

FILING OF AMICUS CURIAE

Your Honor:

Arakan Rohingya Society for Peace and Human Rights, Rohingya Youth for Legal Action, Rohingya Women Development Forum, Rohingya Women's Empowerment and Advocacy Network, Rohingya Student Unity and Rights y Rohingya Peace Innovation Unity, represented in this act by Eva Buzo, Kate Gibson y Clare Brown, with the legal representation of **Dr. Dr. Roberto Durrieu (DPhil in Law from Oxford University)**, with address for notifications located in 20-24030934-4, regarding file No. 8419/2019, titles "NN: N.N. s/TORTURA, DESAPARICIÓN FORZADA DE PERSONA (ART.142 TER), ABUSO SEXUAL - ART. 119 1° PARRAFO y HOMICIDIO SIMPLE DENUNCIANTE: BURMESE ROHINGYA ORGANISATION UK", we present ourselves and respectfully state:

I. OBJECTIVE:

We hereby submit a legal brief as *amicus curiae* with the objective of establishing a set of legal and factual arguments that we consider could be use in the resolution of the appeal presented against the 12 July 2021 resolution.

We anticipate that the contested decision has severe vices in its motivation, therefore, it should be quashed by the *ad quem*. Consequently, we understand that there is reason enough to initiate an extensive investigation into the human rights violations committed against the victims.

II. LEGAL GROUNDS

- 1 The Amici seeking to intervene in the present proceedings are people of the Rohingya ethnicity who were displaced from Myanmar into Bangladesh. The Amici arrived in 2017 following clearance operations conducted by the Myanmar military (the "Tatmadaw") and other authorities, for the purpose of clearing the Rohingya population from Rakhine State, and which were characterised by the commission of mass

atrocities. Many of the Amici are survivors of sexual violence carried out in this context.

- 2 The Amici make this submission in support of the appeal against the ruling in the case on Myanmar of the lower court, made on 12 July 2021. This decision determined that the Argentinian courts were not the appropriate forum to adjudicate crimes committed against the Rohingya. First, it found that the Independent Commission of Enquiry established in Myanmar, and the national transitional justice mechanisms the Commission will feed into, give Rohingya victims the best opportunity for local justice. Second, it found that the principle of complementarity in the Rome Statute of the International Criminal Court (“ICC”) means that ongoing investigation before ICC into crimes committed against the Rohingya preclude another case being heard in Argentina. And third, it found that the exercise of universal jurisdiction required certain types of cultural or socio-political links which did not exist in the present case.

Justification for Intervention

- 3 The Amici argue that if the current case is discontinued, there will be no avenue for obtaining justice for survivors of sexual violence, the majority of whom stand to be excluded from both local transitional justice processes and the case at the ICC. For these survivors, there is no complementary proceeding. If the decision of the lower court is confirmed on appeal, this will frustrate their hopes of being able to access justice in any forum.
- 4 Survivors of sexual violence stand to be excluded from any potential national transitional justice processes because the Independent Commission of Enquiry made findings that directly contradict with and deny their experiences. Furthermore, survivors of sexual violence stand to be excluded from the ICC case because of limits to the Court’s jurisdiction. These considerations are outlined below.

Commission of Enquiry

- 5 The Prosecutor made a number of observations with regards to Myanmar's establishment of an Independent Commission of Enquiry. The Commission of Enquiry Report, published on 21 January 2020, made various findings, including that a clearance operation took place for the purpose of responding to domestic threats. Her Honour concurred with the Prosecutor's observations.
- 6 The Amici will not reiterate the broad concerns with the Independent Commission of Enquiry that have been raised by the Applicant. The Amici agree with the finding of Her Honour that the best form of justice is local, and have previously seized the ICC with a request that it move its seat to Bangladesh to hear any future cases.¹ The Amici vehemently long to return to Myanmar in peace, and want the perpetrators of the crimes against them to face justice in a Court that is close to home.
- 7 The concern of the Amici is that, should the recommendations of the Independent Commission of Enquiry be relied upon by Myanmar as the factual basis for future transitional justice proceedings, victims of sexual violence will be invisible, and thereby excluded from this process.
- 8 The Commission of Enquiry made the following finding in relation to sexual violence:
- There were no credible statements on allegations of gang rape committed by Myanmar's security forces. Although some interviewees mentioned rape cases, these were all second-hand information heard from someone else. Additionally, some female witnesses noted that they were searched by male Myanmar's Defence Services personnel as a part of the operations. This behaviour may amount to constitute sexual violence.²*
- 9 Three of the Amici are victims of sexual violence; one man, one woman, and a transgender woman or "Hijra".
- 10 Rohingya Hijra have reported gang rape by members of the police and Rakhine community on multiple occasions. The Amici C13422 is 19 years old and living in the

¹ *Victims' joint request concerning hearings outside the host State*, No.: ICC-01/19, 4 August 2020

² *Executive Summary of Independent Commission of Enquiry*; <https://reliefweb.int/report/myanmar/executive-summary-independent-commission-enquiry-icoe>

camp in Bangladesh. She was gang raped by police officers multiple times when she was 14 years old:

I used to go to my teacher's home for tuition in a nearby village. On the way, the police would find me and they used to mock me. One day in 2016 I was returning home from my teacher's home when three police stopped me. They raped me one by one. There are many more times the police raped me. Sometimes, they try to offer me money and when I don't agree they would force me.

- 11 Rohingya men have also reported being subjected to sexual violence and sexualised torture by authorities. The Amici C10165 stated:

On 24 November 2016 when teaching at Gu Dar Pyin primary school, I was one of seven people arrested by the government. We were taken to the police station where we were beaten. They beat my penis and put an iron rod into my anus. They tied me up and beat me. After some days, two of the people in our group had been killed. We were then taken to Sendom Battalions where I saw a group of Rohingya being raped.

- 12 The Amici C10060, is 23 years of age and lives in the camp in Bangladesh. She reported that she was raped by four members of the military in her home village of Chut Pyin in 2017. When asked how she knew they were military, she stated:

"By military uniform, military's arm and the stars. I was raised in Burma and saw military always. How could I not recognise them?"

- 13 The experiences of the Amici are similar to those reported in the Independent International Fact-Finding Mission ("FFM") Report, providing a degree of corroboration. At the 42nd Session of the Human Rights Council in September 2019, the FFM produced the report *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*. The report, stated:

The Mission found that sexual and gender-based violence was a hallmark of the Tatmadaw's operations in northern Myanmar and in Rakhine. These violations, for most part perpetrated against ethnic women and girls, were used with the

intent to intimidate, terrorise and punish the civilian population and as a tactic of war. The Tatmadaw was overwhelmingly the main perpetrator.

Two years after the “clearance operations” against the Rohingya population in Rakhine, and one year since the publication of the Mission’s findings, accountability for these egregious acts remains elusive. The Mission felt compelled to issue this thematic report, further exposing these grave violations that the Mission considers amount to war crimes, crimes against humanity and acts of genocide.³

- 14 The Amici who are victims of sexual violence agree with Her Honour’s preference for local justice, but do not want to be excluded from accountability processes now or in the future. Should accountability proceed based on the findings of Independent Commission of Enquiry, victims of sexual violence will necessarily be excluded. The Amici have been waiting and wishing for justice for the crimes committed against them since they arrived in the Cox’s Bazar refugee camp. Some have taken action to try to ensure their stories are shared with the different courts adjudicating on the crimes committed against the Rohingya. The Arakan Rohingya Society for Peace and Human Rights, for example, has been organising volunteers in the camp to collect the stories of camp residents about the crimes they have seen and experienced, with the intention of sharing them with these courts, including the court in Argentina.

International Criminal Court

- 15 Her Honour has also relied upon the investigation of the ICC as an example of existing accountability processes. The ICC was designed to support, rather than supplant domestic prosecution of international crimes; the exercise of its jurisdiction is therefore complementary to national trials, as per Articles 1 and 17 of the ICC Statute. Its regime is designed to try perpetrators of international crimes only when the domestic courts of States Parties are unwilling or unable to investigate or prosecute themselves. As such, it is often referred to as the “Court of last resort”.

³ *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* A/HRC/42/CRP.4 paras. [2]-[3]

- 16 The ICC's jurisdictional reach, outside the situation of a referral by the United Nations Security Council, is limited to crimes committed on the territory of, or by nationals of, a State Party, which Myanmar is not. As such, the ICC's jurisdiction over crimes committed against the Rohingya, is limited to the crime against humanity of deportation, one of the elements of which took place in Bangladesh, an ICC State Party. This is, on its face, extremely narrow, and means that any eventual ICC proceedings will never be able to reflect or encompass anything near the full spectrum of the crime base in question.
- 17 The Amici who are victims of sexual violence are concerned that the narrow jurisdiction of the ICC, being limited to the crime against humanity of deportation, will mean that any charges brought by the ICC Office of the Prosecutor will not include the crimes committed against them.
- 18 At most, it would appear that evidence of acts of sexual violence may be able to contribute to establishing the contextual elements of crimes against humanity. However, the jurisdictional limits of ICC mean that the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity will never form part of any eventual ICC case.
- 19 The *Hijra* represented in this Amici are particularly concerned that the case at the ICC will not adequately adjudicate the crimes specifically committed against their community. Sexual violence and other serious violations were committed against the *Hijra* because of the combined factors of the gender identities, religion and ethnicity. However, not only has the ICC historically been unwilling to apply an intersectional lens to understanding how some groups experience persecution— leading it to misjudge the gravity of these crimes⁴ – but gender identity also appears not to be recognised ground for persecution under the Rome Statute. Article 7(1)(h), which makes 'gender'

⁴ In *The Prosecutor v Lubanga*, for example, the Court failed to take an intersectional approach when adjudicating on the use of child soldiers, failing both to recognise that young girls were targeted for sexual abuse both due to their age and their gender, and to recognise sexual violence as one of the ways in which the perpetrators committed the war crime of using children to participate in hostilities. This was noted both by dissenting judge Odio Benito and in a recent article by Gregor Muavec: *Prosecutor v. Lubanga*, Trial Chamber, Separate and dissenting opinion of Judge Odio Benito [14 March 2012] ICC-01/04-01/06, paras. 15- 16; G. Muavec (2021) 'The International Criminal Court and the Issue of Intersectionality — A Conceptual and Legal Framework for Analysis' in *International Criminal Law Review*.

a protected ground, defines gender as “*the two sexes, male and female, within the context of society.*” This section omits those, like the *Hijra*, who identify as neither of these gender binaries.

- 20 The Amici who are victims of sexual violence submit that without the present proceedings, they risk being excluded from the process of accountability altogether. In the absence of the present proceedings, the charges brought against those accused in relation to the crimes committed in 2012, 2016 or 2017 in other fora will necessarily circumvent their experiences, and exclude their narrative. As such, current proceedings with a particular focus on sexual violence will not be duplicative of existing or potential accountability processes.

Proceedings before the International Court of Justice

- 21 The Amici submit that the present proceedings present a critical opportunity to support the International Court of Justice (“ICJ” or “Court”) in the administration of justice.
- 22 As raised in the decision, the proceedings at the ICJ concern proceedings brought by the Gambia against Myanmar for possible violations of the Genocide Convention.
- 23 Her Honour noted that the ICJ is concerned with the litigation of public international law and is not concerned with individual criminal liability. As such, the objective of the Court is to determine whether States are responsible for the violations alleged. In doing so, however, the Court may avail itself of evidence elicited in trials before criminal courts and tribunals, and has given substantial weight to this form of evidence in prior cases.
- 24 In the *The Gambia v Myanmar* proceedings, the Court can and will likely consider a vast array of materials tendered as evidence from each party. This evidence can reasonably be expected to include reports, government communications, witnesses, experts *inter alia*. From these materials, the Court will make its own determination of the facts which are relevant to whether the Respondent has violated its obligations under the Genocide Convention. In determining the weight to be given to a particular item of evidence, the Court has made comments on its approach:

*The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits Judgement I.C.J Reports 1986, p.41, para 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involve, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention.*⁵

- 25 As such, any findings of fact arising from the present proceedings will assist the ICJ in its determination of State responsibility under the Genocide Convention. This has been the method adopted previously by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*. As the Court stated in *Bosnia and Herzegovina v Serbia and Montenegro*:

*The fact-finding process of the ICTY falls within this formulation, as “evidence obtained by examination of persons directly involved”, tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal’s processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgements following a plea agreement and decisions of the Appeals Chambers.*⁶

- 26 Critically, as a result of the jurisdictional limitations of the ICC requiring the crimes to have taken place in the territory of a State Party, the crime of genocide will almost

⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement I.C.J. Reports 2005, p. 35, para. 61

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgement I.C.J Reports 2007 p.43, para. 214

certainly not be included in any charges brought by the ICC Office of the Prosecutor in the *Bangladesh/Myanmar* situation before that Court.

27 In the preliminary examination stage of the Bangladesh/Myanmar situation, a legal representative of victims, Wayne Jordash QC, argued in a filing on behalf of victims that the crime of genocide should be considered a continuing crime that was commenced in Myanmar and continued in Bangladesh.⁷The Prosecutor of the ICC was **not** receptive to this continuing crime argument⁸ and the jurisdiction of the Court remains focused on crimes against humanity.

28 The Amici therefore submit that the ICJ case will not supplant any ongoing proceedings. At present, there are no proceedings that are making inquiries and determinations with regards to individual criminal liability for the crime of genocide. As such, there is an opportunity for the present proceedings to assist the ICJ to perform its function of determining State responsibility for violations of the Genocide Convention.

29 The significance of this assistance should not be understated. The crime of genocide has been singled out by international courts for special condemnation and opprobrium. The crime has been described as:

*“horrific in its scope; its perpetrators identify entire human groups for extension. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide”.*⁹

Determining whether individual criminal responsibility exists for genocide, in a manner that is directly relevant to the adjudication of state responsibility, is of incalculable value to the Amici.

⁷ *Situation in Bangladesh/Myanmar*, Submissions on behalf of the Victims pursuant to Article 19(3) of the Statute [30 May 2018], ICC-ROC46(3)-01/18, para. 60

⁸ *Situation in Bangladesh/Myanmar*, Prosecution Response to Observations by Intervening Participants [11 July 2018], ICC-ROC46(3)-01/18, para. 30

⁹ *Prosecutor v Krstić*, IT-98-33-A, Judgment, 19 April 2004, para.36.

Requirement of a cultural, social-political or immigration link

- 30 Her Honour's reliance on an apparent requirement that the exercise of universal jurisdiction be grounded in a link between the victim community, and the prosecuting state, is inconsistent with the fundamental purpose of the exercise of universal jurisdiction. The willingness of a state to prosecute crimes committed outside its borders, and against non-citizens, is of course grounded in something far greater; a commitment to justice for vulnerable communities, and the end of impunity for perpetrators of crimes that shock the collective conscience.
- 31 Her Honour is correct that there is there is no obviously apparent link between the Rohingya community, and the population of Argentina, in terms of culture, or immigration, or other socio-political factors. However, they are linked by something far greater, which the Amici implore be taken into account. The Rohingya are one of the most marginalised and vulnerable populations in history. The extent of their victimisation is currently matched only by the extent of impunity to those who victimise them. In acting to prosecute the perpetrators of the atrocities against them, Argentina would be acting on the basis its collective humanity, an ideal which sits at the very heart of the exercise of universal jurisdiction.

Conclusions:

- 32 The Amici submit that the Court should consider their predicament; the absence of current procedures that present them with a realistic chance of being able to access justice; and the commitments Argentina has made domestically and internationally to combat sexual violence and protect the rights of trans individuals. They believe that a consideration of these factors will lead the Court to quash the decision of the lower court, on the basis that there is no other forum where the violations committed against them are likely to be adjudicated, either locally or internationally. They request the court to hear their plea for justice.

III. REQUEST:

For the motives hereby stated, we request:

1. We are acknowledged as *amicus curiae*, the legal representation recognized and the address for notifications noted.
2. The contested decision is quashed and that the initiation of an investigation is ordered.

Provided accordingly,

JUSTICE SHALL BE SERVED



Eva Buzo
Black Chambers



Kate Gibson
St Philips Chambers



Clare Brown
Justitia Chambers

Dr. Roberto Durrieu