

## **Victims' Representations on Article 18(2) Request to Resume Investigation**

### **Situation of Afghanistan**

**Guled Hassan Duran (r/00750/18) and Sharqawi Al Hajj (r/00751/18)**

**14 December 2021** (via email: [VPRS.Information@icc-cpi.int](mailto:VPRS.Information@icc-cpi.int))

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Individual victims **Guled Hassan Duran** and **Sharqawi Al Hajj** (collectively, "Victims") herein submit their views and concerns on the Prosecution's 27 September 2021 request to authorise resumption of an investigation under article 18(2) of the Statute ("Prosecution's Article 18(2) Request") pursuant to the Pre-Trial Chamber's 8 November 2021 "Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute" ("8 November Decision") and its 25 November 2021 "Decision on the 'Registry's Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings" (25 November Decision"). The Victims also submitted their views and concerns in a collective submission, "Request for Leave and Victims' Submissions Concerning the Prosecutor's Application under Article 18(2) and on Victim Participation in the Afghanistan Situation," 13 December 2021 in which they *inter alia* urged the Pre-Trial Chamber to **grant the Prosecution's Article 18(2) Request without further delay**, and incorporate the arguments made therein into this representation.

In accord with the Pre-Trial Chamber's advisement that the standard form is not a requirement (8 November Decision, para. 14) and the Registry/VPRS guidance that individuals who submitted article 15 representations need not repeat the form, this document and its attachments constitute Victims Al Hajj and Duran's representations. The prior forms of Victims Al Hajj and Duran are attached hereto as **Annex I** and **Annex II**, respectively. The contact details for both men is unchanged: both **Guled Duran and Sharqawi Al Hajj remain detained in Guantánamo without charge**.

The Pre-Trial Chamber instructed the VPRS to collect victims' views and concerns and to prepare an assessment on: (a) whether the criteria under rule 85 are met, and (b) victims' view and concerns as to the Prosecutor's Article 18(2) Request. The Victims address each point, and then provide additional observations.

*(a) Whether the criteria under rule 85 are met*

Both **Guled Duran and Sharqawi Al Hajj** qualify as "victims" under rule 85 in the **Situation of Afghanistan**. Indeed, **this determination was already made nearly four years ago, when their article 15 representations were reviewed by VPRS** in light of the Prosecutor's 20 November 2017 article 15 request **and transmitted to the Pre-Trial Chamber**. That 2017 article 15 request, in its entirety, remains the guidepost for determining who is a victim under rule 85; Mr. Duran and Mr Al Hajj are victims of crimes set forth in the third dimension of the request, namely torture and other crimes arising out of the US-led rendition, detention and interrogation program. Both men have been subjected to conduct that meets the temporal, territorial and subject-matter (war crimes and crimes against humanity) jurisdictional requirements of the Court as outlined in the article 15 request. Victims Duran and

Al Hajj detailed the harms they suffered, the locations, time-frames and information about the alleged perpetrators in their article 15 forms (**Annex I and II**) as well as in a detailed Narrative (attached hereto as **Annex III**), which elaborates on the harms, the scale, scope and evidentiary support for the crimes, and addresses matters of admissibility, complementarity and the interests of justice. It was based on this documentation that the VPRS previously registered the Victims views and concerns (r/00751/18 and r/00750/18) and conveyed them to the Pre-Trial Chamber. As such, the Victims were deemed to satisfy the conditions set out in rule 85. *See*, VPRS Final Report, Annex 1, ICC-02/17-29-AnxI-Red, 20 Feb. 2018, para. 17 (confirming representations that met rule 85 conditions were transmitted to the PTC, while those that did not were not transmitted). Accordingly, **the VPRS should again transmit the views and concerns of Mr. Duran and Mr. Al Hajj as “victims” under rule 85**, pursuant to article 68(3).

*(b) Victims’ view and concerns as to the Prosecution’s Article 18(2) Request*

**Victims support the Prosecution’s Article 18(2) Request and urge the Pre-Trial Chamber to authorize resumption of the investigation forthwith.** Indeed, the Victims have sought an active investigation by the ICC’s Office of the Prosecutor for years – predating the article 15 request – and have been consistent and clear in their support for a prompt, impartial, adequate, thorough and effective in meetings with the Prosecution, with the Registry and in submissions before the Pre-Trial Chamber as well as the Appeals Chamber.

Notably, the Victims have already shared their views and concerns, in detail, with the Pre-Trial Chamber on the question regarding the deferral request in multiple filings, and urge the Pre-Trial Chamber to review and consider the substance and merits of those submissions, and rule accordingly – again, without further delay. *See* “Response to the Prosecution’s ‘Request to authorize resumption of investigation under article 18(2) of the Statute,’” dated 7 Oct. 2021 and transmitted 11 Oct. 2021, ICC-02/17-167-AnxA. *See also* “Request for Reconsideration of the ‘Decision regarding applications related to the Prosecution’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request,’” dated 17 Sept. 2021 and transmitted 20 Sept. 2021, ICC-02/17-159-AnxA; “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,” ICC-02/17-146-Anx, 29 April 2021 (“Victims’ 29 April Submission”); “Request for Leave and Victims’ Submissions Concerning the Prosecutor’s Application under Article 18(2) and on Victim Participation in the Afghanistan Situation,” 13 Dec. 2021.

*(c) Additional observations*

The Victims seek to convey the following views and concerns on the procedure for collecting and conveying the views and concerns of victims in this Situation and in relation to the Prosecution’s Article 18(2) Request and envisioned next steps.

*i. The process for collecting representations in flawed, misguided and unnecessary*

The Victims consider this process of submitting views and concerns via the VPRS to the Pre-Trial Chamber on an article 18(2) application to be not only ill-conceived and unnecessary, but also contrary to the legal texts of the Court, particularly after they have been active participants

throughout the article 15 proceedings and after the investigation was authorized by the Appeals Chamber.

*First*, as sections (a) and (b) make clear, the Victims have already been vetted against rule 85 criteria and have already expressed their view that the investigation proceed without further delay. Indeed, Victims made this view clear even *before* the Prosecution’s Article 18(2) Request was lodged. In April 2021, Victims argued that the deferral request, as a matter of law and in fact, could not serve as a basis to forestall the already-authorized investigation into crimes falling within the jurisdiction of the Court by US actors and their proxies on the territory of Afghanistan, Poland, Lithuania, Romania and other States Parties, including Jordan and Djibouti. *See* Victims’ 29 April Submission. And they have sought to make those views known to the Pre-Trial Chamber after the article 18(2) request was filed. The process instituted in the 8 November Decision, which is currently open-ended, *see* 25 November Decision, delays resolution of the Prosecution’s article 18(2) Request. *See* “Request for Leave and Victims’ Submissions Concerning the Prosecutor’s Application under Article 18(2) and on Victim Participation in the Afghanistan Situation,” 13 Dec. 2021. As such, it has the *opposite* effect of what the Victims (and other victims in the Situation) have long sought and urged the Pre-Trial Chamber to authorize back in 2018, and again over the course of 2021: an active investigation into the crimes set forth in the Prosecutor’s article 15 request. This indirect method for accepting the views and concerns of victims also conflicts with the expectation that deferral requests be resolved in an expeditious manner. *See* Victims’ 29 April Submission, paras. 2, 38-39 and 45-48.

*Second*, the process for VPRS collection and vetting of views and concerns runs contrary to the Statute, Rules and Regulations of the Court, which allow for victims to seize the Court when their person interests and rights are implicated - and at risk. The Victims, and other victims in this Situation, have briefed the Chamber in multiple submissions on the relevant legal provisions (*e.g.*, art. 68(3), rules 85, 86 and 93; *see also* rule 92(2) and regulation 16 of the Regulations of the Office of the Prosecutor) and proper application thereof to ensure meaningful victim participation, as envisioned by the drafters of the legal texts and the States which adopted them. The Victims respectfully request that both the Registry and Pre-Trial Chamber consider these submissions on their merits, and proceed in accordance with both the letter and the spirit of the Court’s legal texts. *See* Victims’ 29 April Submission, paras. 25-31; *see also* “Victims’ Request for Leave to Submit Observations,” dated 12 Oct. 2021 and transmitted 13 Oct. 2021, ICC-02/17-168.

ii. “Potential Victims”

In a number of its decisions or orders, beginning with its refusal to authorize the opening of an investigation following the Prosecutor’s article 15 request, the Pre-Trial Chamber has regularly referred to the Victims and others who assert that they have suffered harm as a result of a crime within the jurisdiction of the Court as “potential victims.” The Registry, including the *Victims* Participation and Reparations Section (VPRS), has also adopted this framing of “potential victims.” *See* “Public redacted version of ‘Registry Submission Pursuant to Decision ICC-02-17-171 in Relation to Article 18(2) Proceedings, 15 November 2021, ICC-02/17-172-Conf,” 16 Nov. 2021, ICC-02/17-172-Red, para. 7; Email “Information on art. 18(2) process in the Afghanistan situation” from VPRS, 10 Dec. 2021, 6:04pm. The use by Court officials of the phrase “potential victims” is likely intended as a reference for those persons who submit that they have suffered harm as a result of crimes with the jurisdiction of the Court but whose

assertions of such harm have not been assessed by any officials or organs of the Court vis-à-vis rule 85 – i.e., a term that refers to *administrative* matters or status. The impact of the phrase, however, is different than that probable intention. The result on persons who have suffered harm of being referred to as “potential” victims is to suggest that their own understanding of the physical and mental harm to which they have been subjected is dubious or ill-founded. It calls into question victims’ agency to assess their own harm or well-being, and suggests that they are objects of the proceedings, not subjects. Regretfully, the classification of “potential victims” causes harm to the very persons the Court is intended to support in healing and finding justice. Victims ask both the Pre-Trial Chamber and Registry to refrain from referring to victims coming before the Court as “potential victims” and instead use a phrase that more accurately reflects the *administrative* purposes for which this phrase has seemingly been employed, such as a “victim-applicants” or even “potential victim-applicants.”

*iii. Investigation into all dimensions of the situation of Afghanistan remains necessary and urgent*

*a. The deferral request should not have stalled the investigation into crimes arising out of the US torture program.*

As a preliminary matter, the Victims maintain that the Prosecutor erred in pausing the investigation into the US dimension of the Situation in response to the March 2020 deferral request. The Victims have argued that as a matter of law and fact, Afghanistan’s deferral request cannot address the entirety (if any) of the US dimension of the investigation. *First*, the Prosecutor sought authorization to investigate crimes arising out of the U.S. rendition, detention and interrogation program alleged to have occurred on the territory of the Afghanistan *as well as* crimes with a nexus to the armed conflict there that occurred on the territory of other States Parties, including Poland, Romania and Lithuania. Afghanistan was not – and is not – in a position to investigate, let alone prosecute, crimes on the territory of those States, including crimes committed by U.S. actors.<sup>1</sup> *See* Victims’ 29 April Submission, paras. 15-16, 25-38. *Second*, requests made under article 18(2) are not presumptively situation-wide. *Id.* at paras. 39-45. Because deferrals reinforce the principle of complementarity, deferrals can only address criminal conduct that the requesting State is seeking to and can in fact investigate. In this Situation, with three dimensions for investigation, a discerning and granular review of the request against the full scope of the investigation was warranted. In this case, such a review by the Prosecution should have led to the resumption of *at least* the U.S. dimension of the investigation far earlier than it filed the Prosecution’s Article 18(2) Request. The Victims deserve justice without unnecessary delay.

*b. Crimes arising out of the US torture program fall within the jurisdiction of the Court, have been authorized for investigation and no action has been taken the Prosecution under article 53 to reconsider its decision to investigate these crimes.*

The Prosecution’s Article 18(2) Request asks the Pre-Trial Chamber to “[i]ssue an expedited decision authorizing the resumption of the investigation in the *Situation in Afghanistan*, notwithstanding the Deferral Request.” The Request affirms that the investigation authorized by the Appeals Chamber pursuant to articles 15(4) and 53(1) consists of three dimensions: (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

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<sup>1</sup> The United States did not submit a deferral request.

National Security Forces; and (iii) war crimes allegedly committed by members of the US armed forces and members of the CIA. Prosecution's Article 18(2) Request, para. 6. There is nothing in the Request to suggest that the circumstances have changed with admissibility of any of the dimensions of the investigation or indeed, that the Prosecution does not intend to pursue the investigation in its entirety, in accordance with its obligations under article 54.

*However*, simultaneously with announcement of the Request, the Prosecutor issued a statement in which he said he will "deprioritize" *inter alia* the dimension of the investigation related to the US-led torture program. This decision was one taken apparently without having conducted *any* investigations in the Situation to date – contrary to its obligations under article 54(1)(b) – and without consulting the impacted Victims. Notably, the Prosecutor provided no legal basis for abandoning the position advanced by his Office throughout the Article 15 proceedings in that statement nor in any subsequent communication or submission.

**It is the undisputed and undisturbed position of the Prosecution, the Pre-Trial Chamber and the Appeals Chamber that crimes arising out of the US torture program advanced in the article 15 request fall within the jurisdiction of the Court. The Prosecution, the Pre-Trial Chamber and the Appeals Chamber have also found such crimes admissible: they are not being investigated or prosecuted at the national level – including in the United States – and are of sufficient gravity, in terms of scale, scope and seriousness.** The "deprioritisation" decision threatens to leave uninvestigated crimes that fall within the jurisdiction of the Court consisting of acts and omissions of actors from more than 30 States Parties, who territory or resources facilitated the U.S. torture program and crimes by U.S. actors. Such a widescale criminal enterprise and the long-running impunity for those who bear the greatest responsibility for it *should* remain of great concern – indeed, a priority – of the Prosecutor.

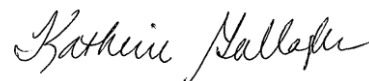
The Victims fully concur with the views advanced in a submission by Afghan victims that "[o]f all the decisions a Prosecutor can take, there is no greater threat to the rights of a victim than a decision not to investigate the crimes committed against the victim." "Victims' Request for Leave to Submit Observations," ICC-02/17-168, para. 10. To avert such a denial of justice – particularly after the efforts that Victims have undertaken to advance the Situation to this stage and the promises of investigation that followed a decade-long preliminary examination and the article 15 proceedings – **the Victims (i) urge the Prosecutor to reconsider its "deprioritisation" decision and (ii) request the Pre-Trial Chamber to exercise its powers to review that decision pursuant to article 54(3)(b)** and its inherent powers, taking into account the views and concerns of the Victims. In relation to the latter request, the Victims support the position advanced by the Afghan victims that the Prosecutor's decision "amounts to an Article 53(1) decision not to proceed with an investigation" and that the Pre-Trial Chamber is empowered to review that decision under article 53(3)(b) – and should do so immediately after granting the Prosecution's Article 18(2) Request. *See* "Victims' Request for Leave to Submit Observations," ICC-02/17-168, para. 3(b) and (c).

*iii. There is no prospect for "complementarity" for crimes arising out of the US torture program - the ICC is the "Court of Last Resort."*

Upon notification of the opening of the investigation, the United States did not submit a deferral request, altering the Prosecutor that it was finally opening an independent, thorough and effective investigation into crimes committed in the course of its post-9/11 rendition, detention and interrogation program. Instead, the last eighteen months has seen the former US president pardon convicted war criminals, then undertake 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 one of her senior staff. Notably, the Executive Order and sanctions carried over into the current administration and were only rescinded in April, at which point the Secretary of State reiterated that the United States “continue[s] to disagree strongly with the ICC’s actions” with regard to the opening of an investigation in this Situation.<sup>2</sup> **There simply is no prospect of justice and accountability in the United States.**

In the absence of an *active* ICC investigation, the Victims will continue to be deprived of an effective remedy, and their right to truth and reparations. Victims recall that article 21(3) requires that “[t]he application and interpretation of law [by the Court] must be consistent with internationally recognized human rights, and without any adverse distinction founded on grounds such as ...race, colour...religion or belief, political or other opinion, national, ethnic or social origin...or other status.” Accordingly, **the Victims must be accorded equal protection of the law and equal access to justice – regardless of their status or the status and power of their alleged perpetrators. A grant of authorisation to resume the investigation under article 18(2) and the active investigation of all dimensions of the Afghanistan Situation will be a significant step towards vindicating those rights.**



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14 December 2021  
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Annex I: Article 15 VPRS form, Sharqawi Al Hajj

Annex II: Article 15 VPRS form, Guled Duran

Annex III: Victims’ Al Hajj and Duran’s Article 15 Narrative Representations

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<sup>2</sup> U.S. 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.