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6 December 2018

Pre-Trial Chamber II,
Judge Antoine Kesia-Mbe Mindua, Presiding
c/o Victims Participation and Reparations Section
International Criminal Court
Post Office Box 19519
2500 CM The Hague
The Netherlands

Sent via e-mail: VPRS.representations@icc-cpi.int

**Re: Situation in the Islamic Republic of Afghanistan, Case No, ICC-02/17
Updated information for the Pre-Trial Chamber (Second):
Victim Sharqawi Al Hajj's Declining Health**

Dear VPRS:

I write to bring to the attention of Pre-Trial Chamber II an important recent development that has direct bearing on the pending request of 20 November 2017 by the Prosecutor for authorization to open an investigation in the Situation in the Islamic Republic of Afghanistan (Case No. ICC-02/17). On 31 January 2018, I submitted Victim Representation Forms and an accompanying Narrative to the VPRS on behalf of two men, Sharqawi Al Hajj and Guled Hassan Duran, in support of the Prosecutor's Request.¹ This update pertains to the concerning decline in health of Victim Sharqawi Al Hajj and the lack of adequate response to his situation by the United States.

Since August 2004, Mr. Al Hajj has been detained without charge in the U.S.-operated detention facility in Guantánamo Bay; he was transported to Guantánamo from Afghanistan, where he was held first in the CIA-run "Dark Prison" for approximately five months, and then was detained in the U.S. Department of Defense facility at Bagram Air Base.² Mr. Al Hajj has never been accused of

¹ On 4 April 2018, I submitted a supplemental letter to the Pre-Trial Chamber in light of the nomination of Gina Haspel to the position of Director of the U.S. Central Intelligence Agency.

² "In February 2002," Mr. Al Hajj "was transported on a CIA-operated flight to Amman, Jordan, where he was detained for twenty-three months by Jordanian authorities acting under the authority of, and for the purposes of collecting information for, the CIA." Victims' Representation, 31 January 2018 (confidential), para. 4 (citing public sources). (Jordan ratified the ICC's Rome Statute in April 2002, with jurisdiction of the Court effective 1 July 2002.) "Mr. Al Hajj was subjected to repeated acts of physical and mental torture while in detention in Jordan, and was hidden during visits from the Red Cross. [...] Mr. Al Hajj was subjected to repeated acts of physical and mental torture in both locations in Afghanistan." *Id. See id.*, paras. e.g., 41-42, 46, 52-79, 88-89, 97 and 106 (citing public sources, e.g.,

any act of violence, and has never been charged with any crime. Mr. Al Hajj filed a habeas corpus petition in 2005, in which a United States federal judge found that Mr. Al Hajj had been subjected to “patent ... physical and psychological coercion ... in Jordan and Kabul” and refused to rely on statements attributed to Mr. Al Hajj during subsequent interrogations because they were tainted by his prior coercion.³ Mr. Al Hajj ultimately withdrew his original petition after it became clear that he could not prevail under court decisions sanctioning extremely broad detention authority at Guantánamo. In 2011, Mr. Al Hajj became eligible for administrative review by the Periodic Review Board (“PRB”). His initial hearing was not held until 2016, which he did not attend because he was without counsel, and which designated him for continuing detention. A subsequent hearing in 2017, under the Trump administration, affirmed his continuing detention. He is not set to appear before the PRB again until 2020.

In January 2018, Mr. Al Hajj joined a mass habeas petition with other Guantánamo detainees arguing that their indefinite, potentially lifetime detention without charge is unlawful under U.S. and international law. As of this writing, he is still awaiting a decision by the district court.

Mr. Al Hajj suffers from the physical and psychological effects of his torture and his growing despair over his ill health and indefinite detention – itself a form of torture. In September 2017, his counsel in U.S. habeas proceedings filed an *emergency motion* for a medical evaluation, following a precipitous decline in his health after several weeks on a hunger strike (Mr. Al Hajj’s weight was 47 kgs). Fourteen months later, that motion has yet to be ruled upon.

Currently, Mr. Al Hajj weighs only 48 kgs. He continues “to engage in prolonged hunger strikes as a desperate response to his ill health and inadequate health care”⁴ and spends most of his day sitting or lying down because he is too tired to walk or to stand. Mr. Al Hajj is also experiencing a serious decline in his mental state. Most alarmingly, he told his habeas counsel that he does not care about the harm that may result from continuing his hunger strike and that he hasn’t “any more patience” with his circumstances. On 26 October 2018, Mr. Al Hajj’s counsel filed a motion for a status conference to apprise the court of his declining mental health, advising the court that “[t]he risk of inaction to the Court’s jurisdiction over [Mr. Al Hajj] is concrete,” *see* Ex. A ¶ 5, but that request, too, has yet to be ruled upon.

Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, 7 April 2008, available at <https://www.hrw.org/report/2008/04/07/double-jeopardy/cia-renditions-jordan>; Ali Al-Hajj al-Sharqawi, The Rendition Project, available at <https://www.therenditionproject.org.uk/prisoners/sharqawi.html>; Sharqawi Abdu Ali Al Hajj, North Carolina Commission of Inquiry on Torture, October 2017, available at <https://www.dropbox.com/s/4cgz2gau0gnl6oh/Ali-%20al-Hajj%20al-Sharqawi%20narrative-final-dmw.docx?dl=0>; Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013, available at <https://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>) for a detailed account of Mr. Al Hajj’s detention and treatment, and the legal characterization thereof.

³ *See Abdah v. Obama*, 708 F. Supp. 2d 9, 14 (D.D.C. 2010).

⁴ *Al Hajj v. Trump*, Notice of Public Filing of Petitioner’s Motion for Status Conference, Case No. 1:09-cv-745 (RCL) (D.D.C.), Dkt. # 1919, 7 November 2018, ¶ 3 (attached hereto as “Exhibit A”).

In light of Mr. Al Hajj's deteriorating physical and mental health and the U.S.' refusal to act, I respectfully urge the Pre-Trial Chamber to authorize an investigation into the Situation of Afghanistan and related crimes without delay. Opening this investigation could provide hope to Mr. Al Hajj and give him a reason to believe justice is possible.

I remain available to provide further information or analysis including with regard to the U.S. dimension of the Afghanistan et al. investigation request; I will be in The Hague on 6 through 12 of December, should an in-person meeting be of assistance.

Thank you for your continued attention to this pressing matter.

Sincerely,



Katherine Gallagher

Victim Representative for
Sharqawi Al Hajj and
Guled Hassan Duran

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EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SHARQAWI AL HAJJ (ISN 1457),

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

Case No. 09-cv-745 (RCL)

**NOTICE OF PUBLIC FILING OF PETITIONER'S
MOTION FOR STATUS CONFERENCE**

Petitioner hereby files on the public record a version of his sealed Motion for Status Conference (Dkt. No. 1918) that has been cleared for public release. The cleared motion is attached as an exhibit.

Dated: New York, New York
November 7, 2018

/s/ Pardiss Kebriaei

Pardiss Kebriaei (pursuant to LCvR 83.2(g))

Baher Azmy

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Counsel for Petitioner

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHARQAWI AL HAJJ (ISN 1457),

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

Case No. 09-cv-745 (RCL)

PETITIONER'S MOTION FOR STATUS CONFERENCE

Sharqawi Al Hajj, by and through his counsel, respectfully requests a status conference to discuss serious new concerns relating to his health – particularly his mental health – and pending Emergency Motion for an Independent Medical Evaluation and Medical Records, filed September 6, 2017 (Dkt. No. 1880), which underscore the necessity of the requested relief in that motion. A status conference would be an expedient way for the Court to be apprised of Petitioner's present condition so as to resolve his medical motion. Petitioner's counsel have made Respondents aware of their new concerns, and conferred with them about this request. Respondents stated that they do not believe that a status conference is appropriate, but they defer to the Court's preference. Respondents further maintain their opposition to Petitioner's medical motion.

In support of this request, Petitioner states the following:

1. Petitioner filed an Emergency Motion for an Independent Medical Evaluation and Medical Records on September 6, 2017 (Dkt. No. 1880). The government filed its Opposition

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on September 20, 2017 (Dkt. No. 1881). Petitioner filed his Reply on September 27, 2017 (Dkt. No. 1882).

2. Petitioner is a 43-year-old Yemeni who has been held at Guantanamo without charge since 2004, after over two years in CIA sites. He has been designated for continuing indefinite detention. As detailed in his medical motion, he suffers from chronic, debilitating symptoms, including acute weakness and fatigue, recurring jaundice, severe abdominal pain, and painful urination. Mot. at 4. He also has a history of Hepatitis B. *Id.* His physical symptoms and lack of access to medical care he trusts have been major sources of distress, frequently driving him to protest by hunger striking, which exacerbates his condition. Guantanamo has previously approved him for tube-feeding “due to a history of prolonged non-religious fasting” in order to “preserve his life and health.” Opp. at 10 & Ex. 1 at ¶ 14. His medical motion was filed after he was “found to be mentally dulled” in his cell after a period of weeks when he was not eating solid food, drinking liquid nutrition, regularly drinking water, or accepting tube-feedings, and required transfer to the Detainee Acute Care Unit, which is “akin to an intensive care unit.” Opp. at 11 & Ex. 1 at ¶ 9; *see also* Mot. at 5. An independent physician consulted by his counsel attested that Petitioner’s symptoms on their own – which the government does not dispute – could do “serious physical and neuropsychological damage,” and in combination with his hunger strikes threatened “total bodily collapse and medically irreparable harm.” *Id.* at 5. The government itself has acknowledged that Petitioner’s hunger strikes exacerbate his symptoms and endanger his health. Opp. at 2, 8, 10, 14, 18, 19-20.

3. Petitioner’s health continues to be in jeopardy. He continues to engage in prolonged hunger strikes as a desperate response to his ill health and inadequate health care; his protests further aggravate his condition; and his worsened condition leads to greater distress and

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more extreme protests, in a continuous downward spiral that is putting him at increasing risk of irreparable harm. As of counsel's most recent phone calls with Petitioner on October 12, 2018, and October 26, 2018, Petitioner's diet consisted mostly of water and honey, and small amounts of food "sometimes" for the purpose of taking his medication. He weighs 106 pounds – less than the "nadir" of his weight at the time of his collapse requiring hospitalization last year. See Opp. at 12 & Ex. 1 at ¶ 16. He spends most of his day sitting or lying down because "if I walk I get tired" and "if I stand I get tired." He recently summed up his day-to-day: "I don't go outside. I stopped going to classes. I stopped eating. I'm just sleeping in my cell."

4. Of particular concern, which specifically prompted this request for a status conference, in recent weeks counsel has also had worrying communications with Petitioner that may indicate a serious decline in his mental state. During a phone call on September 26, 2018, Petitioner described camp conditions as "getting worse" and creating "too much pressure" on him. He had asked to be moved [REDACTED] [REDACTED] so that he could be left alone to pursue his hunger strike to the point of hospitalization. He spoke of not caring about the harm that might result and not having "any more patience" with his circumstances. Such expressions are not characteristic of Petitioner, as mundane as they may seem in the context of Guantanamo. Over the course of counsel's representation of Petitioner, he has generally tried to manage his health and control his worst impulses, even while engaging in protest. To counsel, Petitioner's recent statements sounded an alarm about his mental capacity and underlined the urgent need for an independent assessment of his physical and psychological health. Counsel cannot know how to assess Petitioner's mental state, and Petitioner refuses mental health care at Guantanamo for lack of

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trust. An examination by a trusted outside physician is thus the only reliable way for counsel to understand Petitioner's true condition.

5. The risk of inaction to the Court's jurisdiction over Petitioner is concrete. On January 11, 2018, Petitioner joined ten other detainees in filing a Motion for Judgment and Order for Release, arguing that the indefinite duration of their detention violates the Due Process Clause and the 2001 Authorization for Use of Military Force (Dkt. No. 1885). Petitioner's motion has been fully briefed and argued, and is awaiting decision. Petitioner will need in the coming months to make consequential decisions about whether and how he wishes to proceed in the litigation. Counsel's recent communications with Petitioner call into real question his ongoing capacity to make rational judgments in his self-interest.

6. Immediately following the September 26, 2018 phone call with Petitioner, his counsel alerted the Commanders of the Joint Task Force and Joint Detention Group of their new concerns about Petitioner's mental state. Ex. A (Letter to Rear Adm. John Ring and Col. Steven Yamashita, dated September 28, 2018) Their letter, which opposing counsel confirmed was transmitted to the Joint Task Force, also identified several recent changes to Petitioner's conditions that were aggravating his already pressured state. *See id.* Counsel requested a meeting to further discuss Petitioner. To date, Guantanamo has not responded. Particularly in light of the lack of response, counsel has been scheduling weekly phone calls with Petitioner in a sorely inadequate attempt to monitor his condition.

CONCLUSION

The new signs of decline in Petitioner's mental health warrant serious attention. The Court should schedule an immediate status conference so that it may be informed of Petitioner's current state of health, including by querying the government about any mental health

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assessments of Petitioner, and resolve Petitioner's Motion for an Independent Medical Evaluation and Medical Records in favor of granting some measure of relief. Alternatively, if a status conference would not be of appropriate assistance to the Court, Petitioner respectfully requests the opportunity for a hearing on the merits of his medical motion.

Dated: New York, New York
October 26, 2018

/s/ Pardiss Kebriaei
Pardiss Kebriaei (pursuant to LCvR 83.2(g))
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Counsel for Petitioner

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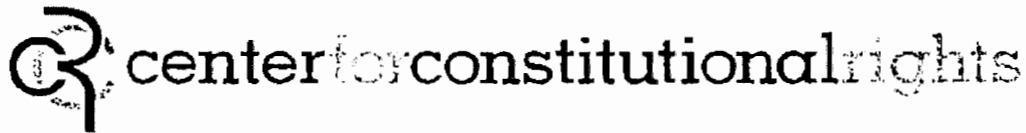
Exhibit A

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September 28, 2018

Via E-Mail to the Department of Justice

Rear Adm. John Ring
JTF-GTMO Commander
U.S. Naval Station
Guantanamo Bay, Cuba

Col. Steven Yamashita
JDG Commander
U.S. Naval Station
Guantanamo Bay, Cuba

Re: Sharqawi Al Hajj, ISN 1457

Dear Sirs:

I am habeas counsel for Guantanamo detainee Sharqawi Al Hajj, ISN 1457, a 43-year-old Yemeni who has been held without charge since 2004. I have represented Mr. Al Hajj since 2016. I write to alert you to serious concerns about his well being based on recent communication with him on September 26, 2018, and request an opportunity to discuss them further with you as soon as possible.

Mr. Al Hajj has had various health challenges for some time. He has chronic pain and weakness, recurring bouts of jaundice, and a history of Hepatitis B. He has refused food and drink for stretches of time over the past two years, which led to an emergency hospitalization for several days last year. More recently, he has developed the need for a hernia operation. Suffice it to say, whether the reasons are within his control or not, he is not in good health.

Nonetheless, over the past two years of my communication with Mr. Al Hajj, he has consistently tried to manage his health and control his worst impulses. In recent weeks, I have observed an apparent deterioration in his ability to cope. He appears increasingly agitated and fixated on the difficulties of his detention, and less able as before to find ways of dealing with his circumstances. During a phone call with Mr. Al Hajj on September 26, 2018, he told me that he has again ceased eating food, and plans to continue even if it leads to re-hospitalization. He talked of not caring about the harm that might befall him as a result, and not having "any more patience" with his circumstances. Such statements are not characteristic of Mr. Al Hajj, and I take them seriously, to reflect a further decline in his mental state.

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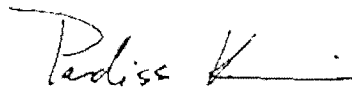
During our phone call, Mr. Al Hajj also noted several specific recent incidents that are aggravating his condition:

- For the past month he has not been receiving meals based on a special diet, as he had for years based on the recommendations of his doctors, which is further discouraging him from eating;
- The temperature in his cell has at times been below a standard degree, and his requests to receive a blanket (provided by his counsel), again as recommended by his doctors, have been denied;
- His recent requests to visit detainees in other blocks have all been denied, which is increasing his sense of isolation;
- In the course of moving from his cellblock to classes, he has frequently been trapped between locked gates, calling for guard assistance without response. Several days prior to our call, he had been trapped behind a gate for 30 minutes. He has stopped attending classes as a result, which is further adding to his isolation.

Mr. Al Hajj has not been given any meaningful explanation for these issues, and they are triggering physical and mental health effects on his already tenuous condition. Based on my recent conversations with Mr. Al Hajj, I believe that addressing these issues would go a certain distance in de-escalating what I observe to be a growing crisis with respect to his condition, and that any further aggravation could have a seriously detrimental effect on him.

I have not before in the course of representing Mr. Al Hajj addressed the camp authorities with specific concerns about him. I hope these issues will be given serious consideration. I would appreciate the opportunity to discuss them further with you as soon as possible or, at a minimum, to be advised whether and how the conditions that are exacerbating his ill health can be remediated. I look forward to hearing from you soon.

Respectfully,



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