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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Antoine Kesia-Mbe Mindua

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Victims' response to the Prosecutor's "Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request" and request for compliance with Part 5 of the Statute

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. Petitioners, victims of crimes authorised for investigation by the Prosecutor, file this response to the Prosecutor's notification of the status of Afghanistan's deferral request ("Deferral Request"), filed on 16 April 2021 ("Notification").¹ With the Deferral Request now pending for more than one year and the Notification providing no information as to when and how it will be resolved, Petitioners request that this Pre-Trial Chamber ("Chamber") order the Prosecution to clarify the scope of the Deferral Request. If it is deemed to cover the US component of the investigation, Petitioners request that the Chamber order the Prosecution to provide a factual and legal justification for this conclusion as well as to comply with its obligations under article 18(6) and Part 5 of the Statute so as to ensure an effective investigation and prosecutions. If the US component is deemed to fall outside the scope of Afghanistan's deferral, victims of the US component request the Chamber to order the Prosecution to provide a status update on the investigation. Finally, Petitioners request that a deadline be set for the Prosecution's review of the Deferral Request.

2. The crimes underlying this Situation have warranted the Prosecution's focus for more than fifteen years. Through the lengthy preliminary examination, the back-and-forth with government officials on admissibility during that phase, the landmark appeals proceedings that culminated in the authorisation of the investigation, and now one year of near-silence following the Deferral Request, civilians in Afghanistan have been subjected to endless violence, while other victims have languished in detention without charge at Guantánamo Bay or died waiting for justice. Deferral requests are expected to be resolved quickly, so that justice can be delivered timely in the appropriate forum. The Chamber's intervention is required to ensure that a deferral request does not instead mean the derailment of justice.

¹ *Situation in the Islamic Republic of Afghanistan*, Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request, 16 April 2021, [ICC-02/17-142](#) ("Notification"); 16 April 2020, [ICC-02/17-139](#), Annex 1 ("Deferral Request").

II. RELEVANT PROCEDURAL HISTORY AND FACTUAL OVERVIEW

(a) *Timeline for the Situation of Afghanistan*

3. In 2006, the Prosecutor opened a preliminary examination into crimes committed on the territory of Afghanistan, a State Party since 1 May 2003.² A decade later, on 20 November 2017, the Prosecutor requested that the Pre-Trial Chamber authorize the opening of an investigation into alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as crimes that have a nexus to the armed conflict on the territory of other States Parties since 1 July 2002.³

4. Nearly seventeen months after the Request was submitted,⁴ this Chamber rejected it, finding that an investigation into the situation in Afghanistan would not serve the interests of justice.⁵

5. Following the Prosecutor's appeal, in which counsel for Petitioners participated in both the briefing and oral argument,⁶ on 5 March 2020 the Appeals Chamber authorized an investigation into "alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation

² See Office of the Prosecutor, *Report on Preliminary Examination Activities (2011)*, 13 Dec. 2011, para. 20.

³ Request for authorisation of an investigation pursuant to article 15, 20 November 2017, [ICC-02/17-7-Red](#) ("Request").

⁴ Victims representations were filed by 31 January 2018. See Victims' Notice of Appeal-1, ICC-02/17-38, Annexes I and II, Victims' Representation, submitted on behalf of Sharqawi Al Hajj and Guled Hassan Duran. During the pendency of the Request, the legal representative for Mr. Hajj and Mr. Duran sent two additional communications to this Chamber, providing time-sensitive factual updates, including a detailed account of the declining health of Victim Al Hajj. *Id.*, para. 15; *Victims' Joint Appeal Brief against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"*, 30 September 2019 and corrigendum on 1 October 2019, ICC-02/17-75- Corr.

⁵ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, [ICC-02/17-33](#), ("Pre-Trial Chamber Authorisation Decision").

⁶ Chamber Transcript, 05 December 2019, ICC-02/17-T-002-ENG, p. 3 at paras 1-21 (finding victims did not qualify as "party" for purposes of article 82(1), while allowing victims' legal representatives to present argument as participants); [Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan](#), 4 March 2020, ICC-02/17-137 ("Reasons for the Appeals Chamber's oral decision on victims' appeals"), at para 21.

and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002.”⁷

6. In accordance with article 18(1) of the Statute, the Prosecutor notified “all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned” of the open investigation into the Situation of Afghanistan, which included *inter alia* crimes occurring on the territory of other States Parties including but not limited to Poland, Lithuania and Romania, and crimes committed by nationals of the United States.

7. Only Afghanistan sought a deferral of the investigation under article 18(2).⁸ The provision of supporting materials as required by article 18(2) and rule 53 was delayed beyond the statutory period of one month, and, apparently, continues.

8. In the one year between its notification of Afghanistan’s letter requesting deferral of the investigation on 15 April 2020⁹ and the Notification, the Prosecution has made no attempt to contact the Petitioners regarding the existence of or their participation in any active investigations by Afghanistan or any other State into the criminal conduct (e.g., torture, as a war crime and crime against humanity) to which they have been subjected.¹⁰ Notably, Petitioners have previously submitted that there are no such proceedings into crimes committed by US nationals¹¹ – a position advanced by the Prosecutor in the Request¹² and accepted by the Pre-Trial Chamber.¹³

⁷ Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, Appeals Chamber, 05 March 2020, [ICC-02/17-138](#), at para. 79. (“Decision Authorising an Investigation”)

⁸ *Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18(2) of the Rome Statute*, Annex 1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute, 16 April 2020, [ICC-02/17-139-Anx1](#).

⁹ Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute, [ICC-02/17-139](#), 15 April 2020.

¹⁰ See *Report on the Activities of the International Criminal Court*, Assembly of States Parties, ICC-ASP/19/9, 16 November 2020, para. 6 (“OTP ASP 2020 Report”) (“Office has been analysing the information provided by the Government of Afghanistan in support of its deferral request and considering whether this has an impact on its own intended investigation.”)

¹¹ See, e.g., Annex I to the Victims’ Notice of Appeal-1, [ICC-02/17-38-AnxI](#), pp. 51-54.

¹² Request, paras. 296-297, 311-315, 328. See also *id.*, paras. 329-334 (regarding investigations in Romania, Poland and Lithuania).

¹³ Pre-Trial Chamber Authorisation Decision, para. 79.

9. Likewise, the Office of the Prosecutor has made no attempt to contact the Petitioners, either directly or through their counsel,¹⁴ as part of an ICC investigation.¹⁵

10. From a public report, Petitioners glean that, at least as of December 2020, the crimes to which they have been subjected and which have been confirmed to fall within the jurisdiction of the ICC are not under “active” investigation.¹⁶

(b) Scope of the Investigation

11. In her article 15 Request, the Prosecutor identified three distinct components for investigation: (i) crimes against humanity and war crimes allegedly committed by members of the Taliban and affiliated armed groups; (ii) war crimes allegedly committed by members of the Afghan National Security Forces; and (iii) war crimes allegedly committed by members of the US armed forces and members of the CIA.

12. With regard to the third component of the Request, the crimes alleged to have been committed by US nationals and their partners transcend the territorial boundaries of Afghanistan. The Prosecutor identified Poland, Lithuania and Romania (all States Parties) as locations where US actors are alleged to have committed crimes within the jurisdiction of the Court committed in the context of and associated with the armed conflict in Afghanistan.¹⁷ In their victims’ representations submitted pursuant to article 15 in support of the Request, Petitioners identified additional States Parties, including Jordan and Djibouti, where US nationals and their partners are alleged to have

¹⁴ Indeed, Petitioners are unaware of any measures taken the by the Prosecution or the Court as a whole to initiate means for direct communication with those Victims who remain detained in Guantánamo without charge – a matter which has been raised by counsel for Victims Al Hajj and Duran with members of the Registry and other officers of the Court since at least 2015.

¹⁵ *But see*, art. 54(3)(c); OTP ASP 2020 Report, para. 5 (“Following authorisation of the investigation on 5 March 2020, the OTP has continued to engage with a range of stakeholders, to build relevant cooperation networks and prepare the foundation for the commencement of investigative activities. This preparatory work included the identification, analysis and management of risks, assessment of security and logistical issues, and where appropriate, preservation of evidence.”)

¹⁶ OTP ASP 2020 Report: “In view of this ongoing assessment, in addition to practical restrictions due to the global health crisis, the Office is not currently taking active steps while respecting its duties under the Statute.”

¹⁷ *See* Request, para. 49.

committed war crimes and crimes against humanity as part of the interrogation and detention program associated with the armed conflict in Afghanistan.¹⁸

13. In the Decision Authorising an Investigation, the Appeals Chamber authorised an investigation into all three components sought by the Prosecutor, including crimes alleged to have been committed outside the territory and beyond the territorial jurisdiction of Afghanistan as part of the US component.¹⁹

(c) Afghanistan's Article 18 Deferral

14. Under article 18(2), within one month of notification of an investigation, "a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts" which relates to the information provided by the Prosecutor. On 26 March 2020, Afghanistan submitted a request to the Prosecutor to "defer to Afghanistan's national investigations and proceedings in accordance with the provisions of Article 18."²⁰

15. In the Deferral Request, Afghanistan states that it "is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts allegedly committed within the authorised parameters of the Situation in Afghanistan."²¹ It further states that "the investigations and proceedings in Afghanistan cover allegations of crimes committed by Afghan forces, the Taliban and related groups, other terrorist groups and international forces."²² There is no mention of the investigation of US nationals, agencies or partners, including members of the armed forces or those acting at the behest of the CIA – the category of persons who are the subject of the third component of the Prosecutor's investigation.

¹⁸ See ICC-02/17-38, Annex I and II, Victims' Representation, submitted on behalf of Sharqawi Al Hajj and Guled Hassan Duran, paras. 6-9, and Section II ("Factual and Contextual Background: The United States Detention and Interrogation Program in Afghanistan") and Section III ("Arrest, Detention and Torture of Victims Al-Hajj and Duran").

¹⁹ See Separate opinion of Judge Luz del Carmen Ibáñez Carranzato the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138-Anx-Corr, 3 March 2020, para. 1 ("the scope of the investigation is broad and includes crimes outside Afghanistan, as per the Appeals Chamber's interpretation of common article 3 of the 1949 Geneva Conventions").

²⁰ Deferral Request, p. 2.

²¹ Deferral Request, p. 1.

²² *Ibid.*

16. Although Afghanistan sought until 12 June 2020 to submit further information and supporting materials for the Deferral Request, it provided a “summary outline” of “investigations and proceedings currently being undertaken including by the recently established Directorate on International Crimes and the Anti-Torture Commission.”²³ At most, the matters purported to be under investigation appear to relate to the first and second components of the ICC Prosecutor’s investigation. The summary outline includes an “alleged perpetrator” column; US nationals are not identified as alleged perpetrators under investigation.²⁴ While “international forces,” along with Afghan Security Forces are the subject of 26 war crimes investigations, the underlying actions for these investigations apparently arise out of airstrikes; torture is not listed as the type of crime linked to “international forces.”²⁵ The “torture cases” appear to relate to National Security Directorate-run detention facilities – a conclusion reinforced by the Government of Afghanistan’s submissions to the Appeals Chamber where it stated: “Afghanistan will not hesitate to investigate *its own forces* for war crimes.”²⁶ (emphasis added)

17. According to the Notification, Afghanistan requested a further extension until 15 January 2021 to provide additional information necessary for the Prosecution’s assessment of the Deferral Request and whether “certain aspects of its intended investigation could be deferred,”²⁷ thus suggesting, if not indicating, that aspects of the investigation are *not* under consideration for deferral. Additionally, when that material was provided, “almost all” of it was in the Dari language²⁸ – supporting the inference that any proceedings in Afghanistan only concern Afghan suspects.

²³ *Ibid.*, p. 6.

²⁴ *Ibid.*, pp. 6-9.

²⁵ Deferral Request, p. 7.

²⁶ Written Submissions of the Government of the Islamic Republic of Afghanistan, 2 December 2019, [ICC-02/17-130](#), para. 21.

²⁷ Notification, para. 2.

²⁸ *Ibid.*

III. THE VICTIMS

18. In January 2018, by and through undersigned counsel, **Guled Duran, Sharqawi Al Hajj, Ahmed Rabbani, and Mohammed Abdullah Saleh al-Asad**, all who have been subjected to crimes falling within the scope of Article 15(3) Request and the Authorized Investigation and as such, are victims, submitted victims' representations through the Registry.

19. Victims Sharqawi Al Hajj and Guled Hassan Duran, represented by Katherine Gallagher, remain detained at Guantánamo Bay, without charge, after transfer from detention centers operated by the US Department of Defence ("DoD")/CIA on the territory of Afghanistan after 1 May 2003, and detention and interrogation on the territory of other ICC States Parties after 1 July 2002.

20. Mr. Al Hajj is a Yemeni citizen who was captured in Karachi, Pakistan in February 2002, from where he was transported on a CIA-operated flight to Amman, Jordan, where he was detained for twenty-three months without charge by Jordanian authorities acting under the authority of, and for the purposes of collecting information for, the CIA.²⁹ He was transported by the CIA from Jordan to Afghanistan on 8 January 2004, where he was held first in the CIA-run "Dark Prison" for approximately five months, and then was detained in the DoD facility at Bagram Air Base. Mr. Al Hajj was subjected to repeated acts of physical and mental torture in both locations in Afghanistan. In August 2004, Mr. Al Hajj was transferred to the US-operated detention facility in Guantánamo Bay, where he remains detained without charge. Mr. Al Hajj suffers physical and psychological effects of his torture and is currently experiencing acute health issues. His despair in recent years have led him to engage in a hunger strike, leading to him weighting only 48kgs, and to cut his wrist after stating he wanted to end his life.³⁰ Mr. Al Hajj has experienced two separate incidents of actual self-inflicted violence, in August 2019 and March 2020, and has been repeatedly hospitalized due to prolonged periods of hunger strikes and issues of

²⁹ The ICC has jurisdiction over crimes committed on the territory of Jordan, since 1 July 2002.

³⁰ See Second Update to the Pre-Trial Chamber from Sharqawi Al Hajj, 6 Dec. 2018.

chronic pain and jaundice.³¹ He has become withdrawn from formal legal processes because after years of engagement, his legal case remains stagnant with no hope for release. Mr. Al Hajj's downward trajectory – the result of untreated torture during his years at CIA sites and the toll of nearly two decades of indefinite detention – reflects a broader urgency for this investigation to proceed.

21. Guled Hassan Duran is a Somali citizen who was captured on 4 March 2004 by Djiboutian security forces as he was transiting through the airport en route from Somalia to Sudan, where he was to receive medical treatment.³² The Djiboutians turned Mr. Duran over to CIA personnel. Until 2006, when he was transferred to Guantánamo, Mr. Duran was imprisoned in the CIA's secret prison network, where myriad forms of physical and psychological torture have been documented, but little information about his location and treatment during that time has been made publicly available. However, based on a report by the ICRC, it is known that Mr. Duran spent at least some of the time between March 2004 and September 2006 detained in Afghanistan. Mr. Duran has been subjected to "a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information,"³³ and remains detained at Guantánamo without charge.

22. Victim Ahmed Rabbani, represented by Tim Moloney QC and Megan Hirst, is a taxi driver from Karachi who was abducted by Pakistani intelligence services in September 2002. He was handed over to the US authorities who subsequently rendered him to Afghanistan, where he was subjected to severe torture in a number of different US-run detention centres. Ahmed endured over 500 days in CIA custody.³⁴ In

³¹ Mr. Al Hajj had a Periodic Review Board (PRB) Hearing on 20 April 2021, which he did not participate in due to his worsening mental and physical condition and hopelessness of ever being transferred from Guantánamo. Mr. Al Hajj's attorneys presented at the PRB that they are worried his current state could lead to death or severe injury. They urged the Board to grant Mr. Al Hajj transfer from Guantánamo and resettlement in any safe third country. See Statement of Pardiss Kebriaei, Center for Constitutional Rights, attorney for Sharqawi Al Hajj since 2015.

³² The ICC has jurisdiction over crimes committed on the territory of Djibouti, a State Party, since November 2002.

³³ International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, February 2007.

³⁴ Senate Select Committee on Intelligence: Committee Study of the CIA's Detention and Interrogation Program, Executive Summary, page

September 2004, he was rendered from Afghanistan to Guantanamo Bay where he remains. Ahmed was among the detainees subjected to “enhanced interrogation techniques”.³⁵ He began the first of a number of hunger strikes in 2013 as a peaceful protest against his continued torture and detention without charges or a trial.³⁶ They have come at a great cost, to both his physical and mental health.³⁷ The US military has adopted a “forced feeding” regime³⁸ that has been characterized as cruel and inhuman by the UN Office of the High Commissioner for Human Rights³⁹. Ahmed continues to be subjected to this procedure - twice a day, the prison authorities strap him into a chair and force a 110-centimeter tube up his nose.⁴⁰ His current weight is around 80 pounds (36.3kg), which is just 47% of his body weight when he was originally detained. Ahmed’s health continues to deteriorate and creates the very real prospect that he will never leave Guantanamo Bay alive. His primary concern continues to be his three children,⁴¹ the youngest of whom (Jawad, aged 17) he has never met, as his wife was pregnant at the time he was abducted.⁴² The false assertions against him are predicated on material extracted from him and others through torture. Indeed, the U.S authorities told him he might be released if he testified against another - but only if he repeated under oath things he had said under torture. He declined to do this. Hence, his torture-induced statements continue to be used to prolong his illegal detention.

23. Victim Mohammed Abdullah Saleh al-Asad, represented by Margaret Satterthwaite, is now deceased.⁴³ He was held *incommunicado* and in secret detention facilities operated by the CIA on the territory of Afghanistan after 1 May 2003, and in

458. https://www.therenditionproject.org.uk/documents/RDI/141209-SSCI-Torture_Report_Executive_Summary.pdf

³⁵ Ibid, pages 101 – 102.

³⁶ <https://gitmohungerstrikes.org/>

³⁷ <https://www.theguardian.com/world/2014/may/22/guantanamo-inmate-vomit-blood-force-feeding>

³⁸ <https://www.nytimes.com/2006/02/22/world/middleeast/forcefeeding-at-guantanamo-is-now-acknowledged.html>

³⁹ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14770>

⁴⁰ <https://truthout.org/articles/im-on-hunger-strike-in-guantanamo-i-dream-of-cooking-for-my-family/>

⁴¹ <https://www.aljazeera.com/features/2021/3/24/collateral-damage-the-impact-of-guantanamo-on-a-family>

⁴² <https://www.independent.co.uk/news/world/asia/guantanamo-bay-google-ahmed-rabbani-pakistan-b1562166.html>

⁴³ Mr. al-Asad’s wife, Zahra Ahmed Mohamed, is the successor to the legal claims of her late husband and the Global Justice Clinic has been representing Ms. Mohamed since Mr. al-Asad’s passing in 2016.

CIA-linked secret detention on the territory of Djibouti. Mr. al-Asad was a Yemeni citizen who was apprehended at his home in Tanzania on 26 December 2003. During the early morning hours of the next day, he was transferred to Djibouti. In Djibouti, Mr. al-Asad was detained *incommunicado*, subject to ill-treatment, and interrogated for approximately two weeks before being handed over to a team of CIA agents. In their control, he was subjected to the abusive transfer process systematically implemented by the US torture program and then flown to Afghanistan. For the next sixteen months, Mr. al-Asad was imprisoned in three different facilities in Afghanistan, facilities which were part of CIA's secret prison network and where Mr. al-Asad was physically and psychologically tortured. On 5 May 2005, he was flown to Yemen, where he was detained for an additional ten months before being finally released on 14 March 2006. Throughout his ordeal, Mr. al-Asad was never charged with a terrorism-related offense. Mr. al-Asad suffered physical and psychological effects of his torture until his death, ten years after his release.

24. For all the Victims, impunity reigns. For those who continue to be held in Guantánamo without charge, cut off from the outside world for nearly two decades, the physical and mental suffering continues. With the investigation authorized, it is imperative that the investigation proceeds expeditiously so that evidence collection commences, including testimonial evidence from the Victims.

IV. LEGAL BASIS TO RESPOND TO THE PROSECUTOR'S NOTIFICATION

(a) *The Chamber should allow victims' views and concerns to be presented without a formal application process*

25. Article 68(3) allows victims' views and concerns to be presented and considered at any stage of ICC proceedings in which their personal interests are affected, so long as this is not prejudicial to, or inconsistent with, the rights of the accused or a fair and impartial trial. 'Victim' is defined in rule 85 of the Rules of Procedure and Evidence ("RPE") as including, "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." As Pre-Trial Chamber I explained, article 68 translates into "the *right* [of victims] to be heard" and "the *duty*"

of the Court “to effectively enable them to exercise this right.”⁴⁴ ‘Proceedings’ have been found to include an investigation.

26. The four Victims were abducted, detained and tortured by officials of the United States and/or their allies as a part of the US torture program.⁴⁵ Each experienced part of their abduction, detention or torture within the territory of Afghanistan after 1 May 2003, and three of them experienced part of their abduction, detention or torture on the territory of another State Party after 1 July 2002.

27. As a result of the crimes they experienced, the Victims have suffered serious harm in numerous forms. All have experienced excruciating physical and psychological suffering inflicted through torture; all have been deprived of their freedom of movement for multiple years; all were removed from families, friends and communities and are now isolated from them; and all face the lasting reputational damage of being detained in accordance with such “terrorist” programs.

28. A Chamber is permitted to “seek the views of victims *irrespective* of whether they have made an application for participation in the proceedings before the Court or have been granted rights of participation.”⁴⁶ This is supported by rule 93 RPE, in accordance with which a Chamber may seek the views of victims participating pursuant to rules 89 and 91 RPE and, in addition, “may seek the views of other victims.” The jurisprudence confirms that at the pre-trial stage a Chamber may allow

⁴⁴ *Situation in the State of Palestine*, Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2, 13 July 2018, para. 8 (“Palestine Outreach Decision”). *See id.* para. 10-11.

⁴⁵ As in previous filings, the Victims use the phrase “US torture program” to refer to the US rendition, detention and interrogation program, in all its facets, that was operationalized in the immediate aftermath of the September 11, 2001 attacks. This program was carried out on the territory of Afghanistan as well as on the territory of other States, including both States Parties (e.g., Lithuania, Poland, Romania, Jordan and Djibouti) and non-States Parties (e.g., Pakistan). Both the US DoD and the CIA played a role in its establishment and operation. US civilians and military leadership, with the involvement of members of the DoD and CIA as well as private contractors, ran the US torture program. The program could not have and would not have had the reach and impact it did, including directly on the Victims, without the assistance of individuals from States Parties. This included the use of their territory for detention and interrogation operations where, it is submitted, crimes falling within the Statute were committed including against the Victims. Officials from other States Parties, such as the UK, participated in other ways, including by carrying out abductions.

⁴⁶ *Prosecutor v Callixte Mbarushimana*, “Decision on ‘Proposal on victim participation in the confirmation hearing’”, ICC-01/04-01/10-229, 10 June 2011, pp. 4-5 [emphasis added].

victims who have not been granted rights of participation at this stage to present their views and concerns in proceedings.⁴⁷

29. The Victims have not been formally recognised as such in accordance with the procedure set out in rule 89 RPE. However, it is submitted that a Chamber may hear the views and concerns of victims without undertaking a process pursuant to rule 89. Indeed, in this situation no process inviting applications under rule 89(1) RPE has been initiated, nor has an application form been created specific to this situation, or made available in any Afghan languages. Counsel infers that, following the practice of other Pre-Trial Chambers,⁴⁸ the application process will not be undertaken at the investigation stage. This is the most appropriate approach in present circumstances for several reasons: The procedure in rule 89(1) RPE involves individual written applications, observations from the parties, and individual judicial determinations for each application. The process is time and resource intensive. Such a process may be worthwhile within a trial, where victims are likely to engage with the proceedings repeatedly and frequently over many years. In contrast, the *ad hoc* nature of the current judicial proceedings suggests that any benefit to undertaking the rule 89(1) RPE process would be outweighed by the time and resource burden involved.

30. Given that the case is currently in the investigation phase of proceedings, such that suspects have not been identified, the adversarial nature of the rule 89 procedure makes it more appropriate for formal applications to be made at a later stage in the proceedings so they can be challenged by the Defence (rule 89(2) RPE).

⁴⁷ *Ibid.*; *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18-37, 6 Sept. 2018, para. 21; *Situation in the State of Palestine*, Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 Jan. 2020, para. 13 (“Palestine Order on Submission of Observations”); *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Decision on Victims’ joint request concerning hearings outside the host State, ICC-01/19-38, 26 Oct. 2020, paras 17-19 and 23 (“Bangladesh/Myanmar Decision on Victims’ Request”). See also *obiter* from the Chamber on the same question in Palestine Outreach Decision, p. 6, n. 16.

⁴⁸ *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18-37, 6 Sept. 2018, para. 21; Palestine Order on Submission of Observations, para. 13; Bangladesh/Myanmar Decision on Victims’ Request, paras 17-19 and 23.

31. The Victims, through these same counsel, have previously participated in these proceedings.⁴⁹ This demonstrates that: firstly, the initiation of an investigation is a matter on which the victims' have a personal interest; and secondly, that a chamber can allow victims to be heard despite the absence of a rule 89 application process at this stage of proceedings.⁵⁰

(b) The victims' personal interests are affected such that the Chamber should allow a response to the Prosecutor's Notification

32. The investigation has already been significantly delayed. First, by a decade at the preliminary examination stage, and then by more than two years during the article 15 proceedings.

33. The Court has recognized that victims have an interest in seeing that an investigation is initiated promptly, so that they may realise all rights that flow from the opening of that investigation.⁵¹

34. Petitioners submit that the matters dealt with in the Prosecutor's Notification affect the personal interests of the victims in the following ways:

- (a) The lack of clarity as to the ambit of the deferred investigation means that no progress is being made on any part of the investigation into the situation;
- (b) There is an urgent need for the investigation to commence. The crimes are *ongoing*. Some of the victims continue to be deprived of their liberty and access to due process;
- (c) In the absence of an ICC investigation, the Victims continue to be deprived of an effective remedy, as well as of truth and reparations; and
- (d) Additional delays pose risks to investigators' ability to secure evidence.

⁴⁹ Reasons for the Appeals Chamber's oral decision on victims' appeals, para.23: "The victims have had the opportunity to effectively access this Court and participate in various proceedings relating to the Prosecutor's Request; they were heard by the Pre-Trial Chamber and have been heard by the Appeals Chamber as participants in the Prosecutor's appeal against the Impugned Decision."

⁵⁰ See further, Corrected version of "Decision on Victims' joint request concerning hearings outside the host State (26 October 2020, ICC-01/19-38), ICC-01/19-38-Corr27-10-2020, 27 October 2020.

⁵¹ *Request Under Regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 6 September 2018, para.88.

V. SUBMISSIONS

35. At the outset, it is recalled that the Prosecution spent at least four years of the preliminary examination reviewing the admissibility of all three components of the proposed investigation, and engaged in extensive discussions with the Government of Afghanistan throughout that time. The Prosecutor carefully considered changes made to the domestic laws in Afghanistan, structural reforms to the justice system, and information provided by Afghan officials about cases under investigation or prosecution. After that thorough review, the Prosecutor determined the investigation was admissible. From the information available, there do not appear to be significantly changed circumstances that would warrant a deferral of any part of the investigation. The Statute, Rules and drafting history all make clear that deferral requests must be made in good faith and should not be employed to delay otherwise admissible proceeding, thereby delaying or even denying victims access to justice, accountability and reparations through proceedings at the ICC. This is as true for victims of crimes committed by the Taliban or Afghan National Forces as it is for victims of crimes committed by members of the US armed forces, CIA or their allies.

36. The United States did not submit a deferral request pursuant to Article 18(2) when it was informed by the Prosecutor of the opening of the investigation into war crimes alleged to have been committed by members of the US armed forces and those associated with the CIA in March 2020. Indeed, rather than finally initiating domestic proceedings against US nationals for torture in Afghanistan, Poland, Lithuania and Romania, as well as on the territory of other States Parties such as Jordan or Djibouti, the last year has seen a continuation of the trend by the former US president to pardon convicted war criminals and followed by the unprecedented measure of issuing an Executive Order aimed at punishing personnel of this Court and those who support its mandate, culminating in sanctions against Prosecutor Bensouda and senior staff member Phakiso Mochochoko.⁵² Notably, the Executive Order and sanctions carried

⁵² Federal Register, Executive Order 13928: Blocking Property of Certain Persons Associated With the International Criminal Court, Jun. 11, 2020.

over into the current administration and were only rescinded earlier this month, at which point the Secretary of State reiterated that the United States “continue[s] to disagree strongly with the ICC’s actions” regarding the Afghanistan situation.⁵³

37. Nor did other States Parties explicitly included within the scope of the investigation due to alleged war crimes having been committed on their territory, namely Romania, Poland, and Lithuania, submit deferral requests under article 18(2).

38. Article 18 is designed to reinforce the principle of complementarity, motivating effective domestic investigations and prosecutions into international crimes, rather than duplicating or superseding them. Article 18(2) cannot be read as allowing one State alone to block all aspects of a multi-component investigation involving criminality by a multitude of actors on the territory of numerous States Parties; in order to achieve the objective of complementarity, a more granular and nuanced assessment is required. At a minimum, Afghanistan has indicated no plans to conduct investigations into war crimes committed by US nationals, including members of the armed forces or the CIA, or their partners. Continuing to stall the US component of this investigation defeats the purpose of article 18, and only bolsters impunity for those who bear the greatest responsibility for the harm caused to the Victims. The Victims call on the Prosecution to fully comply with its obligations under Part 5 of the Statute and proceed expeditiously to begin gathering and preserving evidence, including from Victims, and actively investigate those who bear the greatest responsibility for the crimes set forth in the Request.

(a) Requests under article 18(2) are not presumptively situation-wide

39. The purpose of a deferral request under article 18(2) is to reinforce the principle of complementarity,⁵⁴ which requires a balance between national judicial systems and

⁵³ US State Department, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court, Press Statement, Antony J. Blinken, Secretary of State, Apr. 2, 2021.

⁵⁴ Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck, Hart, Nomos, 2016), Commentary to article 18, Daniel D. Ntanda Nsereko, p. 836.

the ICC jurisdiction with the two working together to end impunity.⁵⁵ The purpose of article 18 is not to delay an investigation but rather to serve the interests of justice – at the national level.

40. Article 18(2) should not be read as applying to the Afghanistan situation as a whole, but instead requires a more discerning and granular review. Article 18(2) specifically states that the Prosecutor can defer to the State’s investigations “of those persons” and that the deferral should be based on the State showing that it is “investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts.” By the plain language of article 18(2), deferral requests can only challenge the investigation of specific persons alleged to have committed crimes under the jurisdiction of the Court. The drafters limited the reach of a deferral request to “those persons” being investigated by a State, and, in rule 53 of the RPE, required that sufficient information about the national investigation be provided. The available information about the scope of the deferral request, summarized above, indicates that “those persons” who Afghanistan might be investigating do not include US actors and their allies potentially implicated in the third component of the investigation.

41. The Notification indicates that the Prosecution agrees that article 18(2) deferral requests are not presumptively Situation-wide: the Office is assessing whether “certain aspects of its intended investigation could be deferred, or whether it should file a request to the Pre-Trial Chamber under article 18(2).”⁵⁶ Indeed, this formulation suggests that there are already certain parts of the investigation that could *not* be deferred, with the issue under consideration being whether those components or crimes for which deferral is sought satisfy Rule 53 of the RPE or warrant the Prosecutor to file an application under Rule 54.

42. This accords with years of admissibility review during the preliminary examination when the focus of Afghanistan’s complementarity arguments was vis-à-

⁵⁵ See *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr. German Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 Sept. 2009, [ICC-01/4-01/07-1497](#), para. 85: “the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to “put an end to impunity” on the other hand.”

⁵⁶ Notification, p. 4.

vis the first two components of the investigation, not US actors. The Prosecutor's Request makes this clear. It was divided throughout by investigative component, with a separate assessment of the legal characterization of the alleged criminal acts, admissibility and gravity for each of the three components. Notably, the Prosecutor's complementarity analysis of the US component *only* reviewed national proceedings in the United States, Poland, Romania and Lithuania; Afghanistan was neither mentioned nor reviewed as a possible venue for investigation and prosecution of US actors for the alleged crimes; nor were the other States Parties identified by Victims.⁵⁷

43. Moreover, during the preliminary examination period, the Prosecutor analyzed complementarity by stating that, "US civilian and military courts can exercise their jurisdiction over conduct that would constitute a crime within ICC subject-matter jurisdiction (i.e. war crimes, crimes against humanity, and genocide), when committed abroad by US nationals."⁵⁸ The Prosecutor assessed investigations and reviews by the US Department of Defense and Department of Justice and statements by the US Attorney General to determine that, "no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the US armed forces."⁵⁹ Notably, the Prosecutor recognized that the Afghan government had opened no national investigations or prosecutions with respect to crimes allegedly committed by members of international forces and most likely would not open investigations, "in line with status of forces agreements in place between Afghanistan and the US as well as between Afghanistan and ISAF troop contributing countries, which provide for the exclusive exercise of criminal jurisdiction by the authorities of the sending State."⁶⁰

44. Furthermore, Afghanistan is not the State that would "normally exercise jurisdiction" over US citizens or the State that would "normally exercise jurisdiction" over crimes that took place on the territory of Poland, Lithuania or Romania; such

⁵⁷ See Request, pp. 142-164.

⁵⁸ See OTP, *Report on Preliminary Examination Activities* (2016), para. 219.

⁵⁹ See OTP, *Report on Preliminary Examination Activities* (2017), 4 December 2017, para. 267.

⁶⁰ *Ibid.* para. 271.

States would be “the one whose national commits one of the crimes [...] or the State on whose territory such a crime is committed.”⁶¹ The Prosecution has already posited that agreements in place between Afghanistan and the US as well as between Afghanistan and other countries provide for the exclusive exercise of criminal jurisdiction by the authorities of the sending State.⁶²

45. Article 18 is considered “one of the most controversial provisions of the Statute” and its seven parts, which include both the possibility for the Prosecutor to file an application against deferral and to continue to take investigative steps during the pendency of a deferral under article 18(6), reflect a balancing of competing interests without compromising the mandate of the Court to end impunity.⁶³ The drafters were concerned that article 18 could be exploited to “delay proceedings and thereby threaten the Prosecutor’s ability to secure evidence.”⁶⁴ For this reason, article 18 and its implementing Rules (R. 52-57) provide instruction for deferrals to be lodged within one month, require pre-trial chambers rule on applications against deferral “as soon as possible” and appeals to be heard on an “expedited basis,” while allowing for certain investigation matters to continue, with commentators also finding Part IX cooperation obligations continue in the deferral context.⁶⁵ Indeed, review of a deferral was provided for every six months; one year after the request was made, a decision still has not been reached by the Prosecutor as to whether it is meritorious, in whole or in part. The rights of all victims are compromised and infringed by such delay.

(i) Part 5 of the Statute Mandates the Prosecution Take Measures to Ensure An Effective Investigation and Prosecution

46. The Prosecutor has an obligation to “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.” Art. 54(1)(b). As set forth above, there has already been significant delay at every stage

⁶¹ See Triffterer Commentary, Daniel D. Ntanda Nsereko, Commentary to article 18, p. 840.

⁶² *Report on Preliminary Examination Activities* (2017), para. 271.

⁶³ John T. Holmes, *Complementarity: National Courts versus the ICC*, p. 681, in Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: 2009).

⁶⁴ *Ibid.*

⁶⁵ Triffterer Commentary, Daniel D. Ntanda Nsereko, Commentary to article 18, p. 844.

of this Situation. The Court itself, and especially the Prosecution, must take care not to create the very “unjustified delay” seen as inconsistent with an intent to bring the persons concerned to justice, and therefore not tolerated at the national level.⁶⁶

47. To date, none of the Victims or their counsel – two of whom have been involved with accountability efforts for US torture for more than 15 years – have been contacted by the Prosecution to begin evidence collection and preservation under article 54(3)(b). There remains an outstanding question as to whether the Prosecution and the Registry have put in place – or sought to put in place -- the requisite modalities for evidence collection, including Memoranda of Understanding, with non State Parties (including to secure access to victims at Guantánamo) or relevant international organizations, such as NATO, to properly effectuate its obligations or investigative powers under article 18(6) or article 56. It is recalled that the Prosecutor can exercise her powers under Part 9 of the Statute in the deferral context.

48. As the Victims’ section above indicated, further delay in taking such measures not only allows for even more passage of time but also risks the loss of evidence due to the acute mental and physical health crisis facing certain of the Victims. Whether pursuant to its right to seek authority from the Pre-Trial Chamber to pursue necessary steps to preserve evidence during its consideration of the deferral under article 18(6) – a step it could take in relation to all three components of the long-delayed investigation – or by activating the seemingly dormant US torture component to meet its statutory obligation to “ensure the effective investigation and prosecution” of crimes under article 54(1)(b) by *inter alia* interviewing victims (art. 54(3)), the Victims call on the Prosecutor to exercise her powers under Parts 5 and 9 of the Statute to ensure compliance with her obligations in article 54(1)(b).

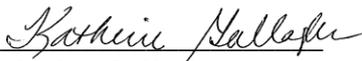
VI. RELIEF SOUGHT

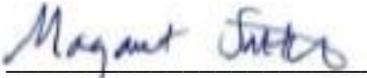
49. The lengthy review of Afghanistan’s article 18(2) deferral request, and the lack of information about the status of the investigation, especially as regards the third

⁶⁶ See article 17(2)(b); see also OTP, Situation in Iraq/UK, Final Report, Dec. 2020, para. 432 (“the frequency of recourse to the ‘passage of time’ criteria...shows how determinative a factor this may be in shaping [the] practical ability to progress many allegations of past detainee abuse”).

component regarding alleged war crimes by US nationals or their partners on the territory of multiple States Parties, risks comprising the integrity of the investigation and Victims' access to justice before the Court. Accordingly, the Victims respectfully request that the Court:

- i. Order the Prosecution to clarify which aspects of the investigation fall within Afghanistan's Deferral Request;
- ii. In the event that the Prosecution submits that all three components of the investigation fall within Afghanistan's Deferral Request, require the Prosecution to provide factual and legal justifications for that conclusion regarding the US component on the record and order the Prosecution to immediately comply with its obligations under article 18(6) and Part 5 of the Statute regarding that part of the Situation to preserve evidence;
- iii. Alternatively, if the Prosecution submits that the US component falls outside Afghanistan's Deferral Request, order the Prosecution to provide a status update on its investigation regarding that component of the investigation, and comply with its obligations under Part 5 of the Statute; and
- iv. Set a deadline for when the Prosecution's assessment of the Deferral Request must be concluded.


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Dated this 29th of April 2021, at New York, USA; Phnom Penh, Cambodia.