 12.

⁴⁶¹ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0588-0589, para. 12.

⁴⁶² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0410, para. 1190.

⁴⁶³ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0589, para. 15; Myanmar State Counsellor Office Facebook post of 27 May 2018, [BGD-OTP-0002-0012](#); HRW article of 21 August 2018, [BGD-OTP-0002-0809](#) at 0809-0810.

⁴⁶⁴ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0589, para. 15; Myanmar State Counsellor Office Facebook post of 27 May 2018, [BGD-OTP-0002-0012](#).

⁴⁶⁵ UN High Commissioner for Human Rights oral update of 3 July 2018, [BGD-OTP-0002-0586](#) at 0589, para. 12.

⁴⁶⁶ HRW article of 21 August 2018, [BGD-OTP-0002-0809](#) at 0809, 0811.

⁴⁶⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0414, para. 1204; HRW article of 21 August 2018, [BGD-OTP-0002-0809](#) at 0809-0812. Specifically, some of these detainees detailed how the BGP tortured, abused and interrogated them about the ARSA at gunpoint (HRW article of 21 August 2018, [BGD-OTP-0002-0809](#) at 0809, 0811).

iii. The identified conduct is of prolonged duration and great scale

168. Third, another obvious indicator of the gravity of the perpetrator's conduct, for the purpose of article 7(1)(k), is the degree of victimisation which it causes. In this situation, this aspect speaks for itself. The available information suggests that hundreds of thousands of Rohingya persons, even considering those deported in the 2017 wave of violence alone, currently remain in Bangladesh and are prevented from exercising their right to return safely and humanely to Myanmar.⁴⁶⁸

iv. Cessation of the identified conduct may directly ameliorate the victims' harm

169. Finally, it is acknowledged that the suffering and harm inflicted upon the displaced Rohingya persons,⁴⁶⁹ as a consequence of their inability to return to Myanmar, is in part determined simply by the extreme difficulty of the circumstances in which they are forced to live. Yet this suffering is sufficiently proximate to the conduct of those persons responsible for intentionally and effectively preventing their safe and humane return in the sense that, if the conduct were to cease, this would be likely to substantially and directly ameliorate their suffering. This further suggests that the gravity of this conduct is similar to other acts under article 7(1).

170. The potential ability of the Myanmar authorities to take appropriate steps to enable the safe and humane return of the displaced Rohingya persons – and the potential responsibility of those persons with the capacity to effect such a policy – is amply illustrated by the international efforts to enable repatriation in

⁴⁶⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174.

⁴⁶⁹ See above paras. 145-147.

dialogue with Myanmar which, to date, have remained ultimately unsuccessful.⁴⁷⁰ The ICG noted, as of 12 November 2018, that no Rohingya refugees had returned through official channels, while some 16,000 additional Rohingya had in fact left Myanmar for Bangladesh in 2018.⁴⁷¹ Notably, on 25 January 2019, the Myanmar Special Rapporteur expressed her opinion that the Myanmar authorities were not sincere in their discussion of repatriating refugees from Bangladesh, and that displaced Rohingya persons would not be able to return to Myanmar in the near future.⁴⁷²

3. Persecution on grounds of ethnicity and/or religion

171. In its Jurisdiction Decision, Pre-Trial Chamber I noted that if “members of the Rohingya people were deported from Myanmar to Bangladesh on any of the grounds enumerated in article 7(1)(h) of the Statute, the Court might also have jurisdiction [...] over the crime against humanity of persecution, considering that an element or part of this crime (i.e. the cross-border transfer) takes place on the territory of a State Party”.⁴⁷³ Deportation constitutes a severe deprivation of human rights, including the right of individuals to live in their communities and homes,⁴⁷⁴ and may amount to persecution.⁴⁷⁵

⁴⁷⁰ See e.g. Arrangement on return between Bangladesh and Myanmar, [BGD-OTP-0002-0050](#); UNDP Press Release of 28 May 2019, [BGD-OTP-0001-5175](#). But see [Jurisdiction Decision](#), fn. 52, 121; United Nations Children’s Fund (“UNICEF”) Press Release of 16 November 2018, [BGD-OTP-0002-0986](#) at 0987; Voice of America News article of 15 November 2018, [BGD-OTP-0002-1083](#) at 1083; UNHCR press release of 11 November 2018, [BGD-OTP-0002-0959](#) at 0959; UN High Commissioner for Human Rights oral update 3 July 2018, [BGD-OTP-0002-0586](#) at 0588-0589, paras. 11-12; UNHCR Press Release of 31 May 2018, [BGD-OTP-0002-0983](#) at 0983; Myanmar State Counsellor Office press release of 1 May 2018, [BGD-OTP-0002-0025](#); Kyodo article of 1 May 2018, [BGD-OTP-0002-0034](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0409, para. 1183; HRW article of 15 November 2018, [BGD-OTP-0002-0803](#) at 0804-0806; ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0819; HRW letter of 11 December 2017, [BGD-OTP-0002-0866](#) at 0866-0870; HRW “Burma: Rohingya Return Deal Bad for Refugees” report, [BGD-OTP-0002-0797](#) at 0797-0780.

⁴⁷¹ ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0819.

⁴⁷² UN Special Rapporteur report of 25 January 2019, [BGD-OTP-0002-0977](#) at 0980-0981. See also OHCHR News Release of 6 November 2018, [BGD-OTP-0002-0875](#) at 0877 (noting the “high risk of persecution” for any displaced Rohingya persons who returned to Myanmar at that time).

⁴⁷³ [Jurisdiction Decision](#), para. 76.

⁴⁷⁴ See [Krnjelac AJ](#), para. 218 (in the context of acts of forcible displacement).

172. The available information provides a reasonable basis to believe that the crime against humanity of persecution, based on ethnic and/or religious grounds under article 7(1)(h), by means of deportation and intentional and severe deprivation of the customary international law right to return, was committed in the context of the 2017 wave of violence.

173. This requires proof that: (i) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (ii) 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; (iii) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7(3) of the Statute, or other grounds that are universally recognised as impermissible under international law; and (iv) the conduct was committed in connection with any of the acts referred to in article 7(1) of the Statute or any crime within the jurisdiction of the Court.⁴⁷⁶

174. The available information provides a reasonable basis to believe that the victims were targeted because of their membership in the Rohingya group, which may be characterised potentially in ethnic and/or religious terms.⁴⁷⁷ This is demonstrated by the composition of the victimised population, the patterns of coercive acts and the methods employed – in particular, perpetrators appear to have distinguished between Rohingya and non-Rohingya persons. For example, the villages attacked by the *Tatmadaw* and others in the context of the 2017 wave

⁴⁷⁵ See e.g. [Kenya et al. CD](#), para. 283 (finding that “displacement” [...] “constitute[s] severe deprivations of fundamental rights” which may amount to persecution as a crime against humanity); [Krnjelac AJ](#), para. 221 (noting that forcible displacements “can constitute a crime of persecution”).

⁴⁷⁶ See [Rome Statute](#), articles 7(1)(h), 7(2)(g); [Elements of Crimes](#), article 7(1)(h), paras. 1-4. See also [Burundi Article 15 Decision](#), para. 130.

⁴⁷⁷ See above paras. 37-38, 46.

of violence were comprised almost exclusively of Rohingya; in those mixed villages which were attacked, non-Rohingya populations were left unharmed.⁴⁷⁸

175. The perpetrators' discriminatory intent is further reflected in public statements made by *Tatmadaw* officials and perpetrators on the ground. For instance, it is reported that on 8 September 2017 a post appeared on the official Facebook page of the Office of the *Tatmadaw* Commander-in-Chief Senior General Min Aung Hlaing, comparing a certain Myanmar parable and the issue of the Rohingya in Rakhine State. The Myanmar parable is a supposed cautionary tale concerning a camel which gradually takes more and more space in his merchant's tent until eventually the merchant is forced out.⁴⁷⁹

176. Social media posts and statements by more junior *Tatmadaw* soldiers and other Security Forces members have also used language targeted against Rohingya. For example, it is reported that:

- i. On 26 August 2017, a soldier of the 99th Light Infantry Division ("LID") wrote that he could not wait to be deployed to Rakhine State because the "Muslim dogs" are posing a threat to the citizens.⁴⁸⁰ The following day he posted, "on the battlefield, whoever is quick will get to eat you, Muslim dogs".⁴⁸¹
- ii. On 27 August 2017, a police officer deployed in the "clearance operations" posted that he "Ha[s] been wanting to kill these 'Kalar' for so long. Only got to kill them just now."⁴⁸²

⁴⁷⁸ See above para. 110.

⁴⁷⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0454, para. 1312 (referring to a post on file with the UNFFM which has since been deleted). See also below para. 194, section VI. B. 4. (b) (iii) .

⁴⁸⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478-0479, para. 1378.

⁴⁸¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478-0479, para. 1378.

⁴⁸² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478-0479, para. 1378.

- iii. A lieutenant of the 33rd LID deployed to Rakhine in early August 2017 posted a “smirking emoji” on Facebook, along with the commentary, “If they’re Bengali [...] they’ll be killed”.⁴⁸³
- iv. In early 2018, *Tatmadaw* soldiers near the border with Bangladesh used a loudspeaker to scare and insult Rohingya persons, and to compel them to enter Bangladesh, using phrases such as “Leave, stateless Bengali!”⁴⁸⁴

177. Numerous physical perpetrators of the coercive acts reportedly uttered discriminatory statements and slurs, indicating that they intended to target the victims on the basis of their ethnicity and/or religion. In particular, the term “*kalar*” was allegedly frequently used by perpetrators. This translates as “black or dark skinned”,⁴⁸⁵ and is “often used” against the Rohingya as “a racist slur to insult and highlight someone’s dark skin or foreign ancestry, signifying inferiority compared to ‘ethnic’ Myanmar people”.⁴⁸⁶ Other derogatory or discriminatory expressions used by perpetrators against their victims allegedly included “*Mout Kalar*”; “*Yay Myaw Kan Tin*” (a Myanmar phrase for “unwanted person”);⁴⁸⁷ “You Bengali, we will finish you”; “*Kalars*, why are you living here. You must live with your people. You must go”.⁴⁸⁸

178. The targeting of Rohingya victims is also demonstrated by the destruction of Rohingya villages through fire or bulldozing, houses being planned or constructed predominantly for use by other ethnic and/or religious groups and

⁴⁸³ Reuters article of 26 June 2018, [BGD-OTP-0001-1086](#) at 1089. The Facebook page Reuters refers to has since been deleted.

⁴⁸⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0414, para. 1203.

⁴⁸⁵ PILPG Report, [BGD-OTP-0001-3307](#) at 3351.

⁴⁸⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0451, para. 1312.

⁴⁸⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478, para. 1378.

⁴⁸⁸ PILPG Report, [BGD-OTP-0001-3307](#) at 3351-3352.

other infrastructure being built on formerly Rohingya land.⁴⁸⁹ A senior official in Rakhine’s GAD demonstrated the targeting of Rohingya when he confirmed that a Rakhine Buddhist nationalist group was operating with Government approval to resettle Buddhists on Rohingya land, and that his office signed off on the resettlement of families vetted by this group.⁴⁹⁰

179. Indications that the Rohingya group were additionally or alternatively targeted on religious grounds are also present. For example, it has been reported that mosques and *madrassas* were usually burned and destroyed first during attacks on villages.⁴⁹¹ Similarly, religious clothing and symbols were targeted and men’s beards forcibly removed.⁴⁹² As noted above,⁴⁹³ a soldier of the 99th LID posted online about the “threat” posed by “Muslim dogs”.⁴⁹⁴

180. The same discriminatory intent appears to be present in the context of the 2016 wave of violence. The information reviewed indicates that the crime against humanity of persecution, based on ethnic and/or religious grounds under article 7(1)(h), by means of deportation, was committed in the context of the 2016 wave of violence. As in 2017, in the context of the 2016 wave of violence, the victims of deportation were targeted because of their membership in the Rohingya group.⁴⁹⁵

⁴⁸⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0408, para. 1182, at 0416-0436, paras.1216-1241; Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:00:00-00:01:20, 00:03:10-00:08:32. *See also* above paras. 156-167.

⁴⁹⁰ Reuters article of 18 December 2018 (containing video and graphics), [BGD-OTP-0001-5170](#) at 00:03:43-00:04:11.

⁴⁹¹ PILPG Report, [BGD-OTP-0001-3307](#) at 3353.

⁴⁹² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0508, para. 1501.

⁴⁹³ *See* above para. 176.

⁴⁹⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478-0479, para. 1378. Rakhine nationalists called for strict vetting of returnees, wanting a “Muslim-free zone” in southern Maungdaw (*see* ICG briefing of 12 November 2018, [BGD-OTP-0002-0818](#) at 0821).

⁴⁹⁵ For a similar conclusion *see also* OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0376 (“According to the testimonies gathered, the following types of violations were reported and experienced frequently in the area: [...] ethnic and religious discrimination and persecution.”), at 0378-0379 (“The information gathered by OHCHR raises serious concerns that what is occurring in nRS [northern Rakhine State] is the result of a ‘purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group for certain geographic areas.’”) AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1681, 1683, 1686, 1687, 1720 (“Amnesty international has documented the following crimes in this report: [...] Persecution based on ethnic and religious discrimination, through burning of homes, other buildings and sometimes whole villages, looting, severe restriction on freedom of movement and

Further, religious scholars, teachers and community leaders were specifically apprehended and on some occasions killed.⁴⁹⁶ The targeting of victims because of their membership in the Rohingya group is further reflected in public statements made by Myanmar officials⁴⁹⁷ and in the discriminatory language that perpetrators reportedly used.⁴⁹⁸ This conclusion is supported by the general atmosphere of contempt towards the Rohingya in Myanmar, and their systematic discrimination and repression for years.⁴⁹⁹

4. Contextual elements of crimes against humanity

181. There is a reasonable basis to believe that the identified crimes were committed as part of a widespread and systematic attack directed against any civilian population.⁵⁰⁰ The violent acts perpetrated in the context of the 2017 wave of violence,⁵⁰¹ whether or not in combination with the violent acts perpetrated in the context of the 2016 wave of violence, constituted an “attack” for the purpose of article 7 – a course of conduct (multiple acts under article 7(1)) directed against Rohingya persons in Rakhine State (a civilian population), pursuant to or in furtherance of a State policy.

(a) *Attack directed against any civilian population*

182. The available information provides a reasonable basis to believe that the 2017 wave of violence against the Rohingya civilian population comprised or

denial of humanitarian aid, all imposed overwhelmingly on Rohingyas [...]”). *See also* in general in relation to the persecutorial context in which the clearance operations took place in Physicians for Human Rights (“PHR”) “Where there is Police” report, [BGD-OTP-0002-0380](#). In addition, following the 9 October 2016 incidents (and before the *Tatmadaw* stepped up the clearance operations after the 12 November 2016 incidents) the restrictions imposed on Rohingya’s freedom of movement, business activities and religious practices were tightened – including limiting their right to offer burial services, *see* OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0371-0372.

⁴⁹⁶ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0372.

⁴⁹⁷ *See* below paras. 194-195.

⁴⁹⁸ UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0385, para. 1075; OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0357, 0363, 0378.

⁴⁹⁹ *See* above section V. C.

⁵⁰⁰ *See* [Côte d’Ivoire Article 15 Decision](#), para. 29; [Kenya Article 15 Decision](#), para. 79.

⁵⁰¹ *See* above section VI. B. 1. (a)

encompassed a course of conduct within the meaning of article 7(2)(a), in which members of the *Tatmadaw* and other Security Forces, with some participation of non-Rohingya civilians, carried out multiple acts under article 7(1).

183. The acts described above⁵⁰² — killings, rapes and others forms of sexual violence, acts of physical and psychological violence causing great suffering or serious injury and deportation (including coercion by means of destruction of property)⁵⁰³ — are not the mere aggregate of a few isolated and random incidents.⁵⁰⁴ Rather, they share common features in terms of the nature and characteristics of the acts, the population targeted and the alleged perpetrators. These common features are evidenced through patterns of killings, rapes and other forms of sexual violence, acts of physical and psychological violence and destruction of property perpetrated against the civilian population present in the villages targeted by the 2017 wave of violence.

184. Although the Myanmar authorities claim that they only targeted ARSA members and their supporters, resulting in the killing of 376 “ARSA Bengali terrorists”,⁵⁰⁵ this claim does not appear credible, considering the available information as a whole. Rather, the information available provides reasonable

⁵⁰² See above section VI. B. 1. (a)

⁵⁰³ Destruction of property is not referred to in article 7(1). However, in this case it can be legally considered to establish the existence of the alleged attack (as well as its widespread and systematic nature) because it constitutes an intrinsic part of the crime of deportation referred to in article 7(1). In addition, the alleged destruction resulting in the annihilation of hundreds of Rohingya villages and the violation of the right to return, amounts to other inhumane acts under article 7(1)(k). Property destruction of significant gravity can in any event meet the threshold of article 7(1)(k), in particular when depriving the victims of essential means for sustaining their lives and livelihoods. Pre-Trial Chamber II accepted that property destruction could in principle meet the threshold *Kenyatta et al. CD*, paras. 278-279. In that case, the destruction of property was of a character similar to the acts under article 7(1) and caused great suffering or serious injury to mental or physical health, as victims were deprived of the essential means for sustaining their lives.

⁵⁰⁴ *Gbagbo CD*, para. 209; *Bemba TJ*, para. 149. For similar conclusions on the facts of this situation, see for e.g. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0509-0510, para. 1508; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2525-2526.

⁵⁰⁵ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#) at 0017, para. 8.

grounds to believe that the attack(s) targeted Rohingya civilians, including children, the elderly and expectant mothers.⁵⁰⁶

(b) *State or organisational policy*

185. Pursuant to article 7(2)(a) of the Statute, the course of conduct involving the multiple commission of acts under article 7(1) must be carried out “pursuant to or in furtherance of a State or organisational policy to commit such attack”. Showing that the attack was planned, directed or organised — as opposed to wholly spontaneous, or an aggregate of isolated acts of violence — necessarily satisfies the policy criterion.⁵⁰⁷ In fact, showing a “policy” does not require proof of a motive, ideology or ulterior purpose,⁵⁰⁸ the perpetrators’ motivation is irrelevant. Nor is it necessary for a policy to be formalised,⁵⁰⁹ bureaucratic or precise; it may be implicit.⁵¹⁰ The term “policy” merely requires that some part of the State or organisation must at least have encouraged the attack, either actively or passively, thus linking the multiple article 7(1) acts together.

186. The available information indicates that the above-described course of conduct,⁵¹¹ involving killings, rapes and others forms of sexual violence, acts of physical and psychological violence and deportation (including coercion by mean

⁵⁰⁶ See above section VI. B. 1. (a) See also PILPG Report, [BGD-OTP-0001-3307](#) at 3352-3353; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3427.

⁵⁰⁷ [Gbagbo CD](#), para. 215; [Katanga and Ngudjolo CD](#), para. 396; [Bemba CD](#), para. 81; [Côte d’Ivoire Article 15 Decision](#), para. 43; [Kenyatta CD](#), para. 111.

⁵⁰⁸ [Gbagbo CD](#), para. 214; [Bemba TJ](#), para. 159; [Katanga TJ](#), para. 1108; [Ruto CD](#), para. 213.

⁵⁰⁹ [Gbagbo CD](#), para. 215; [Katanga TJ](#), paras. 1109-1110; [Bemba CD](#), para. 81; [Bemba TJ](#), para. 160; [Kupreškić TJ](#), para. 551. See also [Blaškić TJ](#), para. 204: “This plan, however, need not necessarily be declared expressly or even stated clearly and precisely”. See also [Tadić TJ](#), para. 653.

⁵¹⁰ [Katanga and Ngudjolo CD](#), para. 396; [Katanga TJ](#), paras. 1108 (no “formal design”), 1110 (the policy may “become clear [...] only in the course of its implementation, such that the definition of the overall policy is possible only *in retrospect*”, emphasis supplied). It is not necessary to show that the policy was adopted at the highest levels of a State or organisation (see also [Bemba TJ \(Separate Opinion of Judge Ozaki\)](#), para. 30; [Blaškić TJ](#), para. 205) nor is it required that every member of a State or organisation support or endorse the policy (see [Bemba TJ \(Separate Opinion of Judge Ozaki\)](#), para. 30).

⁵¹¹ See above para. 183.

of destruction of property), was carried out pursuant to a State policy to attack the Rohingya civilian population.⁵¹²

187. This policy is suggested by a variety of indicators including: the clear patterns of violence involving Myanmar State actors; the entrenched system of institutionalised oppression; public statements by high-level senior officials portraying the Rohingya population as a whole as a terrorist threat; and the failure to take meaningful measures to bring members of the *Tatmadaw* and other Security Forces to justice and/or to prevent or deter the repetition of the crimes.

(i) Patterns of conducts and perpetrators involved in the 2017 wave of violence

188. The *timing, location* and *extensive* occurrence of the prohibited acts, as well as the categories of *victims* and alleged *perpetrators* involved are consistent with the existence of a State policy to commit the attack.⁵¹³

189. The systematic and consistent manner in which the villages were attacked and the violent acts that were carried out are strong indications that they were the product of a policy. In particular, Rohingya settlements or populated areas appear to have been targeted and measures put in place to spare non-Rohingya persons and houses.⁵¹⁴ The consistent discriminatory character of the attacks further demonstrates the existence of an underlying policy to attack the Rohingya civilian population specifically.

190. The acts were also consistently attributable to the same alleged *perpetrators*, mainly members of the *Tatmadaw* and other Security Forces. This further shows

⁵¹² See similar conclusion reached by UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0510, para. 1509; PILPG Report, [BGD-OTP-0001-3307](#) at 3379; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2526-2527.

⁵¹³ See above section VI. B. 1. (a) See also in general regarding the pattern of conducts in the context of the 2017 wave of violence: UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0371 paras. 883-1008.

⁵¹⁴ PILPG Report, [BGD-OTP-0001-3307](#) at 3379, 3352; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0361-0363, paras. 972-976.

the direct involvement of the State and the use of public resources to further the policy.

(ii) An institutionalised system of exclusion and oppression

191. The 2017 wave of violence was connected to a wider context of violence and general oppression directed against the Rohingya people in Myanmar, as described above,⁵¹⁵ and in particular to the 2016 wave of violence.

192. These measures have been accompanied by, and should be seen in the context of, State-sponsored exclusionary and discriminatory rhetoric. The UN FFM observed that the situation of the Rohingya in Rakhine State has been aggravated by their increasing exclusion from Myanmar society since the 1960s, amid decades of “State-sponsored stigmatization, leading to their being *de facto* stateless and reviled by much of the population”.⁵¹⁶

(iii) Official statements feeding the anti-Rohingya sentiment and associating the entire Rohingya population with terrorism

193. The attack was also accompanied by anti-Rohingya and broader anti-Muslim sentiment, including in the form of virulent hate speech propagated by a number of actors.⁵¹⁷ According to the information available, State-run media and Myanmar authorities have engaged in, and contributed to, the propagation of anti-Rohingya sentiment, by associating the entire Rohingya population with terrorism⁵¹⁸ and portraying them as a security threat which must be contained to protect those whom they consider to be rightful Myanmar citizens.⁵¹⁹

⁵¹⁵ See above paras. 45-58.

⁵¹⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478, para. 1377. See also above paras. 59-60.

⁵¹⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0449-0450, paras. 1302-1304. AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2669.

⁵¹⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0461-0465, paras. 1327-1328, 1330-1331, 1333-1334, at 0472-0473, paras. 1355-1356; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2669.

⁵¹⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0465, paras. 1334-1335.

194. For example, it has been reported that Senior-General Min Aung Hlaing, Commander-in-Chief of the *Tatmadaw*, stated on 1 September 2017, “we openly declare that absolutely, our country has no Rohingya race”;⁵²⁰ on 16 October 2017, “The Senior General said he would like to note at first that those Bengali are not Myanmar ethnics [...] Therefore, the Tatmadaw needs to take security measures for local people” and “Bengali are not ethnic of Myanmar. Rohingya is not included on the list of Myanmar’s ethnics. [...] The Tatmadaw on its part will give priority to safeguarding the security and interest of the ethnics while protecting the citizens residing in Myanmar”;⁵²¹ on 19 March 2018, “Bengali do not have any characteristics or culture in common with the ethnicities of Myanmar. The tensions [in Rakhine State] were fuelled because the Bengali demanded citizenship.”⁵²² On 1 September 2017, only a few days into the 2017 wave of violence, in a Facebook post, Senior-General Min Aung Hlaing reportedly linked the 2017 “clearance operations” with an “unfinished” “Bengali problem” dating back to 1942.”⁵²³

195. These statements — attributable to the highest echelons of the Myanmar State authorities — condoning, if not encouraging, the commission of crimes and reflecting a State-sponsored narrative of the entire Rohingya population being illegal immigrants, terrorists and ultimately a threat to Myanmar society, further demonstrate the existence of an underlying State policy to attack the Rohingya civilian population.

196. Discriminatory and derogatory language was also reportedly used by members of the *Tatmadaw* and other Security Forces physically carrying out the

⁵²⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0463, para. 1330.

⁵²¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0463, para. 1330.

⁵²² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0461, para. 1328.

⁵²³ “The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.” See UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 753, at 0465-0466, para. 1336. See also AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2805.

violent acts described earlier. A number of witnesses interviewed by the UN FFM allegedly reported that they were told “that they should leave Myanmar as they are “Bengali” or “illegal Bengali” and that Myanmar is not their country.”⁵²⁴ Soldiers also allegedly used similar rhetoric and derogatory language in social media posts, as previously described.⁵²⁵

(iv) Failure to bring the alleged perpetrators to justice

197. Finally, the information available indicates that the Myanmar authorities have failed to take meaningful measures to bring members of the *Tatmadaw* and other Security Forces allegedly responsible for violent conduct to justice and to prevent or deter repetition of the relevant conduct,⁵²⁶ further showing that the attack was carried out pursuant to a State policy. With respect to the 2017 wave of violence specifically, the Myanmar authorities have, for the most part, vehemently and consistently denied the occurrence of any crimes.⁵²⁷

198. For instance, in a press release following Pre-Trial Chamber I’s Jurisdiction Decision, the Office of the President of Myanmar noted that “allegations of deportation cannot be further from the truth. Myanmar reiterates that it has not deported any individuals in the areas of concern and in fact has worked hard in collaboration with Bangladesh to repatriate those displaced from their homes”.⁵²⁸

199. With respect to allegations regarding the widespread commission of rapes and other forms of sexual violence, Senior-General Min Aung Hlaing, in a Facebook post of April 2018, reportedly stated that “no sexual violence happened in the history of Myanmar Tatmadaw”.⁵²⁹

⁵²⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0478-0479, para. 1378.

⁵²⁵ See above paras. 175-177.

⁵²⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0479-0480, paras. 1381-1382, at 0537-0538, para. 1612; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2797. See also below section VII. A.

⁵²⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0480, para. 1382.

⁵²⁸ Myanmar Office of President press release of 7 September 2018, [BGD-OTP-0002-0014](#).

⁵²⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0480, para. 1382.

200. The Myanmar authorities' failure to take meaningful measures to bring to justice those allegedly responsible for the crimes committed in the context of the 2017 wave of violence — including the truncated sentences imposed on some of those involved in the Inn Din massacre — can be seen in the findings of the *Tatmadaw* Investigation Team which investigated those allegations.⁵³⁰ As explained in more detail at Section VII. A. , to the extent that members of the *Tatmadaw* and other Security Forces were cleared of wrongdoing as physical perpetrators by this Investigation Team, it appears that the inquiry into these allegations was not conducted genuinely, but for the purpose of shielding them from criminal responsibility.

(c) *Widespread and systematic nature of the attack*

201. The available information also provides a reasonable basis to believe that the attack directed against the Rohingya civilian population was both widespread *and* systematic.⁵³¹ However, as a matter of law, it is only necessary for the attack to satisfy one or other of these conditions.

(i) Widespread

202. The term “widespread” refers to “the large scale nature of the attack and the number of targeted persons”.⁵³² Attacks of such scale may be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁵³³ This threshold may be met by “an attack carried out

⁵³⁰ See below paras. 236-246.

⁵³¹ For a similar conclusion see for e.g. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0476, para. 1369, at 0510; para. 1508; PILPG Report, [BGD-OTP-0001-3307](#) at 3378-3379.

⁵³² [Bemba TJ](#), para. 163; [Katanga TJ](#), para. 1123.

⁵³³ [Gbagbo CD](#), para. 222; [Bemba TJ](#), para. 163, [Bemba CD](#), para. 83.

over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians.”⁵³⁴

203. The available information provides a reasonable basis to believe that the attack was large-scale in nature, because it involved a massive number of acts under article 7(1) — including killings, rapes and others forms of sexual violence, acts of physical and psychological violence and deportation (including coercion by mean of destruction of property). It involved a very large number of perpetrators and victims.⁵³⁵ Further, the attack occurred over a large area — encompassing most of northern Rakhine State, across the townships of Buthidaung, Rathedaung, and Maungdaw⁵³⁶ — and over an extended period of time — between at least 25 August 2017 and at least March 2018.⁵³⁷

204. Conservative estimates indicate that the 2017 wave of violence resulted in the killing of up to 10,000 Rohingya (including children, women and elderly);⁵³⁸ the massive and systematic rape and sexual violence against women and girls (and to a lesser degree men and boys);⁵³⁹ the destruction of at least 392 Rohingya villages;⁵⁴⁰ the infliction of grave injuries;⁵⁴¹ and the deportation of at least 700,000 Rohingya.⁵⁴²

⁵³⁴ [Katanga and Ngudjolo CD](#), para. 395. What is large is not absolute, and may also depend on other factors that are not exclusively quantitative or geographical (See [Côte d’Ivoire Article 15 Decision](#), para. 53; [Bemba TJ](#), para. 163; [Gbagbo CD](#), para. 222).

⁵³⁵ See above for instance section VI. A. 3.

⁵³⁶ See above for instance section VI. A. 1.

⁵³⁷ See above for instance section VI. A. 2.

⁵³⁸ See above section VI. B. 1. (a) (i)

⁵³⁹ See above section VI. B. 1. (a) (ii)

⁵⁴⁰ See above section VI. B. 1. (a) (iv)

⁵⁴¹ See above section VI. B. 1. (a) (iii)

⁵⁴² See above section VI. B. 1. (b) .

(ii) Systematic

205. The term "systematic" refers to the "organised nature of the acts of violence and the improbability of their random occurrence"⁵⁴³ and can "often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis."⁵⁴⁴

206. The available information provides a reasonable basis to believe that the attack was systematic. The above-described alleged acts under article 7(1)⁵⁴⁵ evidenced a high-degree of organisation, demonstrated by factors such as the amount and type of resources employed, and the careful, systematic and exclusive targeting of the Rohingya population.

207. The high-degree of organisation of the attack is evidenced by the consistent *patterns* of conduct during the 2017 wave of violence across a large affected area — including repeated killings;⁵⁴⁶ the targeted burning down of houses and villages;⁵⁴⁷ and the repeated use of rape and other forms of sexual violence.⁵⁴⁸ Further evidence of a high-level of organisation may be seen in the alleged efforts by the perpetrators to dispose of the bodies, by loading them onto military trucks, burning them or burying them in mass graves.⁵⁴⁹

208. The amount and type of *resources* employed further evidences the highly-organised nature of the attack. The available information indicates that up to 11,000 *Tatmadaw* soldiers and an estimated 900 police were involved in the

⁵⁴³ [Gbagbo CD](#), para. 223; [Côte d'Ivoire Article 15 Decision](#), para. 54; [Katanga and Ngudjolo CD](#), para. 394; [Katanga TJ](#), para. 1123; [Harun and Kushayb Arrest Warrant Decision](#), para. 62. See also [Blaškić AJ](#), para. 101; [Kunarac AJ](#), para. 94.

⁵⁴⁴ [Gbagbo CD](#), para. 223; [Côte d'Ivoire Article 15 Decision](#), para. 54; [Katanga TJ](#), para. 1123; [Katanga and Ngudjolo CD](#), para. 397. See also [Kordić AJ](#), para. 94; [Blaškić AJ](#), para. 101; [Kunarac AJ](#), para. 94; [Nahimana AJ](#), para. 920.

⁵⁴⁵ See above section VI. B. 1. (a) .

⁵⁴⁶ See above section VI. B. 1. (a) (i)

⁵⁴⁷ See above section VI. B. 1. (a) (iv)

⁵⁴⁸ See above section VI. B. 1. (a) (ii)

⁵⁴⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0321-0322, paras. 812, 814, at 0325, para. 830, at 0369-0370, paras. 1000-1003, 1005.

attack.⁵⁵⁰ Witness' accounts, as reported by Public International Law and Policy Group ("PILPG"), also allege coordination between the "military" and Rakhine villagers through a "system" involving "an initial phase of heavy gunfire from the military followed by a looting and burning phase by the Rakhine".⁵⁵¹ The type and wide array of weapons employed also denotes a high level of organisation. Even helicopters were occasionally used to move equipment and personnel.⁵⁵²

209. Evidence of the organised nature of the attack may also be seen in the perpetrators' ability to *target* the Rohingya population, while leaving non-Rohingya areas unaffected.⁵⁵³

(d) *Nexus between the identified crimes and the attack*

210. The underlying acts charged under article 7(1) must be committed "as part" of the widespread or systematic attack directed against any civilian population, requiring proof of a nexus between individual acts and the attack.⁵⁵⁴ This requires consideration of the characteristics, aims, nature and/or consequences of the acts in question. Isolated acts that clearly differ in their context and circumstances from other acts that occur during an attack do not form part of the attack.⁵⁵⁵

211. The available information provides a reasonable basis to believe that there is a nexus between the identified crimes (deportation, other inhumane acts based on violation of the right to return and persecution) and the attack on the basis of factors including: (i) the geographical and temporal overlap between the attack and the identified crime; (ii) the fact that in many instances the perpetrators of the

⁵⁵⁰ See above section VI. A. 3.

⁵⁵¹ PILPG Report, [BGD-OTP-0001-3307](#) at 3350.

⁵⁵² HRW "Massacre by the river" report, [BGD-OTP-0001-1375](#) at 1392; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0311-0312, paras. 762, 770, at 0386, para. 1084.

⁵⁵³ See above para. 110.

⁵⁵⁴ [Bemba TJ](#), para. 164; [Katanga TJ](#), para. 1124.

⁵⁵⁵ [Bemba TJ](#), para. 165; [Katanga TJ](#), para. 1124. See also [Ongwen CD](#) para. 107 stating that "It is not required that the crimes against humanity are committed during the attack [...] as the required nexus can be established otherwise". See further [Kunarac AJ](#), para. 100; [Mrkšić et al. AJ](#), para. 41.

identified crime — in particular, the *Tatmadaw*— also appear to be responsible for the attack; (iii) the fact that the same people, the Rohingya population, were both the object of the attack and the victims of the identified crime.

212. In all cases, the identified crimes were clearly connected with the attack on the Rohingya population in Rakhine State, not only insofar as they led to at least 700,000 Rohingya persons being deported to Bangladesh, but also because they had the effect of consolidating and securing those deportations. The identified crimes were clearly not isolated acts distinguishable from the attack itself.

5. Contextual elements of crimes against humanity in the context of the 2016 wave of violence

213. Striking analogies between the two waves of violence further suggest that the violent acts perpetrated in the context of the 2016 wave of violence (whether or not in combination with the violent acts perpetrated in the context of the 2017 wave of violence) constituted an attack for the purpose of article 7 — a course of conduct (multiple acts under article 7(1)) directed against Rohingya persons in Rakhine State (a civilian population), pursuant to or in furtherance of a State policy. The information reviewed also suggests that the alleged crimes were committed as part of such widespread and systematic attack.

(a) *Attack directed against any civilian population*

214. The above-described multiple killings, rapes and other forms of sexual violence, destruction of property (as coercive acts and an integral part of deportation) and acts of physical and psychological violence causing great suffering or serious injury that took place in the context of the 2016 wave of violence,⁵⁵⁶ constitute a course of conduct involving the multiple commission of

⁵⁵⁶ See above paras. 88, 93, 101, 105, 111.

acts under article 7(1). Collectively, they constitute an *attack* against the Rohingya civilian population.

(b) *State or organisational policy*

215. The available information also indicates that the above-described course of conduct was carried out by the *Tatmadaw* and other Security Forces pursuant to a State policy to attack the Rohingya civilian population. This State policy is suggested by a variety of indicators. First, the clear *patterns of violence* during the 2016 wave of violence: the *timing, location, forms of violence* as well as the categories of *victims* (Rohingya civilians) and alleged *perpetrators* (mainly the *Tatmadaw* and other Security Forces) is consistent with the existence of a State policy to commit the attack. The violence was characterised by a similar pattern of equating an entire civilian population, the Rohingya, with the non-State armed group perceived as a “terrorist” threat, ARSA.

216. Second, the *manner* in which the villages were attacked also followed a consistent pattern: as in the context of the 2017 wave of violence, in 2016 large numbers of armed men entered the villages and destroyed/burned/looted houses, mosques and schools, as well as fields and livestock. These acts were usually accompanied by random and targeted shootings, rapes and other forms of sexual violence, and severe beatings.⁵⁵⁷ Some villages were systematically destroyed over days.⁵⁵⁸

217. Third, as the OHCHR found, the “calculated policy of terror” implemented from 9 October 2016 was not an isolated event, but must be seen in the context of

⁵⁵⁷ See above paras. 88, 93, 101, 105, 111. See also OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0375.

⁵⁵⁸ ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3814.

the long-standing pattern of violations and abuses, together with systematic discrimination and policies of exclusion against the Rohingya.⁵⁵⁹

218. Fourth, the existence of a policy is supported by Myanmar authorities portraying the entire Rohingya population as “terrorists”.⁵⁶⁰ For instance, it is reported that on 23 May 2016 the *Myawady Daily*, a newspaper run by the *Tatmadaw*, argued that “[t]hroughout successive eras, several racial and religious conflicts have broken out in Rakhine State, due to the “Khoe Win Bengali” [Bengali who entered the country by stealth]. The attack on the race happened again in 2012 in Rakhine State, between the “Khoe Win Bengali”, who are not citizens, and the ethnic people”;⁵⁶¹ on 31 October 2016 Rakhine State Member of Parliament Aung Win declared “[a]ll Bengali villages are like military strongholds”; on 1 November 2016 the State-run media referred to the Rohingya as a “thorn” that “has to be removed”;⁵⁶² on 26 November 2016 the State-run *Global New Light of Myanmar* (“GNLM”) alluded to the Rohingya as “detestable human fleas” and warned that “[w]e should not underestimate the enemy.”⁵⁶³

219. Finally, the State policy is further confirmed by the absence of any meaningful measures to bring members of the *Tatmadaw* and other Security Forces allegedly responsible for the violent conduct to justice, or to prevent or deter the repetition of violent acts.⁵⁶⁴ The existence of a policy is supported by statements of Senior-

⁵⁵⁹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0378; *see also* at 0375; AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1686-1688. *See also* above paras. 44-60.

⁵⁶⁰ UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0464, para. 1333.

⁵⁶¹ UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0464, para. 1333.

⁵⁶² Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453.

⁵⁶³ Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2445.

⁵⁶⁴ Initiatives by the Myanmar authorities to address the 2016 wave of violence are described below, but none resulted in effective investigations leading to criminal accountability. *See* below paras. 259-270. *See also* UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0385, para. 1071.

General Min Aung Hlaing, Commander-in-Chief of the *Tatmadaw*, denying the commission of crimes.⁵⁶⁵

(c) *Widespread and systematic nature of the attack*

220. The information available also suggests that the attack directed against members of the Rohingya civilian population was both widespread and systematic.⁵⁶⁶ The attack was *widespread* as it involved numerous acts over a protracted period of time (from immediately after the ARSA attack on or about 9 October 2016 into at least January 2017),⁵⁶⁷ and covered at least eleven separate locations in Maungdaw Township.⁵⁶⁸ The attack involved the widespread commission of crimes, including the estimated killing of hundreds⁵⁶⁹ and the deportation of 87,000 Rohingya.⁵⁷⁰

221. That the attack was *systematic* is evidenced by the amount and type of resources employed,⁵⁷¹ the targeting of the Rohingya population and the repeated patterns of conduct.⁵⁷²

(d) *Nexus between deportation and persecution based on deportation and the attack*

222. The geographical and temporal overlap between the attack and the crimes, the fact that the same perpetrators were responsible, and the same persons were

⁵⁶⁵ AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1709. *See also* Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453.

⁵⁶⁶ *See for e.g.* a similar conclusion reached by the OHCHR, OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0378 (indicating the very likely commission of crimes against humanity); AI “We are at breaking point” report, [BGD-OTP-0001-1675](#) at 1683 (concluding may have amounted to crimes against humanity). *See further*, AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1765.

⁵⁶⁷ The 2016 wave of violence continued into January or February 2017: OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0344; UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0384, para. 1070 (Government declaring the end of the operation on 16 February 2017).

⁵⁶⁸ *See also* UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0384, paras. 1069-1070.

⁵⁶⁹ OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0378.

⁵⁷⁰ *See also* UNFMM detailed report, [BGD-OTP-0001-0129](#) at 0384, para. 1070.

⁵⁷¹ Including the wide array of weapons used, including bladed weapons, guns, petrol and fire, rocket propelled grenades, and even helicopters (*see above*, paras. 93, 105, 111).

⁵⁷² *See above* paras. 88, 93, 101, 105, 111.

victims of both the attack and the crimes shows a nexus between the attack and the crimes of deportation and persecution through deportation.

VII. ADMISSIBILITY

223. The factors set out in article 53(1)(b) of the Statute, applied *via* rule 48, provide that in determining whether there is a reasonable basis to proceed, the Prosecutor shall consider whether “the case is or would be admissible under Article 17”.

224. At least the following potential case(s) would be admissible, against: senior members of the *Tatmadaw* and other Security Forces for the crimes against humanity of deportation, other inhumane acts (based on violation of the right to return) and persecution (based on deportation and violation of the right to return), and other Myanmar authorities for other inhumane acts and persecution (based on violation of the right to return). This determination is made in light of the information presently available, taking into consideration that — to date — the Myanmar authorities have not provided any information to the Prosecution.

225. Admissibility at this stage should be assessed against certain criteria defining a “potential case” such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).⁵⁷³

226. In relation to the level of specificity and detail required for identifying potential cases, the Prosecution has borne in mind the nature of the present procedure, the low threshold applicable, and the procedure’s object and purpose. Identification of potential cases “at this stage is preliminary, and as such, this may

⁵⁷³ [Kenya Article 15 Decision](#), para. 59; [Burundi Article 15 Decision](#), para. 143; [Côte d’Ivoire Article 15 Decision](#), paras. 190-191.

change as a result of the investigation”.⁵⁷⁴ The Appeals Chamber has similarly observed that “the contours of the likely cases will often be relatively vague [...] Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.”⁵⁷⁵

227. Accordingly, and as previously described above,⁵⁷⁶ the Prosecution has attached to this Request confidential *ex parte*, Annexes 5 and 7. Annex 5 presents an indicative list of the most serious incidents within the context of the events from at least 25 August 2017 during which crimes within the jurisdiction of the Court were allegedly committed, based on the available information. Annex 7 presents a preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, with an indication of their specific role.

A. Complementarity

228. The information available does not indicate that any investigations or prosecutions are being, or have been undertaken by Myanmar authorities or in relevant third States, in relation to the potential case(s) identified in this Request and confidential *ex parte* Annexes 5 and 7, related to those who appear most responsible for the most serious crimes. For these reasons, the potential case(s) would be admissible pursuant to the complementarity criteria in article 17(1)(a) and (b) of the Statute.

229. The Appeals Chamber has explained that “in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having

⁵⁷⁴ [Georgia Article 15 Decision](#), para. 37. See also [Kenya Article 15 Decision](#), para. 50. In the context of the gravity assessment, see also [Georgia Article 15 Decision](#), para. 51; [Kenya Article 15 Decision](#), para. 60; [Burundi Article 15 Decision](#), para. 184.

⁵⁷⁵ [Ruto Admissibility Appeals Judgment](#), para. 39.

⁵⁷⁶ See para. 9 above.

jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to [...] examine the question of unwillingness and inability.”⁵⁷⁷ Inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to an assessment of gravity under article 17(1)(d).⁵⁷⁸ As set out above,⁵⁷⁹ these assessments are carried out in relation to the potential case(s) that are likely to be the focus of an investigation by the Prosecution.

1. Position of the Government of Myanmar on International Criminal Court proceedings and complementarity

230. On 7 September 2018, the Office of the President of Myanmar issued a press release where the Government of Myanmar “resolutely reject[ed] the [Jurisdiction Decision]”.⁵⁸⁰ The Government noted that “allegations of deportation cannot be further from the truth”, as Myanmar “has not deported any individuals in the areas of concern and in fact has worked hard in collaboration with Bangladesh to repatriate those displaced from their homes”.⁵⁸¹ It asserted that “Myanmar is both willing and able to investigate any crimes and violations of human rights in its own territory”.⁵⁸² It listed a number of measures taken to bring about peace, stability and development in Rakhine State, and also emphasised the establishment of an Independent Commission of Enquiry (“ICOE”) “to investigate the violations of human rights and related issues in regard to Rakhine”.⁵⁸³

⁵⁷⁷ [Katanga Admissibility Decision](#), para. 78. See also [Burundi Article 15 Decision](#), para. 146.

⁵⁷⁸ [Katanga Admissibility Decision](#), para. 78.

⁵⁷⁹ See above paras. 225, 226.

⁵⁸⁰ Myanmar Office of President press release of 7 September 2018, [BGD-OTP-0002-0014](#).

⁵⁸¹ Myanmar Office of President press release of 7 September 2018, [BGD-OTP-0002-0014](#).

⁵⁸² Myanmar Office of President press release of 7 September 2018, [BGD-OTP-0002-0014](#).

⁵⁸³ Myanmar Office of President press release of 7 September 2018, [BGD-OTP-0002-0014](#) (specifying 31 August 2018 as the date for the establishment of the ICOE. However an earlier press release by the Government

231. In accordance with its practice regarding situations under preliminary examination, the Prosecution has taken steps to obtain information directly from the Myanmar authorities. In a letter dated 12 December 2018, the Prosecution expressly invited the Myanmar authorities to provide any relevant information in relation to allegations that in the context of the 2017 wave of violence, “members of Myanmar’s armed forces, together with other security forces and groups of civilians, have committed a number of acts [...] ultimately leading to the forced displacement of hundreds of thousands members of the Rohingya people into Bangladesh”.⁵⁸⁴ It also invited them to provide any pertinent information relating to the admissibility assessment such as regarding “investigations and prosecutions which may have been carried out in relation to crimes allegedly committed.”⁵⁸⁵ Myanmar’s embassy in Belgium refused to accept receipt of this letter.

232. To date, the Myanmar authorities have not provided any information to the Prosecution. Nevertheless, the limited open-source information available indicates that a few inquiries, investigations or prosecutions may have been initiated at the national level that are potentially relevant to the admissibility assessment under the complementarity criterion. To the extent that such information is available, the Prosecution has sought to review each initiative’s mandate, methodology and outcome, relying on official statements and the reports of these inquiries, as well as media reports and reports from international organisations and NGOs.

of Myanmar set out 30 July 2018 as the date of the ICOE’s establishment: *see* Myanmar Office of President press release of 30 July 2018, [BGD-OTP-0002-0016](#)).

⁵⁸⁴ Letter from OTP to Myanmar Authorities of 12 December 2018, [BGD-OTP-0001-4958](#) at 4959.

⁵⁸⁵ Letter from OTP to Myanmar Authorities of 12 December 2018, [BGD-OTP-0001-4958](#) at 4960.

2. Relevant national proceedings in Myanmar

233. The admissibility provisions of the Statute are founded on the complementary relationship between the Court and “national criminal jurisdictions”.⁵⁸⁶ In principle, it is only the criminal investigations and/or prosecutions of a State that can trigger the application of article 17(1)(a)-(b). As held by Pre-Trial Chamber III in the context of commissions of inquiry, “a national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court, considering that, for the purposes of complementarity, an investigation must be carried out with a view to conducting criminal prosecutions.”⁵⁸⁷ Out of an abundance of caution and to ensure the completeness of its analysis, the Prosecution has previously considered in its admissibility assessment the findings of commissions of inquiry and other fact-finding initiatives to the extent that they had the capacity and relevant powers to trigger full-scale criminal investigations and prosecutions.⁵⁸⁸ Pre-Trial Chamber III, in its decision concerning Burundi, similarly examined a number of national fact-finding mechanisms to the extent that, in the circumstances, they appeared to exercise certain judicial and investigative powers and/or were authorised to refer persons to the competent authorities.⁵⁸⁹ The present admissibility assessment examines such initiatives in line with this past practice.

234. The Prosecution has identified two specific developments at the domestic level that are potentially relevant to its admissibility assessment: i) the investigation by the *Tatmadaw* Investigation Team into alleged misconduct of the *Tatmadaw* and other Security Forces in Rakhine State in 2017 and ii) the setting up of the ICOE to investigate allegations of human rights violations following the

⁵⁸⁶ Article 1 of the [Rome Statute](#). See also [Burundi Article 15 Decision](#), para. 152.

⁵⁸⁷ [Burundi Article 15 Decision](#), para. 152.

⁵⁸⁸ See for e.g. [Burundi Article 15 Request](#), para. 153.

⁵⁸⁹ [Burundi Article 15 Decision](#), para. 153.

ARSA attacks, with the *caveat* noted above.⁵⁹⁰ In addition, the inquiry by the *Tatmadaw* Investigation Team appears to have led to the conviction and sentence of seven members of the *Tatmadaw* for participating in the execution of ten Rohingya individuals in the village of Inn Din in September 2017. It also appears to have resulted in the recent formation of a military investigation court. These developments are examined in more detail below.

235. The information currently available indicates that the legal proceedings that followed the *Tatmadaw* Investigation Team's inquiry did not concern the potential case(s) identified in this Request and accompanying Annexes. In addition, the ICOE does not, at present, appear to have the capacity to result in criminal investigations and prosecutions. To the extent that the work of the ICOE is ongoing, and with respect to any activity of the recently-formed military investigation court, the Prosecution will continue to review its assessment in light of new information. On the information presently available, however, the Prosecution concludes that the potential case(s) against senior members of the *Tatmadaw*, other Security Forces and other Myanmar authorities would be admissible under the complementarity criterion.

(a) *Investigation by the Tatmadaw and subsequent prosecution, and formation of military investigation court*

236. The available information indicates that the *Tatmadaw* may have conducted some kind of investigation into the conduct of the *Tatmadaw* and other Security Forces during the 2017 "clearance operations". However, the findings of the *Tatmadaw* Investigation Team and the outcome of subsequent proceedings do not show that the Myanmar authorities have taken steps "directed at ascertaining" whether those whose conduct forms the basis of the potential case(s) are

⁵⁹⁰ See para. 233 above.

responsible for that conduct.⁵⁹¹ Rather, the Investigation Team generally discounted the alleged responsibility of the *Tatmadaw* and other Security Forces for the commission of crimes. To the extent that members of the *Tatmadaw* and other Security Forces were cleared of wrongdoing as physical perpetrators, it appears that the inquiry into these allegations was not conducted genuinely, but for the purpose of shielding them from criminal responsibility within the meaning of article 17(2)(a) and (c). The limited proceedings initiated into the involvement of the *Tatmadaw* in the killing of ten Rohingya victims in Inn Din appear to have focused on a discrete number of individuals related to a single incident. Neither the investigation nor subsequent proceedings reveal any past criminal process seeking to establish the criminal responsibility of those who appear to bear the greatest responsibility for the alleged crimes set out in this Request and accompanying Annexes. Accordingly, the *Tatmadaw* investigation and subsequent proceedings do not lead to the inadmissibility before the Court pursuant to the principle of complementarity of the potential case(s) identified. The Prosecution will continue to review its assessment as information becomes available particularly regarding any activity of the recently-formed military investigation court.

237. The *Tatmadaw* reportedly formed an Investigation Team led by the Inspector-General of the *Tatmadaw*, Lieutenant-General Aye Win in October 2017.⁵⁹² On 13 November 2017, the *Tatmadaw* True News Information Team released the Investigation Team's findings.⁵⁹³ As explained further below,⁵⁹⁴ Lieutenant-

⁵⁹¹ See [Burundi Article 15 Decision](#), para. 148.

⁵⁹² See Office of the Commander-in-Chief of Defence Services press release, [BGD-OTP-0002-1421](#), para. 3.

⁵⁹³ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#) (title). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1612.

⁵⁹⁴ See para. 268 below.

General Aye Win appears to also have led an earlier *Tatmadaw* investigation into allegations of human rights violations during the 2016 wave of violence.⁵⁹⁵

238. With respect to the 2017 wave of violence, the Investigation Team led by Lieutenant-General Aye Win was reportedly assigned to find out “the true situation in connection with terrorist attacks of the ARSA Bengali terrorists on 30 police outposts and an army battalion headquarters” in Buthidaung, Maungdaw and Rathedaung townships on 25 August 2017, and “to ascertain whether security troops conducted the military operations in accord with their duty assignments”.⁵⁹⁶ For the purpose of this investigation, between 13 October and 7 November 2017 the Investigation Team reportedly interviewed 3,217 villagers in 58 villages in Rakhine State and collected the account of 804 witnesses.⁵⁹⁷ However, it appears that the Investigation Team did not seek the views of members of the Rohingya population who had fled to Bangladesh.⁵⁹⁸

239. In its findings, the Investigation Team reportedly found that on 25 August 2017 “ARSA Bengali terrorists” with an estimated strength of between 6,200 to 10,000 individuals attacked the *Tatmadaw* and other Security Forces.⁵⁹⁹ In the fighting in Rakhine State “from 25 August 2017 to 5 September”, “376 bodies of ARSA Bengali terrorists” were found, while 13 members of “security forces” were killed, 15 members injured and 1 went missing.⁶⁰⁰ The Investigation Team concluded that the “security forces abided by laws related to the wars in conducting clearance operations”, and “did not perform the use of excessive

⁵⁹⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537-0538, para. 1612.

⁵⁹⁶ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 1.

⁵⁹⁷ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 2. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1612.

⁵⁹⁸ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1612. *See also* HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0249.

⁵⁹⁹ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), paras. 4-5.

⁶⁰⁰ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 8.

force”.⁶⁰¹ It reportedly found that “the security troops including Tatmadaw columns which were accompanied by members of Border Guard Police [...] were only fighting against the ARSA Bengali terrorists”⁶⁰² and “never shot” at those who it referred to as “the innocent Bengalis.”⁶⁰³ On the basis of interviews conducted with “Bengali” villagers, it reportedly found that:

“security forces did not commit shooting at innocent villagers and sexual violence and rape cases against women. They did not arrest, beat and kill the villagers. They did not totally destroy, rob and take property, gold and silver wares, vehicles and animals of villagers from the villages and displaced villages. They did not set fire to the mosques in Bengali villages. They allow the Bengali villagers to perform their faiths in freedom without banning them to attend the mosques and join prayers. They did not threaten, bully and drive out the villagers not to be able to live in the villages and they did not set fire to the houses. They are joining hands with relevant administrative bodies in systematically supervising the tasks to protect the remaining houses in villages against destruction and stealing [...]”.⁶⁰⁴

240. Specifically in the context of arrests of “Bengali terrorists and their supporters”, the Investigation Team reportedly found that those arrested “were systematically handed over in good situations to the local police stations” and members of the “security forces did not commit persecution” against them but

⁶⁰¹ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 5. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1612.

⁶⁰² Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 4. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1612.

⁶⁰³ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 4. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1612.

⁶⁰⁴ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 9.

acted in accordance with IHL.⁶⁰⁵ It found that “ARSA Bengali terrorists torched houses and fled to Bangladesh”, and that the “flocks of Bengalis” fled into Bangladesh because they had lost their houses and had no place to live, out of fear following ARSA threats, or for fear of being punished for not having revealed their relatives’ participation in the terrorist attacks.⁶⁰⁶ The *Tatmadaw* announced that “arrests of the remaining ARSA Bengali terrorists will continue”⁶⁰⁷ and that action would be taken against those officials responsible for “weaknesses in doing management and acquiring security information”.⁶⁰⁸

241. The Investigation Team’s initial conclusion denying any wrongdoing by the “security forces”⁶⁰⁹ was subsequently refuted. This casts doubt on the Investigation Team’s willingness to genuinely investigate the allegations against the *Tatmadaw* and other Security Forces. On 10 January 2018, around two months after the release of the Investigation Team’s initial findings, the Office of the Commander-in-Chief stated that an investigation team led by the same Lieutenant-General Aye Win – indicating it was the same Investigation Team⁶¹⁰ – had conducted an additional investigation.⁶¹¹ This was an investigation into “information sent by an unidentified person that slain human bodies were buried in Inndin [Inn Din] Village cemetery in Maung[daw] Township [...] to investigate

⁶⁰⁵ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 6 (referring to the “provisions of the Geneva Convention and the law of wars”). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1612.

⁶⁰⁶ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 10

⁶⁰⁷ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 14.

⁶⁰⁸ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 14. See also para. 13 (“Despite the extended terrorist group, the issue including atrocities committed by the terrorists could not be exposed as officials in the concerned region were weak in acquiring information.”)

⁶⁰⁹ Myanmar Office of President press release of 13 November 2017, [BGD-OTP-0002-0017](#), para. 3.

⁶¹⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1614 (“from the same Investigation Team, still headed by Lieutenant-General Aye Win”). See Office of the Commander-in-Chief of Defence Services press release, [BGD-OTP-0002-1421](#), para. 3 (“With regard to the incidents [of 25 August 2017], the investigation team led by Lt-Gen Aye Win was formed in October 2017 to carry out investigation”).

⁶¹¹ See Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1614 (dating the release of the statement as 11 January 2018).

whether or not security forces were involved in the case.”⁶¹² The available information suggests that this subsequent investigation may have been triggered by “the imminent publication by Reuters of an investigative piece on the mass grave in Inn Din”,⁶¹³ casting further doubt on the genuineness of the Investigation Team’s efforts.

242. During the additional investigation, the Investigation Team reportedly questioned witnesses — including members of the *Tatmadaw* and other Security Forces.⁶¹⁴ It found that “security forces” conducting a security operation were attacked “by about 200 Bengalis with sticks and swords” on 1 September 2017. After arresting 10 of them, “[t]he security forces questioned the 10 arrestees”,⁶¹⁵ and later made the decision to kill them.⁶¹⁶ The following day, detainees were cut with swords by villagers and “four members of the security forces [...] shot them with the use of guns” inside the pit into which they had been ordered to

⁶¹² Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1614. See further ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3840 (dating the publication of the summary report as 10 January 2018), 3874.

⁶¹³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538-0539, para. 1616 (“in all likelihood”); AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2798 (“as Reuters was preparing to publish a detailed account of the incident”). See also Reuters article of 18 December 2017, [BGD-OTP-0002-1395](#) at 1395 (in a statement posted on the Facebook page of the *Tatmadaw*’s Commander-in-Chief, the army said that unidentified bodies had been found at the Inn Din village cemetery following information by an unidentified source). See further Reuters article of 8 February 2018 (text), [BGD-OTP-0001-0861](#) at 0865; Reuters article of 8 February 2018 (containing video and graphics), [BGD-OTP-0001-5168](#) at 00:00:44-00:00:56 (stating that the Reuters investigation of the Inn Din massacre is what prompted Myanmar police authorities to arrest two Reuters reporters on 12 December 2017, for allegedly obtaining confidential documents relating to Rakhine); UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0447-0448, para. 1296 (the two Reuters journalists were arrested and detained in December 2017 “ostensibly for alleged violations of the Official Secrets Act, but in reality in an attempt to prevent or punish them from publishing a story about serious violations committed by the Myanmar security forces”); AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2732. Compare with Reuters article of 10 April 2018, [BGD-OTP-0001-1141](#) at 1143 (“The [Myanmar] authorities told Reuters in February the military opened an internal investigation independently and that it is unrelated to the Reuters reporters who are accused of obtaining unrelated secret government papers.”)

⁶¹⁴ Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1614.

⁶¹⁵ Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#).

⁶¹⁶ Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1614 (citing Facebook post on file with the FFM).

descend.⁶¹⁷ The Investigation Team “found that the incident was not submitted to superior levels.”⁶¹⁸ The *Tatmadaw* reported that “action will be taken against the villagers who participated in the case and the members of security forces who broke the Rules of Engagement under the law” and, once identified, against “the officials who needed to control subordinates despite no direct relation to the incident”.⁶¹⁹

243. On 10 April 2018, it was reported that the *Tatmadaw* announced that “[s]even Myanmar soldiers” — “[f]our officers” and “three soldiers” — had been permanently dismissed from the army and sentenced to “10 years in prison with hard labo[u]r in a remote area” for participating in the massacre of ten Rohingya Muslim men in the village of Inn Din in September 2017. Proceedings against the police personnel and civilians “involved in the crime” were reportedly still under way.⁶²⁰ There was, until recently, limited information available on the steps taken to execute these sentences of imprisonment.⁶²¹ At the end of May 2019, however, Reuters reported that the seven soldiers had been granted early release, and that they may have been released as early as November 2018.⁶²² Reuters also reported that “an ethnic Rakhine Buddhist villager also jailed over the Inn Din killings was

⁶¹⁷ Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1615.

⁶¹⁸ Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1615.

⁶¹⁹ Office of the Commander-in-Chief of Defence Services press release of 10 January 2018, [BGD-OTP-0002-0035](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1615.

⁶²⁰ Reuters article of 10 April 2018, [BGD-OTP-0001-1141](#) at 1141, 1143. See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1615. See further Myanmar Office of President press release, undated “News release on the act of British MPs”, [BGD-OTP-0002-0021](#), para. 13.

⁶²¹ See UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1615, noting that “State media reported that these prisoners had been released in the context of the Presidential pardon [...] The same day the Government denied these reports”, citing New York Times article of 18 April 2018, [BGD-OTP-0002-0515](#). See also AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2798; UN High Commissioner for Human Rights report of 11 March 2019, [BGD-OTP-0002-0599](#) at 0610, para. 55 (“No information is available, however, on the identity of the perpetrators or the actual execution of the sentences other than an announcement made by the Tatmadaw Commander-in-Chief on his Facebook page”).

⁶²² Reuters article of 27 May 2019, [BGD-OTP-0001-5176](#). The article reportedly named one of the soldiers.

still in prison [...] serving a five-year sentence for murder.”⁶²³ A military spokesperson reportedly confirmed that Commander-in-Chief Senior General Min Aung Hlaing had reduced the prison sentence of the seven soldiers “from 10 years to one year with hard labour” and they were released in November 2018,⁶²⁴ apparently because of their “dutifulness during their time in the Army, and in consideration of the petition” submitted on their behalf to Senior General Min Aung Hlaing.⁶²⁵

244. It does not seem that these proceedings examined the conduct of those who appear most responsible for the crimes identified in this Request, namely the crimes of deportation, persecution and other inhumane acts. It appears that the proceedings were of limited scope, involving allegations against a limited number of individuals concerning one particular incident. Proceedings appear to have focused on seven *Tatmadaw* officers and soldiers of other rank⁶²⁶ — and maybe some police personnel and non-Rohingya civilians — involved in the commission of execution-style killings during a single incident.

245. Information issued subsequently indicates that senior *Tatmadaw* members allegedly connected to the 2017 wave of violence were removed from their posts, but this information — including on the nature of the purported sanction — does not allow for the conclusion that their removal stems from an investigation or prosecution into their conduct in relation to the alleged crimes. The Myanmar President’s Office indicated that “[t]he duties of the commander of Western Command, who took charge of Rakhine security affairs, were terminated as he

⁶²³ Reuters article of 27 May 2019, [BGD-OTP-0001-5176](#) (reportedly providing the name of this individual). But see Irrawaddy article of 29 May 2019, [BGD-OTP-0001-5182](#) (“The fates of three policemen and six villagers arrested along with the soldiers are unknown”).

⁶²⁴ Irrawaddy article of 29 May 2019, [BGD-OTP-0001-5182](#).

⁶²⁵ Irrawaddy article of 29 May 2019, [BGD-OTP-0001-5182](#) (in addition, the Office of the Judge Advocate General reportedly submitted to the Commander-in-Chief that “the soldiers were found not to have had any intention to kill, but their actions were simply not in line with procedures while serving in a time of conflict.”)

⁶²⁶ Reuters article of 10 April 2018, [BGD-OTP-0001-1141](#) at 1143 (referring to four officers and three soldiers of other rank). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0538, para. 1615 (referring to “seven ‘officials and other ranks of the Tatmadaw’”).

had weaknesses in his actions over the issue.”⁶²⁷ According to Human Rights Watch (“HRW”), the *Tatmadaw* announced on 25 June 2018 (i) the dismissal, following transfer to reserve duty, of commander of the Western Command Major General Maung Maung Soe;⁶²⁸ and (ii) the belated resignation, following transfer partly on health grounds, of his superior and commander of the Bureau of Special Operations Lieutenant General Aung Kyaw Zaw.⁶²⁹ On that same day of 25 June 2018, the European Union and Canada announced new sanctions against these individuals,⁶³⁰ among others, for their alleged responsibility for crimes against Rohingya in Rakhine State.⁶³¹ HRW reported that the *Tatmadaw’s* announcement made no reference to allegations of crimes, but instead focused on these individuals’ weakness of administration and performance in relation to the ARSA attacks, such as in gaining advance information and preparing for them.⁶³² In her March 2019 report, the UN High Commissioner for Human Rights similarly stated that the OHCHR “received unconfirmed information on the reported demotion, reassignment and forced retirement of Tatmadaw officers involved in the violence in Rakhine after August 2017. While further corroboration would be required from the Tatmadaw, these actions remain inadequate in light of the gravity of the crimes alleged.”⁶³³

246. The Office of the *Tatmadaw* Commander-in-Chief announced the establishment, starting from 18 March 2019, of an investigation court,⁶³⁴ “[d]ue to assessments and suggestions of the Office of the Judge Advocate-General” over the Investigation Team’s reports, and over reports compiled by HRW, AI and the

⁶²⁷ Myanmar Office of President press release, undated “News release on the act of British MPs”, [BGD-OTP-0002-0021](#), para. 13. See also AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2798.

⁶²⁸ HRW article of 29 June 2018, [BGD-OTP-0002-1349](#) at 1349-1350; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2798.

⁶²⁹ HRW article of 29 June 2018, [BGD-OTP-0002-1349](#) at 1349-1350.

⁶³⁰ EU Council Decision of 25 June 2018, [BGD-OTP-0001-0781](#) at 0781, 0782; Canada Special Economic Measures, [BGD-OTP-0001-1247](#) at 1247-1249.

⁶³¹ See also HRW article of 29 June 2018, [BGD-OTP-0002-1349](#) at 1350.

⁶³² HRW article of 29 June 2018, [BGD-OTP-0002-1349](#) at 1349-1350.

⁶³³ UN High Commissioner for Human Rights report of 11 March 2019, [BGD-OTP-0002-0599](#) at 0610, para. 55.

⁶³⁴ Office of the Commander-in-Chief of Defence Services press release, [BGD-OTP-0002-1421](#), para. 5.

UN FFM, requiring further scrutiny by the Office.⁶³⁵ The investigation court is reportedly composed of three *Tatmadaw* officers (Chairperson Major-General Myat Kyaw, and two Colonels) and mandated “to further scrutinize and approve the respective incidents.”⁶³⁶ The *Tatmadaw* reported that this court “was set up in conformity with” *Tatmadaw* (Defence Services) rules,⁶³⁷ and that on 2 April 2019 it had invited submissions.⁶³⁸ On 18 April 2019, the Judge Advocate General reportedly formed and assigned a “Legal Advisory Team” to the court “in accordance with the directive of the Office of the Commander-in-Chief (Army)”, and that it was composed of five members of the armed forces.⁶³⁹ At present there does not appear to be significant additional information available regarding the court or its activities. Its establishment does not affect, for the time being, the conclusion regarding the complementarity determination. However, the Prosecution will continue to review its assessment in light of new information as it becomes available.

(b) *The Independent Commission of Enquiry (“ICOE”)*

247. On 30 July 2018, the Government of Myanmar established the ICOE.⁶⁴⁰ The ICOE’s establishment, mandate and powers do not show that it meets the admissibility requirements under article 17(1)(a) of the Statute demonstrating that the potential cases are being investigated or prosecuted. To the extent that the ICOE is considered relevant to the complementarity determination, there is

⁶³⁵ Office of the Commander-in-Chief of Defence Services press release, [BGD-OTP-0002-1421](#), para. 4

⁶³⁶ Office of the Commander-in-Chief of Defence Services press release, [BGD-OTP-0002-1421](#), para. 5.

⁶³⁷ Office of the Commander-in-Chief of Defence Services press release on formation and assignment of legal advisory team, [BGD-OTP-0001-5180](#), para. 1.

⁶³⁸ Office of the Commander-in-Chief of Defence Services press release on formation and assignment of legal advisory team, [BGD-OTP-0001-5180](#), para. 2.

⁶³⁹ Office of the Commander-in-Chief of Defence Services press release on formation and assignment of legal advisory team, [BGD-OTP-0001-5180](#), para. 3 (referring to Major-General Thaung Naing, Deputy Judge Advocate General, chairman of the team, and four members: Lieutenant-Colonel Myint Thein, Assistant Judge Advocate General, Major Myint San, Deputy Assistant Judge Advocate General, Captain Kyaw Kyaw Lin, Deputy Assistant Judge Advocate General (Captain) and Captain Daw Thazin Swe, Judge Advocate.) *See also* Office of the Commander-in-Chief of Defence Services press release regarding Court of Enquiry call for submissions, [BGD-OTP-0001-5181](#).

⁶⁴⁰ Myanmar Office of President press release of 30 July 2018, [BGD-OTP-0002-0016](#). *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0539, para. 1619.

insufficient indication that it has taken “tangible, concrete and progressive investigative steps”⁶⁴¹ since its establishment. Finally, a number of statements made by Myanmar officials point to Myanmar authorities’ unwillingness to genuinely carry out the investigation with which the ICOE has been tasked. The ICOE appears to be a recent example of several domestic initiatives which have not resulted in effective investigations leading to criminal accountability. For these reasons, the ICOE does not lead to the inadmissibility before the Court, pursuant to the principle of complementarity, of the potential case(s) identified in this Request and accompanying Annexes. Given that it appears that the ICOE’s activity is ongoing, the Prosecution will continue to review its assessment as new information becomes available.

(i) The ICOE’s establishment, mandate and powers

248. The ICOE’s establishment, mandate and powers do not show that its investigation is designed to result in criminal prosecutions, so that it does not meet the admissibility requirements under article 17(1) of the Statute.⁶⁴² By way of comparison, in the *Burundi* Article 15 Decision, Pre-Trial Chamber III went on to assess the findings of commissions of inquiry for the purposes of the complementarity determination. This was because, according to the information available at the time, these commissions (i) had been established by a quasi-judicial authority (the Prosecutor General); (ii) had certain judicial and investigative powers; and (iii) at least some of the commissions were explicitly authorised to refer persons to the competent authorities, to such an extent that arrests had been made and charges brought in connection with their inquiries.⁶⁴³

⁶⁴¹ [Burundi Article 15 Decision](#), para. 148.

⁶⁴² See [Burundi Article 15 Decision](#), para. 152.

⁶⁴³ [Burundi Article 15 Decision](#), para. 153. See also [UN Doc E/CN.4/2005/102/Add.1](#), Principle 19 (“States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and IHL and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. [...]”)

In contrast, on the information currently available, it does not appear that the ICOE fulfills those conditions.

249. Regarding the authority behind its establishment, the Myanmar Government established the ICOE.⁶⁴⁴ The Myanmar Government appointed four members, namely two international commissioners, Ambassadors Rosario Manalo (Chairperson) and Kenzo Oshima, and two domestic commissioners, U Mya Thein and Professor Dr Aung Tun Thet.⁶⁴⁵

250. As for the ICOE's mandate, when it announced its establishment the Office of the President of Myanmar stated that the ICOE was tasked with "investigat[ing] the allegations of human rights violations and related issues, following the terrorist attacks by ARSA".⁶⁴⁶ Reporting on the ICOE's 16 August 2018 press conference taking place about two weeks after its establishment, "Government newspaper" the GNLM⁶⁴⁷ noted that the ICOE was to discharge its mandate "with a view to seeking accountability and to formulate recommendations on steps to be taken to ensure peace and stability in Rakhine State."⁶⁴⁸

251. In a 24 May 2019 press release, the ICOE clarified that by virtue of "Myanmar's Investigation Committees Act 1950", "investigations of the committee shall be deemed to be a 'criminal case proceeding' [...] [t]hereby entrenching it as part of the criminal justice system of Myanmar."⁶⁴⁹ Under the ICOE terms, "the Investigation Committees Act 1950 will apply to the ICOE."⁶⁵⁰ Nevertheless, the ICOE terms also prescribe that it shall submit its "reports with

⁶⁴⁴ Myanmar Office of President press release of 30 July 2018, [BGD-OTP-0002-0016](#).

⁶⁴⁵ Myanmar Office of President press release of 30 July 2018, [BGD-OTP-0002-0016](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0539, para. 1619.

⁶⁴⁶ Myanmar Office of President press release of 30 July 2018, [BGD-OTP-0002-0016](#).

⁶⁴⁷ See e.g. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0379, para. 1053, at 0397, para. 1137 (describing the GNLM as a "government newspaper").

⁶⁴⁸ GNLM article of 17 August 2018, [BGD-OTP-0002-1133](#). See also ICOE, Key Terms, [BGD-OTP-0002-1135](#).

⁶⁴⁹ ICOE press release of 24 May 2019, [BGD-OTP-0001-5178](#).

⁶⁵⁰ "In the discharge of its mandate, ICOE will be guided by the laws of Myanmar. In this regard, the Investigation Committees Act 1950 will apply to ICOE. ICOE will have reference to international human rights law and international humanitarian law, where applicable", ICOE, Key Terms, [BGD-OTP-0002-1135](#).

its recommendations” to the President of Myanmar,⁶⁵¹ but do not indicate what measures should follow from this. In any case, it remains unclear if and how it is envisaged the ICOE’s investigation will lead to criminal proceedings. There are indications to the contrary. For instance, during the 16 August 2018 press conference, the ICOE’s Chairperson reportedly stated that while the ICOE will seek accountability, it “will not ‘blame or finger-point’ at anyone but seek ‘to cooperate’ for peace in the region.”⁶⁵²

252. At present the ICOE’s activity appears to be ongoing, as the ICOE anticipated submitting an interim report to the President’s Office,⁶⁵³ but has not yet publicly announced having done so. Its relationship, if any, to the recently established *Tatmadaw* military investigation court is also unclear.⁶⁵⁴

253. As for its powers, the ICOE has been characterised by the UN High Commissioner for Human Rights as a “non-judicial” body.⁶⁵⁵ The ICOE is reported to have certain investigative powers but these appear to be limited. Reportedly, the ICOE “shall have the cooperation” of Government, region and State authorities, which “shall include complying with requests for information”.⁶⁵⁶ It “will take into account all available sources of information that it considers to be relevant and reliable”, “may undertake study/investigative

⁶⁵¹ ICOE, Key Terms, [BGD-OTP-0002-1135](#).

⁶⁵² Irrawaddy article of 16 August 2018, [BGD-OTP-0001-0768](#) at 0769. See also ICJ “New commission of inquiry” report, [BGD-OTP-0001-2908](#) at 2908. See further UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0539, para. 1619.

⁶⁵³ ICOE Press release of 1 February 2019, [BGD-OTP-0002-1139](#) (interim report to be submitted in mid-March 2019). But see ICOE press release of 6 April 2019, [BGD-OTP-0001-5177](#) (ICOE reviewed the framework of its preliminary report); ICOE press release of 4 May 2019, [BGD-OTP-0001-5183](#) (preliminary report in the process of being prepared for submission); ICOE press release of 26 May 2019, [BGD-OTP-0001-5179](#) (ICOE had intensive discussions on its preliminary report).

⁶⁵⁴ See e.g. ICOE press release of 4 May 2019, [BGD-OTP-0001-5183](#) (reporting meeting Senior General Min Aung Hlaing Commander-in-Chief of the *Tatmadaw*, during which they exchanged views “on the events that brought about the evolution” of the military investigation court including “the creation of the ICOE.” Also during this meeting the ICOE expressed appreciation on the reassurance of full cooperation by the *Tatmandaw* with respect to “outcomes of [military investigation court’s] deliberations”).

⁶⁵⁵ UN High Commissioner for Human Rights report of 11 March 2019, [BGD-OTP-0002-0599](#) at 0610-0611, para. 56.

⁶⁵⁶ ICOE, Key Terms, [BGD-OTP-0002-1135](#). See also GNLM article of 17 August 2018, [BGD-OTP-0002-1133](#).

visits to relevant areas”, “may [...] make a call for written submissions [...] to any interested person or group” and “will be guided [...] by the principles of independence, impartiality, objectivity, discretion, transparency, confidentiality, integrity and professionalism.”⁶⁵⁷ The ICOE stated in a recent press release that “Myanmar’s Investigation Committees Act 1950”, applying to the ICOE, “provides a robust hybrid of powers” among others “to compel production of documents and seek the attendance of witnesses.”⁶⁵⁸ Nevertheless, in relation to the scope of the ICOE’s powers, the Myanmar Special Rapporteur expressed concern over the ICOE’s assurance that those in contact with it in connection with the investigation shall not, as a result of such cooperation, suffer any “prejudicial treatment”. This concern stemmed from the fact that, according to the Special Rapporteur, the ICOE “does not have the power to protect witnesses and victims.”⁶⁵⁹

254. To the extent that the Chamber considers that the ICOE’s investigation is relevant under the complementarity determination, the Prosecution submits that on the information currently available there is insufficient indication that the ICOE has taken “tangible, concrete and progressive investigative steps”⁶⁶⁰ since its establishment in July 2018.

(ii) Steps undertaken by the ICOE

255. The press releases issued so far report several meetings of the ICOE, including with Myanmar authorities, among them the team leader of the *Tatmadaw* Investigation Team — referred to above⁶⁶¹ — and several members of the Investigation Commission for Maungdaw in Rakhine State, discussed further

⁶⁵⁷ ICOE, Key Terms, [BGD-OTP-0002-1135](#). See also GNLM article of 17 August 2018, [BGD-OTP-0002-1133](#).

⁶⁵⁸ ICOE press release of 24 May 2019, [BGD-OTP-0001-5178](#).

⁶⁵⁹ UN Special Rapporteur report of 5 March 2019, [BGD-OTP-0002-0456](#) at 0468, para. 62. See also ICOE, Key Terms, [BGD-OTP-0002-1135](#).

⁶⁶⁰ [Burundi Article 15 Decision](#), para. 148.

⁶⁶¹ See paras. 237 above, 268 below.

below.⁶⁶² During its second meeting, the ICOE also reportedly conducted “a day trip to the affected areas in Northern Rakhine” in the course of which it met with relevant authorities, inspected a reception centre, engaged in dialogue with the different communities “living in mixed villages” and “also spoke to some survivors and their family-members of the terrorists’ attacks” and with “a family [...] who had returned to Myanmar of their own volition.”⁶⁶³ In a recent press release dated 26 May 2019, the ICOE indicated that it had discussed a plan for its second visit to Rakhine State, and also a “proposed programme in Cox’s Bazar, Bangladesh” for its evidence collection and verification team.⁶⁶⁴ According to one of its press releases, the ICOE has also collected 36 depositions in Rakhine, during which the witnesses were interviewed, and were assured of their protection. It also reportedly received 43 submissions through its call for submissions.⁶⁶⁵

256. Reflecting the limited steps undertaken up until that point, the ICOE Chairperson reportedly stated on 12 December 2018 that the ICOE had found no evidence so far to prove the allegations of human rights abuses in northern parts of the state against the “government security forces”.⁶⁶⁶ The ICOE’s Chairperson did not explain the methodology and steps that had led to this conclusion but reportedly stated that they “will clarify how [they] collected the evidence later”.⁶⁶⁷

⁶⁶² ICOE press release of 7 October 2018, [BGD-OTP-0002-1137](#); ICOE press release of 10 January 2019, [BGD-OTP-0002-1141](#). See also ICJ “New commission of inquiry” report, [BGD-OTP-0001-2908](#) at 2911. See further paras. 261-266 below.

⁶⁶³ ICOE press release of 31 August 2018, [BGD-OTP-0002-1136](#). See also GNLM article of 1 September 2018, [BGD-OTP-0002-1134](#); ICJ “New commission of inquiry” report, [BGD-OTP-0001-2908](#) at 2911.

⁶⁶⁴ ICOE press release of 26 May 2019, [BGD-OTP-0001-5179](#). See also ICOE press release of 1 February 2019, [BGD-OTP-0002-1139](#) (discussing preparations for second visit to Rakhine State); ICOE press release of 6 April 2019, [BGD-OTP-0001-5177](#) (discussing proposed visit to Bangladesh and Cox’s Bazar).

⁶⁶⁵ ICOE press release of 1 February 2019, [BGD-OTP-0002-1139](#).

⁶⁶⁶ Irrawaddy article of 12 December 2018, [BGD-OTP-0001-0765](#) at 0765-0766 (reportedly stating that “for the time being, allegations are still allegations. There is no conclusive evidence.”) See also HRW article of 19 December 2018, [BGD-OTP-0001-3519](#) at 3520.

⁶⁶⁷ Irrawaddy article of 12 December 2018, [BGD-OTP-0001-0765](#) at 0766.

(iii) Statements by officials relevant to the ICOE

257. In addition to the limited steps undertaken by the ICOE, there are further indications that point to the Myanmar authorities' unwillingness to genuinely carry out the investigation within the meaning of article 17(2)(a) and (c). Statements from inquiry members and government officials that appear to predetermine outcomes of the investigation are relevant to such an assessment. It was reported by Government newspaper GNLM that the spokesperson for Myanmar's Office of the President had stated that the ICOE's purpose was "to respon[d] to false allegations made by the UN Agencies and other international communities."⁶⁶⁸ Prior to his appointment as one of the ICOE's domestic commissioners, Dr Aung Tun Thet reportedly stated that Myanmar has a "clear conscience" and that "there is no such thing in our country, in our society, as ethnic cleansing, and no genocide."⁶⁶⁹ Dr Aung Tun Thet reportedly stated that "[t]ortures happened" but that "[w]hatever has happened in Rakhine is not systematic, and that Myanmar is now working for their repatriation clearly demonstrates that there was no intention for ethnic cleansing".⁶⁷⁰ This same commissioner is the Chief Coordinator of the UEHRD, described above.⁶⁷¹ He was also a member of the Investigation Commission for Maungdaw in Rakhine State⁶⁷² carrying out an investigation into the 2016 wave of violence, as discussed further below.

⁶⁶⁸ GNLM article of 29 August 2018, [BGD-OTP-0002-0023](#) at 0023. *See also* ICJ "New commission of inquiry" report, [BGD-OTP-0001-2908](#) at 2908.

⁶⁶⁹ Reuters article of 14 March 2018, [BGD-OTP-0001-1160](#) at 1163; HRW article of 19 December 2018, [BGD-OTP-0001-3519](#) at 3522-3523. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0539-0540, para. 1619.

⁶⁷⁰ *See* ICJ "New commission of inquiry" report, [BGD-OTP-0001-2908](#) at 2912 citing Daily Star article of 25 March 2019, [BGD-OTP-0002-0495](#) at 0496.

⁶⁷¹ Union Enterprise website page of 4 March 2019, [BGD-OTP-0002-0031](#); UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0539-0540, para. 1619, citing Reuters article of 26 February 2018, [BGD-OTP-0001-1201](#); ICJ "New commission of inquiry" report, [BGD-OTP-0001-2908](#) at 2911-2912. *See also* paras. 83, 161-162 above.

⁶⁷² HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0252. *See also* ICOE, About, [BGD-OTP-0002-1140](#). *See further* Myanmar Office of President press release of 1 December 2016, [BGD-OTP-0002-1161](#).

258. In its assessment, the UN FFM “concluded on reasonable grounds” that the ICOE “will not and cannot provide a real avenue for accountability, even with some international involvement.”⁶⁷³ Rather, the ICOE appears to be a recent example of a number of domestic initiatives which have not resulted in effective investigations leading to criminal accountability.

(iv) Other previous domestic initiatives

259. Regarding the domestic initiatives set up following the 2016 wave of violence, publicly available information indicates that domestic authorities established at least four inquiries. These were: (1) Investigation Commission for Maungdaw in Rakhine State (at the national or Union-level); (2) Rakhine State Investigation Committee (at the State-level); (3) *Tatmadaw* Investigation Team; and (4) Ministry of Home Affairs Investigation Committee.⁶⁷⁴

260. While these initiatives are reviewed in more detail below, in the assessment of the UN FFM⁶⁷⁵ and Myanmar Special Rapporteur⁶⁷⁶ and of several NGOs

⁶⁷³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0540, para. 1619. *See also* UN Special Rapporteur report of 5 March 2019, [BGD-OTP-0002-0456](#) at 0468, para. 62. *See further* UN High Commissioner for Human Rights report of 11 March 2019, [BGD-OTP-0002-0599](#) at 0610-0611, para. 56.

⁶⁷⁴ *See* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0535, para. 1605; HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0246-0248. *See further* Myanmar Office of President press release, undated “Tatmadaw ends clearance operation”, [BGD-OTP-0002-0020](#), outlining these and other efforts, including “the Advisory Commission on Rakhine [State] led by former UN Secretary-General Mr Kofi Annan”. Regarding the latter, its Final Report released in August 2017 stated that the Commission was “not mandated to investigate specific cases of alleged human rights violations”, Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5043. The accusations against “security forces” of serious human rights violations during the 2016 wave of violence led the Commission to recommend in its interim report that “an impartial and independent investigation should be carried out.” In its Final Report, it reiterated this recommendation “that the Government should ensure – based on independent and impartial investigation – that perpetrators of serious human rights violations are held accountable.” Advisory Commission on Rakhine State report, [BGD-OTP-0001-5031](#) at 5085.

⁶⁷⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0534, para. 1602 (referring to domestic inquiries into Rakhine State since 2012). *See also* UNFFM summary report, [BGD-OTP-0001-0108](#) at 0125, para. 96.

⁶⁷⁶ UN Special Rapporteur statement of 27 June 2018, [BGD-OTP-0002-0489](#) at 0493 (referring to domestic inquiries into Rakhine State since 2012). *See also* UN High Commissioner for Human Rights report of 11 March 2019, [BGD-OTP-0002-0599](#) at 0611, para. 57.

(HRW,⁶⁷⁷ AI,⁶⁷⁸ and the International Commission of Jurists (“ICJ”))⁶⁷⁹ none resulted in effective investigations leading to criminal accountability.

a. Investigation Commission for Maungdaw in Rakhine State

261. At the national or Union-level, the Office of the President of Myanmar established the Investigation Commission for Maungdaw in Rakhine State on 1 December 2016.⁶⁸⁰ The commission was composed of 13 domestic appointees, among them the military appointed Vice-President Senior General U Myint Swe (Chairperson) and the then-serving MPF Chief Major-General Zaw Win.⁶⁸¹ According to the Myanmar Special Rapporteur, “the inclusion of some members call[ed] into question the Commission’s impartiality”.⁶⁸² As previously mentioned, Dr Aung Tun Thet was among those appointed.⁶⁸³ According to the Office of the President, the Commission’s mandate was to “probe into the background” of the “9 October and 12-13 of November” attacks in Maungdaw and “the truth about the incidents”, and “to investigate whether existing laws, rules and regulations were observed [...] before making recommendations”.⁶⁸⁴ However, it was unclear whether and how these recommendations were designed to achieve accountability.

262. According to the UN FFM, this commission’s “methodology and skills regarding sensitive human rights investigations have been called into

⁶⁷⁷ HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0245; HRW article of 24 May 2017, [BGD-OTP-0002-0263](#) at 0264.

⁶⁷⁸ AI public statement of 21 February 2017, [BGD-OTP-0002-0091](#) at 0091.

⁶⁷⁹ ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3843 (citing UN Special Rapporteur statement of 13 March 2017, [BGD-OTP-0002-0483](#)), 3852-3853, 3857. *See also* 3860, 3871; ICJ “New commission of inquiry” report, [BGD-OTP-0001-2908](#) at 2908.

⁶⁸⁰ Myanmar Office of President press release of 1 December 2016, [BGD-OTP-0002-1161](#). *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1606.

⁶⁸¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1606. *See also* Myanmar Office of President press release of 1 December 2016, [BGD-OTP-0002-1161](#). *See further* UN Special Rapporteur report of 14 March 2017, [BGD-OTP-0002-0432](#) at 0446, para. 78.

⁶⁸² UN Special Rapporteur report of 14 March 2017, [BGD-OTP-0002-0432](#) at 0446, para. 78.

⁶⁸³ Myanmar Office of President press release of 1 December 2016, [BGD-OTP-0002-1161](#).

⁶⁸⁴ Myanmar Office of President press release of 1 December 2016, [BGD-OTP-0002-1161](#).

question.”⁶⁸⁵ It was reported to have power to “conduct the investigation in accordance with the Criminal Procedure and the Evidence Act”, and “to question necessary individuals, ask for necessary documents and [...] visit necessary places.”⁶⁸⁶ Regarding its methodology, the UN FFM noted that before the Investigation Commission issued its interim or final reports, the State Counsellor’s Office released a statement casting doubt on the allegations of rape committed by the *Tatmadaw* or other Security Forces during the 2016 wave of violence. This was specifically in reference to an alleged victim of sexual violence interviewed by the Investigation Commission whose name, village of residency and photograph were publicly released.⁶⁸⁷

263. On 3 January 2017, the Office of the President released the commission’s interim report which stated that the commission “held three meetings, went on a field trip [...] to the 10 villages and 4 Security Camps, and interviewed Security Police, Government Staff, Administrative Organisations, villagers from different community based organisations, and community elders.”⁶⁸⁸ According to the Myanmar Special Rapporteur, the commission’s “interim report appears to contain blanket statements that do not seem to have been based on assessing available information and evidence, raising serious doubts about its credibility.”⁶⁸⁹ The report focused on attacks committed against the *Tatmadaw* and other Security Forces and the casualties suffered as a result of those attacks,

⁶⁸⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1607. See also UN Special Rapporteur statement of 13 March 2017, [BGD-OTP-0002-0483](#) at 0487. See further HRW article of 24 May 2017, [BGD-OTP-0002-0263](#) at 0264.

⁶⁸⁶ Myanmar Office of President press release of 1 December 2016, [BGD-OTP-0002-1161](#).

⁶⁸⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0533-0534, paras. 1599-1600 (and citations therein), and at 0536, para. 1607. See also Myanmar State Counsellor Office press release of 26 December 2016, [BGD-OTP-0002-1165](#). See further AI public statement of 21 February 2017, [BGD-OTP-0002-0091](#) at 0092 (“the Investigation Commission has allowed details of some survivors and eyewitnesses they interviewed-including their names and pictures-to be published by the media [...] Amnesty International is aware of two rape survivors whose personal details were published in state media after speaking to the Commission”). *Contra* Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1143, para. 3 (“The names and addresses of the interviewees were kept confidential where the interviewees so wished.”), at 1149, para. 35 (referring to alleged victims “who presented their cases directly to the commission”).

⁶⁸⁸ Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 2.

⁶⁸⁹ UN Special Rapporteur report of 14 March 2017, [BGD-OTP-0002-0432](#) at 0446, para. 78.

including the casualties among attackers when “security forces returned fire”.⁶⁹⁰ The interim report identified the group purportedly responsible for the attacks as “Aqa Mul Mujahidin” supposedly linked to the “Rohingya Solidarity Organisation”.⁶⁹¹ The interim report also noted that upon arriving at villages, the “security forces found that some houses were on fire” or found “burnt” or “burning” houses.”⁶⁹² It found “that there were no cases of genocide and religious persecution in the region”,⁶⁹³ as “purportedly proven by the continued presence of Rohingya and the presence of mosques and religious edifices in Maungdaw.”⁶⁹⁴ It said that arsons, illegal arrests and torture were being investigated but concerning rape, “the Commission interviewed local villagers and women [...] and didn’t find sufficient evidence to take legal action” up until that point.⁶⁹⁵ While it mentioned legal proceedings against those “committing crimes in the violent attacks”, these did not appear to refer to members of the *Tatmadaw* and other Security Forces.⁶⁹⁶

264. The Investigation Commission for Maungdaw in Rakhine State released a summary of its final report on 6 August 2017.⁶⁹⁷ As for the steps taken by the commission, the summary of the final report mentioned: “investigations

⁶⁹⁰ Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 5. *See also* paras. 3-4.

⁶⁹¹ Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 6. According to the summary of the final report, “[t]he group changed its name to Arakan Rohingya Salvation Army (ARSA), according to its ‘official’ statement released on 29 March 2017.” Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1145, para. 13. *See also* ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3817 (explaining *Harakah al-Yaqin* is called “Aqa Mul Mujahidin” by the Myanmar Government).

⁶⁹² Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), paras. 4-5.

⁶⁹³ Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 10.

⁶⁹⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1606. *See also* Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 10 (referring to “[t]he Bengali population residing in Maung[daw] region, the increasing population of Mawlawi, mosques and religious edifices”).

⁶⁹⁵ Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 11. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1606.

⁶⁹⁶ Myanmar Office of President Interim Investigation Report, [BGD-OTP-0002-1162](#), para. 15 (“Ten detainees who were found to be innocent of committing crimes in the violence attacks have already been released [...] legal action was taken against 485 suspects in 49 cases. Of them, 28 cases have been put on trial with 3 coming to a final conviction.”)

⁶⁹⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1607. *See also* GLNM article of 28 September 2018, [BGD-OTP-0002-1157](#) (“The Investigation Commission’s final report was released on 4 August 2017”).

conducted by the Commission in Bangladesh” at three refugee camps where they spoke to refugees, “personally interview[ing] men and women of different ages and from different social classes”, “field investigations in villages reported to be affected”, and reviewing “statements made by some of those who have been arrested”.⁶⁹⁸

265. In its final report, the commission for Maungdaw reiterated the alleged responsibility of the group “Aqa Mul Mujahidin,” supposedly linked to the “Rohingya Solidarity Organisation,” for the attacks carried out between October and November 2016.⁶⁹⁹ It concluded that during October-November 2016 and after,⁷⁰⁰ the “members of the Armed Forces and the Police”⁷⁰¹ “generally followed the rules and regulations of the unit”, but that “there could have been cases of violations in areas of weak command”.⁷⁰² It stated that action had been taken and was being taken in relation to these violations, with no further detail given.⁷⁰³ It maintained that villagers moved to Bangladesh as a result of threats from the “terrorist groups”, concern at having been involved with or aware of the activities of those groups, and propaganda giving “rise to misconceptions of the activities of the security forces among Muslim villagers.”⁷⁰⁴ In relation to specific

⁶⁹⁸ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1142, para. 2, at 1149-1154, paras. 35-36, 40-42, 45. *See also* GLNM article of 28 September 2018, [BGD-OTP-0002-1157](#) (stating that the Commission held 11 meetings and conducted four field trips to the villages and camps in Maungdaw District where it interviewed 2,240 local residents, in addition to 10 prisoners, people from interfaith groups, personnel from international NGOs, “officials from the respective departments and the security forces”, and also “visited the refugee camps in Bangladesh.”)

⁶⁹⁹ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1145, paras. 13-14, at 1155, para. 51. *See also* at 1145, para. 13 (“[t]he group changed its name to Arakan Rohingya Salvation Army (ARSA), according to its ‘official’ statement released on 29 March 2017.”) *See further* ICG “A new Muslim insurgency” report, [BGD-OTP-0001-3802](#) at 3817 (explaining *Harakah al-Yaqin* is called “Aqa Mul Mujahidin” by the Myanmar government).

⁷⁰⁰ *See* Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1155-1156, paras. 51-53 (referring to a broader period beyond October and November 2016).

⁷⁰¹ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1146, para. 17.

⁷⁰² Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1153, para. 41. *See also* at 1154, para. 47 (“In securing local area tranquility and stability, some violations of rules and regulations were found to have occurred where supervision was lax in the security units or where there were individual weaknesses in compliance with rules and regulations.”)

⁷⁰³ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1151-1153, para. 41. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536-0537, paras. 1607, 1611.

⁷⁰⁴ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1146, paras. 16-18.

allegations of human rights violations, including killings, torture, rape and arson, the commission indicated that there had been cases where action was taken, again with no further detail.⁷⁰⁵ Specifically in connection with allegations of rape against two named victims “who presented their cases directly to the commission [...] as the allegations could not be confirmed, [it] concluded that the cases require further investigation.”⁷⁰⁶ Regarding “[a]llegations of disproportionate use of force by security personnel [...] [t]here have also been such cases where action was taken.”⁷⁰⁷ As for allegations contained in the OHCHR Flash Report, it concluded that most of them had not been made out.⁷⁰⁸ In particular, it was difficult to “identify who set fire to buildings with any level of certainty, whether it was security forces or villagers or members of terrorist organisations.”⁷⁰⁹ While it noted that between mid-February and the beginning of March 2017, 21 cases were filed for “murder, rape, arson, destruction of evidence, loss of money/ property and deaths”, it gave no further indication of any outcome or any explanation except to note that for some cases there were “mismatches between the complaint and the results of the investigations and in some other cases, the complaints were fabricated”.⁷¹⁰

266. From the summary of the Commission’s final report it appears that it “made no specific findings regarding the role and responsibility of the security forces.”⁷¹¹ Its recommendations do not appear to have proposed or led to specific accountability outcomes.⁷¹² “Less than three weeks” after the Commission issued

⁷⁰⁵ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1150, para. 37.

⁷⁰⁶ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1149, para. 35.

⁷⁰⁷ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1150, para. 38.

⁷⁰⁸ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1151-1153, para. 41.

⁷⁰⁹ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1151-1153, para. 41.

See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1607.

⁷¹⁰ Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1151-1153, para. 41.

See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1607.

⁷¹¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536, para. 1607.

⁷¹² Investigation Commission for Maungdaw Summary Report, [BGD-OTP-0002-1142](#) at 1156, paras. 57-58. *See also* ICJ “New commission of inquiry” report, [BGD-OTP-0001-2908](#) at 2911.

its final report, the *Tatmadaw* and other Security Forces carried out further “clearance operations” following new ARSA attacks on 25 August 2017.⁷¹³

b. Rakhine State Investigation Committee

267. It was announced on 26 October 2016 that the Rakhine State Parliament formed a State-level committee made up of 11 state legislators, none of whom were Rohingya.⁷¹⁴ Its chairperson was state legislator U Aung Win.⁷¹⁵ Reportedly, the committee submitted interim and final reports to the Rakhine State Parliament in December 2016 and March 2017 respectively.⁷¹⁶ According to a media report, the committee undertook two investigation trips to villages in northern and southern Maungdaw Township during which the committee “met some Bengalis.”⁷¹⁷ On the basis of an account by the Myanmar media regarding the committee’s final report, it does not appear to have addressed the alleged responsibility of the *Tatmadaw* or other Security Forces or made any recommendations regarding accountability.⁷¹⁸ In addition, its chairperson reportedly made a public statement on 7 November 2016, before any of the committee’s reports were issued, drawing into question his impartiality by appearing to predetermine the outcome of the investigation.⁷¹⁹ In this statement the chairperson appeared to dismiss in an extremely derogatory way allegations that members of the *Tatmadaw* had raped Rohingya women.⁷²⁰

⁷¹³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1611.

⁷¹⁴ HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0246. *See also* Irrawaddy article of 26 October 2016, [BGD-OTP-0002-0512](#) at 0512.

⁷¹⁵ *See* Myanmar Times article of 22 March 2017, [BGD-OTP-0002-1158](#). *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1610.

⁷¹⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1610 (stating that the UNFFM saw a copy of the interim report but only news reports about the final report).

⁷¹⁷ *See* Myanmar Times article of 22 March 2017, [BGD-OTP-0002-1158](#).

⁷¹⁸ *See* Myanmar Times article of 22 March 2017, [BGD-OTP-0002-1158](#). *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1610; HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0247.

⁷¹⁹ *See* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1610, at 0533, para. 1599.

⁷²⁰ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0533, para. 1599, citing BBC broadcast of 7 November 2016, [BGD-OTP-0002-0288](#).

c. Tatmadaw Investigation Team

268. According to AI, “[a]mid increased international attention in the wake of” the OHCHR Flash Report released on 3 February 2017, two internal commissions were established, led by the *Tatmadaw* and the police respectively. “According to state media, both commissions were established at the request of the Investigation Commission” for Maungdaw in Rakhine State.⁷²¹

269. On 9 February 2017, the *Tatmadaw* announced the composition of its five-member — all from the armed forces — investigation team “to investigate whether there have been unlawful acts including violations of human rights,” with Lieutenant-General Aye Win as Chairperson.⁷²² According to the UN FFM, on 23 May 2017 the *Tatmadaw* True News Information Team released the findings of the investigation, stating that 12 out of 18 allegations in the OHCHR Flash Report were “totally wrong” and 6 were false accusations or exaggerated.⁷²³ HRW reported that the *Tatmadaw* announced that its investigation into alleged abuses in Rakhine State “uncovered no wrongdoing except in two minor incidents.”⁷²⁴ The investigation team reportedly “interviewed approximately 2,875 villagers in 29 villages” in Maungdaw Township from 10 February to 4 March 2017.⁷²⁵ According to HRW, the two cases of abuse identified amounted to: (1) “the theft of a motorbike, for which a soldier was sentenced to one year in jail and received a fine”; and (2) “military personnel who beat villagers for allegedly not helping to

⁷²¹ AI public statement of 21 February 2017, [BGD-OTP-0002-0091](#) at 0092. See also Myanmar Office of President press release of 20 February 2017, [BGD-OTP-0002-1164](#) (“At the request of the commission, the Ministry of Defence and Ministry of Home Affairs also formed commissions investigating the accusations”); UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536-0537, para. 1608.

⁷²² Myanmar Ministry of Information press release of 10 February 2017, [BGD-OTP-0002-1166](#). See also UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536-0537, para. 1608. See further Irrawaddy article of 10 February 2017, [BGD-OTP-0002-0505](#) at 0506.

⁷²³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536-0537, para. 1608. See also HRW article of 24 May 2017, [BGD-OTP-0002-0263](#) at 0264.

⁷²⁴ HRW article of 24 May 2017, [BGD-OTP-0002-0263](#) at 0263.

⁷²⁵ HRW article of 24 May 2017, [BGD-OTP-0002-0263](#) at 0263.

extinguish a fire, for which one officer was ‘penalized and warned’ and two soldiers were sentenced to a year in jail.”⁷²⁶

d. Ministry of Home Affairs Investigation Committee

270. Also in February 2017, the Ministry of Home Affairs reportedly established its own five-member investigation committee chaired by Police Brigadier-General Win Tun to investigate the allegations of human rights violations during the 2016 wave of violence.⁷²⁷ According to HRW, the 12 February 2017 announcement of its establishment stated that the investigative team would act “in accordance with the Criminal Codes and police manual” to assess whether any members of the police had violated human rights, in which event they would be charged under police disciplinary law.⁷²⁸

271. The UN FFM relied on a Reuters media report indicating that five policemen seen beating a group of Rohingya, in a widely viewed video, were sentenced to two months of imprisonment.⁷²⁹ In addition, Reuters reported that the police had stated that “three senior police officers involved in the case have been demoted.”⁷³⁰ The UNFFM noted that media reports also suggested three BGP officers were sentenced to imprisonment for negligence “reportedly not for excessive use of force or ill-treatment of Rohingya but for failing to protect the

⁷²⁶ HRW article of 24 May 2017, [BGD-OTP-0002-0263](#) at 0264. *See also* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0536-0537, para. 1608. *See further* ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3852.

⁷²⁷ Reuters article of 13 February 2017, [BGD-OTP-0002-0412](#) at 0413-0414; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1609; Myanmar Office of President press release, undated “Tatmadaw ends clearance operation”, [BGD-OTP-0002-0020](#). *See also* AI public statement of 21 February 2017, [BGD-OTP-0002-0091](#) at 0092 (“The army commission is composed solely of members of the military and the police commission will be conducted by an internal departmental enquiry composed solely of police personnel”); HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0248 (“the Ministry of Home Affairs announced that a team of five high-ranking police officials would investigate allegations of abuses”).

⁷²⁸ HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0248.

⁷²⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1609, citing Reuters article of 13 February 2017, [BGD-OTP-0002-0412](#) at 0414. *See also* ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3849.

⁷³⁰ Reuters article of 13 February 2017, [BGD-OTP-0002-0412](#) at 0414.

security post against the attack in the first place.”⁷³¹ The UN FFM was unable to tell whether these actions were undertaken as a result of the Ministry of Home Affairs Investigative Committee.⁷³² To date, it is unclear, based on publicly available information, how this investigation concluded or what was its outcome.⁷³³

3. Limited domestic accountability prospects

272. In addition, a number of concerns have been raised more generally with respect to the willingness of the Myanmar authorities to genuinely investigate and prosecute the alleged criminal responsibility of senior members of the *Tatmadaw* and other Security Forces. Further supporting the admissibility of the potential case(s), the information currently available suggests that there are extremely limited prospects that senior officials of the *Tatmadaw* and other Security Forces will be held accountable for the crimes in the Request and accompanying confidential *ex parte* annexes 5 and 7.

273. With respect to accountability for crimes by the *Tatmadaw*, the UN FFM found that, “[t]he military’s involvement in all levels of government and the legal and judicial deficiencies [...] mean that criminal accountability at the domestic level, in particular for those who bear the greatest responsibility, is unattainable and will remain so for the foreseeable future.”⁷³⁴ It further found that “[t]he Constitution and other laws provide for immunities and place the *Tatmadaw*

⁷³¹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1609. *See also* Irrawaddy article of 4 October 2017, [BGD-OTP-0001-0762](#) at 0762 (in the aftermath of attacks on BGP outposts in Maungdaw in October 2016, Police Brigadier General Maung Maung Khin was replaced as the chief of the local board guard police force. Police Brigadier General Maung Maung Khin and two other police officers were imprisoned for negligence.)

⁷³² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1609 (“Earlier the State Counsellor’s Information Committee had already issued a statement that action was being undertaken against those identified in the video”). *See also* Myanmar Information Committee Facebook post of 1 January 2017, [BGD-OTP-0002-1159](#).

⁷³³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0537, para. 1609 (“had not seen a final report of this inquiry.”) *See also* HRW statement of September 2018, [BGD-OTP-0002-0245](#) at 0248 (stating that to HRW’s knowledge, the results of this investigation have not been publicly released).

⁷³⁴ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0545, para. 1648.

beyond civilian oversight. The Tatmadaw can independently adjudicate its own matters, with the Commander-in-Chief having the final word. The rare cases, brought mostly before military courts without transparency, are wholly insufficient to counter the overall trend of impunity.”⁷³⁵

274. According to the UN FFM, similar considerations apply to other Security Forces because the “police and its administration fall under the Ministry of Home Affairs, which is ultimately answerable to the Tatmadaw Commander-in-Chief”,⁷³⁶ and “[d]uring joint security operations, the police fall under the command of the Tatmadaw [...] There can be no expectation that the police will conduct credible, independent investigations into alleged gross human rights violations by the military or other security forces.”⁷³⁷

275. ICJ found that “[m]embers of the military and police force enjoy impunity largely through the use of military courts or special police courts as mechanisms of investigation and prosecution concerning the conduct of military and police personnel.”⁷³⁸ Rather than the criminal justice system, “security forces and ad hoc government committees tend to hold responsibility for undertaking these investigations [into allegations of human rights violations], which rarely lead to successful prosecution of perpetrators.”⁷³⁹ In addition, “[b]oth the executive and the military continue to wield significant influence over the judiciary [...] The courts rarely review acts carried out by the State’s security personnel.”⁷⁴⁰ In sum, “[b]y law and in practice the security forces have blocked and remain capable of

⁷³⁵ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0540, para. 1621.

⁷³⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0528-0529, para. 1582.

⁷³⁷ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0530, para. 1589.

⁷³⁸ ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3840 (“Convictions are rare and penalties are relatively weak, often times not commensurate with the gravity of the acts in question.”)

⁷³⁹ ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3840 (“Within this framework, there is no apparent logic to the State’s selective investigation of alleged human rights violations”).

⁷⁴⁰ ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3841.

blocking independent and impartial investigations, allowing impunity for human rights violations.”⁷⁴¹

4. National proceedings in third States

276. Finally, the available information does not indicate any relevant national proceedings in any other States with jurisdiction in relation to the potential case(s) identified in this Request and accompanying Annexes.⁷⁴²

277. Should the Chamber authorise the investigation, the Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction at the article 18 stage.

B. Gravity

278. The potential case(s) identified in this Request and the accompanying confidential *ex parte* annexes (5 and 7) are sufficiently grave to justify further action by the Court, pursuant to article 17(1)(d) of the Statute.

279. The Prosecution has examined gravity, under article 17(1)(d), against the backdrop of the potential case(s) likely to arise from an investigation. This means that the Prosecution has: first, conducted a “generic assessment” (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and second, examined the gravity of the crimes allegedly committed during the incidents, which are likely to be the object of an

⁷⁴¹ ICJ “Achieving justice” report, [BGD-OTP-0001-3836](#) at 3842.

⁷⁴² See confidential and *ex parte* Annex 8.

investigation.⁷⁴³ In relation to the latter, the Prosecution has examined the scale, nature, manner of commission and impact of crimes committed on victims and considered both quantitative and qualitative factors.⁷⁴⁴

280. As set out earlier,⁷⁴⁵ the Prosecution has attached to this Request an Indicative List of Incidents (confidential *ex parte* Annex 5) and a Preliminary List of Persons/Groups Most Responsible (confidential *ex parte* Annex 7).

281. **Greatest responsibility:** As noted above,⁷⁴⁶ the potential case(s) identified by the Prosecution concern persons or groups of persons who may bear the greatest responsibility for the alleged crimes committed. The Prosecution otherwise refers the Chamber to confidential *ex parte* Annex 7.

282. **Nature:** The crimes alleged (crimes against humanity of deportation, persecution and other inhumane acts) are very serious in nature. The coercive acts underpinning the crime of deportation committed during the 2017 wave of violence include the use of physical violence in armed attacks, such as killings, rapes, and the burning of homes and properties.⁷⁴⁷ The conduct involved in the violation of the right to return as an other inhumane act included the destruction of property, and the discriminatory resettlement of other ethnicities on burnt and/or cleared Rohingya land.⁷⁴⁸

283. **Scale:** According to the UN FFM, the 2017 “clearance operations” “targeted and terrorised the entire Rohingya population”.⁷⁴⁹ The alleged crimes were

⁷⁴³ [Burundi Article 15 Decision, para. 184](#); [Kenya Article 15 Decision](#), paras. 58-61, 188; [Côte d’Ivoire Article 15 Decision](#), paras. 202-204; [Georgia Article 15 Decision](#), para. 51.

⁷⁴⁴ [Burundi Article 15 Decision, para. 184](#); [Kenya Article 15 Decision](#), paras. 62, 188; [Côte d’Ivoire Article 15 Decision](#), paras. 203-204; [Georgia Article 15 Decision](#), para. 51. *See also* [Abu Garda CD](#), para. 31; [Regulations of the Office of the Prosecutor](#), regulation 29(2).

⁷⁴⁵ *See* para. 227 above.

⁷⁴⁶ *See* para. 227 above.

⁷⁴⁷ *See* e.g. paras. 89-92, 94-100, 106-110 above.

⁷⁴⁸ *See* e.g. paras. 154, 156, 158-166 above.

⁷⁴⁹ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751. The UNFFM further states that “[w]hat happened in northern Rakhine State on 25 August and the following days and weeks [...] caused the

committed on a very large scale, with at least 700,000 Rohingya deported to Bangladesh during the 2017 wave of violence⁷⁵⁰ — and being caused great suffering or serious injury through violation of the right to return to Myanmar,⁷⁵¹ along with the 87,000 Rohingya deported in the context of the 2016 wave of violence.⁷⁵² The coercive acts underpinning the crime of deportation were also committed on a large scale. As described above, up to 10,000 Rohingya were killed within the context of the 2017 wave of violence.⁷⁵³ AI documented “large-scale massacres” in three villages.⁷⁵⁴ Widespread sexual violence was also reported, as described above.⁷⁵⁵ The alleged crimes occurred over a large geographic area, encompassing most of northern Rakhine State, across the townships of Buthidaung, Rathedaung, and Maungdaw.⁷⁵⁶

284. **Manner of commission:** The information available shows that victims were targeted on ethnic and/or religious grounds because of their membership in the Rohingya group.⁷⁵⁷

285. Alleged acts committed with particular cruelty include: burning people to death,⁷⁵⁸ beheadings,⁷⁵⁹ the stomachs of pregnant women being cut⁷⁶⁰ and fetuses

disintegration of a community and resulted in a human rights catastrophe, the effects of which will span generations”. UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0307-0308, para. 749.

⁷⁵⁰ ISCG situation report of 29 November 2018, [BGD-OTP-0001-0581](#) at 0582; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751; at 0407. para. 1174; at 0505, para. 1489.

⁷⁵¹ See paras. 142-147, 168-171 above.

⁷⁵² AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1765; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1383; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453 (claiming that the attacks displaced more than 94,000 Rohingya and more than 74,000 fled to Bangladesh). On 5 January 2017 IOM reported 65,000 refugees, while on 20 January 2017 OCHA updated the number to 66,000 (OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342). See also in general, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384-0388, paras. 1069-1095

⁷⁵³ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0370-0371, paras. 1005-1008, at 0504, para. 1482; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3415, fn. 6; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2708. See in general UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0343, paras. 884-919. See also para. 89 above.

⁷⁵⁴ AI “We will destroy everything”, [BGD-OTP-0001-2649](#) at 2709.

⁷⁵⁵ See paras. 94-95 above.

⁷⁵⁶ See para. 77 above.

⁷⁵⁷ See paras. 174-179 above.

⁷⁵⁸ Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2476; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0312-0313, para. 772.

ripped out.⁷⁶¹ Women and girls were allegedly subject to rape and gang-rape on a massive scale.⁷⁶² It is also alleged that victims suffered the mutilation of their breasts and genitals after rape.⁷⁶³ Rapes were often committed in public spaces and in front of the wider community.⁷⁶⁴

286. The youth and vulnerability of the victims further heightens the gravity of the alleged crimes. MSF reported that at least 730 children under 5 years old were killed in the first month of the 2017 wave of violence (between 25 August and 24 September 2017).⁷⁶⁵

287. **Impact:** The alleged crimes have had a severe impact on both individual victims and the entire Rohingya community of Rakhine State.

288. Up to 10,000 Rohingya were killed within the context of the 2017 wave of violence.⁷⁶⁶ For those who survived, the enduring and devastating impact of alleged crimes can be seen in life-long physical injuries (including mutilations),⁷⁶⁷ as well as documented psychological injuries such as post-traumatic stress disorder, depression and anxiety.⁷⁶⁸

289. As described previously, as a result of the 2017 wave of violence in Rakhine State, 700,000 (as of November 2018) Rohingya (from a population of

⁷⁵⁹ PILPG Report, [BGD-OTP-0001-3307](#) at 3368; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2474-2475.

⁷⁶⁰ Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2475.

⁷⁶¹ PILPG Report, [BGD-OTP-0001-3307](#) at 3368.

⁷⁶² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0343, para. 920, at 0477, para. 1372.

⁷⁶³ PILPG Report, [BGD-OTP-0001-3307](#) at 3357; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2482.

⁷⁶⁴ PILPG Report, [BGD-OTP-0001-3307](#) at 3356. *See also* MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3429.

⁷⁶⁵ MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3415.

⁷⁶⁶ UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0370-0371, paras. 1005-1008, at 0504, para. 1482; MSF “No one was left” report, [BGD-OTP-0001-3412](#) at 3415, fn. 6; AI “We will destroy everything” report, [BGD-OTP-0001-2649](#) at 2708. *See in general* UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0335-0343, paras. 884-919.

⁷⁶⁷ PILPG Report, [BGD-OTP-0001-3307](#) at 3368; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0345, para. 926.

⁷⁶⁸ PILPG Report, [BGD-OTP-0001-3307](#) at 3358.

approximately 1 million living in Myanmar)⁷⁶⁹ fled across the border into Bangladesh.⁷⁷⁰ These Rohingya refugees, along with the estimated 87,000 Rohingya deported in the context of the 2016 wave of violence,⁷⁷¹ reportedly face personal security concerns, including the particular vulnerability of women and girls to harm from trafficking in persons and other exploitation,⁷⁷² public health issues due to contagious diseases and contaminated water, limited access to food and major environmental threats.⁷⁷³

VIII. INTERESTS OF JUSTICE

290. The Prosecution has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice.

291. Under article 53(1) of the Statute, while jurisdiction and admissibility are positive requirements that must be satisfied, the “interests of justice” is a potential countervailing consideration that may provide a reason *not* to proceed. As such, the Prosecution is not required to establish that an investigation is in the interests of justice, but rather, to determine whether there are specific circumstances which

⁷⁶⁹ See para. 38 above. Census Atlas Myanmar, [BGD-OTP-0002-0113](#) at 0157; Myanmar Population and Housing Census 2004 – Provisional Results, [BGD-OTP-0001-4988](#) at 4988-4999, 5007. See also AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1761; Fortify Rights “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2449.

⁷⁷⁰ ISCG situation report of 29 November 2018, [BGD-OTP-0001-0581](#) at 0582; UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0308, para. 751, at 0407, para. 1174, at 0505, para. 1489.

⁷⁷¹ AI “Caged without a roof” report, [BGD-OTP-0001-1743](#) at 1765; HRW “Massacre by the river” report, [BGD-OTP-0001-1375](#) at 1383; Fortify Rights, “They gave them long swords” report, [BGD-OTP-0001-2415](#) at 2453 (claiming that the attacks displaced more than 94,000 Rohingya and more than 74,000 fled to Bangladesh). On 5 January 2017 IOM reported 65,000 refugees, while on 20 January 2017 OCHA updated the number to 66,000 (OHCHR Flash Report, [BGD-OTP-0002-0337](#) at 0342). See also in general, UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0384-0388, paras. 1069-1095.

⁷⁷² UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174; ISCG situation report of 10 January 2019, [BGD-OTP-0002-0843](#) at 0848; House of Commons report, [BGD-OTP-0002-0640](#) at 0676-0677, paras. 64-65; BBC article of 20 March 2018, [BGD-OTP-0002-0624](#) at 0625-0628. See also HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0755.

⁷⁷³ PILPG Report, [BGD-OTP-0001-3307](#) at 3326; HRW “Bangladesh is Not My Country” report, [BGD-OTP-0002-0721](#) at 0758-0763; OCHA Joint Response Plan, [BGD-OTP-0002-0992](#) at 1038; ISCG emergency preparedness and response, [BGD-OTP-0002-0841](#) at 0841. See also Xchange report 2018, [BGD-OTP-0002-1465](#) at 1470, 1477 (methodology), 1489-1490.

provide substantial reasons to believe it would *not* serve the interests of justice to conduct an investigation at this time.⁷⁷⁴

292. As described in the preceding section, the alleged crimes are sufficiently grave to justify further action by the Court. The seriousness and extent of the alleged deportation of members of the Rohingya people into Bangladesh and continued denial of their right to return to Myanmar; the recurring patterns of criminality; the identification of the potential cases as involving senior members of the *Tatmadaw*, other Security Forces and other Myanmar authorities; and the limited prospects at the national level for accountability of the persons allegedly most responsible, all weigh heavily in favour of an investigation.

293. Victims of alleged crimes within the context of this situation have manifested their interest in seeing justice done in various ways.⁷⁷⁵ The Prosecution has sought to ascertain the interests of victims through direct consultations with organisations representing Rohingya victims as well as through an examination of communications received and publicly available information.

294. Human rights organisations representing victims have, in their consultations with the Prosecution and through communications and public reports, repeatedly stressed the desire for justice expressed by Rohingya refugees present in Bangladesh and other surviving victims of the violence committed in Myanmar.

295. Neither in communications from victims, nor in any of the consultations with organisations representing victims or knowledgeable of the interests of victims,

⁷⁷⁴ [OTP Policy Paper on Preliminary Examinations](#), paras. 67-71. See [Burundi Article 15 Decision](#), para. 190; [Georgia Article 15 Decision](#), para. 58; [Côte d'Ivoire Article 15 Decision](#), paras. 207-208; [Kenya Article 15 Decision](#), para. 63. On 7 June 2019 the Prosecutor sought leave to appeal the [Afghanistan Article 15 Decision](#), including Pre-Trial Chamber II's interpretation of articles 15(4) and 53(1)(c), with regard to the assessment of the interests of justice as well as the exercise of the Pre-Trial Chamber's discretion under those provisions. See [Afghanistan Request Leave to Appeal](#), paras. 3, 15-24.

⁷⁷⁵ [Tula Toli Observations](#), paras. 14, 52, 69; see also paras. 48-57. See further UNFFM detailed report, [BGD-OTP-0001-0129](#) at 0407, para. 1174, at 0523, para. 1563; PILPG Report, [BGD-OTP-0001-3307](#) at 3411; Xchange report 2018, [BGD-OTP-0002-1465](#) at 1496.

has the Prosecution received views that the interests of justice would not be served by an investigation.

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

IX. RELIEF REQUESTED

297. For the reasons set out in this Request and the supporting material, the Prosecution requests the Chamber to authorise the commencement of an investigation into the Situation in Bangladesh/Myanmar in the period since 9 October 2016 and continuing. Specifically, the Prosecution seeks authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events.



Fatou Bensouda, Prosecutor

Dated this 4th day of July 2019

At The Hague, The Netherlands