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VICTIMS AT THE CENTER OF JUSTICE

From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC

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The Challenges for Legal Representation of Victims of U.S. Torture on the Territory of Afghanistan and other States Parties at the International Criminal Court

by Katherine Gallagher[125]

As is now well-known, in the aftermath of the September 11th attacks in the United States, the Bush administration mobilized assets across the U.S. government to launch an aggressive, multi-faceted and ultimately long-term response that included a global rendition, detention and interrogation program. Bolstered by the Congressional Authorization for Use of Military Force,[126] George W. Bush, Vice President Dick Cheney and other senior U.S. civilian and military officials, including government attorneys, constructed a two-part strategy: a military response managed by the Department of Defense ("DOD") under Secretary of Defense Donald Rumsfeld and a covert, counter-terrorism response led by the Central Intelligence Agency ("CIA") under the leadership of Director of Central Intelligence George Tenet.[127]

While the military and counter-terrorism responses overlapped in time, space and objective,[128] it was the CIA-led covert operation that constituted the primary response to the attacks of September 11th, and it was through the secret CIA detention and interrogation program that, like many others, Sharqawi Al Hajj and Guled Duran were captured, detained – both directly by the CIA and through proxy-State CIA detention – interrogated and subjected to brutal, long-term acts of physical and psychological torture.[129]

Individuals subjected to serious violations of international criminal law, including torture, cruel, inhuman and degrading treatment, and denials of fundamental rights arising out of the operation of an international network of prisons by the CIA and the DOD, including on the territory of Afghanistan and other States Parties of the International Criminal Court ("ICC" or "Court"), have been pursuing justice and accountability in various forums for much of the last fifteen years; in the case of Al Hajj and Duran, those efforts include seeking release from detention, as both men

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126. On 18 September 2001, President Bush was empowered by Congress to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" those attacks or who harbored said persons or organizations "to prevent any future acts of international terrorism against the United States by such nations, organizations[,] or persons." Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (2001).

127. The U.S. also sought the participation of international allies and institutions, including the U.N. and NATO, to support its efforts, particularly in relation to the military response in Afghanistan and in developing legal and political regimes to track terrorist organizations and financing.

128. The overlap between the two responses is evident through *e.g.,* CIA operatives and special forces on the ground directing the Northern Alliance with CIA's Tenet having been authorized to spend up to $1 billion to secure allegiances among Afghan factions (*see* George Tenet, *At the Center of the Storm: The CIA During America's Time of Crisis* (Harper, 2007), at p. 175); the movement of detainees between CIA-run facilities and DoD detention sites.

129. Both Victim Al Hajj and Victim Duran are referenced in the Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Executive Summary, Declassification Revisions, 3 December 2014.

continue to be held at the U.S.-run detention facility at Guantánamo Bay. To date, no senior U.S. official has been held liable for their role in committing, ordering, soliciting, facilitating, aiding and abetting or otherwise contributing to the commission of torture and other crimes falling within the Statute of the ICC.[130]

On the contrary, under three successive administrations, the United States has demonstrated it is unwilling to genuinely investigate or prosecute allegations of torture and other serious violations, shielding the conduct – the underlying policies – of high-level U.S. officials from scrutiny. Furthermore, the U.S. has made repeated efforts to block victims of its detention and interrogation policies from seeking justice in U.S. courts and has interfered with proceedings initiated in foreign courts, including those brought under the principle of universal jurisdiction.[131] Finally, the Bush and Obama era policies favoring impunity for torture have not only been widely supported under the current administration, but the risk of reviving these policies is particularly acute and real under the presidency of Donald Trump.

It is against this backdrop that the Prosecutor's request to open an investigation into possible international crimes committed in Afghanistan since May 2003, as well as to related crimes on the territory of other States Parties since July 2002 must be assessed and understood.[132] In the 181-page Request, the Prosecutor provided detail for three distinct areas of investigation: acts committed by members of the Taliban and affiliated armed groups; acts committed by members of the Afghan National Security Forces; and acts committed by member of the U.S. armed forces and members of the CIA. This is the first time alleged crimes by U.S. actors would by investigated by the ICC.[133]

And it is for this reason that Shaqawi Al Hajj and Guled Duran (the "Victims") represented to the Pre-Trial Chamber that such an investigation would serve the interests of justice in that it would make clear that no one is above the law regardless of power or position; that those who bear the greatest responsibility for serious international crimes will be held accountable and will not enjoy global impunity; and that all victims of serious crimes can and will have their claims heard and adjudicated by an independent and impartial tribunal.[134]

As will be explained below, however, such an investigation raises a particular set of issues that will require various organs of the ICC to respond with a measure of flexibility and creativity, while demonstrating a fierce commitment to the underlying principles and purposes of the Court.

From Preliminary Examination to Investigation Request

The Office of the Prosecutor ("OTP") made public its preliminary examination on Afghanistan in 2007. While earlier OTP Preliminary Examination reports made brief reference to alleged crimes by "international forces" among its more detailed summary of alleged crimes by the Taliban or

130. Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

131. For an analysis of the U.S. accountability efforts – or lack thereof – *see, e.g.,* CCR and European Center for Constitutional and Human Rights ("ECCHR"), "Response to the Submission from the United States in Relation to the Criminal Complaint pending against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes and John Yoo," Audiencia Nacional, Spain Case No. 134/2009 (April 2011); CCR and ECCHR, "Complaint against the United States of America and the Kingdom of Spain: Interference with the Independence and Impartiality of the Judiciary," to United Nations Special Rapporteur on the independence of judges and lawyers, 19 January 2012.

132. *Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber III,* 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, ICC-02/17-7 ("Request").

133. Because the alleged crimes occurred on the territory of Afghanistan and also on the territory of at least Romania, Lithuania, and Poland, which are all States Parties to the ICC, investigations can proceed in regards to crimes committed by U.S. actors - even though the U.S. is not a party - in addition to Afghan, Taliban, or related forces. *See* ICC Statute, Art. 12(2)(a). *See also Request under Regulation 46(3) of the Regulations of the Court,* Pre-Trial Chamber I, 'Decision on the "Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute."' 6 September 2018, ICC-RoC46(3)-01/18, ¶¶ 44-48, ¶ 64.

134. *See* ICC Statute, Art. 53(1)(c).

government forces,[135] it was not until the 2014 report that the Prosecutor identified "torture or ill-treatment of conflict-related detainees by US armed forces in Afghanistan in the period 2003-2008 forms" as "another potential case identified by the Office."[136] In relation to these alleged crimes, the OTP indicated that it was "analyzing the relevance and genuineness of national proceedings" – complementarity – as well as gravity.[137]

Days after the Prosecutor released her 2014 report, as the Thirteenth Session of the Assembly of States Parties Session got underway in New York, the U.S. Senate Intelligence Committee released the 525-page Executive Summary of its "Study on CIA Detention and Interrogation Program," widely known as the "Senate Torture Report."[138] The 2016 OTP Preliminary Examination Report concluded that a reasonable basis to believe that U.S. armed forces and CIA officials had committed war crimes, including torture, in furtherance of a policy existed and indicated that it would be making a decision on whether to pursue authorization to open an investigation "imminently."[139] However, it was a full year later that the OTP lodged its request with the Pre-Trial Division.

On 20 November 2017, the Prosecutor sought authorization to open a three-part investigation into alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003.[140] Notably, the investigation would cover not only serious crimes in the context of the armed conflict in Afghanistan but also crimes committed since 1 July 2002 on the territory of other Member States of the ICC where the crimes have a nexus to those committed in Afghanistan, including (but not necessarily limited to) Romania, Poland and Lithuania – all known to have hosted CIA black sites. The Request seeks authorization to investigate *inter alia* war crimes of torture, cruel treatment, rape and other sexual violence by members of the U.S. armed forces and/or the CIA of detainees in Afghanistan and at other locations, principally in 2003-2004.[141]

Victims and Their Representations

The particular challenges, and views and concerns of victims of crimes arising out of the U.S. detention and interrogation program will be discussed herein; the challenges for victims in and from Afghanistan to submit their representations are addressed in another article in this publication.

Upon filing of the Prosecutor's Request, the Registry initiated the process for victims to submit their representations, pursuant to Regulation 50 of the Regulations of the Court. The Pre-Trial Chamber set a deadline of 31 January 2018 for victims to present their views on the opening of an investigation, including the scope of the investigation. Within a day of the Prosecutor's Request, the Registry's Victims Participation and Reparations Section ("VPRS") initiated contact via e-mail with a range of civil society actors and attorneys whom it learned worked with or represented potential victims of the Situation in Afghanistan, informing them of the procedure for victims to submit their representations, including the author. Upon request, the Registry translated the

135. For example, the 2011 Report on Preliminary Examination Activities identified the alleged crimes in Afghanistan as civilian deaths by the Taliban and pro-government forces, torture "by various forces," attacks on humanitarian targets and the United Nations, child recruitment, and attacks on protected objects including hospitals, mosques and girls' schools. Office of the Prosecutor, Report on Preliminary Examination Activities 2011 (13 Dec. 2011), ¶¶ 24-29.

136. Office of the Prosecutor, Report on Preliminary Examination Activities 2014, (2 Dec. 2014), ¶ 94. It found: "Certain of the enhanced interrogation techniques apparently approved by US senior commanders in Afghanistan in the period from February 2003 through June 2004, could, depending on the severity and duration of their use, amount to cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence." Id. At ¶ 95.

137. *Id.* at ¶ 96.

138. *See supra* n. 5.

139. Office of the Prosecutor, Report on Preliminary Examination Activities 2016, (14 Nov. 2016), ¶ 230.

140. In addition to alleged crimes by U.S. actors, the Prosecutor seeks authorization to investigate crimes against humanity and war crimes alleged to have been committed by members of the Taliban and affiliated armed groups, and Afghan National Security Forces.

141. Request, ¶ 4.

Representation form into Arabic, the preferred language for some victims, particularly in relation to alleged crimes arising out of U.S. detention.

Potential victims detained in Guantánamo learned of the possibility to file victim's representations through existing counsel. The Registry has not had any direct contact with the men detained there. CCR submitted victims representations and a supporting narrative in support of the ICC Prosecutor's Request concerning two men detained at Guantánamo, namely Sharqawi Al Hajj and Guled Hassan Duran, both of whom it represents in U.S. federal litigation.[142] Both Victims have been held for more than a dozen years without charge after transfer to Guantánamo from detention centers operated by the CIA, including on the territory of Afghanistan after 1 May 2003, and had been either detained in or transited through other ICC States Parties after 1 July 2002. Potential victims detained in Guantánamo learned of the possibility to file victim's representations through existing counsel. The Registry has not had any direct contact with Al Hajj and Duran, and indeed, neither has the author, who serves as their legal representative at the ICC but does not represent the men in their U.S. litigation. The author, who was empowered to file the views and concerns of Al Hajj and Duran, has not had access to either man.[143] Because of their ongoing detention at Guantánamo and the restrictions on communication in place by the detaining authority, the two men were not able to assist in the preparation of their representations; accordingly, the information provided in their VPRS forms and incorporated and expanded upon in an accompanying 55-page narrative is based exclusively on publicly available sources including Victims' declassified filings in their respective cases in U.S. courts. The Victims' Representation details the treatment that the men endured in proxy-detention in ICC State Party Jordan, CIA black sites and DOD facilities, including in Afghanistan. The filing elaborates on the importance of an ICC investigation into these international crimes, and elaborates on the suggested scope of the inquiry to ensure the investigation captures the full liability of those who bear the greatest criminal responsibility. It also addresses issues of admissibility including complementarity.

The Victims

Sharqawi Al Hajj was born in 1974 in Ta'izz, Yemen. In 2000 Mr. Al Hajj traveled to Afghanistan, fled to Pakistan after the U.S. bombing campaign began in 2001, and, in February 2002, was captured in Karachi during a joint American and Pakistani operation. From Pakistan, 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. (Jordan has been a State Party to the ICC since April 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. 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 a 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 2011, a U.S. federal judge adjudicating his habeas corpus claim found that Sharqawi had been subjected to "patent ... physical and psychological coercion" in Jordan and Kabul and a second U.S. federal district court refused to rely on statements attributed to Mr. Al Hajj "in light of the abusive circumstances of [his] detention" and because he had "recently been tortured" while detained in Jordan and Afghanistan.[144] In August 2004, Mr. Al Hajj was transferred to the U.S.-operated detention facility in Guantánamo Bay, where he remains detained. Mr. Al Hajj has never

142. *See Al Hajj v. Trump*, Case No. 09-cv-745 (D.D.C.); *Duran v. Trump*, Case No. 16-cv-02358 (D.D.C.). In both habeas corpus cases, the Victims are represented by other attorneys at CCR who have security clearances and operate pursuant to *inter alia* applicable statutes, regulations and protective orders. Accordingly, the Victims' Representations included the following disclaimer: "Habeas counsel for Sharqawi Abdu Ali Al Hajj and Guled Hassan Duran have no involvement in this matter and do not confirm or deny any statement or other aspect of this matter."

143. The author has neither the security clearance nor signed any protective orders required to provide her direct access to the Victims. *See id.*

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

been accused of any act of violence, and has never been charged with any crime. Mr. Al Hajj suffers from the physical and psychological effects of his torture and is currently experiencing acute health issues: his counsel in U.S. habeas proceedings filed an emergency motion for a medical evaluation in September 2017, following a precipitous decline in his health after several weeks on a hunger strike (Mr. Al Hajj's weight was 47kgs) because of growing despair over his ill health and indefinite detention – itself a form of torture. That motion has yet to be ruled upon; on 26 October 2018, Mr. Al Hajj's habeas counsel filed a motion for a status conference to apprise the court of serious concerns about his declining mental health, but no date has yet been set.

Guled Duran, a Somali citizen, was born in 1974. Mr. Duran was captured on 4 March 2004 by Djiboutian security forces as he was transiting through the airport en route from Mogadishu, Somalia to Sudan, where he was to receive medical treatment. (Djibouti has been a State Party to the ICC since November 2002.) The Djiboutians turned Mr. Duran over to CIA personnel. After a few hours of interrogation, Mr. Duran was loaded on to a plane, shackled and strapped down to the floor of the plane, and flown to an unknown location, making one stop en route. 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. Based on a report by the International Committee of the Red Cross ("ICRC"), it is known that Mr. Duran spent at least some of the time between his capture in March 2004 and his transfer to Guantánamo Bay in September 2006 detained in Afghanistan.[145] Moreover, the ICRC report establishes that Mr. Duran was subjected to "a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information," transfer "to multiple locations" in a manner "that was intrusive and humiliating and that challenged the dignity of the persons concerned," being subjected to "continuous solitary confinement and incommunicado detention throughout the entire period of [his] undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements" – conditions "that amounted to torture and/or cruel, inhuman or degrading treatment."[146] Mr. Duran was named as a so-called "high-value detainee"; however, he denies having any link to al-Qaeda, and he has never been charged with a crime or tried for any terror-related offense. He remains detained at Guantánamo without charge.

Scope of the Investigation

While the Victims fully support the Prosecutor's Request, they observed that the articulated scope of the proposed investigation into U.S. and other international forces unduly narrow in three fundamental respects:

> (1) the proposed investigation specifically encompasses only part of the crime-base; in addition to detention/interrogation-related torture in Afghanistan and in CIA-run locations, the investigation must also include CIA-run extraordinary renditions and proxy detentions that involved conduct on the territory of a State Party as well as continuing crimes that began on the territory of a State Party and were or are ongoing at Guantánamo;
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> (2) the Request identifies only a subsection of crimes that fall within the Situation; additional war crimes (i.e., Art. 8(2)(e)(xi) – medical experimentation) and crimes against humanity (i.e., Arts. 7(1)(e) (deprivation of liberty in violation of fundamental rules of international law), 7(1)(f) (torture), 7(1)(g) (rape and other forms of sexual violence), 7(1)(h) (persecution) and 7(1)(i)(enforced disappearance)), which reflect both the attack against a civilian population and the policy aspect of the multi-faceted

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

146. *Id.* at 4-5, 7.

detention and interrogation program, should also be investigated for the purpose of any future case(s);[147] and

(3) the proposed investigation encompasses only some categories of persons who bear the greatest responsibility for the crimes; the investigation should explicitly include U.S. civilian and military leadership, and private contractors.

In so doing, the Victims clarified that they are not seeking a significantly larger investigation, but rather, a more fulsome analysis of the criminal conduct currently encompassed in the Request.

Response to the Request: Silence from the Court and Attacks from the United States

ICC

The immediate steps taken by various sections of the ICC following the Request gave many victims hope that the long delay of justice, exemplified by a decade-long Preliminary Examination, was over. Within two weeks of receiving the Prosecutor's Request, the Pre-Trial Chamber issued an "urgent" order requesting additional information regarding potential crimes by international forces, which was provided forthwith; the Pre-Trial Chamber issued a second Order for the Prosecutor to provide additional information in February 2018, which it did four days later.[148] Within days of submitting their Victims' Representations, the Victims received confirmation from the Registry via their legal representative that their Victims' Representations were received and transmitted in their entirety to the Pre-Trial Chamber. On 16 March 2018, the Pre-Trial Chamber considering the Request was reconstituted. VPRS informed victims of this development in early April.[149] Since that time, however, there has been no activity by the Pre-Trial Chamber and no outreach by the VPRS or other relevant sections of the Court.[150]

Prior Article 15 requests by the Prosecutor were ruled upon within months.[151] In the Situation of Afghanistan, the one-year anniversary of the Request passed without any acknowledgment by any organ of the ICC.[152] Victims deserve a decision, and indeed, an investigation of the alleged crimes committed against them.

United States

The United States made its strong opposition to the Request clear in a statement issued during the Sixteenth Session of the Assembly of States Parties. It expressed "serious and fundamental concerns" with the Request, stating that it "will regard as illegitimate any attempt by the Court to

147. The suggested framing of the alleged criminal acts as crimes against humanity avoids the risk that the investigation and any subsequent prosecutions might reinforce the so-called "war on terror" paradigm advanced by the United States in the aftermath of the September 11th attacks; the U.S. response which spawned the detention and interrogation program at issue has entailed a counter-terrorism effort that has extended far beyond any armed conflict, as understood under international law, or "battlefield." It is a global campaign of anti-terrorism operations without any defined end, better understood as a law-enforcement effort than a military mission. *See* ICRC, "International humanitarian law and the challenges of contemporary armed conflicts," 32nd International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 Dec. 2015) at 18 ("As repeatedly asserted, the ICRC considers that, from a legal perspective, there is no such thing as a 'war against terrorism'").

148. These filings can be found at the ICC situation page for Afghanistan.

149. Victims Al Hajj and Duran made a supplemental submission to the Pre-Trial Chamber on 4 April 2018, informing it of the nomination of Gina Haspel as Director of the CIA, and urging a positive decision on the Request without further delay, in light of the risk of repetition and the foreclosure of any possibility of domestic accountability evident with such an appointment. Haspel, who had been identified in their Victim Representation, had overseen a CIA blacksite in 2002.

150. In response to a query by the author on behalf of the Victims on the status of the pending Request and whether additional submissions could assist Pre-Trial Chamber II in arriving at a decision, VPRS wrote in November that there have been no procedural developments and there is currently no information on when a decision will be issued.

151. In the four former authorization requests, a decision was rendered relatively soon after the request: 50 days for Burundi; 102 days for Cote d'Ivoire; 106 days for Georgia; and 125 days for Kenya.

152. *But see* "The Long Wait for Justice: Will the ICC Investigate Crimes in the Afghanistan Situation?" Joint Press Release of FIDH, Armanshahr/Open Asia and CCR, 20 November 2018.

assert the ICC's jurisdiction over American citizens."[153] Echoing arguments it raised two decades earlier during negotiations of the Rome Statute, the U.S. argued that any exercise of jurisdiction over non-Party nationals without the States' consent or Security Council action under Chapter VII violated fundamental principles of international law. The U.S. lamented the fact that the Prosecutor relied upon U.S. government reports, including the Senate Torture Report, as a basis for deciding to initiate an investigation – without acknowledging that those government reports did not result in the prosecution of *any* senior U.S. military or civilian officials, or any private contractors, which is precisely why the ICC, as a court of last resort, is acting.

In April 2018, John Bolton was named as U.S. National Security Advisor. As a senior official in the administration of George W. Bush, Bolton had led that administration's anti-ICC efforts nearly fifteen years earlier: Bolton oversaw the United States "unsigning" of the Rome Statute[154] and the conclusion of more than 100 so-called "Article 98" bilateral agreements, which sought *inter alia* to prohibit States from extraditing any American citizens present on its territory to the ICC without the consent of the United States.[155] Indeed, Bolton had an op-ed in the *Wall Street Journal* on the day the Request was filed, in which he wrote that the U.S. should "welcome the opportunity…to strangle the ICC in its cradle. At most, the White House should reply to [the ICC prosecutor] with a terse note: 'Dear Madame Prosecutor: You are dead to us. Sincerely, the United States.'"[156] Mr. Bolton repeated that sentiment as National Security Advisor in a speech to the conservative Federalist Society on September 10th.[157] This attack was even more extreme: not only did Bolton threaten to punish any country that aided such an investigation, the US threatened to ban, sanction, and prosecute ICC *judges and prosecutors* if the court opened the Afghanistan investigation, or any inquiry into Israel or other US allies. This is a direct attack against the independence of judges, lawyers and the rule of law – and was addressed as such in a statement issued by the ICC in response to the Bolton speech.[158]

Donald Trump echoed John Bolton two weeks later in his speech to the U.N. General Assembly where he derided the ICC as a "global bureaucracy." He declared that the United States "will provide no support in recognition of the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority.[159]

Notably, Bolton also threatened to sanction or prosecute any "company or state that assists an ICC investigation of Americans."[160] For the 123 Member States of the ICC who are obligated to cooperate with the Court,[161] Bolton's threat puts them in the position of choosing between the ICC – and the rules-based international order it reflects – and United States. As for what was meant by "company," civil society groups as well as legal representatives could find themselves facing sanctions or even criminal prosecutions for supporting justice and accountability efforts – a stunning prospect, as much of the international community prepares to gather in The Hague for the Seventeenth Session of Assembly of States Parties to mark, and celebrate, the 20th anniversary of the Rome Statute.

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153. Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties, 8 December 2017.

154. U.S. Dep't of State, International Criminal Court: Letter to UN Secretary General Kofi Annan, 6 May 2002.

155. For background on the U.S. use of Article 98 ("Cooperation with Respect to waiver of Immunity and Consent to Surrender") agreements, see, e.g., Mark Kielsgard, *War on the International Criminal Court*, 8 N.Y. City L. Rev. 1 (2005); Ben Batros, *To Undermine the ICC, Bolton's Targets Extend Way Beyond the Court*, Just Security, 24 Sept. 2018.

156. John Bolton, *The Hague Aims for U.S. Soldiers*, WALL STREET JOURNAL, 20 Nov. 2017.

157. Full text of John Bolton's Speech to the Federalist Society, 10 Sept, 2018. Bolton declared the ICC to be an "illegitimate, unaccountable, and unconstitutional foreign bureaucracy" in a speech to the Zionist Organization of America on 5 November 2018.

158. *See "*The ICC will continue its independent and impartial work, undeterred,*" Press Release, CC-CPI-20180912-PR1406, 12 September 2018.*

159. Remarks by President Trump to the 73rd Session of the United Nations General Assembly, 25 September 2018.

160. *Id.*

161. *See* ICC Statute, Part 9: International Cooperation and Judicial Assistance.

John Bolton concluded his September speech by advising that the United States will "consider taking steps in the UN Security Council to constrain the court's sweeping powers." It can be understood that the United States will seek to invoke (or have another State invoke) Article 16 of the Rome Statute to have any investigation into the Situation in Afghanistan and related crimes deferred for a renewable 12-month period, pursuant to a Security Council resolution adopted under Chapter VII of the U.N. Charter. Such an outcome not only be a serious blow for all the victims of the crimes reflected in this Situation – for Afghanistan and its people, who have borne decades of impunity and are still enduring the commission of serious crimes including widespread attacks on civilians, and for the victims and survivors of the U.S. torture program – and for the United States itself, where President Obama's plea to "look forward not back" instead potentially opens the door to repetition under Donald Trump, who campaigned on a promise to "bring back a hell of a lot worse than waterboarding."[162] It would also be a serious blow to the independence and legitimacy, if not the future, of the Court.

Looming Challenges and Recommendations

The ICC is intended to be a court of last resort for the most serious human rights violations, the place to go when no other court or country has prosecuted the most serious crimes, including war crimes and crimes against humanity. It is the appropriate venue to investigate and adjudicate the crimes outlined in the Request, alleged to have been committed by the Taliban and affiliated groups, Afghan National Security Forces, *and* U.S. actors. The Pre-Trial Chamber should grant the Prosecutor's Request to authorize an investigation without further delay. In order for such an investigation to proceed effectively and in such a manner that those who bear the greatest responsibility face prosecution in The Hague, at a minimum, the following issues must be addressed:

- Accessing Victims of U.S. Crimes

One of the primary challenges that the ICC – and indeed, legal representatives without U.S. security clearances – will face during the investigation stage is accessing those victims of the U.S. torture program who are currently detained at Guantánamo for interviews and for potential appearances as witnesses at any subsequent proceedings. And critically, victims must be able to freely communicate with their legal representatives and the Court in order to receive information and present their views and concerns, and participate in the proceedings as enshrined in the Rome Statute. While the author has made inquiries with the Registry of the ICC regarding the existence of a Memorandum of Understanding (MOU) between the ICC and the United States, or indeed, whether such an MOU has been pursued by any organ of the Court (including the OTP) without receiving a definite answer, it can be surmised that under the current administration the United States is unlikely to grant the ICC access to Guantanamo Bay, let alone the 40 individuals who remain detained there.[163] Despite the U.S. hostility, the ICC, led by the Registry, should engage with U.S. officials, particularly in the Department of State, and seek the support and intervention of States Parties, to achieve a solution.

- Providing Victims Access to Counsel of their Choice – within the Legal Aid Regime

Many potential victims of torture and other cruel treatment in U.S.-run detention facilities have long-standing relationships with counsel or legal organizations: these individuals have engaged non-profit organizations like the Center for Constitutional Rights, Reprieve, REDRESS and the ACLU, as well as pro bono counsel from the private bar, to assist them in habeas corpus proceedings or civil proceedings in U.S. courts. Particularly for those men who remain detained at Guantánamo where

162. Tom McCarthy, "*Donald Trump: I'd bring back 'a hell of a lot worse than waterboarding.*" THE GUARDIAN, 7 February 2016.

163. In the Federalist Society speech, John Bolton stated in no uncertain terms: "We will not cooperate with the ICC. We will provide no assistance to the ICC."

they risk facing prosecution, the ICC's practice of appointing either common legal representatives or legal representatives from its Office of the Public Council for Victims would be untenable. In accordance with the Statute and the Rules of Procedure and Evidence, the ICC should be prepared to allow victims to choose their legal representative, and in the case of indigent victims (which should be presumed in the case of the victims in this Situation), to do so within the legal aid system.

- Cooperation with the ICC

In order for an investigation into the Situation of Afghanistan and related crimes to be effective, it will require the full cooperation of a range of actors. First and foremost, States Parties to the ICC must be prepared to fulfill their obligations under Part 9 of the Rome Statute, including by providing records and documents, taking evidence, and effectuating the arrest and transfer of persons to the Court.[164] This requirement is particularly important with regards to those States which are themselves the subject of the investigation or are otherwise implicated in the potential crimes identified in the Request, including through participation in the arrest, transfer or detention of victims. International organizations must also stand ready to cooperate with the ICC in the investigation. Both the United Nations and NATO had a significant presence in Afghanistan, and would be in possession of relevant information for the investigation. Part 3 of the "Relationship Agreement between the International Criminal Court and the United Nations" outlines the parameters for cooperation between the ICC and UN, which should be fully adhered to in this case. If the ICC and NATO have not yet entered into a Memorandum of Understanding or other agreement, they should proceed to conclude such an agreement forthwith, guided by the object and purpose of the Court to end impunity.

Recognizing the threats made against ICC personnel and States Parties, the Assembly of States Parties ("ASP") must stand ready to both empower the Court to undertake a robust and challenging investigation (including with adequate financial support) that complies with the highest standards and seeks to ensure the safety of victims, witnesses and Court personnel, and to defend the institution and the fundamental principles of law that undergirds it.[165] When necessary, the ASP should be prepared to execute its powers under Rule 112 (2)(f) to consider questions relating to non-cooperation.

- Threats to civil society, human rights defenders and legal representatives

The Court must ensure that it takes all reasonable steps to protect the safety and security of members of civil society, human rights defenders and legal representatives, including from being subjected to legal measures such as travel bans or criminal prosecutions, resulting from their engagement with ICC proceedings.

164. Indeed, States Parties could provide resettlement to victims currently detained at Guantánamo, thereby making them available to participate in proceedings. *See* ICC. Art. 93 (1)(f) and (7).

165. *See* Statement by the President of the Assembly, O-Gon Kwon, reaffirming support for the ICC, ICC-ASP-20180911-PR1405, 11 September 2018, *available at*: https://www.icc-cpi.int/Pages/item aspx?name=pr1405.