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October 10, 2018

**Re: Preliminary Examination into the Situation of the Rohingya in Myanmar**

Dear Prosecutor Bensouda,

The Global Justice Center writes to congratulate the Office of the Prosecutor (OTP) on the decision to open a preliminary examination into the deportation of the Rohingya from Myanmar to Bangladesh. Since impunity has long been the rule and not the exception in Myanmar, this examination offers a glimmer of hope that those who have long been oppressed by Myanmar's military will see some measure of justice. We write to the OTP today with respect to three key issues related to this preliminary examination: (1) to emphasize the need to place the gendered experiences of these crimes at the center of the examination; (2) to urge the OTP to take a broad view to the crimes over which the International Criminal Court (ICC) has jurisdiction; and (3) to provide information with respect to any analysis of positive complementarity.

On the first point, we were pleased to attend a recent event with you at the UNGA in New York "Prosecuting Sexual and Gender-based Crimes at the International Criminal Court." We applaud the OTP's commitment to applying a gender analysis in all areas of its work, which has been reinforced by its strong policy on sexual and gender-based crimes. We agree that consideration of the complete nature of the crimes is necessary in order to ensure effective investigations and prosecutions. We urge that this be made a priority in the preliminary examination at hand.

For decades, Myanmar's military has used rape as a weapon of war against multiple ethnic groups.<sup>1</sup> In the more recent attacks against the Rohingya population, Myanmar's military, Border Guard, and police (collectively referred to herein as "Security Forces") targeted women and girls for brutal and particular methods of killing, rape, sexual violence, torture, and attacks forcing their displacement. In addition, these crimes occurred against a backdrop of long-standing systematic discrimination against and control of the Rohingya, including the group's reproductive capacity. These methods reveal the Security Forces' misogyny and deeply gendered conceptions of power. As gender occupied an integral role in the Security Forces' perpetration of crimes against the Rohingya, so too should gender be at the center of the OTP's preliminary examination and possible investigation.

The Global Justice Center recently published an analysis of gender-based crimes against Rohingya women and girls, including genocide and crimes against humanity (enclosed). The brief's analysis is based upon the extensive documentation of human rights abuses by international and regional

NGOs, UN experts and agencies, and the media, which was applied to the framework of crimes codified in the Rome Statute and international criminal law jurisprudence to elucidate the sexual and gender-based crimes that occurred. Of particular relevance, the report analyzes the role that sexual violence and the fear of sexual violence played in the planning and commission of two of the crimes against humanity that have been identified by the OTP and the Pre-Trial Chamber—deportation and persecution. We urge the OTP to ensure that a comprehensive gender analysis is applied to the investigation of these two crimes, and more broadly, to the entire ambit of the preliminary examination.

Second, we urge the OTP to incorporate as expansive a scope as possible for the preliminary examination, and any subsequent investigation. The International Fact-Finding Mission on Myanmar (FFM) recently stated that the ICC is “the most appropriate venue”<sup>22</sup> to investigate the international crimes committed against the Rohingya. The FFM also called for a UN Security Council referral of the situation to the ICC “cover[ing] the entire territory of Myanmar, with a temporal scope starting from 1 July 2002.”<sup>23</sup> Understanding that absent such a referral the OTP is constrained with respect to wide territorial and temporal scope, we urge the OTP to interpret the jurisdictional parameters set forth by the Pre-Trial Chamber as expansively as possible.

In the statement on opening a preliminary examination into the issue, it was noted that the OTP “will further consider whether other crimes under Article 7 of the Rome Statute may be applicable to the situation at hand, such as the crimes of persecution and other inhumane acts.”<sup>24</sup> However, this is more limited than the criteria set forth by the Pre-Trial Chamber, which determined in this circumstance that “[t]he Court may ... exercise jurisdiction over conduct to the extent it partly occurred on the territory of Bangladesh,”<sup>25</sup> including “any other crime set out in article 5 of the Statute.”<sup>26</sup> This includes crimes against humanity under Article 7 of the Statute, but also could include crimes falling under Article 6 and 8 as well, genocide and war crimes respectively.

As mentioned above, our enclosed analysis highlights the international sexual and gender-based crimes – crimes against humanity and genocide – committed against Rohingya women and girls by Myanmar’s Security Forces. In keeping with our analysis, we encourage the consideration and inclusion of all crimes with potential cross-border elements committed against the Rohingya, including torture and murder as “other crimes under article 7.” We also strongly urge that those crimes falling outside of Article 7, including the genocidal acts of killing, causing serious bodily and mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, and imposing measures to prevent births, be considered in the examination and investigation. The traumatic effects and consequences, including severe bodily and mental harm, caused by the Security Forces’ conduct – including widespread and systematic torture, persecution, rape, sexual violence, and murder – are not limited to or contained within the borders of Myanmar. Rather, they continue and have followed the victims as they sought refuge in Bangladesh and may constitute continuing elements of those crimes. Thus, we recommend the OTP utilize a broad view to the preliminary examination in order to include the full extent of the crimes committed by Myanmar’s Security Forces, and to begin to the process of comprehensive justice and accountability for the Rohingya.

Finally, as to the matter of positive complementarity, Myanmar is both unable and unwilling to genuinely carry out any investigations and prosecutions related to international crimes committed by its Security Forces.

Myanmar’s civilian government is unable to hold perpetrators accountable due to structural barriers that preclude the possibility of justice. Myanmar lacks domestic legislation on international crimes,

rendering its court system unable to prosecute any potential crimes against humanity or genocide. Furthermore, constitutionally-imposed limits on the power of the civilian government over the military, coupled with constitutional protections for the military from prosecution, ensure that the military will be immune from accountability in Myanmar (see enclosed *Fact Sheet: Structural Barriers to Accountability for Human Rights Abuses in Burma* for more information). Without significant domestic legal and constitutional reforms, Myanmar's national judicial system is neither available nor able to carry out proceedings for crimes committed by its Security Forces against any ethnic group, including the Rohingya.<sup>7</sup>

Myanmar's authorities—civilian and military alike—have also failed to demonstrate any willingness to investigate or hold perpetrators accountable. In fact, by contrast, the government has variously denied any wrongdoing, ignored the problem, failed to conduct genuine investigations, or impose sanctions or accountability on perpetrators of these crimes.<sup>8</sup> While eight ad-hoc commissions and boards have been set up by the Myanmar authorities since 2012 with regards to the situation in Rakhine state, the FFM determined that none meet the standards of an “impartial, independent, effective and thorough human rights investigation.”<sup>9</sup> A newly constituted Independent Commission of Enquiry for Rakhine (Commission) has done nothing to allay these concerns.<sup>10</sup> One of the four Commissioners is a Myanmar government official who has previously stated that Myanmar had “no intention of ethnic cleansing”<sup>11</sup> and the chairperson has stated that the Commission will not “blame or finger-point,”<sup>12</sup> which is at odds with the pursuit of accountability.

We thank you for your leadership in initiating an examination into this situation and urge you to expeditiously conclude your preliminary examination, taking the factors laid out in this letter into account. After a full consideration of the facts, we are hopeful that the OTP will apply to conduct an investigation into the crimes committed against the Rohingya.

Respectfully submitted,



Akila Radhakrishnan  
President  
Global Justice Center

**Enclosures:**

1. Global Justice Center, *Discrimination to Destruction: A Legal Analysis of Gender Crimes Against the Rohingya*, September 2018
2. Global Justice Center, *Fact Sheet: Structural Barriers to Accountability for Human Rights Abuses in Burma*, October 2018

Cc: Ms. Patricia V. Sellers, Special Adviser on Gender, International Criminal Court

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<sup>1</sup> Women's League of Burma, 'Same Impunity Same Pattern' (Press Release, January 14, 2014).

<sup>2</sup> U.N. Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, para. 1651, UN Doc. A/HRC/39/CRP.2, Sept. 17, 2018.

<sup>3</sup> U.N. Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, para. 1651, UN Doc. A/HRC/39/CRP.2, Sept. 17, 2018.

<sup>4</sup> International Criminal Court, 'Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh (Press Statement, September 18, 2018).

<sup>5</sup> International Criminal Court, 'Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh (Press Statement, September 18, 2018).

<sup>6</sup> International Criminal Court, 'ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh' (Press Release, September 6, 2018).

<sup>7</sup> Notably Myanmar's military is granted 25% of the seats in Parliament and since Constitutional amendments require over a 75% vote, the military retains a veto over any amendments.

<sup>8</sup> U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, para. 73, U.N. Doc. A/HRC/34/67, Mar. 14, 2017; U.N. Human Rights Council, 'Statement by Mr. Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37<sup>th</sup> session of the Human Rights Council' (Press Statement, March 12, 2018).

<sup>9</sup> U.N. Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, para. 96, UN Doc. A/HRC/39/64, Sept. 10-28, 2018.

<sup>10</sup> U.N. Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2, Sept. 17, 2018.

<sup>11</sup> Simon Lewis & Poppy McPherson, *Myanmar appoints panel to probe Rohingya abuses*, Reuters, July 30, 2018.

<sup>12</sup> Nyein Nyein, *Commission of Enquiry for Rakhine to Report to President Within a Year*, The Irrawaddy, Aug. 16, 2018.