

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/17

Date: 20 November 2017

PRE-TRIAL CHAMBER III

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Chang-ho Chung
Judge Raul C. Pangalangan

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

PUBLIC

**with confidential, *EX PARTE*, Annexes 1, 2A, 2B, 2C, 3A, 3B, 3C, 4A, 4B, 4C, 6,
public Annexes 4, 5 and 7,
and public redacted version of Annex 1-Conf-Exp**

**Public redacted version of "Request for authorisation of an investigation pursuant
to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mrs Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

I.	Introduction	6
II.	Confidentiality	9
III.	Procedural History	9
IV.	Background.....	10
A.	Historical context.....	10
B.	Activities of the Office of the Prosecutor	15
V.	Examination of the information available	18
VI.	Jurisdiction.....	22
A.	Alleged crimes within the jurisdiction of the Court	23
B.	Places of alleged commission of the crimes	24
C.	Time period of alleged commission of the crimes	29
D.	Persons or groups involved	30
1.	Taliban and affiliated armed groups	30
2.	Afghan National Security Forces	37
3.	US armed forces and Central Intelligence Agency	39
VII.	Acts allegedly committed.....	41
A.	Acts allegedly committed by members of the Taliban and affiliated armed groups.....	41
1.	Crimes against humanity	41
a.	An attack directed against any civilian population amounting to a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute	42
b.	Pursuant to or in furtherance of a State or organisational policy... 43	
c.	Widespread or systematic nature of the attack	51
d.	Underlying acts constituting crimes against humanity	52
i.	Murder.....	52
ii.	Imprisonment or other severe deprivation of physical liberty	57
iii.	Persecution.....	58
e.	Nexus between individual acts and the attack	63
2.	War Crimes	63
a.	Classification of the armed conflict.....	64
i.	Degree of organisation of the parties to the armed conflict.....	66
ii.	Level of intensity of the armed conflict	68
b.	Underlying acts constituting war crimes	70
i.	Murder.....	70
ii.	Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities	71

iii.	Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission	71
iv.	Intentionally directing attacks against protected objects	72
v.	Conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities	74
vi.	Killing or wounding treacherously a combatant adversary	75
c.	Existence of a plan or policy or large scale occurrence	76
d.	Nexus between the individual acts and the armed conflict	77
B.	Acts allegedly committed by members of the ANSF	78
1.	War Crimes	78
a.	Classification of the armed conflict	78
b.	Underlying acts constituting war crimes	78
i.	Torture and cruel treatment	78
ii.	Outrages upon personal dignity	84
iii.	Sexual violence	85
c.	Existence of a plan or policy or large scale occurrence	87
d.	Nexus between the individual acts and the armed conflict	87
C.	Acts allegedly committed by members of the US armed forces and members of the CIA	88
1.	War Crimes	90
a.	Classification of the armed conflict	90
b.	Underlying acts constituting war crimes	90
i.	Torture and cruel treatment	90
ii.	Outrages upon personal dignity	100
iii.	Rape and other forms of sexual violence	101
c.	Existence of a plan or policy or large scale occurrence	106
i.	Interrogation policies of the US armed forces	107
ii.	Interrogation policies of the CIA	111
d.	Nexus between the individual acts and the armed conflict	121
D.	Other acts allegedly committed by members of international armed forces	125
VIII.	Admissibility	130
A.	Complementarity	132
1.	National proceedings in Afghanistan	133
a.	Proceedings concerning the alleged crimes committed by members of the Taliban and affiliated armed groups	133

b.	Proceedings concerning the alleged crimes committed by members of the ANSF.....	136
2.	National proceedings in the US	142
a.	Proceedings concerning the alleged crimes committed by members of the US armed forces	144
b.	Proceedings concerning the alleged crimes committed by members of the CIA.....	151
3.	National proceedings in Poland, Romania, Lithuania	161
4.	Conclusion on complementarity	163
B.	Gravity	164
1.	Crimes allegedly committed by members of the Taliban and affiliated armed groups.....	165
2.	Crimes allegedly committed by members of the ANSF.....	168
3.	Crimes allegedly committed by members of the US armed forces and members of the CIA.....	171
IX.	Interests of Justice.....	176
X.	Procedural Issues.....	180
XI.	Relief Requested	181

I. INTRODUCTION

1. The Prosecution requests authorisation from the Pre-Trial Chamber to proceed with an investigation of the situation in the Islamic Republic of Afghanistan (“Afghanistan”) in the period since 1 July 2002, pursuant to article 15(3) of the Rome Statute (“Request”). Specifically, the Prosecution seeks authorisation to investigate 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 and were committed on the territory of other States Parties in the period since 1 July 2002.
2. Afghanistan has experienced more than 35 years of violent conflict, much of which pre-dates the entry into force of the Rome Statute for Afghanistan, which occurred on 1 May 2003. Since that time, the armed conflict in the country has intensified, as an armed insurgency led by the Taliban movement wages a guerrilla-style war against the current Government and the international forces supporting it, in an effort to return to power. As the armed conflict has intensified, the incidence of alleged crimes within the jurisdiction of the International Criminal Court (“ICC” or “Court”) being reported has also increased. Since 2009, when accurate statistical reporting on civilian casualties began, more than 26,500 civilians are reported to have been killed by parties to the armed conflict in Afghanistan. Civilians continue to suffer from a deteriorating security situation in many parts of the country and near daily attacks.
3. Despite the high casualty rate and the large number of crimes reported, the preliminary examination was hampered by a number of challenges, the most significant of which was the difficulty of attributing incidents to

specific armed groups. By the end of 2013, the Prosecution had obtained sufficiently credible and detailed information on approximately 200 incidents that it had prioritised for analysis to reach the conclusion that crimes against humanity and war crimes had been committed. Since that time, the Prosecution has focused on analysing the admissibility of potential cases likely to arise from an investigation of the situation, while continuing to gather and assess information on new alleged crimes that continue to be reported on a nearly daily basis.

4. The information available provides a reasonable basis to believe that members of the Taliban and affiliated armed groups are responsible for alleged crimes committed within the context of the situation, constituting crimes against humanity and war crimes, as part of a widespread and systematic campaign of intimidation, targeted killings and abductions of civilians perceived to support the Afghan Government and/or foreign entities or to oppose Taliban rule and ideology. The information available also provides a reasonable basis to believe that members of the Afghan National Security Forces (“ANSF”), in particular members of the National Directorate for Security (“NDS”) and the Afghan National Police (“ANP”), have engaged in systemic patterns of torture and cruel treatment of conflict-related detainees in Afghan detention facilities, including acts of sexual violence. Finally, the information available provides a reasonable basis to believe that members of United States of America (“US”) armed forces and members of the Central Intelligence Agency (“CIA”) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period.

5. Near total impunity has been the rule, not the exception, for the above crimes. Following decades of war which have decimated state institutions and of continuing abuses against civilians by armed groups wielding power, Afghan warlords and their supporters in the Afghan Parliament passed an amnesty law in 2007 for all crimes committed in connection with the conflict, including war crimes and crimes against humanity. Only more recently have the Criminal Procedure Code and Penal Code been amended to explicitly incorporate Rome Statute crimes and to exempt them from statutes of limitation. In the US, a number of congressional inquiries have revealed previously unknown details of the interrogations conducted by armed forces and by the CIA, while other reviews have been undertaken internally or by the Department of Justice (“DOJ”). Despite this, to the Prosecution’s knowledge, other than a very limited number of cases where the alleged use of interrogation techniques resulted in death in custody, either no national investigations or prosecutions have been conducted or are ongoing in the US against the persons or groups of persons involved in the conduct alleged as set out in this Request and its confidential *ex parte* annexes, or the information available is insufficient to identify the contours of any relevant national proceedings. If the Chamber authorises an investigation into the situation, the Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction pursuant to article 18 of the Statute.
6. In light of the gravity of the acts committed, and the absence of relevant national proceedings against those who appear to be most responsible for the most serious crimes within the situation, the potential cases that would

arise from an investigation of the situation would be admissible. Taking into account the gravity of the crimes and the interests of the victims, there are no substantial reasons to believe that an investigation would not serve the interests of justice.

II. CONFIDENTIALITY

7. This Request is filed confidentially in accordance with regulation 23*bis* of the Regulations of the Court (“Regulations”), due to [REDACTED].¹ [REDACTED].
8. [REDACTED].² [REDACTED].³ [REDACTED].
9. [REDACTED].⁴ The Prosecution simultaneously files a public redacted version of this Request.

III. PROCEDURAL HISTORY

10. By letter of 30 October 2017, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations, of her intention to submit a request for authorisation of an investigation into the situation in the Islamic Republic of Afghanistan pursuant to article 15(3) of the Statute.⁵

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

⁵ *Situation in the Islamic Republic of Afghanistan*, The Presidency, ‘Decision assigning the situation in the Islamic Republic of Afghanistan, 3 November 2017’, ICC-02/17-1, ICC-02/17-1-AnxI.

11. On 3 November 2017, the Presidency of the Court assigned the Situation in the Islamic Republic of Afghanistan to Pre-Trial Chamber III.⁶
12. On 3 November 2017, the Prosecutor submitted a request for extension of the applicable page limit under regulation 38 of the Regulations. The Pre-Trial Chamber granted the request on 9 November 2017.⁷

IV. BACKGROUND

A. Historical context

13. The armed conflict in Afghanistan has its roots in the 1978 *coup d'état* that brought to power the communist People's Democratic Party of Afghanistan ("PDPA"). The PDPA's brief rule was characterised by massive repression, sparking local revolts and mutinies within the army.⁸ These uprisings, together with internal fighting and coups within the government between rival factions, prompted the Union of Soviet Socialist Republics ("USSR"/"Soviet Union"), with whom the PDPA had forged close ties, to invade Afghanistan in December 1979 in order to prop-up its faltering and unpopular client state.⁹ The invasion sparked a nationwide resistance movement among both tribal and urban groups – known collectively as the *mujahideen* – while the ensuing counter-insurgency campaign drove millions of Afghans into exile as refugees, mostly to the neighbouring states of the Islamic Republic of Pakistan ("Pakistan") and

⁶ *Situation in the Islamic Republic of Afghanistan*, The Presidency, 'Decision assigning the situation in the Islamic Republic of Afghanistan, 3 November 2017', ICC-02/17-1.

⁷ *Situation in the Islamic Republic Of Afghanistan*, Pre-Trial Chamber III, 'Decision on the Prosecutor's Request for Extension of the Page Limit', 9 November 2017, ICC-02/17-5.

⁸ See Dorronsoro, G., *Revolution Unending: Afghanistan 1979 to the Present*, (Columbia University Press, 2005); Afghanistan Justice Project, "Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001", 2005, AFG-OTP-0003-0537 ("Dorronsoro, 2005") at 0546-0547.

⁹ Encyclopedia Britannica, "Afghan War", AFG-OTP-0003-1123 ("Britannica").

the Islamic Republic of Iran (“Iran”).¹⁰ Over time, the insurgent groups received significant assistance, notably in the form of weaponry, from the US and other states.¹¹ The USSR withdrew its forces from Afghanistan pursuant to the 1988 Geneva Accords, although the US and the USSR continued to provide military and economic aid to their respective clients, the Afghan Government increasingly relied for its defence on regional militias, paying for their loyalty with Soviet-provided cash and weapons.¹² Following the collapse of the Soviet-backed Government of President Najibullah in 1992, a civil war broke out in Afghanistan between rival *mujahideen* groups.¹³

14. Between 1992 and 1996, Afghanistan’s capital, Kabul, was engulfed in a violent power struggle among rival *mujahideen* groups. These groups engaged in indiscriminate attacks and excessive use of force that left tens of thousands of civilians dead and destroyed large portions of the city.¹⁴ The Taliban (meaning “students” in Pashto) emerged from this period of lawlessness, first taking control of Kandahar, the main city in southern Afghanistan, in 1994.¹⁵ By September 1996 they had captured Kabul,¹⁶ and in 1998, Mazar-i-Sharif, one of the main cities in northern Afghanistan.¹⁷
15. In response to the attacks of 11 September 2001 on Washington D.C. and New York City, on 7 October 2001 the United States launched military

¹⁰ Britannica, AFG-OTP-0003-1123.

¹¹ Britannica, AFG-OTP-0003-1123.

¹² Dorrnsoro, 2005, AFG-OTP-0003-0537 at 0584.

¹³ Dorrnsoro, 2005, AFG-OTP-0003-0537 at 0597.

¹⁴ Dorrnsoro, 2005, AFG-OTP-0003-0537 at 0600. *See also* Human Rights Watch (“HRW”), “Blood Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity”, July 2005, AFG-OTP-0003-1405 at 1524-1536.

¹⁵ Afghanistan Justice Project, “Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001”, 2005 (“Casting Shadows”), AFG-OTP-0003-0537 at 0654.

¹⁶ Casting Shadows, AFG-OTP-0003-0537 at 0655.

¹⁷ Casting Shadows, AFG-OTP-0003-0537 at 0656.

‘Operation Enduring Freedom’ (“OEF”) in Afghanistan. The purpose of the operation was to fight Al Qaeda and the Taliban Government that harboured Al Qaeda and its leadership.¹⁸ As part of the initial phase of the operation, the US organised and armed Afghan anti-Taliban groups operating under the coalition known as the ‘Northern Alliance’. By the end of the year, the Taliban were ousted from power.

16. In order to establish permanent governance institutions, a number of Afghan leaders started talks under the auspices of the UN. The 2-5 December 2001 Bonn Conference resulted in the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the Bonn Agreement.¹⁹ The Bonn Agreement envisaged the Afghan Interim Authority to govern Afghanistan during a six-month period. Hamid Karzai was selected at the Bonn Conference to serve as Chairman of the Interim Authority.²⁰ Another body established by the Agreement, the Emergency *Loya Jirga*,²¹ to be convened within six months of the establishment of the Interim Authority, was mandated to elect a Head of the State for the Transitional Administration, pending the election of a fully representative government to be elected within a further two years; and to approve proposals for the structure of the Transitional Administration and its key personnel.²²

¹⁸ See: “Address to the Joint Session of the 107th Congress”, 20 September 2001, and “Address to the Nation on Operations in Afghanistan”, 7 October 2001, both cited in White House Archive, “Selected Speeches of George W. Bush 2001-2008”, AFG-OTP-0007-2264, at 2337-2339 and 2346-2347.

¹⁹ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 5 December 2001, AFG-OTP-0003-3115.

²⁰ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 5 December 2001, AFG-OTP-0003-3115 at 3116, 3121.

²¹ Literally a “grand assembly” or “grand council,” it is an *ad hoc* gathering of community leaders from across the country.

²² Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Annex I, 5 December 2001, AFG-OTP-0003-3115 at 3116 and 3118.

17. The Bonn Agreement also requested the UN Security Council (“UNSC”) to establish a UN mandated force to assist in the maintenance of security for Kabul and its surrounding areas until the new Afghan security and armed forces were fully constituted and functioning.²³ On 20 December 2001, the UNSC adopted resolution 1386 establishing an International Security Assistance Force (“ISAF”).²⁴ In parallel to the ISAF mission, US forces continued military operations pursuant to OEF against supporters of the Al Qaeda network.

18. In tandem with the process of establishing Afghan governing institutions, the security situation continued to deteriorate, primarily due to the increasing level of insurgency. This was largely attributable to the Taliban movement which began to rebuild its influence starting in 2002.²⁵

19. The three largest anti-government armed groups operating in Afghanistan historically have been the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin (“HIG”). Al Qaeda also remains a focus of military operations by international forces in Afghanistan.²⁶ Since 2015, groups calling themselves Daesh/Islamic State Khorasan Province (“Daesh/ISKP”) have emerged and have been held responsible (or claimed responsibility)

²³ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Annex I, 5 December 2001, AFG-OTP-0003-3115 at 3119.

²⁴ UN Security Council, Resolution 1386, S/RES/1386 (2001), 20 December 2001, AFG-OTP-0004-7472 at 7473.

²⁵ Ruttig, T., “The Other Side: Dimensions of the Afghan Insurgency: Causes, Actors and Approaches to ‘Talks’”, *Afghanistan Analysts Network*, 14 July 2009 (“Ruttig, 2009”), AFG-OTP-0001-0044 at 0049.

²⁶ See e.g. VOA News, “US Attacks Massive Al-Qaida Camps in Southern Afghanistan”, 31 October 2015, AFG-OTP-0003-3307; Lamothe, D., “‘Probably the largest’ al-Qaeda training camp ever destroyed in Afghanistan”, *Washington Post*, 30 October 2015, AFG-OTP-0003-3311; see also Devreaux, R., “Manhunting in the Hindu Kush”, *The Intercept*, 15 October 2015, AFG-OTP-0003-3044.

for a number of attacks against civilians in Kabul as well in Nangarhar province.²⁷

20. The number of international forces deployed to support the Afghan Government peaked at over 100,000 in 2010-2011, the majority of which were US armed forces. Approximately 50 other countries contributed troops to ISAF, including states that are not members of the North Atlantic Treaty Organization (“NATO”). The US-led OEF continued in Afghanistan alongside the NATO-led ISAF mission until the end of December 2014, when both combat missions officially concluded, and were replaced by Operation Freedom’s Sentinel and Operation Resolute Support, respectively.²⁸ The new missions are focused primarily on training, advising and assisting the ANSF, although Operation Freedom’s Sentinel also conducts counter-terrorism operations against the remnants of Al Qaeda. Currently there are approximately 13,500 international forces deployed as part of NATO’s Resolute Support Mission²⁹ and approximately 8,400 U.S. troops (6,900 of which operate as part of the NATO Mission),³⁰ supporting a 352,000-strong ANSF.³¹

²⁷ UNAMA, Afghanistan Mid-Year Report on Protection of Civilians in Armed Conflict: 2015, AFG-OTP-0003-6321 at 6343-6344, 6375 & 6399; *see also* “UNAMA, Afghanistan: Protection of Civilians in Armed Conflict, Mid-Year Report 2017, July 2017”, AFG-OTP-0007-0376 at 0428-0430. UNAMA also refers to “self-identified Daesh/ISKP fighters” who reportedly launched attacks in Sari Pul, Ghor and Jawzjan provinces but with no apparent formal links to Daesh/ISKP in Nangarhar province or the Islamic State of Iraq and the Levant.

²⁸ NATO, “Resolute Support Mission (RSM): Key Facts and Figures”, May 2017, AFG-OTP-0007-1280 at 1280.

²⁹ NATO, “Resolute Support Mission (RSM): Key Facts and Figures”, May 2017, AFG-OTP-0007-1280 at 1281.

³⁰ Department of Defense, “Enforcing Security and Stability in Afghanistan”, June 2017, AFG-OTP-0007-1282, at 1287; NATO, “Resolute Support Mission (RSM): Key Facts and Figures”, May 2017, AFG-OTP-0007-1280 at 1281.

³¹ Department of Defense, “Enforcing Security and Stability in Afghanistan”, June 2017, AFG-OTP-0007-1282, at 1319.

21. Security in Afghanistan has also deteriorated due to the challenge of subordinating the influence of regional leaders and their militias to central government control. Such militias are typically controlled at the local level by individuals responsible for small units covering one or several villages or strategic points. Local commanders are generally loyal to a mid-level commander, who may control a substantial portion of a province and in turn is usually affiliated with a regional entity, party or organisation led by a recognised personality, who have sometimes been labelled as ‘warlords’, ‘powerbrokers’ or ‘strongmen.’³² In 2010, coalition forces sought to regularise some of these groups by providing them with official governmental status under the banner of the ‘Afghan Local Police’ (“ALP”).³³

B. Activities of the Office of the Prosecutor

22. The situation in Afghanistan has been under preliminary examination by the Office of the Prosecutor since 2006. During the course of the preliminary examination, the Prosecution has been in contact with relevant governments and stakeholders, including the Government of Afghanistan and the governments of ISAF troop contributing countries, in order to gather and verify information on alleged crimes, and to examine the existence and genuineness of relevant national proceedings.
23. 29 formal requests for information pursuant to article 15(2) and rule 104 have been made, to which the Prosecution has received 15 responses. The

³² See International Crisis Group, “The Afghan Transitional Administration: Prospects and Perils”, 30 July 2002, AFG-OTP-0003-1696 at 1703.

³³ See *below* para 66.

Prosecution has also received 125 communications pursuant to article 15 in relation to the situation.

24. Since its commencement in 2006, the preliminary examination of the situation in Afghanistan has been hampered by a number of constraints, including security concerns, limited or reluctant cooperation from many stakeholders, and challenges in the verification of information. In particular, although a large number of alleged crimes relevant to the preliminary examination have been reported every year since 2006, significant challenges arose in verifying the seriousness of such allegations in terms of obtaining sufficient information to conduct a proper legal assessment of reported incidents and to attribute potential responsibility.
25. The Prosecution took several steps over the years to overcome such challenges. By the end of 2013, it had obtained sufficiently credible and detailed information on approximately 200 incidents prioritised for analysis to enable a determination that there was a reasonable basis to believe that crimes against humanity and war crimes had been committed. After that date, the publication in December 2014 of US Senate Select Committee on Intelligence Report on the Central Intelligence Agency's Detention and Interrogation Program³⁴ ("Report of the Senate Select Committee on Intelligence" or "Senate Report") brought to light a significant body of additional information on the interrogation programme implemented by the CIA. Since then, the Prosecution has focused on analysing the admissibility of potential cases likely to arise from an

³⁴ Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Declassification Revisions 3 December 2014, AFG-OTP-0003-5696 ("Report of the Senate Select Committee on Intelligence").

investigation of the situation, while continuing to gather and assess information on alleged crimes that continue to be reported on a nearly daily basis.

26. The security situation on the ground, and the limited scope for cooperation from relevant stakeholders, also limited the Office's ability to conduct missions to Afghanistan at the preliminary examination stage in order to meet with potential information-providers. To date, the Office has conducted three missions to Afghanistan: in November 2013, October 2015 and October 2016.
27. The preliminary examination was also hampered by the limited information made available on the scope and progress of relevant national proceedings: in particular those undertaken by the Afghan authorities as well as by the US, a State not party to the Rome Statute. The admissibility assessment has been conducted primarily on the basis of public sources, including information submitted to and reported by United Nations bodies as well as the publicly available results of congressional and DOJ inquiries in the US. Lastly, the announcement by the Prosecutor in November 2016 that she would imminently decide on whether to open investigations prompted the submission of additional information by the Afghan authorities, which was provided in its original Dari and required translation and analysis.
28. Accordingly, the timing of this Request has been determined by the challenges in verifying allegations relating to subject-matter jurisdiction, including *prima facie* attribution, as well as issues related the existence and/or genuineness of relevant national proceedings.

V. EXAMINATION OF THE INFORMATION AVAILABLE

29. The Prosecution has evaluated sources and their information following a consistent methodology based on criteria such as relevance (usefulness of the information to determine the commission of crimes within the jurisdiction of the Court), reliability (trustworthiness of the provider of the information as such), credibility (quality of the information in itself, to be evaluated by criteria of *immediacy*, *internal consistency* and *external verification*), and completeness (the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts). It has endeavoured to corroborate the information provided with information available from reliable open and other sources.
30. Despite the volume of information available, as noted above, the nature of the crimes allegedly committed presented a number of challenges at its preliminary examination, including attribution of incidents to specific armed groups and to the persons or groups of persons who appeared most responsible. This was caused by the multiplicity of anti-government armed groups operating in Afghanistan (see below section VI(D)(1)) and their similar tactics and *modus operandi*: including asymmetrical warfare, hit-and-run tactics, improvised explosive devices ("IEDs") and suicide bombings. The particular operating environment in Afghanistan, for example the joint nature of some military operations (applicable to both anti-government elements and pro-government forces), and the inability of primary sources in many incidents to identify clearly or distinguish between diverse military actors or insurgents, posed additional challenges. Traditional techniques, such as examining an armed group's area of operations or influence, were often not conclusive due to the multiplicity of armed groups vying for influence in many areas at any particular moment in time. Claims of responsibility have sometimes proven to be

false, while denials of responsibility for attacks against civilians have also been common.

31. These challenges were not limited to the Prosecution, but have been encountered by all organisations attempting to gather, verify and document conflict-related data in Afghanistan. As a consequence, many attacks against civilians remain unattributed, although their attribution to “anti-government elements” generally remains possible given their shared tactics and *modus operandi*.
32. In particular, prior to 2008 there was no reliable data on civilian casualties. In 2008, UNAMA began to publish biannual reports on conflict-related civilian casualties, which are widely recognised as providing the best and most comprehensive data on the topic. UNAMA further reported that it had established an electronic database in 2009 to support its analysis and reporting on protection of civilians in armed conflict, to facilitate the systematic, uniform and effective collection and analysis of information, including disaggregation by age, gender, perpetrator (where known), tactic, weapon, and other categories.³⁵
33. With regard to alleged crimes by pro-government forces, the context in which detention-related crimes occurred (e.g. few or no witnesses and use of clandestine or undeclared facilities), made it inherently difficult to gather and verify information. Nonetheless, the Prosecution consulted a variety of national, regional and international sources to prepare this

³⁵ UNAMA, “Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict”, February 2015, AFG-OTP-0003-5419 at 5430-5431 (“UNAMA 2014 Annual Report”).

Request, many of which provided first-hand accounts from victims of the alleged crimes.

34. In this respect, UNAMA public reporting again provided information of unparalleled relevance, reliability, credibility and completeness. Since 2010, UNAMA has implemented a programme of observation of conflict-related detainees in Afghan detention facilities, in cooperation with the Ministry of Interior and the NDS.
35. UNAMA's reported findings were corroborated by the separate detention monitoring programme of the Afghanistan Independent Human Rights Commission ("AIHRC"), by the accounts of detainees interviewed by media sources, such as investigative journalists, and by an Afghan Government fact-finding commission appointed by the President.
36. There is overall consistency in the detailed allegations regarding the conditions of detention and treatment in the detention facilities run by both the ANSF as well as by the US armed forces and the CIA. The Prosecution reviewed accounts given by victims of their alleged ill treatment. In addition, allegations regarding ill treatment at detention facilities run by US armed forces and the CIA were further corroborated by the existence of significant documentary material attesting to the development and use of techniques alleged to have been employed in this treatment. Tens of thousands of pages of such documentary material has been released to the public through Freedom of Information Act ("FOIA") litigation in US courts. The Prosecution has examined US Government documents, memoranda, decisions, internal reports, detainee profiles, combatant status review tribunal summaries, letters and e-mails and used

such material as important documentary sources. In addition, the Prosecution analysed the public findings of two Congressional inquiries that conducted comprehensive reviews of the detention and interrogation practices of the US military and CIA, namely the Senate Committee on Armed Services Inquiry into the Treatment of Detainees in US Custody of 20 November 2008 and the Senate Select Committee on Intelligence Report of 9 December 2014, as well as documents disclosed as part of a civil action brought against two former CIA contract psychologists.

37. In its examination of the information the Prosecution has been mindful of the nature of the proceedings under article 15, the low threshold applicable, as well as the object and purpose of the authorisation procedure decision.³⁶ Moreover, the Prosecution's limited powers at the preliminary examination stage have inevitably restricted the scope of its findings set out in this Request. While the Prosecution has been able to determine that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed by members of the main parties to the conflict, it has not been able, nor is it required, to come to a determination on all allegations received.
38. In any event, the above considerations do not alter the Prosecution's conclusion that an investigation into the situation in Afghanistan is warranted. Indeed, should the Pre-Trial Chamber's decide to authorise an investigation under article 15(4), this should not limit the Prosecution's investigation into

³⁶ *Situation in Kenya*, Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", [ICC-01/09-19-Corr](#), 31 March 2010, paras. 17-18, 32 ("Kenya Article 15 Decision"); *Situation in the Republic of Côte d'Ivoire*, Pre-Trial Chamber III, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", [ICC-02/11-14-Corr](#), 15 November 2011, para. 21 ("Côte d'Ivoire Article 15 Decision"); *Situation in Georgia*, Pre-Trial Chamber I, "Decision on the Prosecutor's request for authorization of an investigation", [ICC-01/15-12](#), 27 January 2016 ("Georgia Article 15 Decision"), para. 3.

only the specific crimes set out in this Request; rather, the Prosecution should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation.³⁷ In particular, the situation in Afghanistan is one in which crimes allegedly continue to be committed on a near daily basis, by a wide range of armed actors, including some newly emerging entities, both in support of and against the Government. Accordingly, if an investigation is authorised, the Prosecution should be permitted to expand or modify its investigation with respect to the acts identified in this Request or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.³⁸

VI. JURISDICTION

39. Pursuant to regulation 49 of the Regulations, the Prosecution sets out in this Request information in relation to: (i) the crimes believed to have been committed and a statement of the facts which provide a reasonable basis to believe that such crimes have been committed, and (ii) the Prosecutor's declaration with reasons for why the listed crimes fall within the jurisdiction of the Court.
40. The Prosecution also appends to the Request (a) a chronology of relevant events (public Annex 5); (b) maps showing relevant information, including the location of the alleged crimes in Afghanistan (public Annex 4, and confidential *ex parte* Annexes 4A - 4C); and (c) an explanatory glossary of relevant names of persons, locations and institutions (public Annex 7).

³⁷ [Kenya Article 15 Decision](#), paras. 74-75; [Georgia Article 15 Decision](#), para. 63.

³⁸ [Georgia Article 15 Decision](#), para. 64.

41. As noted above, due to the very large number of conflict related crimes reportedly occurring on the territory of Afghanistan since May 2003 and the territories of other States Parties since July 2002, and the multiplicity of armed groups and forces, the alleged crimes identified in this Request and its confidential *ex parte* annexes represent only the most prevalent and well-documented allegations. Accordingly, the Prosecution has selected 203 incidents for inclusion in confidential *ex parte* Annexes 2A to 2C, which aim to reflect the gravest incidents and the main types of victimisation occurring within the scope of the situation.

A. Alleged crimes within the jurisdiction of the Court

42. As set out more fully in Section VII, on the basis of the information available, and without prejudice to other possible crimes within the jurisdiction of the Court that may be identified during the course of an investigation, there is a reasonable basis to believe that, at a minimum, the following crimes against humanity have been committed: murder (article 7(1)(a)), imprisonment or other severe deprivation of physical liberty (article 7(1)(e)) and persecution against an identifiable group or collectivity on political and gender grounds (article 7(1)(h)); and the following war crimes have been committed: murder (article 8(2)(c)(i)); cruel treatment and torture (article 8(2)(c)(i)); outrages upon personal dignity, in particular humiliating and degrading treatment (article 8(2)(c)(ii)); intentionally directing attacks against civilians (article 8(2)(e)(i)); intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission (article 8(2)(e)(iii)); intentionally directing attacks against protected objects (article 8(2)(e)(iv)); rape and other forms of sexual violence (article 8(2)(e)(vi));

using, conscripting or enlisting children under the age of fifteen years (article 8(2)(e)(vii)), and killing or wounding treacherously a combatant adversary (article 8(2)(e)(ix)).

B. Places of alleged commission of the crimes

43. The above crimes are alleged to have been committed on the territory of Afghanistan, in all 34 of Afghanistan's provinces. Kandahar and Helmand appear to be the most affected provinces, with a high degree of conflict-related violence throughout the relevant time period. While from 2003 to 2008, the insurgency was mostly confined to the south and south-eastern regions of Afghanistan, since 2009, anti-government armed groups have expanded their influence to some of the provinces surrounding Kabul (in particular Wardak and Logar), as well as some provinces in the north (in particular Kunduz, Baghlan, Badakhshan, Balkh, Faryab, and Jawjzan).³⁹ Of the 203 incidents listed in confidential *ex parte* Annexes 2A-C, approximately 20% occurred in Kandahar province and 20% in Kabul province, with the remainder spread relatively evenly throughout the rest of the country. US military detention facilities were set up at Bagram Airfield (near Kabul) and across six provinces in south-eastern Afghanistan.⁴⁰
44. Since Afghanistan is a State Party, the Court may exercise jurisdiction over all alleged crimes committed on Afghan territory since 1 May 2003, irrespective of the nationality of the accused.⁴¹ In particular, article 12(2)(a)

³⁹ See Annex 4 (Map of Afghanistan).

⁴⁰ See confidential *ex parte* Annex 4C.

⁴¹ See *contra* U.S. Congressional finding 22 U.S. Code § 7421 (2 August 2002), AFG-OTP-0007-2197at para. 11; Office of General Counsel, United States Department of Defense, *Law of War Manual*, p.1110, Sec. 118.20.3.1 (2015). See similarly D. Scheffer. 'The United States and the

provides that the Court may exercise its jurisdiction over crimes referred to in article 5 if the “State on the territory of which the conduct in question occurred” is a Party to the Statute or has accepted the Court’s jurisdiction by a declaration lodged under article 12(3). Thus, since the alleged crimes identified in this Request have been committed on the territory of a State Party to the Rome Statute, the Court has territorial jurisdiction over these alleged crimes, regardless of whether the alleged suspects are nationals of a State Party.⁴² This deliberate formulation in article 12 contrasts with paragraph 5 of article 15*bis* with respect to the crime of aggression, which expressly excludes ICC jurisdiction with respect to a national of a State that is not a party to the Rome Statute.

45. The Rome Statute is not unique among treaty regimes in envisaging the exercise of criminal jurisdiction by a party to a treaty over the nationals of another State. Similar bases for the exercise of criminal jurisdiction are provided for in numerous multilateral conventions, including with regard to slavery, piracy, genocide, apartheid, counterfeiting of currency, war crimes (grave breaches of the Geneva Conventions), drug trafficking,

International Criminal Court’ 93 *AJIL* 1 (1999), pp.12—22; R. Wedgwood, ‘The International Criminal Court: An American View’, 10 *EJIL* (1999) pp. 93-107; M. Morris, ‘High Crimes and Misconceptions: The ICC and Non-party States’, 64 *Law & Contemporary Problems* (2001), pp.13-66.

⁴² See generally, D Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’, *Jrnl Int’l Crim Justice* 1 (2003), pp. 618-650; G. Danilenko, ‘ICC Statute and Third States’, in A. Cassese, P. Gaeta & J. Jones eds., *The Rome Statute Of The International Criminal Court: A Commentary*, (2002), pp. 1871-1897; F. Megret, ‘Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution of International Law’, 12 *Eur. J. Int’l L.* pp. 247-268 (2011); M. Scharf, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position’, 64 *L. & Contemp. Probs.* (2001), pp.67-118; G. Hafner *et al.*, ‘A Response to the American View as Presented by Ruth Wedgwood’, 10 *EJIL* (1999), pp. 108-123; B. Brown, ‘U.S. Objections to the Statute of the International Criminal Court: A Brief Response’, 31 *NYU J. Int’l L. & Pol.* (1999), pp. 855-891; E. La Haye, ‘The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction’ (1999) 46 *Neth. Int’l Law Rev* (1999), pp. 1-25. See also W. Schabas and G. Pecorella, ‘Article 12’, in O. Triffterer/K. Ambos eds., *The Rome Statute of the International Criminal Court, A Commentary*, (C.H. Beck/Hart/Nomos, 3rd ed., 2016), p. 678 at mn.10.

hijacking and sabotage of aircraft, sabotage on the High Seas, attacks on diplomats, the taking of hostages, and torture.⁴³ Those treaty regimes do not exclude nationals of States that are not parties to the relevant treaty. Indeed, such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole.⁴⁴ Nor is the conferral or delegation of jurisdiction by a party to a treaty to an international jurisdiction in itself novel, this already having been the basis for the establishment of the Nuremberg Tribunal.⁴⁵

46. Moreover, the conclusion of an agreement pursuant to article 98 of the Statute between the Government of Afghanistan and a third State does not impact on the exercise of jurisdiction by the Court. This is because article 98, which falls within Part 9 of the Statute, serves to qualify the cooperation obligations of States Parties concerning the surrender of persons sought by the Court, not the exercise of jurisdiction by the Court, which is regulated in Part 2. Indeed, the very purpose of article 98 is to

⁴³ See art.3, [Convention to Suppress the Slave Trade and Slavery](#) (1926); art.14-22, [Convention on the High Seas](#) (1958); art.100-107, [United Nations Convention on the Law of the Sea](#) (1982); art.6, [Convention on the Prevention and Punishment of the Crime of Genocide](#) (1948); art.4, [International Convention on the Suppression and Punishment of the Crime of Apartheid](#) (1973); art.49, [Geneva Convention \(I\) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field](#) (1949); art.50, [Geneva Convention \(II\) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea](#) (1949); art.129, [Geneva Convention \(III\) relative to the Treatment of Prisoners of War](#) (1949); art.146, [Geneva Convention \(IV\) relative to the Protection of Civilian Persons in Time of War](#) (1949); art.36(2)(iv) [Single Convention on Narcotic Drugs](#) (1961); art.4, [Convention for the Suppression of Unlawful Seizure of Aircraft](#) (1970); art.5 [Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation](#) (1971); art.3, [Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents](#) (1973); art.5, [Convention Against the Taking of Hostages](#) (1979); art.5, [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (1984); art.4 [Convention against the Illicit Traffic in Narcotic Drugs](#) (1988); art.6, [Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#) (1988); art.2, art.15, [Convention against Transnational Organized Crime](#) (2001).

⁴⁴ See e.g. *United States v List (Wilhelm) and ors (Hostage Case)*, [Judgment](#), 19 February 1948, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2*, 1241. See also Preamble, ICC Statute, paras. 3 and 6.

⁴⁵ *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, [Judgment](#), p. 52 (p.444 in original).

regulate how the Court's exercise of jurisdiction should be enforced.⁴⁶ Similarly, the conclusion of a Status of Forces Agreement ("SOFA") by which Afghanistan has ceded exclusive criminal jurisdiction to a sending State with respect to alleged crimes committed by that sending State's nationals on Afghan soil does not affect the Court's jurisdiction.⁴⁷ In fact, this might constitute a relevant ground for admissibility in view of the resultant inaction, or otherwise unwillingness or inability, of the territorial State to exercise criminal jurisdiction with respect to a particular category of persons or groups.

47. Finally, the Prosecution observes that a suspect is not required to be physically present in the territory of a State Party when a crime is committed for the Court to be able to exercise jurisdiction over his or her conduct, as long as the crime imputed to the suspect occurred within the confines of such territory. As the Appeals Chamber has stated in the context of admissibility, in respect of conduct giving rise to criminal responsibility, where the suspect is not alleged to have committed the crime as a physical perpetrator, the conduct that forms the basis of a criminal case is both that of the suspect him or herself as well as the

⁴⁶ See R. Rastan, 'Jurisdiction', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2016), 162.

⁴⁷ See M. Newton ['How the International Criminal Court Threatens Treaty Norms'](#), 49 *Vand. J. Transnat'l L.* (2016), pp. 371-431, arguing that since Afghanistan has concluded SOFAs consenting to the exclusive exercise of criminal jurisdiction by sending States over their nationals on Afghan soil, Afghanistan has therefore ceded its jurisdictional title over such nationals and as such cannot delegate to the ICC something which it itself does not possess. However, while a SOFA might constitute a decision by a State not to exercise its enforcement jurisdiction, such an agreement does not extinguish a State's prescriptive and adjudicative jurisdiction, which serve as inherent attributes of State sovereignty; see e.g. *Island of Palmas Case (Netherlands, U.S.)*, Permanent Court of Arbitration, 4 April 1928, [Reports of International Arbitral Awards](#), Vol. II, p. 838. See similarly R. O'Keefe, ['Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"'](#), 49 *Vand. J. Transnat'l L.* (2016), pp. 433-441; C. Stahn, ['Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton'](#), 49 *Vand. J. Transnat'l L.* (2016), pp. 443-454.

underlying criminal conduct of other direct perpetrators that are imputed to the suspect.⁴⁸ A suspect's own role or conduct may thus be geographically and temporarily removed from the territory where the crime occurs, as long as the underlying conduct which is imputed to the suspect occurs within the Court's jurisdiction. As such, forms of attribution are not dependent on proximity: a suspect may be wholly outside of a State's territory when, for example, committing a crime through or with another person or persons, or ordering its commission, or otherwise facilitating its commission by aiding and abetting – he or she can still be held criminally responsible under the Statute if all of the material elements of the underlying criminal conduct which is imputed to the suspect occurs within the Court's jurisdiction.⁴⁹

48. In any event, the question of the attribution of specific conduct to specific suspects in the context of charges brought forward for prosecution can only be determined after an investigation into the situation and therefore remains speculative at this stage.
49. In addition, a limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Romania and Lithuania, which are all parties to the Statute. In particular, from 2002-2008, individuals allegedly participating in the armed conflict in Afghanistan, such as members of the Taliban or Al Qaeda, Hezb-e-Islami Gulbuddin and other militant groups, were

⁴⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, [ICC-01/11-01/11-547-Red](#), 21 May 2014, para. 62.

⁴⁹ In the case of a physical perpetrator, recourse could also be made, if required, to the objective application of the territorial principle, which provides jurisdiction over a crime that culminates within a forum State, even if not begun there.

allegedly transferred to clandestine CIA detention facilities located in those countries and are alleged to have been subjected to acts constituting crimes within the jurisdiction of the Court. Since such crimes were allegedly committed in the context of and associated with the armed conflict in Afghanistan,⁵⁰ they are sufficiently linked to and fall within the parameters of the present situation.⁵¹

C. Time period of alleged commission of the crimes

50. The crimes allegedly committed on the territory of Afghanistan in the period since 1 May 2003 fall within the Court's jurisdiction *ratione temporis* since Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003 and the Statute entered into force for Afghanistan on 1 May 2003.
51. In relation to the crimes that took place in the context of and were associated with the armed conflict in Afghanistan that were allegedly committed on the territory of other States Parties (namely, Poland, Romania and Lithuania), the Statute entered into force for Poland and Romania on 1 July 2002 and for Lithuania on 1 August 2003.
52. Accordingly, the situation for which the Prosecutor seeks authorisation encompasses not only alleged crimes committed in Afghanistan since 1 May 2003, but also other alleged crimes that have a nexus to the armed

⁵⁰ *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#), 23 March 2016, (“Ongwen Confirmation Decision”), para. 107.

⁵¹ [Georgia Article 15 Decision](#), para. 64.

conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties since 1 July 2002.⁵²

D. Persons or groups involved

1. Taliban and affiliated armed groups

53. A wide range of anti-government armed groups operate in Afghanistan, and their relationship is not always apparent. For the purpose of this Request, the Prosecution has focussed its analysis on members of the Taliban and their affiliated Haqqani Network, who appear most responsible for the largest number of serious crimes committed by anti-government armed groups.
54. In this context, the term “anti-government armed groups” or “anti-government elements,” refers to all armed groups – including but not limited to those named above – engaged in hostilities against the Government of Afghanistan and its supporters. The term “Taliban affiliate” refers to armed groups allied and operating jointly with the Taliban. For the reasons explained below, this refers principally to the Haqqani Network.⁵³ Bearing in mind the early stage of these proceedings and the nature of insurgent operations in Afghanistan, the affiliation of other groups with the Taliban, such as Al Qaeda, would need to be examined further in the context of any authorised investigation.

⁵² [Georgia Article 15 Decision](#), para. 64.

⁵³ The term “Taliban affiliate” also includes Taliban factions or networks that the Prosecution currently considers to fall within the Taliban organisational structure although conflicting information exists regarding the degree of functional autonomy exercised by such networks (such as the Mullah Dadullah Front or the Abdul Latif Mansur network), as well as any other armed groups that the Prosecution may identify in the future as allied and operating jointly with the Taliban, in the course of an authorised investigation.

55. The Taliban is the largest anti-government armed group in Afghanistan. Since their ouster in 2001, the Taliban view themselves as a government-in-exile and have waged an armed insurgency against the Afghan Government and international forces. According to some estimates, the Taliban may have as many as 60,000-70,000 individuals working for them, including 20,000-30,000 full-time and part-time fighters, as well as clerics, recruiters, judges, tax collectors and other political representatives.⁵⁴ Their traditional strongholds are in the south of Afghanistan, in particular Kandahar and Helmand provinces.
56. For most of the period covered in this Request, the overall leader of the Taliban was Mullah Mohammed Omar (now deceased). Mullah Akhtar Mansoor succeeded him in this position since at least July 2015, until May 2016.⁵⁵ Mullah Akhtar Mansoor was subsequently killed by an airstrike and Mullah Haibatullah Akhundzada was named as his successor on 25 May 2016.⁵⁶ He presides over the Taliban's central decision-making body, the *Rahbari Shura* (Leadership Council), more often dubbed the *Quetta Shura* (Quetta being the city in Pakistan where the highest ranking Taliban leaders resided for many years after their ouster from political power in

⁵⁴ Giustozzi, A., "Negotiating with the Taliban: Issues and Prospects", *The Century Foundation*, 2010 ("Giustozzi, 2010"), AFG-OTP-0003-1265 at 1269; Dawi, A., "Despite Massive Taliban Death Toll No Drop in Insurgency", *Voice of America*, 06 March 2014, AFG-OTP-0003-3305 at 3306, which refers to numbers of Taliban deceased.

⁵⁵ Voice of Jihad (Islamic Emirate of Afghanistan) [official website published by the Taliban], "Declaration of the Leading Council of the Islamic Emirate regarding the appointment of new Amir (leader) of the Islamic Emirate", 30 July 2015, AFG-OTP-0003-6691 at 6692; Associated Press, "Afghan Taliban praise new leader as rift in ranks appears", 31 July 2015, AFG-OTP-0003-0708 at 0709-0710.

⁵⁶ Voice of Jihad (Islamic Emirate of Afghanistan), "Statement by the Leadership Council of Islamic Emirate regarding the martyrdom of Amir ul Mumineen Mullah Akhtar Muhammad Mansour and the election of the new leader", 13 June 2016, AFG-OTP-0006-0059 at 0061; Qazi, S., "Afghan Taliban: Haibatullah Akhundzada named new leader", *Al Jazeera*, 26 May 2016, AFG-OTP-0006-0009; Osman, B., "Taliban in Transition: How Mansur's death and Haibatullah's ascension may affect the war (and peace)", *Afghanistan Analysts Network*, 27 May 2016, AFG-OTP-0006-0012 at 0016.

Afghanistan in 2001). Most have since re-located to other Pakistani cities.⁵⁷ The *Quetta Shura* is estimated to include at least 10-12 Taliban commanders.⁵⁸ The command structure is further divided into four regional military councils responsible for military operations in different regions of Afghanistan. Further information on the organisational structure of the Taliban is provided below in Section VII(A)(1).⁵⁹

57. The second largest anti-government armed group is known as the 'Haqqani Network', a group of militants active in south-eastern Afghanistan and in the Federally Administered Tribal Areas in Pakistan. The Haqqani Network works more closely with foreign militant groups, including Al Qaeda, than does the Taliban.⁶⁰ Their fighters are estimated to number between 10,000 - 15,000 persons.⁶¹
58. The Haqqani Network had claimed allegiance (though not subservience) to Mullah Mohammed Omar.⁶² The group's leader, Sirajuddin Haqqani, is reportedly also a member of the Taliban's Leadership Council, and the Taliban's regional military council responsible for south-eastern

⁵⁷ Shahid, S., "Quetta-based Taliban move to Karachi", *The Nation*, 30 April 2009, AFG-OTP-0003-2989.

⁵⁸ Siddique, A., "The Quetta Shura: Understanding the Afghan Taliban's Leadership", *Terrorism Monitor*, Vol. 12, Issue 4 (2014), AFG-OTP-0003-3012 at 3016; Ruttig, 2009, AFG-OTP-0001-0044 at 0058; Nijssen, S., "The Taliban's Shadow Government in Afghanistan", *Civil-Military Fusion Centre*, September 2011 ("Nijssen, 2011"), AFG-OTP-0003-0916 at 0917; Roggio, B., "The Afghan Taliban's top leaders", *The Long War Journal*, 23 February 2010 ("Roggio, 2010"), AFG-OTP-0005-3331, at 3331-3334.

⁵⁹ See below paras. 77-84.

⁶⁰ Dressler, J., "The Haqqani Network: From Pakistan to Afghanistan", *Institute for the Study of War*, October 2010 ("Dressler, 2010"), AFG-OTP-0003-2038 at 2043, 2055-2058 ("Institute for the Study of War, The Haqqani Network: From Pakistan to Afghanistan"); Ressler, D. and Brown, V., "The Haqqani Nexus and the Evolution of al-Qa'ida", *Combating Terrorism Center*, 14 July 2011, AFG-OTP-0003-1015 at 1019-1020, 1056, ("CTC, Haqqani Nexus and Evolution of al-Qa'ida").

⁶¹ CTC, Haqqani Nexus and Evolution of al-Qa'ida, AFG-OTP-0003-1015 at 1024.

⁶² Haqqani Network, 4 May 2012, AFG-OTP-0002-2340 at 2341; Giustozzi, 2010, AFG-OTP-0003-1265 at 1278-1279.

Afghanistan is largely controlled by the Haqqani Network.⁶³ In July 2015, Sirajuddin Haqqani was appointed as one of the Taliban's two deputies under Mullah Akhtar Mansoor; he has retained this position following the appointment of Mullah Haibatullah Akhundzada as leader of the Taliban.⁶⁴ Thus, while the Haqqani Network appears to bear a certain degree of functional autonomy from the Taliban Leadership Council, the two groups are closely allied and cooperate militarily, including through joint operations, especially in and around Kabul. The alliance allows the Taliban to project influence in a region beyond their traditional strongholds, while providing the Haqqanis with the Taliban label, as the most popular insurgent organisation.⁶⁵ The nature of the alliance between the Taliban and the Haqqani Network, which extends to the highest leadership levels of both organisations, indicates shared ideology and policies, as well as joint planning and execution of military operations, at both the strategic (national) level and at the tactical level for specific attacks. For these reasons, the Haqqani Network can be considered affiliated with the Taliban, based on the information currently available. Further information on the organisational structure of the Haqqani Network is provided below in Section VII(A)(1).⁶⁶

59. The Prosecution also provides below a brief overview of two other armed groups, HIG and Al Qaeda, and their relationships to the Taliban and

⁶³ See e.g., Roggio, 2010, AFG-OTP-0005-3331; CTC, Haqqani Nexus and Evolution of al-Qa'ida, AFG-OTP-0003-1015 at 1029-1030.

⁶⁴ Voice of Jihad (Shahamat English), "Declaration of the Leading Council of the Islamic Emirate regarding the appointment of new Amir (leader) of the Islamic Emirate", 31 July 2015, AFG-OTP-0003-6691 at 6692; Voice of Jihad (Islamic Emirate of Afghanistan), "Statement by the Leadership Council of Islamic Emirate regarding the martyrdom of Amir ul Mumineen Mullah Akhtar Muhammad Mansour and the election of the new leader", 13 June 2016, AFG-OTP-0006-0059 at 0061.

⁶⁵ Ruttig, 2009, AFG-OTP-0001-0044 at 0054.

⁶⁶ See below paras. 85-86.

Haqqani Network. Although the alleged crimes committed by HIG and Al Qaeda do not form the focus of this Request, they are referred to below when analysing the contextual elements for war crimes.

60. Historically the third largest anti-government armed group, HIG is led by Gulbuddin Hekmatyar. It was estimated to have several thousand fighters.⁶⁷ HIG has historically been an enemy of the Taliban since the emergence of the latter in 1994, and this appears to be the case today, although they were allied from 2001-2007.⁶⁸ Relations deteriorated thereafter due to Hekmatyar's insistence that his troops remain independent of the command of the *Quetta Shura* (Taliban Leadership Council).⁶⁹ Today there is deep distrust between HIG and the Taliban, largely stemming from HIG's relations with the Afghan Government.⁷⁰ They fought each other openly in Wardak, Logar and Baghlan provinces in 2010 and 2011.⁷¹ HIG is thus not considered a Taliban affiliate for the purposes of this Request. There was nonetheless occasional tactical cooperation between HIG and Taliban commanders at the local level, and a small number of alleged crimes identified by the Prosecution in the north-eastern region of the country and in Kabul appear to have been

⁶⁷ B. Roggio, "FDD's Long War Journal - Taliban, HIG infighting leads to split in Afghan insurgency in the North" 8 March 2010, AFG-OTP-0007-3368 at 3368. *See also* International Crisis Group, "The Insurgency in Afghanistan's Heartland", 27 June 2011 ("ICG, 2011"), AFG-OTP-0002-2204 at 2223.

⁶⁸ Ruttig, 2009, AFG-OTP-0001-0044 at 0055; ICG, 2011, AFG-OTP-0002-2204 at 2228-2229.

⁶⁹ ICG, 2011, AFG-OTP-0002-2204 at 2229.

⁷⁰ Giustozzi, A. and Reuter, C., "The Insurgents of the Afghan North", *Afghanistan Analysts Network*, April 2011, AFG-OTP-0003-0028 at 0049. *See also* Ruttig, T., "Bomb and Ballot: The many strands and tactics of Hezb-e-Islami", *Afghanistan Analysts Network*, 19 February 2014, AFG-OTP-0004-7666.

⁷¹ Gopal, A. and DuPee, M., "Tensions Rise Between Hizb-i-Islami and the Taliban in Afghanistan", *Combating Terrorism Center*, 1 August 2010, AFG-OTP-0003-1095, at 1114-1117; ICG, 2011, AFG-OTP-0002-2204 at 2229-2230.

committed during joint Taliban-HIG operations.⁷² Due to difficulties in attributing specific incidents, the limited size and reach of this armed group in Afghanistan, and the reasons explained previously in Section V, none of the potential cases identified for the purpose of this Request are attributed to HIG.⁷³ Further information on the organisational structure of HIG is provided below in Section VII(A)(2).

61. Al Qaeda is a much smaller organisation than the three groups mentioned above, but has nonetheless played a prominent role in the armed conflict. Until his death in 2011, Osama bin Laden was Al Qaeda's leader – a function referred to as the *Amir*. Ayman al-Zawahiri took over this position after Osama bin Laden's death, having served as his deputy since at least 1998.⁷⁴ The terms Al Qaeda 'core' or Al Qaeda 'central' are used to differentiate between the historic group (and its eventual replacement) operating from Afghanistan and later from the Federally Administered Tribal Areas region in Pakistan, as distinct from other 'franchise' groups such as Al-Qaeda in the Arabian Peninsula or others claiming to act on behalf of Al-Qaeda or its ideology.⁷⁵

⁷² See "Report of the Secretary-General on children and armed conflict in Afghanistan", U.N. Doc. S/2008/695, 10 November 2008, AFG-OTP-0001-2203 at 2211; Asian Centre For Human Rights, "South Asia Human Rights Index 2008", AFG-OTP-0002-0009 at 0174; [REDACTED].

⁷³ In 2016, UNAMA attributed 7 civilians injured to Hezb-i-Islami, UNAMA 2016 Annual report, AFG-OTP-0006-3441 at 3454 (fn25) and at 3497 (fn182).

⁷⁴ ICG, 2011, AFG-OTP-0002-2204 at 2228, fn. 163; Ould Mohamedou, M., *Understanding Al Qaeda: Changing War and Global Politics*, (Pluto Press, 2011), AFG-OTP-0007-2212 at 2218-2219, and 2220.

⁷⁵ Intelligence and Security Committee, "Report into the London Terrorist Attacks on 7 July 2005", AFG-OTP-0007-0567 at 0597, paras. 98-99. More recently, some analysts have referred to this entity or components of this entity as al-Qaeda Senior Leadership (AQL). See Sude, B., "Assessing al-Qaeda Central's Resilience," CTC Sentinel, vol.8, issue 9, September 2015, AFG-OTP-0007-0469 at 0479-0482.

62. The relationship between Al Qaeda and the Taliban leadership remains ambiguous, and has fluctuated over time.⁷⁶ On the one hand, Taliban leaders have reportedly characterised their relations with Al Qaeda as an alliance that is fundamental to their overall mission of installing an Islamic Emirate in Afghanistan, and have acknowledged Al Qaeda's role as a force multiplier, providing the Afghan insurgency with technical advice, training, weapons, propaganda and communications capabilities and funding.⁷⁷ Al-Zawahiri reportedly renewed his pledge of allegiance to Mullah Omar after the death of Osama bin Laden in 2011 (a pledge originally given by Osama bin Laden in 1999).⁷⁸ On the other hand, while fighters from the two groups cooperate on a tactical level, Al Qaeda and the Taliban have diverged strategically since 2001. For example, whereas Al Qaeda is determined to bring about a pan-Muslim jihad, the Taliban are not interested in fighting outside of Afghanistan's borders.⁷⁹ The affiliation between the two groups would need to be examined on a case-by-case basis. Based on these considerations, the limited size and reach of the Al Qaeda group, as well as the difficulties in attributing specific incidents to this group, none of the potential cases identified for the purpose of this Request are attributed to members of Al Qaeda. Further information on

⁷⁶ See CTC, Haqqani Nexus and Evolution of al-Qa'ida, AFG-OTP-0003-1015 at 1045-1055; Linschoten, A.S. and Kuehn, F., "Separating the Taliban from al-Qaeda: The Core of Success in Afghanistan", *New York University Center on International Cooperation*, February 2011, AFG-OTP-0003-2173 at 2181-2185; "Report of the Analytical Support and Sanctions Monitoring Team pursuant to Security Council resolutions 1267 (1999), 1988 (2011) and 1989 (2011) concerning linkages between Al-Qaida and the Taliban as well as other individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan", U.N. Doc. S/2011/790, 21 December 2011, AFG-OTP-0003-3124 at 3127-3128.

⁷⁷ ICG, 2011, AFG-OTP-0002-2204 at 2227-2228.

⁷⁸ Zahid, F., "Islamic State in Afghanistan Ready to Capitalize on Mullah Omar's Death", *Terrorism Monitor*, Vol. 13, Issue 18, 3 September 2015, AFG-OTP-0003-3009 at 3010; Brown, V., "The Facade of Allegiance: Bin Ladin's Dubious Pledge to Mullah Omar", *CTC Sentinel*, Vol. 3, Issue 1 (January 2010), AFG-OTP-0003-1089; ICG, 2011, AFG-OTP-0002-2204 at 2228.

⁷⁹ ICG, 2011, AFG-OTP-0002-2204 at 2227-2228.

the organisational structure of Al Qaeda is provided below in Section VII(A)(2).⁸⁰

63. For similar reasons, the conduct of members of other anti-government armed groups operating in Afghanistan are not addressed in this Request. These include the Lashkar-i Taiba, the Tehrik-e Taliban Pakistan (also referred to as the ‘Pakistani Taliban’), and Daesh/ISKP.⁸¹ As noted above, since 2016, Daesh/ISKP has reportedly conducted an increasing number of attacks against civilians, including a complex attack on the Mohammad Sardar Daud Khan military hospital in Kabul on 8 March 2017 that caused the death of 22 civilians, and a joint attack with Taliban elements against Mirza Olang village in Sayyad district, Sari Pul province, on 3 August 2017 that resulted in the killing of at least 36 persons (both civilians and persons *hors de combat*).⁸² If an investigation is authorised, these and other incidents could be subjected to proper investigation and analysis.

2. Afghan National Security Forces

64. The ANSF, also known as Afghan National Defense and Security Forces, consist of the Afghan armed forces, including the Afghan National Army (“ANA”) and Afghan Air Force (“AAF”), the ANP, the ALP and the NDS.

⁸⁰ See below paras. 133-134.

⁸¹ In 2016, UNAMA attributed four civilian deaths to Lashkar-i Taiba, and 12 civilian casualties (8 deaths and 4 injured) to Tehrik-e Taliban Pakistan, UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3454, fn. 25 and at 3497, fn. 182.

⁸² UNAMA, Protection of Civilians in Armed Conflict, Midyear Report 2017, AFG-OTP-0007-0376, at 0399-0400; UNAMA, Special Report, Attacks in Mirza Olang, Sari Pul Province: 3-5 August 2007, AFG-OTP-0007-0364.

65. The Ministry of Defence controls the ANA, the main branch of the Afghan armed forces, responsible for ground warfare.⁸³ The Ministry of Interior controls the ANP, which is responsible for maintaining law and order and deals with both ordinary and conflict-related crimes.⁸⁴
66. In mid-2010, President Karzai established the ALP as a temporary, community-based defence initiative designed to protect rural communities from anti-government armed groups, through the recruitment of local individuals into an armed group with oversight from the Ministry of Interior.⁸⁵ The ALP program is also designed as a means to regularise locally established self-defence groups by placing them under the control of the central government.⁸⁶ The ALP cannot operate outside of their home district⁸⁷ and their security duties do not formally include law enforcement tasks, including arrest or investigative powers, unless requested by official police authorities.⁸⁸ As such they are not a formal police force.⁸⁹ At the district level, the ALP reports to the district chief of police.⁹⁰ The ALP is over 20,000 strong.⁹¹

⁸³ Institute for the Study of War, “Afghanistan National Army (ANA)”, AFG-OTP-0006-0071 at 0071.

⁸⁴ Touch Point, “The Organization and Structure of the Afghan National Police”, February 2014, AFG-OTP-0006-0076 at 0076.

⁸⁵ Touch Point, “The Organization and Structure of the Afghan National Police”, February 2014, AFG-OTP-0006-0076, at 0089; HRW, “Just Don’t Call It a Militia”, September 2011, AFG-OTP-0002-3995 at 4054; NATO, “Afghan National Security Forces – ANSF”, AFG-OTP-0007-0660, at 0660.

⁸⁶ HRW, “Just Don’t Call It a Militia”, September 2011, AFG-OTP-0002-3995 at 4056.

⁸⁷ HRW, “Just Don’t Call It a Militia”, September 2011, AFG-OTP-0002-3995 at 4056.

⁸⁸ Touch Point, “The Organization and Structure of the Afghan National Police”, February 2014, AFG-OTP-0006-0076 at 0089; HRW, “Just Don’t Call It a Militia”, September 2011, AFG-OTP-0002-3995 at 4057-4058; NATO, “Afghan National Security Forces – ANSF”, AFG-OTP-0007-0660, at 0660.

⁸⁹ Touch Point, “The Organization and Structure of the Afghan National Police”, February 2014, AFG-OTP-0006-0076 at 0089; HRW, “Just Don’t Call It a Militia”, September 2011, AFG-OTP-0002-3995 at 4005.

⁹⁰ HRW, “Just Don’t Call It a Militia”, September 2011, AFG-OTP-0002-3995 at 4056; NATO, “Afghan National Security Forces – ANSF”, AFG-OTP-0007-0660, at 0660.

⁹¹ Touch Point, “The Organization and Structure of the Afghan National Police”, February 2014, AFG-OTP-0006-0076, at 0090.

67. The NDS is Afghanistan's principal internal and external intelligence-gathering body and plays a key operational role in arresting and interrogating persons suspected of conflict-related offences. It consists of a number of departments (also referred to as directorates and sub-directorates), which are designated by numbers for confidentiality and security. Some of the relevant departments include 90/124 (Counter-Terrorism), 17/40 (Investigations), and 18/34 (Internal Oversight).⁹²

3. US armed forces and Central Intelligence Agency

68. Two international combat missions operated in Afghanistan in parallel until 2014 (ISAF and OEF).⁹³ US armed forces constituted the majority of both missions, but other countries also contributed troops to each mission, for varying periods of time. Due to the joint nature of international military operations, it has not always been possible to identify the nationality of international forces alleged to have participated in particular incidents. Therefore, where the term "international forces" is used in this Request, it refers to ISAF and OEF forces generally.

69. The United States Central Command ("CENTCOM") is a theatre-level Unified Combatant Command of the US Department of Defense ("DOD"), responsible for military operations in the Middle East, North Africa and Central Asia, including Afghanistan. In June 2002, the Combined Joint

⁹² UNAMA, "Treatment of Conflict-Related Detainees in Afghan Custody", October 2011 ("UNAMA 2011 Report on Conflict-Related Detainees"), AFG-OTP-0001-2893 at 2915

⁹³ NATO, "ISAF's mission in Afghanistan (2001-2014)", AFG-OTP-0005-5958, at 5958; Department of Defense, "Report on enhancing security and stability in Afghanistan", June 2015 AFG-OTP-0007-0981, at 0985.

Task Force 180 (“CJTF-180”) assumed overall control of US armed forces in Afghanistan and reported to CENTCOM.⁹⁴

70. In October 2003, the Combined Forces Command-Afghanistan (CFC-A) began to be formed, subsuming CJTF-180.⁹⁵ CFC-A reported directly to CENTCOM. CFC-A (and before that CJTF-180) functioned as the overall corps-level headquarters of US armed forces in Afghanistan. Under CFC-A, division-level headquarters supervising various fighting brigades were maintained in Afghanistan. In April 2004, CJTF-180 was renamed CJTF-76.⁹⁶ CFC-A was disbanded in February 2007 and overall command for US military forces in Afghanistan reverted to CENTCOM, until the creation of US Forces-Afghanistan (USFOR-A) in October 2008. Since that time, the commander of USFOR-A also commanded ISAF, although the underlying chains of command remained separate.⁹⁷

71. The CIA is the civilian foreign intelligence agency of the US Government. The CIA reports to the Director of National Intelligence, who is a member of the National Security Council (“NSC”) and reports directly to the US President. The Counter-Terrorism Center (“CTC”) is a division of the CIA’s National Clandestine Service, which reports directly to CIA

⁹⁴ Price, J., “Operation Enduring Freedom: Commands and HQ”, 23 June 2002, AFG-OTP-0003-2283 at 2283; Wright, D. *et al.*, “A Different Kind of War: The United States in Operation ENDURING FREEDOM October 2001 - September 2005” (Combat Studies Institute Press, 2010), AFG-OTP-0003-3323 at 3528.

⁹⁵ Colonel Hope, I., “Unity of Command in Afghanistan: A Forsaken Principle of War”, *U.S. Army War College Strategic Studies Institute*, November 2008, AFG-OTP-0003-1376 at 1390; Wright, D. *et al.*, “A Different Kind of War: The United States in Operation ENDURING FREEDOM October 2001 - September 2005”, Combat Studies Institute Press, 2010, AFG-OTP-0003-3323 at 3578.

⁹⁶ Wright, D. *et al.*, “A Different Kind of War: The United States in Operation ENDURING FREEDOM October 2001 - September 2005”, Combat Studies Institute Press, 2010, AFG-OTP-0003-3323 at 3615.

⁹⁷ Colonel Hope, I., “Unity of Command in Afghanistan: A Forsaken Principle of War”, *U.S. Army War College Strategic Studies Institute*, November 2008, AFG-OTP-0003-1376 at 1392; Institute for the Study of War, “International Security Assistance Force (ISAF)”, AFG-OTP-0003-2137 at 2140.

leadership. The CIA Director formally designated the CTC Renditions Group as the responsible entity for the management and maintenance of all CIA interrogation facilities in early December 2002.⁹⁸

VII. ACTS ALLEGEDLY COMMITTED

A. Acts allegedly committed by members of the Taliban and affiliated armed groups

1. Crimes against humanity

72. The information available provides a reasonable basis to believe that in the period since 1 May 2003 members of the Taliban and affiliated armed groups have committed the crimes against humanity of murder (article 7(1)(a)), imprisonment or other severe deprivation of physical liberty (article 7(1)(e)), and persecution against an identifiable group or collectivity on political grounds and on gender grounds (article 7(1)(h)). These crimes were committed as part of a widespread and systematic attack against civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities,⁹⁹ or civilians perceived to oppose Taliban rule and ideology, involving the multiple commission of the above mentioned acts in pursuance of a leadership policy to seize power from the Government of Afghanistan by lethal force.
73. The contextual elements of crimes against humanity require: (i) an attack directed against any civilian population amounting to a course of conduct

⁹⁸ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5776, and fn. 274.

⁹⁹ Foreign entities present in Afghanistan include international military forces, private military companies, international governmental and non-governmental organisations, international companies, and international media.

involving the multiple commission of acts referred to in article 7(1) of the Statute; (ii) pursuant to or in furtherance of a State or organisational policy to commit such attack; (iii) the widespread or systematic nature of the attack; (iv) a nexus between the individual act and the attack; and (v) the perpetrator's knowledge of the attack and that his or her acts form part of it.¹⁰⁰ Given the current stage of the proceedings, and bearing in mind that there is presently no suspect before the Court, the last requirement cannot be adequately addressed at this stage, as knowledge is an aspect of the mental element under article 30(3) of the Statute.¹⁰¹ The Prosecution has therefore limited its analysis to the first four elements.

a. An attack directed against any civilian population amounting to a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute

74. Since 1 May 2003, the Taliban and affiliated armed groups have carried out deliberate attacks against the civilian population throughout the territory of Afghanistan. These attacks have targeted specific categories of civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities,¹⁰² or civilians perceived to oppose Taliban rule and ideology. These categories of civilians include, *inter alia*, civil servants employed by the government at all levels, members of parliament, district and provincial governors, *shura* and provincial council members, election workers, mullahs, tribal and religious leaders, doctors and other health care providers, teachers, students, judicial authorities, interpreters, truck

¹⁰⁰ [Kenya Article 15 Decision](#), para. 79; [Côte d'Ivoire Article 15 Decision](#), para. 29.

¹⁰¹ [Kenya Article 15 Decision](#), para. 79; [Côte d'Ivoire Article 15 Decision](#), para. 29.

¹⁰² Foreign entities present in Afghanistan include international military forces, private military companies, international governmental and non-governmental organisations, international companies, and international media.

drivers, farmers, labourers involved in public interest construction work, humanitarian workers, UN personnel, NGO employees, journalists, and individuals who joined the Afghanistan Peace and Reintegration Program and their relatives.¹⁰³

75. Attacks against civilian property and objects related to the targeted civilians were also part of the attack against the civilian population. The Taliban have systematically and on a widespread basis launched a large number of attacks against protected objects such as schools, hospitals, mosques, vehicles and other equipment belonging to targeted categories of civilians. UNAMA reported that “many of the locations targeted” by suicide bombings were “clearly civilian areas with no military purpose” such as markets, gatherings of tribal elders, civilian government offices or protected places such as hospitals, shrines and mosques.¹⁰⁴

b. Pursuant to or in furtherance of a State or organisational policy

76. Both the Taliban and the affiliated Haqqani Network qualify as ‘organisation’ for the purpose of article 7.

¹⁰³ UNAMA, “Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2008”, January 2009, AFG-OTP-0001-2144 at 2149, para. 9 (“UNAMA 2008 Annual Report”); UNAMA Human Rights, “Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2009”, January 2010, AFG-OTP-0001-1836 at 1854-1857 (“UNAMA 2009 Annual Report”); UNAMA, “Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict”, March 2011, AFG-OTP-0001-4334 at 4372 (“UNAMA 2010 Annual Report”); UNAMA, “Afghanistan Annual Report 2011: Protection of Civilians in Armed Conflict”, February 2012, AFG-OTP-0001-4141 at 4173 (“UNAMA 2011 Annual Report”); UNAMA, Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2014, AFG-OTP-0003-5192 at 5231, 5235-5237 (“UNAMA 2013 Annual Report”); UNAMA “Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2014” February 2015, AFG-OTP-0003-5419 at 5474, 5486-5489 (“UNAMA 2014 Annual Report”); UNAMA, “Afghanistan Annual Report 2015: Protection of Civilians in Armed Conflict”, February 2016, AFG-OTP-0005-0515 (“UNAMA 2015 Annual Report”); UNAMA, “Afghanistan Annual Report 2016: Protection of Civilians in Armed Conflict”, February 2017, AFG-OTP-0006-3441 at 3511 (“UNAMA 2016 Annual Report”).

¹⁰⁴ UNAMA 2011 Annual Report, AFG-OTP-0001-4141 at 4171.

77. According to estimates, the Taliban may have as many as 60,000-70,000 individuals working for them, including 20,000-30,000 full-time and part-time fighters, as well as clerics, recruiters, judges, tax collectors and other political representatives.¹⁰⁵
78. The Taliban is organised under the leadership of the Commander of the Faithful (*Amir ul-Momineen*) of the Islamic Emirate of Afghanistan, who presides over the Taliban's supreme decision-making body, the Leadership Council (*Rahbari Shura*, more often referred to as the *Quetta Shura*). The Leadership Council reportedly consists of between 12 to 20 Taliban commanders. It used to include the surviving founding members of the Taliban movement and some regional commanders.¹⁰⁶
79. Its military organisation comprises four regional councils that report to the Leadership Council.¹⁰⁷ Alongside the four military regional councils, there are around 10 committees (or commissions) in charge of specific thematic areas and that loosely mirror the cabinet structure existing under the 1996-2001 Taliban Government (as well as previous Afghan Governments).¹⁰⁸ These committees are in charge of the following areas: Religious Affairs (the so-called *Ulema Council*), Military, Finance, Political Affairs, Culture and Information, Interior Affairs, Prisoners and Refugees, Education, Recruitment, and Repatriation.¹⁰⁹ Each committee consists of two to three

¹⁰⁵ Giustozzi, 2010, AFG-OTP-0003-1265 at 1269; Dawi, A., "Despite Massive Taliban Death Toll No Drop in Insurgency", Voice of America, AFG-OTP-0003-3305 at 3306.

¹⁰⁶ Roggio, 2010, AFG-OTP-0005-3331 at 3331 to 3332; Siddique, A., "The Quetta Shura: Understanding the Afghan Taliban's Leadership", *Terrorism Monitor*, Vol. XII, Issue 4 (2014), AFG-OTP-0003-3012 at 3016.

¹⁰⁷ Roggio, 2010, AFG-OTP-0005-3331, at 3332; Ruttig, 2009, AFG-OTP-0001-0044 at 0058-0059.

¹⁰⁸ Ruttig, 2009, AFG-OTP-0001-0044 at 0059.

¹⁰⁹ Roggio, 2010, AFG-OTP-0005-3331, at 3332; Ruttig, 2009, AFG-OTP-0001-0044 at 0059; Fourth report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2081 (2012) concerning the Taliban and other associated individuals and entities

members and reports to the Leadership Council.¹¹⁰ Some committee heads may also be members of the Leadership Council.¹¹¹

80. The leadership of the Taliban has to date issued at least three versions of its military code of conduct, or *Layha*, demonstrating the existence of a command structure and disciplinary rules and mechanisms within the group.¹¹² The *Layha* sets out the organisation's local, provincial and regional military command structure and hierarchy as comprising: Commander (*Amir ul-Momineen* or *Imam*); Deputy Commander (*Nayeb*); commanders of zones; senior provincial officials; district leaders; group leaders; and ordinary *mujahideen*.¹¹³ Zone commanders and senior provincial officials are reportedly directly appointed by the Supreme Command which also removes and replaces commanders as needed.¹¹⁴
81. In parallel to the military command structure, the Taliban run administrative structures headed by their senior provincial officials appointed by zonal commanders.¹¹⁵ The Taliban reportedly appointed

constituting a threat to the peace stability and security of Afghanistan", U.N. Doc. S/2014/402, 10 June 2014; AFG-OTP-0005-1896 at 1921-1924.

¹¹⁰ Ruttig, 2009, AFG-OTP-0001-0044 at 0059.

¹¹¹ Ruttig, 2009, AFG-OTP-0001-0044 at 0059.

¹¹² See Clark, K., "The Layha: Calling the Taleban to Account", *Afghanistan Analysts Network*, June 2011 ("Clark, 2011"), AFG-OTP-0001-0079 at 0080-0081; Shah, N., "The Taliban Layeha for Mujahidin and the Law of Armed Conflict", *International Humanitarian Legal Studies*, Vol. 3 (2012), AFG-OTP-0003-2927 at 2929-2930. Unofficial English translations of the *Layha* from 2006, 2009 and 2010 have been published by Clark, K. (AAN) as Appendix 1 to the report cited (AFG-OTP-0001-0079): "Translated text of the 2010 Version of the Taleban Code of Conduct", AFG-OTP-0003-3923 at 3924 ("2010 Layha"); "Translated text of the 2009 Version of the Taleban Code of Conduct", AFG-OTP-0003-3923 at 3937 ("2009 Layha"); and "Translated text of the 2006 Version of the Taleban Code of Conduct", AFG-OTP-0003-3923 at 3947 ("2006 Layha").

¹¹³ Article 40, 2010 Layha, AFG-OTP-0003-3923 at 3925 (including fns. 14, 15), 3930. [REDACTED].

¹¹⁴ See Miyundi, I., "The Islamic Emirate of Afghanistan and its Successful Administrative Policy", 23 January 2011 (English translation of the Taliban's Al-Somood Magazine, Issue 55, 25 December 2010), AFG-OTP-0003-1958 at 1959; Elias, M., "The Resurgence of the Taliban in Kabul", in Giustozzi, A., (ed.), *Decoding the New Taliban: Insights from the Afghan Field*, (Hurst & Co., 2009), AFG-OTP-0007-1091 at 1097.

¹¹⁵ Ruttig, 2009, AFG-OTP-0001-0044 at 0059-0060.

‘shadow’ governors for most of the 34 provinces in Afghanistan.¹¹⁶ The *Layha* calls for these ‘governors’ to establish provincial commissions consisting of at least five people, who in turn establish district commissions, ran by district governors.¹¹⁷

82. Provincial governors are responsible for nearly all civil and military matters at the provincial level,¹¹⁸ including providing oversight of Taliban finances, of local judicial and dispute resolution mechanisms, and the control of local schools.¹¹⁹
83. The Taliban has also set up quasi-judicial services in the form of mobile courts, frequently presided over by a religious leader as judge, and responsible for rulings on criminal matters as well as on civil complaints in accordance with *Sharia* and local customs.¹²⁰
84. The Taliban’s annual income is estimated to be around \$400 million US dollars.¹²¹ The main sources of revenue include the collection of ‘taxes’

¹¹⁶ Nijssen, 2011, AFG-OTP-0003-0916 at 0916-0917; “Second report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1988 (2011) concerning the Taliban and other associated individuals and entities”, U.N. Doc. S/2012/971, 31 December 2012, AFG-OTP-0005-1942 at 1958-1959.

¹¹⁷ Articles 34 and 35, 2010 *Layha*, AFG-OTP-0003-3923 at 3930.

¹¹⁸ Dressler, J. and Forsberg, C., “The Quetta Shura Taliban in Southern Afghanistan: Organization, Operations, and Shadow Governance”, *Institute for the Study of War*, 21 December 2009, AFG-OTP-0003-2145, at 2151.

¹¹⁹ Dressler, J. and Forsberg, C., “The Quetta Shura Taliban in Southern Afghanistan: Organization, Operations, and Shadow Governance”, *Institute for the Study of War*, 21 December 2009, AFG-OTP-0003-2145, at 2146; Giustozzi, A., and Franco, C., “The Battle for the Schools: The Taleban and State Education”, *Afghanistan Analysts Network*, 1 December 2011 (“Giustozzi, and Franco, 2011”), AFG-OTP-0003-0143 at 0153 and 0161.

¹²⁰ Nijssen, 2011, AFG-OTP-0003-0916.

¹²¹ First report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1988 (2011) concerning the Taliban and associated individuals and entities, S/2012/683, 5 September 2012, AFG-OTP-0007-1386 at 1398-1400; Fourth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2082 (2012) concerning the Taliban and other associated individuals and entities constituting a threat to the peace, stability and security of Afghanistan (S/2014/402), AFG-OTP-0005-1896 at 1913-1915.

from areas under their control, the opium trade, and financial contributions from international jihadist networks.¹²²

85. The Haqqani Network is an armed group that wields substantial influence in Paktika, Paktya and Khost provinces of south-eastern Afghanistan, as well as North Waziristan in Pakistan.¹²³ Its members are primarily from the Pashtun Zadran tribe and are reportedly drawn from a pool of 10,000 - 15,000 fighters.¹²⁴
86. The Haqqani Network's structure and hierarchy is reportedly organised as comprising: senior Haqqani Commanders in North Waziristan, responsible for providing strategic guidance and finances; senior local commanders with familial ties to the area; operational level commanders, responsible for a district or multiple villages; locally based group leaders, serving as group or platoon leaders; core fighters, constituting the network's professional fighters; and cash fighters, constituting *ad hoc* locally hired individuals.¹²⁵
87. In terms of policy, as noted earlier, the nature of the alliance between the Taliban and the Haqqani Network, which extends to the highest leadership levels of both organisations, indicates a shared ideology and policies, and joint planning and execution of military operations, at both the strategic (national) level and at the tactical level for specific attacks. As

¹²² Giustozzi, 2010, AFG-OTP-0003-1265 at 1276-1277; Ruttig, 2009, AFG-OTP-0001-0044 at 0063-0064.

¹²³ Dressler, 2010, AFG-OTP-0003-2038 at 2043.

¹²⁴ CTC, Haqqani Nexus and Evolution of al-Qa'ida, AFG-OTP-0003-1015 at 1024; Ruttig, T., "Loya Paktia's Insurgency", in Giustozzi, A., (ed.), *Decoding the New Taliban: Insights from the Afghan Field*, (Hurst & Co.: London, 2009), AFG-OTP-0007-2239 at 2244, 2249.

¹²⁵ Institute for the Study of War, The Haqqani Network: From Pakistan to Afghanistan, AFG-OTP-0003-2038 at 2064, figure 3, Haqqani Network Structure.

such, both groups have been identified by the Prosecution as pursuing a shared policy to attack the civilian population in order to seize power from the Government of Afghanistan by lethal force. To reach this goal, the Taliban and the Haqqani Network appear to have deliberately targeted civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule, including women and girls who worked, took part in public affairs, and attended school past the age of puberty.

88. The Taliban leadership has expressly declared its policy of attacking civilians publicly: (a) in official documents issued by the Taliban leadership such as the *Layha* and in *fatwas* (religious edicts); (b) in public statements by Taliban officials or spokespersons who claimed that particular civilians were the primary object of an attack; and (c) in public lists of civilians to be killed or captured. For example, a *fatwa* reportedly issued by the Taliban in December 2005 and signed by some 100 religious scholars, ordered the death of anyone who supported the US-led military intervention in Afghanistan.¹²⁶ The 2006 *Layha* specifically stipulated that teachers¹²⁷ and mullahs who continue to “instruct contrary to the principles of Islam” must be killed,¹²⁸ and that all activities of foreign non-governmental organisations must be banned, including by burning down schools that continue to operate despite a warning¹²⁹. The 2009 and 2010 *Layha* stated that contractors who build bases or transport fuel or other material,¹³⁰ contractors who supply labour and services for the same

¹²⁶ AI, “All who are not friends, are enemies: Taleban abuses against civilians”, April 2007 (“All Who are Not Friends”), AFG-OTP-0002-3022 at 3034.

¹²⁷ Articles 24-25, 2006 *Layha*, AFG-OTP-0003-3923 at 3948.

¹²⁸ Article 25, 2006 *Layha*, AFG-OTP-0003-3923 at 3948.

¹²⁹ Article 26, 2006 *Layha*, AFG-OTP-0003-3923 at 3948.

¹³⁰ Article 25, 2010 *Layha*, AFG-OTP-0003-3923 at 3929.

purpose,¹³¹ and drivers who transport supplies¹³² shall be killed or, if taken alive and proven guilty, sentenced to death. Similarly, members of private security companies¹³³ and translators shall be executed if arrested and found guilty.¹³⁴

89. Taliban statements have expanded their list of declared targets to include members of the Afghan cabinet, parliament, and peace councils;¹³⁵ civilians participating in the *Jirga* or otherwise associated with the Government;¹³⁶ or anyone associated with or who voted in the 2009 and 2014 presidential elections.¹³⁷
90. Although the Taliban leadership has instructed their fighters to avoid ‘civilian’ casualties, the Taliban’s definition of ‘civilian’ is considerably narrower than, and therefore at odds with, the definition under international humanitarian law.¹³⁸ The Taliban definition of ‘civilian’, as evinced from a number of their statements, appears to refer generally to the category “common people” and members of the civilian population

¹³¹ Article 26, 2010 Layha, AFG-OTP-0003-3923 at 3929.

¹³² Article 24, 2010 Layha, AFG-OTP-0003-3923 at 3928-3929.

¹³³ Article 11, 2010 Layha, AFG-OTP-0003-3923 at 3927.

¹³⁴ Article 11, 2010 Layha, AFG-OTP-0003-3923 at 3927.

¹³⁵ Voice of Jihad (Islamic Emirate of Afghanistan), “Statement of the Leadership Council of the Islamic Emirate Regarding the Inception of the Spring Operations”, 30 April 2011, AFG-OTP-0001-0271 paras. 2-3. See also Voice of Jihad (Islamic Emirate of Afghanistan), “Statement of Leadership Council of Islamic Emirate regarding the commencement of the annual spring operation named ‘Khaibar’”, 08 May 2014, AFG-OTP-0003-5087.

¹³⁶ Voice of Jihad (Islamic Emirate of Afghanistan), “Remarks of the spokesman of Islamic Emirate regarding the upcoming supposed Loe Jirga”, 26 October 2011, AFG-OTP-0003-5093.

¹³⁷ Voice of Jihad (Shahamat English): “Statement of the Islamic Emirate of Afghanistan Regarding the Runoff Elections”, 25 October 2009, AFG-OTP-0003-6234; “Notification of Islamic Emirate regarding the upcoming elections”, 10 March 2014, AFG-OTP-0003-5089; “Message of the Islamic Emirate to the pious people of Afghanistan regarding the elections”, 2 June 2014, AFG-OTP-0003-5084 at 5084, 5086; “Final warning of the Islamic Emirate regarding the second term of Elections”, 11 June 2014, AFG-OTP-0003-5082 at 5082-5083.

¹³⁸ Clark, 2011, AFG-OTP-0001-0079 at 0098-0104; Shah, N., “The Taliban Layeha for Mujahidin and the Law of Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 3 (2012), AFG-OTP-0003-2927 at 2952-2958.

understood by the Taliban to be innocent bystanders and therefore not to be targeted.¹³⁹ Thus, for example, in the annual ‘felicitation’ messages from Mullah Omar for the Muslim holidays of Eid-ul-Odha and Eid-ul-Fitr, where appeals are made to the Taliban fighters that “[e]very caution should be taken to protect life and property of the public during Jihadic operations [...]”.¹⁴⁰ Nonetheless, according to Taliban spokesperson Qari Yousef Ahmadi, the Taliban makes no distinction between members of Afghan and international armed forces, and “people who are not armed but who are working and cooperating with foreigners”.¹⁴¹

91. The Taliban have also claimed responsibility, through direct contact with the media or *via* their website, for numerous targeted killings and abductions of specific categories of civilian objectives, including government officials and employees, community leaders, tribal elders, contractors, drivers, and translators.¹⁴² In 2014, the Taliban claimed responsibility for 143 attacks which deliberately targeted civilians, including attacks against tribal elders, humanitarian de-miners, civilian government or justice sector employees, and aid workers.¹⁴³ Similarly, in 2016 the Taliban claimed responsibility for another 82 incidents that targeted particular categories of civilian objects, including civilian

¹³⁹ See e.g. articles 65-66, 2010 Layha, AFG-OTP-0003-3923 at 3934; Voice of Jihad (Islamic Emirate of Afghanistan), “Message of Felicitation of the Esteemed Amir ul Momineen on the Eve of Eid ul Odha”, 26 November 2009, AFG-OTP-0007-2945 at 2947.

¹⁴⁰ Voice of Jihad (Islamic Emirate of Afghanistan), “Message of Felicitation of Amir-ul-Momineen (may Allah protect him) on the Auspicious Eve of Eid-ul-fitr”, 25 July 2014, AFG-OTP-0003-5079 at 5081.

¹⁴¹ Amnesty International, All Who are Not Friends, AFG-OTP-0002-3022 at 3037.

¹⁴² UNAMA 2011 Annual Report, AFG-OTP-0001-4141 at 4154 and 4169; See also, UNAMA 2015 Report, AFG-OTP-0005-0515 at 0570.

¹⁴³ UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5501-5502. Annex 1 of the 2014 Annual Report at 5539 contains a detailed breakdown of attacks claimed by the Taliban including target type. The number of Taliban claims of responsibility recorded by UNAMA is higher than the Prosecution’s because UNAMA’s records include the Taliban’s various twitter accounts, other websites, etc.

government workers and judicial staff, tribal elders and humanitarian deminers, causing them death and/or injuries.¹⁴⁴

c. Widespread or systematic nature of the attack

92. The Taliban and affiliated armed groups have directed attacks against the Afghan civilian population in both a widespread *and* systematic manner.

93. The widespread nature of the attacks can be demonstrated by a number of factors. In terms of scale and temporal spread, between 2009 – 2016, UNAMA documented over 50,000 civilian casualties (over 17,700 deaths and over 33,000 injuries) attributed to the Taliban and other anti-government elements, including 6,994 civilian casualties in 2016 alone.¹⁴⁵ The civilian victims of such attacks largely corresponded to the targets identified in the *Layha* and in the Taliban statements noted above. In terms of geographic spread, the alleged acts occurred over a large part of the territory of Afghanistan, with the vast majority having occurred in the southern and south-eastern regions of the country, representing the main areas of operation and influence of the Taliban and the Haqqani Network.¹⁴⁶

¹⁴⁴ UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3522.

¹⁴⁵ UNAMA 2016 Annual Report, AFG-OTP-0006-3441 calculated from statistics provided at 3498. Although these figures include casualties attributed to other anti-government armed groups, they nonetheless attest to the widespread nature of the attack because the Taliban and affiliated armed groups represent by far the largest of these groups, responsible for the most attacks among these groups and with the widest territorial reach across the country. E.g., of the 6,994 civilian casualties attributed to anti-government entities in 2016, UNAMA attributed 70% of these to the Taliban (4,953 civilian casualties); UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3454.

¹⁴⁶ See e.g. UNAMA 2009 Annual Report, AFG-OTP-0001-1836 at 1854; UNAMA 2010 Annual Report, AFG-OTP-0001-4334 at 4349; UNAMA 2011 Annual Report, AFG-OTP-0001-4141 at 4159; UNAMA 2013 Annual Report, AFG-OTP-0003-5192 at 5235.

94. The alleged acts were also committed in a systematic manner over a protracted period of time. This is demonstrated by the consistent pattern of conduct followed, pursuant to the above-stated policy to attack the categories of civilians described in paragraphs 74-75 and 88-91. The systematic nature of the attacks against the civilian population is also evinced by the planned nature of such attacks, as demonstrated for example by the Taliban's established practice of distributing 'night letters'. Such letters are intended to "induce compliance with social norms favored by the Taliban and to deter various forms of collaboration with the Government, the international forces, and other actors" by means of direct threats.¹⁴⁷ Night letters were regularly sent to specific individuals or displayed in public places, such as mosques.¹⁴⁸ In numerous cases, delivery of a night letter was followed by the abduction, killing or assault of the recipient.¹⁴⁹

d. Underlying acts constituting crimes against humanity

i. Murder

95. On the basis of the information available, there is a reasonable basis to believe that after 1 May 2003, members of the Taliban and affiliated armed groups have committed the crime against humanity of murder pursuant to article 7(1)(a).

¹⁴⁷ "Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Mission to Afghanistan", A/HRC/11/2/Add.4, 6 May 2009, AFG-OTP-0003-3233 at 3248.

¹⁴⁸ AIHRC, "Insurgent Abuses Against Afghan Civilians", December 2008, AFG-OTP-0002-2677 at 2690-2691.

¹⁴⁹ AIHRC, "Insurgent Abuses Against Afghan Civilians", December 2008, AFG-OTP-0002-2677 at 2690-2694; HRW, "The 'Ten-Dollar Talib' and Women's Rights: Afghan Women and the Risks of Reintegration and Reconciliation", July 2010, AFG-OTP-0002-3071 at 3079 ("The Ten-Dollar Talib"); Associated Press, "New Taliban Rules Target Afghan Teachers", 9 December 2006, AFG-OTP-0005-0668.

96. The Taliban and affiliated armed groups have deliberately killed civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule and ideology. Victims have been killed by various methods including shooting, beheading, hanging, and bombing. Attacks have been perpetrated by means including ambushes, suicide attacks, attacks on vehicles, IEDs, remote controlled bombs, car bombs and grenade attacks.
97. Since 2009, UNAMA has documented approximately 17,700 civilians killed by the Taliban and other anti-government elements, including over 6,900 targeted killings of civilians.¹⁵⁰ Between 2007 and 2011, more than 130 NGO workers were killed.¹⁵¹ Since 2013, the Taliban have reportedly claimed responsibility for 1,112 separate attacks, in which 1,639 civilians were killed.¹⁵² The victims of these attacks included government officials, mullahs, tribal elders, labourers, teachers, election workers and judicial authorities.¹⁵³
98. As indicated, the Taliban and affiliated armed groups have also used IEDs as a proficient method of killing. Between 2009 and 2016, IEDs reportedly

¹⁵⁰ UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3498, 3512 (total numbers based on UNAMA's yearly statistics provided in charts at 3498 and 3512).

¹⁵¹ Afghanistan NGO Safety Office (ANSO) Quarterly Data Report: Q.4 2011, AFG-OTP-0005-0025 at 0031, calculated from statistics provided in chart titled "ANSO: Aid workers killed/injured, 2007-2011"; *See also* ANSO, Quarterly Data Report: Q.4 2010, AFG-OTP-0001-0247 at 0247; ANSO, Quarterly Data Report: Q.4 2009, AFG-OTP-0005-3118 at 3118; ANSO, Quarterly Data Report: Q.4 2008, AFG-OTP-0001-0152 at 0152; ANSO, Quarterly Data Report: Q.4 2007, AFG-OTP-0001-0115 at 0127.

¹⁵² These total figures for the period 2013–2016 are calculated from annual statistics in the following reports: UNAMA 2013 Annual Report, AFG-OTP-0003-5192 at 5246 (153 attacks, killing 302 civilians); UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5501 (382 attacks, killing 542 civilians); UNAMA 2015 Annual Report, AFG-OTP-0005-0515 at 0577-0578 (352 attacks, killing 437 civilians); UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3522 (225 attacks, killing 358 civilians).

¹⁵³ UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5486.

killed 6,861 civilians.¹⁵⁴ The Taliban deliberately planted IEDs in locations where specific individuals were present at the moment of detonation. Many of the civilians targeted by these attacks fell within the categories of civilians identified as targets in the organisational policy of the Taliban and affiliated armed groups, as set out in paragraphs 74-75 and 88-91.¹⁵⁵

99. Suicide bombing as a method of attack has also been approved in the *Layha*.¹⁵⁶ Despite the *Layha's* instructions when carrying out suicide attacks to “take great efforts to avoid casualties among the common people”,¹⁵⁷ in practice, many suicide bombings attributed to the Taliban and affiliated armed groups have taken place in crowded civilian areas.

100. In addition, the Taliban have executed individuals falling within the categories of civilians described in paragraphs 74-75 and 88-91. For example, on 18 December 2006, the Taliban allegedly killed 26 males, at least some of whom were allegedly beheaded, in the Panjwai district of Kandahar province, and placed their bodies at various locations as a warning to anyone assisting coalition forces or assisting with the

¹⁵⁴ Calculated from statistics in chart titled “Civilian Deaths and Injuries by Improvised Explosive Devices” January to December 2009-2016 in UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3500.

¹⁵⁵ See e.g. UNAMA, “Afghanistan Mid-year Report 2012: Protection of Civilians in Armed Conflict”, July 2012, AFG-OTP-0003-4066 at 4094 (“UNAMA 2012 Mid-Year Report”); UNAMA 2013 Annual Report, AFG-OTP-0003-5192 at 5241; UNAMA, “Afghanistan Mid-year Report 2014: Protection of Civilians in Armed Conflict”, July 2014, AFG-OTP-0003-5324 at 5357 (“UNAMA 2014 Mid-Year Report”); UNAMA 2015 Mid-Year Report, AFG-OTP-0003-6321 at 6387; UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5474; UNAMA 2015 Mid-Year Report, AFG-OTP-0003-6321 at 6389.

¹⁵⁶ Article 57, 2010 *Layha*, AFG-OTP-0003-3923 at 3933, the law refers to “martyrdom operations”; Article 41, 2009 *Layha*, AFG-OTP-0003-3923 at 3943. Taliban commanders have also confirmed the use of suicide attacks as a method of implementing their policy in public statements; see e.g. AI, All Who are Not Friends, AFG-OTP-0002-3022 at 3049, quoting a Taliban commander as reportedly stating: “Praise be to God, we have announced some 200 suicide bombers, but that number is now in the thousands and more people are coming forward”.

¹⁵⁷ Article 57(3), 2010 *Layha*, AFG-OTP-0003-3923 at 3933.

distribution of humanitarian aid.¹⁵⁸ On 16 June 2007, the Taliban allegedly executed approximately 30 civilians in the village of Sarab (Uruzgan province) for *inter alia* refusing to join the Taliban in its fight against the Afghan Government forces.¹⁵⁹ On 24 June 2010, the Taliban allegedly kidnapped and beheaded, shot dead or slit the throats of up to 11 civilians in Khas Uruzgan district (Uruzgan province), reportedly for spying or working for the Government, or for otherwise being ethnic Hazaras and Shia Muslims.¹⁶⁰ On 25 August 2013, the Taliban abducted and shot dead five national staff members of an international NGO and one governmental employee when the group was travelling to Gulran district (Herat province), and later claimed responsibility.¹⁶¹

101. Other examples of acts of murder allegedly committed by members of the Taliban and affiliated armed groups include an incident on 16 January 2006, involving an alleged Taliban suicide bomber who drove a motorcycle into a crowd of about 2000 civilians gathered to watch a wrestling match in the town of Spin Boldak, in Kandahar province, and detonated a body-borne IED, killing at least 20 civilians.¹⁶²

¹⁵⁸ [REDACTED]. Worldwide Incidents Tracking System, “26 civilians killed in assault by Taliban in Panjva’i, Kandahar, Afghanistan”, ICN 200698500, AFG-OTP-0001-1176; Canada.com, “Taliban execute 26 male Afghans”, 19 December 2006, AFG-OTP-0001-1081 at 1081-1082; [REDACTED].

¹⁵⁹ [REDACTED]. HRW, “Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan”, September 2008, AFG-OTP-0002-3905 at 3933-3934 (“HRW, Airstrikes and Civilian Deaths in Afghanistan”); [REDACTED].

¹⁶⁰ [REDACTED]. Global Terrorism Database, GTD-ID 201006240002, AFG-OTP-0001-1106; RAWA/AP, “Bodies found beheaded in Afghanistan; 4 troops die”, 26 June 2010, AFG-OTP-0001-0033; [REDACTED].

¹⁶¹ [REDACTED]. UNAMA, “Afghanistan Annual Report 2013: Protection of Civilians in Armed Conflict”, February 2014, AFG-OTP-0003-5192 at 5236; Voice of Jihad (Islamic Emirate of Afghanistan), “6 national solidarity program hirelings killed”, 27 August 2013, AFG-OTP-0003-5096.

¹⁶² [REDACTED]. Amnesty International, “Afghanistan: Amnesty International condemns the recent killing of civilians in southern Afghanistan”, 18 January 2006, AFG-OTP-0005-0061 at 0061; [REDACTED]; HRW, “The Human Cost: The Consequences of Insurgent Attacks in Afghanistan”, 15 April 2007, AFG-OTP-0002-4514 at 4540-4541, 4612, 4622.

102. On 8 October 2009, a suicide attacker detonated a vehicle-borne improvised explosive device in close proximity to the gate of the Ministry of Interior Affairs and the Indian Embassy in Kabul. The explosion killed 14 (including two ANP members and the attacker) and wounded some 83 people. The Taliban spokesman Zabiullah Mujahid claimed responsibility for the attack adding that the Indian Embassy was the target.¹⁶³
103. On 26 February 2010, in an attack for which the Taliban claimed responsibility, at least four suicide attackers wearing ANA uniforms carried out a complex attack on the Noor (Hamidi) guesthouse and Park Residence guesthouse in Kabul, killing 18 civilians.¹⁶⁴
104. On 21 February 2011, a Taliban suicide bomber allegedly attacked the central census department in Imam Sahib district (Kunduz province), killing at least 31 civilians and injuring at least 39.¹⁶⁵
105. On 21 June 2012, in an another incident for which the Taliban claimed responsibility, Taliban fighters armed with AK47s, rocket-propelled grenades, and other explosives and firearms allegedly attacked the Spozhmai Hotel on Qargha lake near Kabul, seizing dozens of hostages including women and children and killing at least 18 civilians.¹⁶⁶

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED]. UNAMA, "Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict", July 2011, AFG-OTP-0001-2732 at 2763; Al Jazeera, "Many dead in Afghan suicide bombing", 21 February 2011, AFG-OTP-0001-0952 at 0953.

¹⁶⁶ [REDACTED]; "Quick glance at 2012 Jihadi achievements (part 1)", 3 January 2013, AFG-OTP-0005-2979.

106. On 4 August 2012, a Taliban suicide bomber allegedly attacked the Deputy District Governor of Dur Baba district (Nangarhar province) during a funeral ceremony, killing between 19 and 25 civilians.¹⁶⁷
107. Like the Taliban, the Haqqani Network primarily uses IEDs and suicide bombings to carry out attacks, as well as rockets, mortars and small arms. Their attacks tend to display greater tactical complexity and sophistication (e.g., through the use of coordinated IED attacks and ambushes), and they are alleged to have coordinated many of the high-profile insurgent attacks in Kabul.¹⁶⁸

ii. Imprisonment or other severe deprivation of physical liberty

108. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e).
109. As mentioned above, abductions have followed a regular pattern, often preceded by threats or warnings from the Taliban in the form of 'night letters'.¹⁶⁹ Some abductees were later executed, in some cases by beheadings and hanging.¹⁷⁰

¹⁶⁷ [REDACTED].

¹⁶⁸ Dressler, J., "The Haqqani Network: A Strategic Threat", *Institute for the Study of War*, March 2012, AFG-OTP-0003-2088 at 2118-2122; Ramsey, A. and Zyck, S. A., "The Kabul Attack Network", *Civil-Military Fusion Centre*, July 2011, AFG-OTP-0003-0912; CTC, Haqqani Nexus and Evolution of al-Qa'ida, AFG-OTP-0003-1015 at 1030; Roggio, B., "Suicide assault team targets civilian guesthouse in Kabul", *The Long War Journal*, 10 August 2010, AFG-OTP-0007-2975.

¹⁶⁹ See above para. 94.

¹⁷⁰ UNAMA 2009 Annual Report, AFG-OTP-0001-1836 at 1854.

110. Abductions have occurred throughout the period under review. In 2015 and 2016 alone, UNAMA documented 750 incidents of abduction of civilians by anti-government elements.¹⁷¹
111. For example, on or about 23 January 2011 in Marawara district (Kunar province), Taliban fighters allegedly abducted between 14 and 21 community elders, reportedly to demand the resignation of their relatives from the Afghan Government and NATO positions.¹⁷² On 12 July 2011, 30 residents in the Toot area of Gulistan district (Farah province) were allegedly abducted by the Taliban for supporting the Government.¹⁷³ A sample of 18 alleged incidents of abductions attributed to the Taliban and affiliated armed groups are included in confidential *ex parte* Annex 2A.

iii. Persecution

112. On the basis of the information available, there is a reasonable basis to believe that after 1 May 2003, members of the Taliban and affiliated armed groups have committed the crime against humanity of persecution against identifiable groups of civilians on political grounds and on gender grounds under article 7(1)(h).
113. In particular, there is a reasonable basis to believe that the Taliban and affiliated armed groups targeted the categories of civilians described in paragraphs 74-75 and 88-91, severely depriving them of their fundamental

¹⁷¹ UNAMA 2015 Annual Report, AFG-OTP-0005-0515 at 0574; UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3513.

¹⁷² AFP, “Taliban ‘abduct 21 Afghan tribal elders’”, 31 January 2011, AFG-OTP-0001-0951; AFP, “Taliban frees six tribal elders”, 1 February 2011, AFG-OTP-0001-1259; [REDACTED].

¹⁷³ [REDACTED], UNAMA, “Today’s Afghan Headlines”, 24 July 2011, AFG-OTP-0001-2874; Pahjwok Afghan News, “Taliban free 16 civilians in Farah”, 17 July 2011, AFG-OTP-0001-1261; [REDACTED].

rights, based on their actual or perceived political affiliation with the Afghan Government or foreign entities, or because they opposed or were perceived to oppose Taliban rule and ideology.¹⁷⁴ Factors that led to such targeting appear to include the personal activities and associations of victims, their familial ties, and/or their occupational relationship with the Afghan Government, including public services, or with foreign entities.

114. Such conduct was committed in connection with other underlying acts attributed to the Taliban and affiliated armed groups in this Request, and as part of a widespread or systematic attack on the civilian population. In particular, the Taliban and affiliated armed groups committed persecution by means including killings; imprisonment; intentionally attacking civilians and humanitarian personnel; and intentionally attacking protected objects, including buildings dedicated to religion and education.

115. There is also a reasonable basis to believe that the Taliban and affiliated armed groups targeted civilians, severely depriving them of their fundamental rights, based on their gender. Although in many cases it appears that female politicians, public servants and students were also killed based on their political affiliation or beliefs, the information available provides a reasonable basis to believe that they were also targeted by reason of their gender. Such conduct was committed in connection with other underlying acts attributed to the Taliban and

¹⁷⁴ See *Prosecutor v. Akayesu*, Trial Chamber, [Judgement](#), ICTR-96-4-T, 2 September 1998, para. 583, identifying discrimination on the basis of a person's political ideology as satisfying the requirement of 'political grounds' under Article 3 of the ICTR Statute. Persecution on 'political grounds' need not be limited to membership of a particular political party or adherence to a particular ideology, nonetheless, and could include a difference in opinion concerning public affairs issues as a reason for persecuting an identifiable group or collectivity; C. Hall/J. Powderly/N. Hayes, 'Article 7', in O. Triffterer/ K Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, (C.H. Beck/Hart/Nomos, 3rd ed., 2016), p. 223 at mn.77.

affiliated armed groups in this Request, and as part of a widespread or systematic attack on the civilian population.

116. Pursuant to the ideology and rules of the Taliban, women and girls have been deliberately attacked by the Taliban and affiliated armed groups to prevent them from studying,¹⁷⁵ teaching, working or participating in public affairs, through intimidation, death threats, abductions and killings.¹⁷⁶ As a result of such attacks, countless other women and girls have reportedly stopped going to school or working due to the attendant climate of fear.¹⁷⁷
117. For example, in 2012, the Taliban allegedly killed two female heads of the Department of Women's Affairs ("DWA") for Laghman province in a span of 6 months so as to stop further employment of women in public institutions in Laghman province.¹⁷⁸ On 13 July 2012, the Taliban allegedly killed a provincial head of DWA by means of an IED attached to her vehicle. The victim was a prominent politician who had for years been a leading advocate for the fair treatment of women.¹⁷⁹ On 10 December 2012, the Taliban allegedly fatally shot the Acting Head of the DWA on her way to work in the village of Mazo (Mehtar Lam district, Laghman). The victim had reportedly received

¹⁷⁵ The Taliban and affiliated armed groups believe that girls should stop attending school past puberty; see HRW, *The Ten-Dollar Talib*, AFG-OTP-0002-3071 at 3104; Giustozzi, A. and Franco, C., "The Ongoing Battle for the Schools: Uprisings, Negotiations and Taleban Tactics", *Afghanistan Analysts Network*, June 2013 ("Giustozzi, and Franco, 2013"), AFG-OTP-0003-0172 at 0175; UNAMA, "Silence is Violence: End the Abuse of Women in Afghanistan", 8 July 2009, AFG-OTP-0001-3204 at 3225.

¹⁷⁶ UNAMA, "Silence is Violence: End the Abuse of Women in Afghanistan", 8 July 2009, AFG-OTP-0001-3204 at 3218-3228; Reid, R., "The Taliban War on Women Continues", *Wall Street Journal*, 14 July 2010, AFG-OTP-0003-3744; Amnesty International, "Their Lives on the Line: Attacks on Women Human Rights Defenders in Afghanistan," 6 April 2015, AFG-OTP-0003-0444 at 0470-0496.

¹⁷⁷ HRW, "We have the Promises of the World: Women's Rights in Afghanistan", December 2009, AFG-OTP-0002-4181 at 4264; UNAMA, "Silence is Violence: End the Abuse of Women in Afghanistan", 8 July 2009, AFG-OTP-0001-3204 at 3218-3228.

¹⁷⁸ BBC, "Female Afghan politician Hanifa Safi killed", 13 July 2012, AFG-OTP-0005-0489; Amnesty International, "Their Lives on the Line – Attacks on Women Human Rights Defenders in Afghanistan", 6 April 2015, AFG-OTP-0003-0444 at 0492-0496; [REDACTED].

¹⁷⁹ [REDACTED].

death threats from the Taliban prior to the attack. Other DWA staff members were also reportedly threatened.¹⁸⁰ It appears that by targeting these two prominent female figures in the local community, the Taliban terrorised and effectively prevented women and girls from approaching an important social institution where they could seek protection and file complaints in efforts to improve the living conditions of Afghan women and girls.¹⁸¹

118. Reflective of the climate of fear and intimidation created by the Taliban, a night letter addressed to an Afghan woman in February 2010 reportedly stated: “We Taliban warn you to stop working otherwise we will take your life away. We will kill you in such a harsh way that no woman has so far been killed in that manner. This will be a good lesson for those women like you who are working. The money you receive is *haram* [prohibited under Islam] and coming from the infidels. The choice is now with you”.¹⁸²
119. Similar public announcements and night letters have been issued to intimidate parents from sending their daughters to school.¹⁸³ Moreover, the Taliban unleashed a campaign of violence against schools, destroying hundreds of public schools with IEDs, rockets, grenades or by setting them on fire.¹⁸⁴ Girls’ schools were frequently targeted.¹⁸⁵ Since that time, the Taliban Leadership Council appears to have ceased its attacks on school

¹⁸⁰ [REDACTED].

¹⁸¹ Amnesty International, “Afghanistan: Another women’s affairs official murdered”, 10 December 2012, AFG-OTP-0003-5097; Amnesty International, “Their Lives on the line: Attacks on Women Human Rights Defenders in Afghanistan”, 6 April 2015, AFG-OTP-0003-0444 at 0470-0496; [REDACTED].

¹⁸² HRW, The Ten-Dollar Talib, AFG-OTP-0002-3071 at 3100.

¹⁸³ HRW, “Lessons in Terror: Attacks on Education in Afghanistan”, July 2006, AFG-OTP-0002-4364 at 4426-4433 (“Lessons in Terror”); CARE, “Knowledge on Fire: Attacks on Education in Afghanistan”, September 2009, AFG-OTP-0002-0641 at 0647, 0673-0678 (“Knowledge on Fire”); HRW, The Ten-Dollar Talib, AFG-OTP-0002-3071 at 3104-3107; [REDACTED].

¹⁸⁴ See also paras. 75, 87-88, 116.

¹⁸⁵ CARE, “Knowledge on Fire”, AFG-OTP-0002-0641 at 0687-0688; HRW, Lessons in Terror, AFG-OTP-0002-4364 at 4440.

buildings, but has continued to enforce its educational policies, including with respect to girls' education, through threats and violence directed at teachers, school administrators and students who refuse to abide by the Taliban's rules.¹⁸⁶

120. Other examples of persecution based on gender include the September 2008 killing of the most prominent female member of the Afghan police force;¹⁸⁷ the August 2013 attack on the convoy of a female senator from Nimroz Province on the Kandahar-Kabul highway;¹⁸⁸ and the November 2008 attack against teachers and schoolgirls at the Nazu Anan high school in Kandahar city, in which two male motorcyclists, reportedly paid by high-ranking Taliban fighters, fired water pistols filled with acid on their victims, causing severe burns, blindness and disfiguration.¹⁸⁹
121. Restrictions placed on women and girls in Taliban-controlled areas have led to severe economic hardship due to loss of employment and income.¹⁹⁰ Overall efforts to prevent women from participating in the workforce,¹⁹¹ education,¹⁹² and governance and politics,¹⁹³ have resulted in major

¹⁸⁶ Giustozzi, and Franco, 2013, AFG-OTP-0003-0172 at 0172-0174 and 0199-0201.

¹⁸⁷ [REDACTED]; UNAMA, "Silence is Violence: End the Abuse of Women in Afghanistan", 8 July 2009, AFG-OTP-0001-3204 at 3219; Afghanistan Rights Monitor, "Forgotten Heroes: Afghan Women Leaders Killed in Impunity, Ignored in Justice", December 2012, AFG-OTP-0003-5285 at 5302; HRW, "We have the Promises of the World: Women's Rights in Afghanistan", December 2009, AFG-OTP-0002-4181 at 4202.

¹⁸⁸ [REDACTED].

¹⁸⁹ [REDACTED].

¹⁹⁰ HRW, The Ten-Dollar Talib, AFG-OTP-0002-3071 at 3101-3103.

¹⁹¹ HRW, The Ten-Dollar Talib, AFG-OTP-0002-3071 at 3098-3103.

¹⁹² HRW, The Ten-Dollar Talib, AFG-OTP-0002-3071 at 3104-3107.

¹⁹³ HRW, The Ten-Dollar Talib, AFG-OTP-0002-3071 at 3107-3108.

disruption to the ability of women to exercise many of their fundamental rights.¹⁹⁴

e. Nexus between individual acts and the attack

122. For the purpose of the present proceedings, a nexus can be established between the acts allegedly committed and the attack against a civilian population from the common features of the acts committed, such as their characteristics, nature, aims, targets, alleged perpetrators, and times and locations.¹⁹⁵ The geographical and temporal spread of the alleged acts; the multiple and recurrent occurrence of the prohibited acts over a protracted period of time, displaying a consistent pattern of conduct; and the categories of civilian victims, corresponding to an organisational policy to attack the categories of civilians described in paragraphs 74-75 and 88-91 are all factors indicating a nexus between the individual acts and the attack.

2. War Crimes

123. The information available provides a reasonable basis to believe that in the period since 1 May 2003, the Taliban and affiliated armed groups have committed the following war crimes in the context of a non-international armed conflict: murder (article 8(2)(c)(i)), intentionally directing attacks against the civilian population (article 8(2)(e)(i)), intentionally directing attacks against humanitarian personnel (article 8(2)(e)(iii)); intentionally

¹⁹⁴ HRW, *The Ten-Dollar Talib*, AFG-OTP-0002-3071 at 3079 and 3098; Human Rights Watch, “Between Hope and Fear. Intimidation and Attacks against Women in Public Life in Afghanistan”, October 2004, AFG-OTP-0002-4319 at 4321-4322 and 4325.

¹⁹⁵ *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, “Decision on the confirmation of charges against Laurent Gbagbo”, [ICC-02/11-01/11-656-Red](#), 12 June 2014, para. 212. *See also Kenya Article 15 Decision*, para. 135.

directing attacks against protected objects (article 8(2)(e)(iv)); conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities (article 8(2)(e)(vii)); and killing or wounding treacherously a combatant adversary (article 8(2)(e)(ix)).

124. The contextual elements for article 8(2)(c) and 8(2)(e) require, *inter alia*, that the conduct took place in the context of or was associated with an armed conflict not of an international character.

a. Classification of the armed conflict

125. In the period between 7 October 2001 and 19 June 2002, there was an international armed conflict between Afghanistan (under Taliban Government) and a US-led coalition, which resulted in the removal of the Taliban from power. Provisional arrangements for the post-Taliban administration of Afghanistan were agreed to at the December 2001 Bonn Conference, including the establishment of an Afghan Interim Authority and the convening of a *Loya Jirga* to elect a head of state and members of a transitional administration to replace the Interim Authority within six months. Pursuant to these arrangements, the Afghan Transitional Administration was formed on 19 June 2002.

126. Hostilities continued after that date between the Taliban, Al Qaeda, HIG and other armed groups on the one hand, and the US-led coalition on the other, including the 'Northern Alliance' forces which assumed power and became Government forces. International forces have operated in Afghanistan with the consent of, and in cooperation with, the Afghan authorities since mid/late December 2001, after the Taliban forces were

defeated and the Taliban removed from political power.¹⁹⁶ As such, from the fall of the Taliban from government onwards, foreign forces operating in Afghanistan at the invitation of the Afghan authorities were no longer engaged in a confrontation between States. Nor has the Prosecution identified the necessary level of control over anti-government groups by another State to render the armed conflict international.¹⁹⁷

127. The International Committee of the Red Cross (“ICRC”) has qualified the situation in Afghanistan as a non-international armed conflict as of 19 June 2002, the date when the Afghan Transitional Administration was fully established.¹⁹⁸ UNAMA and the AIHRC have also classified the armed conflict as non-international, an assessment which remains valid in the light of the ongoing nature of the armed conflict, the identities of the parties and the fact that international forces continue to operate in Afghanistan with the consent of the Government of Afghanistan.¹⁹⁹

128. The level of intensity of the armed conflict and the degree of organisation of the parties to the conflict qualify the violence as an armed conflict of a non-international character.²⁰⁰

¹⁹⁶ “Letter dated 19 December 2001 from the Permanent Representative of Afghanistan to the United Nations addressed to the President of the Security Council”, U.N. Doc. S/2001/1223, 19 December 2001, AFG-OTP-0003-3122.

¹⁹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, [ICC-01/04-01/06-2842](#), 14 March 2012, (“Lubanga Trial Judgment”), para. 541; *Prosecutor v. Germain Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, [ICC-01/04-01/07-3436-tENG](#), 7 March 2014 (“Katanga Trial Judgment”), paras. 1177-1178.

¹⁹⁸ See The ICRC reply to the UK House of Commons Select Committee on International Development, 20 December 2002, AFG-OTP-0002-4893 at 4895-4896.

¹⁹⁹ See UNAMA 2010 Annual Report, AFG-OTP-0001-4334 at 4340; UNAMA, Special Report, Attacks in Mirza Olang, Sari Pul Province: 3-5 August 2007, AFG-OTP-0007-0364 at 0370; AIHRC, “From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan”, December 2008, AFG-OTP-0002-2720 at 2726-2727.

²⁰⁰ See *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, [ICC-01/05-01/08-424](#), 3 July 2009, paras. 235-236; [Côte d’Ivoire Article 15 Decision](#), para. 121; [Katanga Trial Judgment](#), paras. 1183, 1185-1187; [Lubanga Trial Judgment](#), paras.534-538; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “Judgment pursuant to

i. Degree of organisation of the parties to the armed conflict

129. As described in paragraphs 74-75 and 88-91, the Taliban and the Haqqani Network are armed groups under responsible commands, each with an internal system and code of discipline, the ability to carry out military operations in designated zones of operation, and the ability to procure, transport and distribute arms.

130. As a further illustration of the level of organisation of the parties to the conflict, the Prosecution provides below a brief overview of two of the other main armed groups operating in Afghanistan. It should be stressed, however, that there are other non-state armed groups that may also meet the required level of organisation to qualify as parties to the armed conflict in Afghanistan, on both sides of the conflict. Particularly in areas of the country where insecurity is greatest, a multiplicity of armed groups vie for power and control, including those allied with government forces, nominally pro-government militias, the Taliban, and other anti-government factions whose relationship with the Taliban is not always apparent.²⁰¹

131. HIG was the third largest anti-government armed group in Afghanistan, at least until it concluded a peace agreement with the Government of Afghanistan in September 2016. Like the Taliban and the Haqqani Network, its membership is predominantly of Pashtun ethnicity. HIG was once the dominant military power in the central and eastern regions of Afghanistan (Kapisa, Laghman, Logar, Ghazni and Wardak provinces), but

Article 74 of the Statute”, [ICC-01/05-01/08-3343](#), 21 March 2016 (“Bemba Trial Judgment”), paras. 134-137.

²⁰¹ See, e.g. Bleuer, C. and Ali, O., “Security in Kunduz Worsening Further: The case of Khanabad”, *Afghanistan Analysts Network*, 28 October 2014, AFG-OTP-0003-0135.

it has progressively lost ground to the Taliban since their alliance ended in 2007.²⁰²

132. HIG is reportedly the most centrally controlled of the three main anti-government armed groups in Afghanistan, with nearly all strategic and tactical decisions taken by Hekmatyar or his close aides.²⁰³ According to former fighters in the organisation, the group's structure is largely the same as it was during the civil war following the collapse of the Soviet Union,²⁰⁴ with the general director of military operations giving commands to regional and provincial military zones, and with a military commander assigned to each district, with around 20 fighters under his command.²⁰⁵
133. While currently much smaller in the number of fighters than the three armed groups mentioned above, the information available indicates that Al Qaeda has been a party to the armed conflict throughout the period in question, conducting operations against the Afghan Government and international forces in cooperation with both the Taliban and the Haqqani Network, while also operating training camps and planning attacks in foreign countries from its base in the Afghanistan-Pakistan border region.²⁰⁶

²⁰² ICG, 2011, AFG-OTP-0002-2204 at 2223.

²⁰³ Giustozzi, A. (ed.), *Decoding the New Taliban: Insights from the Afghan Field*, (Hurst & Co., London, 2009), AFG-OTP-0007-2258 at 2260; Rahmani, W., "Afghanistan's Veteran Jihadi Leader: An Interview with Qazi Mohammad Amin Waqad", *MonitorSpotlight on Terror*, Vol. 4, Issue 1, 3 May 2007, AFG-OTP-0003-3022.

²⁰⁴ ICG, 2011, AFG-OTP-0002-2204 at 2223, (citing interviews with Hezb-e-Islami party officials conducted on 31 May 2011).

²⁰⁵ ICG, 2011, AFG-OTP-0002-2204 at 2223.

²⁰⁶ The White House, Office of the Press Secretary, "Remarks by the President on the Way Forward in Afghanistan", 22 June 2011, AFG-OTP-0003-3285 at 3286; Roggio, B. and Megahan, P., "ISAF raids against al Qaeda and allies in Afghanistan 2007-2013," *The Long War Journal*, 30 May 2014, AFG-OTP-0007-2942.

134. Al Qaeda was formed in 1988 in Peshawar, Pakistan.²⁰⁷ At the time of its formation, the group's structure had the Command Council (*shura majlis*) as the highest decision-making body of Al Qaeda. It was considered the highest authority excluding the *Amir* (the overall leader, currently Ayman al-Zawahiri) and his deputy. Its members were nominated by the *Amir* and their function was to plan and supervise all aspects of the organisation's activity.²⁰⁸ The Command Council authorised the organisation's regulations, policies and the annual budget, and elected members of the various committees.²⁰⁹ It was further subdivided into committees according to operational themes.²¹⁰ Following the launch of OEF in 2001, the organisation came under significant pressure and it decentralised its operating structure and hierarchy to mitigate the risk of all of its leaders being killed or captured at the same time or place.²¹¹ Notwithstanding this evolution, since 2001, Al Qaeda has "remained a clearly defined and active terrorist organization with an identifiable leadership and chain of command".²¹²

ii. Level of intensity of the armed conflict

135. The level of intensity of the armed conflict in the period from 1 July 2002 through the present time meets the necessary threshold to qualify as a

²⁰⁷ Bergen, P. & Cruickshank, P., "Revisiting the Early Al Qaeda: An Updated Account of its Formative Years", *Studies in Conflict & Terrorism*, Vol. 35, Issue 1 (2012), AFG-OTP-0006-0023 at 0024.

²⁰⁸ Combating Terrorism Centre, Harmony Program Database, "Al-Qaeda Interior Organization (English Translation)", AFG-OTP-0003-1080 at 1086-1088 ("CTC, Al-Qaeda Interior Organization").

²⁰⁹ CTC, Al-Qaeda Interior Organization, AFG-OTP-0003-1080 at 1086-1088.

²¹⁰ Gunaratna and Oreg, 2010, AFG-OTP-0003-1312 at 1328-1329. *See also* Combating Terrorism Centre, Harmony Program Database, "Al-Qa'ida Goals and Structure (English Translation)", AFG-OTP-0003-1071 ("CTC, Al-Qa'ida Goals and Structure").

²¹¹ Farrall, L., "The evolution of command", *Jane's Strategic Advisory Services*, November 2009, AFG-OTP-0006-0004 at 0004.

²¹² Hoffman, B. & Reinares, F., 'Conclusion', in Hoffman & Reinares (eds.), *The Evolution of the Global Terrorist Threat: From 9/11 to Osama Bin Laden's Death*, (Columbia University Press, 2014), AFG-OTP-0007-2081.

non-international armed conflict. Armed clashes between pro-government forces and anti-government armed groups have been consistently reported since mid-2002, and the level of violence has only increased since that time, reaching its highest level in 2015.²¹³ The number of international, including US troops, stationed in Afghanistan between 2002-2014 ranged from a minimum of 12,000 (in 2002) to a peak of more than 100,000 (in 2010-2011).²¹⁴ The number of troops in the ANSF increased from 6,000 in 2003 to more than 330,000.²¹⁵ According to one estimate, between the years 2001-2014 the total number of people (military and civilian) killed as a result of the armed conflict was 92,000.²¹⁶

136. Parties to the conflict have employed diverse and sophisticated weaponry. Anti-government armed groups have conducted attacks using small arms and light munitions such as AK-47s, rocket propelled grenades, and IEDs. International forces have employed heavy weaponry, artillery, B-52 and B-1B heavy bombers, and helicopters in support of their military campaign. While initially the NATO/ISAF forces based in Kabul were lightly armed,

²¹³ For an illustrative example of developments indicating the intensity of the armed conflict since 2002 see selection of annual Reports of the Secretary-General on the situation in Afghanistan: A/57/487-S/2002/1173, 21 October 2002, AFG-OTP-0004-6452 at 6459-6460, paras. 29-35; A/60/224-S/2005/525, 12 August 2005, AFG-OTP-0004-6560 at 6573-6574, paras. 60-64; A/61/326/-S/2006/727, 11 September 2006, AFG-OTP-0004-6599 at 6599-6601, paras. 2-12; A/62/345-S/2007/555, 21 September 2007, AFG-OTP-0004-6635 at 6636-6637, paras. 5-9; A/63/372-S/2008/617, 23 September 2008, AFG-OTP-0004-6679 at 6683-6684, paras. 16-22; A/64/613-S/2009/674, 28 December 2009, AFG-OTP-0004-6751 at 6755-6757, paras. 18-25; A/66/369-S/2011/590, 21 September 2011, AFG-OTP-0004-6886 at 6886-6887, paras. 3-7; A/67/619-S/2012/907, 6 December 2012, AFG-OTP-0004-6981 at 6985-6986, paras. 13-16; A/71/682-S/2016/1049, 13 December 2016, AFG-OTP-0007-1632 at 1635-1640; A/72/392-S/2017/783, 15 September 2017, AFG-OTP-0007-1618 at 1621-1624.

²¹⁴ Associated Press, "A Timeline of US Troops in Afghanistan since 2001", 15 October 2015, AFG-OTP-0003-0723; Brookings Institute, "Afghanistan Index", editions dated 23 February 2005 AFG-OTP-0003-0764 at 0767, 31 December 2010 AFG-OTP-0003-0828 at 0831, FIGURE 1.1 and 1.2., and 31 July 2015, AFG-OTP-0003-0872 at 0876, ("Brookings Institute, Afghanistan Index").

²¹⁵ Brookings Institute, Afghanistan Index, AFG-OTP-0003-0872 at 0877, FIGURE 1.4.

²¹⁶ Crawford, N., "War-related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014", *Watson Institute for International Studies, Brown University, Costs of War Project*, 22 May 2015, AFG-OTP-0003-0981 at 0981.

there had been increasing use of heavy artillery and air power in their military operations, particularly in the southern and eastern provinces.²¹⁷

137. Moreover, since 2001, the United Nations Security Council has been seized of the situation in Afghanistan pursuant to Chapter VII of the UN Charter and has continued to recognise and characterise the situation as an armed conflict.²¹⁸

b. Underlying acts constituting war crimes

i. Murder

138. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the war crime of murder pursuant to article 8(2)(c)(i).

139. As described in paragraphs 74-75 and 88-91, the Taliban and affiliated armed groups deliberately killed civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule and ideology, pursuant to the declared policy of the Taliban leadership. Civilian victims who were taking no direct part in hostilities included Afghan politicians, public officials and civil servants, members of provincial peace councils, teachers, mullahs and religious scholars, doctors, aid workers and other civilians who the Taliban define as “enemies” in the *Layha*, in their public statements and in night letters. A sample of 47 incidents of murder

²¹⁷ See e.g., HRW, “Troops in Contact”, Airstrikes and Civilian Deaths in Afghanistan, AFG-OTP-0002-3905 at 3909, 3917-3920; UNAMA 2015 Annual Report, AFG-OTP-0005-0515 at 0560, 0584.

²¹⁸ See e.g. UNSC resolution 2344 (17 March 2017), AFG-OTP-0007-0355 at 0356.

attributed to the Taliban and affiliated armed groups are included in confidential *ex parte* Annex 2A.

***ii.* Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities**

140. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the war crime of intentionally directing attacks against the civilian population pursuant to article 8(2)(e)(i).

141. As described in paragraphs 98-99 and 101-107, the Taliban and affiliated armed groups intentionally attacked civilians using suicide bombers, IEDs, firearms and rocket propelled grenades. A sample of 52 incidents of intentional attacks directed against civilians attributed to the Taliban and affiliated armed groups are included in confidential *ex parte* Annex 2A.

***iii.* Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission**

142. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the war crime of intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance missions pursuant to article 8(2)(e)(iii).

143. The Taliban have frequently attacked staff members of humanitarian organisations and aid personnel throughout the whole territory of

Afghanistan, including international organisations such as UNAMA, the ICRC and international and national non-governmental organisations providing humanitarian assistance to the civilian population. All the victims of these attacks were entitled to the protection given to civilians under the international law of armed conflict.

144. For example, 495 attacks against humanitarian aid workers were recorded between May 2003 and September 2017, resulting in 394 aid workers killed, 302 injured and 421 kidnapped.²¹⁹ Although not all these attacks can be ascribed to the Taliban, a sample of seven alleged incidents of attacks on humanitarian assistance workers attributed to the Taliban and affiliated armed groups are included in confidential *ex parte* Annex 2A.

***iv.* Intentionally directing attacks against protected objects**

145. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the war crime of intentionally directing attacks against protected objects, including buildings dedicated to religion, education, hospitals and places where the sick and wounded are collected, pursuant to article 8(2)(e)(iv).

146. For example, from 2006 until 2010 the Taliban unleashed a deliberate campaign of violence against schools, destroying hundreds of public schools with IEDs, rockets, grenades or by setting them on fire. The schools were targeted for several reasons, including: an ideological opposition to education generally or to education of girls; because the

²¹⁹ Humanitarian Outcomes (2015), *Aid Worker Security Database*, AFG-OTP-0007-0697.

schools were propagating views or ideologies contrary to those of the Taliban; and because public schools represented symbols of the Government, since in some areas they were the only public presence.²²⁰

147. Since 2010, the Taliban Leadership Council appears to have ceased its attacks on school buildings, although attacks on teachers, students and school administrators have continued. This tactical shift was reportedly motivated by the need to maintain popular support for the insurgency among local communities, the increased strength of the insurgency which came to rely less on attacking “soft” targets, and *de facto* power-sharing arrangements which gave the Taliban significant latitude to control school curricula, textbooks, hiring of teachers, and other conditions such as bans on mixed (male/female) education and on girls’ secondary education, in exchange for which the Taliban allowed public schools to operate.²²¹

148. UNAMA has also documented a large number of direct attacks against medical facilities and personnel attributed to anti-government armed groups and causing civilian casualties.²²² UNAMA also recorded a pattern of threats and intimidation, resulting in civilian casualties and/or the temporary closure of medical facilities.²²³

²²⁰ Giustozzi, and Franco, 2011, AFG-OTP-0003-0143 at 0147-0150 and 0167-0168; HRW, Lessons in Terror, AFG-OTP-0002-4364 at 4397-4399; CARE, Knowledge on Fire, AFG-OTP-0002-0641 at 0672, 0675 and 0679-0683.

²²¹ For evolution of these policies and tactics *see* Giustozzi, and Franco, 2011, AFG-OTP-0003-0143 at 0144; Giustozzi, and Franco, 2013, AFG-OTP-0003-0172.

²²² UNAMA 2012 Annual Report, AFG-OTP-0003-6236, at 6307; UNAMA, “Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict”, July 2011, AFG-OTP-0001-2732 at 2759; [REDACTED].

²²³ UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3467-3468; [REDACTED]; UNAMA, “Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict”, July 2011, AFG-OTP-0001-2732 at 2759.

149. A large number of attacks against places of worship or the clergy have been recorded.²²⁴ For example, an IED attack on a mosque during Friday prayers on 8 October 2010, in the city of Taluqan (Takhar province), killed 15 people including the Governor of Kunduz province who was an outspoken critic of the Taliban and had survived an assassination attempt.²²⁵

150. A sample of 11 alleged incidents of attacks intentionally directed against protected objects are included in confidential *ex parte* Annex 2A.²²⁶

v. Conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities

151. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the war crimes of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities pursuant to article 8(2)(e)(vii).

152. The recruitment and use of children by the Taliban and affiliated armed groups has been reported since at least 2008. Children under the age of 15 have allegedly been recruited and used, *inter alia*, to carry out suicide attacks or transport munitions.²²⁷ The UN country task force monitoring

²²⁴ UNAMA 2013 Annual Report, AFG-OTP-0003-5192 at 5240; UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5489; UNAMA, “Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict”, July 2011, AFG-OTP-0001-2732 at 2759.

²²⁵ [REDACTED].

²²⁶ [REDACTED].

²²⁷ “Report of the Secretary-General on children and armed conflict in Afghanistan”, U.N. Doc. S/2008/695, 10 November 2008, AFG-OTP-0001-2203 at 2209, para. 23; HRW, “Taliban Child Soldier Recruitment Surges”, 17 February 2016, AFG-OTP-0005-4360 at 4360, 4362, 4365. For examples of prohibited categories of activities concerning the use of children in the context of

children and armed conflict documented the recruitment and use of 401 children, including children as young as 6, 8 and 10 years old, by armed opposition groups between 2010 to 2014.²²⁸ According to testimonies of children who failed to carry out a suicide attack, children are tricked, promised money, indoctrinated, militarily trained or otherwise forced to become suicide bombers.²²⁹

153. A sample of seven incidents of alleged recruitment or use of children attributed to the Taliban and affiliated armed groups is included in confidential *ex parte* Annex 2A.

***vi.* Killing or wounding treacherously a combatant adversary**

154. On the basis of the information available, there is a reasonable basis to believe that members of the Taliban and affiliated armed groups have committed the war crime of killing or wounding treacherously a combatant adversary (article 8(2)(e)(ix)).

155. In particular, the deliberate feigning of protected civilian status—for example by wearing civilian clothing to conceal a suicide vest—is a

hostilities see *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction”, [ICC-01/04-01/06-3121-Red](#), 1 December 2014, paras. 334-340.

²²⁸ “Report of the Secretary-General on children and armed conflict in Afghanistan,” S/2015/336, 15 May 2015, AFG-OTP-0003-3215 at 3219-3220, paras. 18-20. The Prosecution understands that the total figure used in the Secretary-General’s report includes children under 18 years, pursuant to the age restriction set out in article 1 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, A/RES/54/263, 25 May 2000. Nonetheless, as noted above, the report expressly includes within this total children found to be under the age of 15. See also Office of the Special Representative of the Secretary-General for Children and Armed Conflict, “Mission Report: Visit of the Special Representative for Children & Armed Conflict to Afghanistan”, 20-26 February 2010, AFG-OTP-0003-3270 (“SRCAC Mission Report 2010”) at 3274.

²²⁹ SRCAC Mission Report 2010, AFG-OTP-0003-3270 at 3274; HRW, “Taliban Child Soldier Recruitment Surges”, 17 February 2016, AFG-OTP-0005-4360 at 4361.

common *modus operandi* for the Taliban and affiliated anti-government armed groups when carrying out attacks against Afghan and international forces.

156. For example, on 7 April 2011, the Taliban allegedly used an ambulance in a suicide attack targeting an ANP regional training centre in Kandahar, killing several officers and wounding others.²³⁰ On 9 June 2012, a male suicide bomber dressed in a burqa allegedly blew himself up near a patrol of international military forces, killing four soldiers and injuring another five.²³¹ On 6 December 2012, a suicide bomber disguised as a Taliban peace envoy allegedly detonated his explosive device, hidden in his undergarments, at a guesthouse in Kabul, intending to target NDS chief Asadullah Khalid.²³² In each incident, the Taliban claimed responsibility.
157. A sample of six incidents of alleged treacherous attacks by the Taliban and affiliated armed groups is included in confidential *ex parte* Annex 2A.²³³

c. Existence of a plan or policy or large scale occurrence

158. The information available provides a reasonable basis to believe that the alleged crimes described above were committed as part of a plan or policy of the Taliban and affiliated armed groups and on a large scale. As set out in paragraphs 74-75 and 88-91, these groups have deliberately targeted

²³⁰ UNAMA, “Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict”, July 2011, AFG-OTP-0001-2732 at 2759; International Committee of the Red Cross, “Afghanistan: ambulance used in attack on police training compound”, 7 April 2011, AFG-OTP-0003-1881; IRIN News, “Afghanistan: Taliban rue ambulance attack”, 12 April 2011, AFG-OTP-0003-2037.

²³¹ The Telegraph, “Four French soldiers killed by burka-wearing bomber,” 9 June 2012, AFG-OTP-0003-2991 at 2991-2992.

²³² NDTV, “Afghan spy chief wounded by underpants bomber”, 7 December 2012, AFG-OTP-0003-0331 at 0331.

²³³ [REDACTED].

civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule and ideology, pursuant to a leadership policy to seize power from the Government of Afghanistan by lethal force.

159. Although the existence of a plan or policy or on the large scale occurrence of crimes is not a pre-requisite for the Court to exercise jurisdiction over war crimes,²³⁴ such information has assisted the Prosecution in determining whether there is a reasonable basis to believe that those alleged crimes were committed and in its admissibility assessment for gravity.

d. Nexus between the individual acts and the armed conflict

160. The information available indicates that the crimes referred to above took place in the context of and were associated with the armed conflict in Afghanistan. The relevant crimes were committed during the armed conflict between the Taliban and affiliated anti-government armed groups and the Government of Afghanistan, as part of those groups' military campaign aimed at defeating the Afghan Government and international forces. The alleged perpetrators were Taliban or Haqqani Network's fighters, and the victims were civilians, or combatant adversaries in the case of treacherous attacks. Accordingly, the requisite link can be established between the alleged acts committed by the Taliban and affiliated armed groups, and the armed conflict in Afghanistan.

²³⁴ [Bemba Trial Judgment](#), para. 126.

B. Acts allegedly committed by members of the ANSF

161. The information available provides a reasonable basis to believe that in the period since 1 May 2003, members of the ANSF have committed the following war crimes in the context of a non-international armed conflict: torture and cruel treatment (article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(c)(ii)); and sexual violence (article 8(2)(e)(vi)).

1. War Crimes

a. Classification of the armed conflict

162. For the reasons set out above in paragraphs 125-128, the conduct allegedly committed by members of the ANSF took place in the context of or was associated with an armed conflict not of an international character.

b. Underlying acts constituting war crimes

i. Torture and cruel treatment

163. On the basis of the information available, there is a reasonable basis to believe that members of the ANSF, including members of the NDS, the ANP, the ANA, the Afghan National Border Police (“ANBP”) and the ALP, have committed the war crime of torture and cruel treatment pursuant to article 8(2)(c)(i).

164. Multiple sources have reported on the prevalence of torture in Afghan Government detention facilities, including the AIHRC, UNAMA and a fact-finding commission appointed by the President of Afghanistan in 2013. Journalists have also published the accounts of individuals who

allege that they were subjected to torture or other forms of cruel treatment while in detention.²³⁵ Governmental authorities alleged to have tortured conflict-related detainees include the NDS, the ANP, ANA, the ANBP and the ALP.

165. UNAMA has published a series of reports setting forth the findings and results of its observation programme from 2010 to 2017, based on interviews with hundreds of detainees as well as meetings with detaining authorities and other relevant government officials. The reports indicate that a high percentage of interviewed detainees experienced interrogation techniques at the hands of officials that constitute torture. For example, in 2011, UNAMA found that torture was practised “systematically”²³⁶ in five NDS facilities: the provincial NDS facilities in Herat, Kandahar, Khost and Laghman, and the national facility of the NDS Counter-Terrorism Department 124 in Kabul.²³⁷ In January 2013, UNAMA reported sufficiently credible information that 326 of the detainees interviewed (51%) had experienced torture or cruel treatment by the NDS, ANP, ANA or ALP, including 80 of 105 child detainees interviewed (76%).²³⁸ Similar findings

²³⁵ See, e.g., Stickler, A., and Clark, K., “Special investigation: a charter for torture”, *New Statesman*, 1 September 2011, AFG-OTP-0005-6035 at 6035 to 6039_in particular; Smith, G., “From Canadian custody into cruel hands”, *Globe and Mail*, 23 April 2007, AFG-OTP-0003-5318.

²³⁶ UNAMA explains that the term “systematic” indicates a pattern or practice of torture within a specific detention facility that is so prevalent that the facility’s management and investigative staff must have known, committed, ordered or acquiesced to the practice of torture. UNAMA’s 2015 report further specifies that for them to reach such a finding, approximately 50 % of the detainees interviewed who had been held in that facility had been tortured. See UNAMA 2011 Report on Conflict-Related Detainees AFG-OTP-0001-2893 at 2903 and 2904; UNAMA, “Treatment of Conflict-Related Detainees in Afghan Custody - One Year On”, January 2013, AFG-OTP-0003-4133 at 4143 (“UNAMA 2013 Report on Conflict-Related Detainees”); UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5555; UNAMA, “Treatment of Conflict-Related Detainees: Implementation of Afghanistan’s National Plan on the Elimination of Torture”, April 2017, AFG-OTP-0006-3571 at 3578 (“UNAMA 2017 Report on Conflict-Related Detainees”).

²³⁷ UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2917.

²³⁸ UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4148-4149.

on the consistent use of torture are contained in UNAMA's February 2015²³⁹ and April 2017²⁴⁰ reports.

166. Detainees reportedly described experiencing torture in the form of prolonged and severe beatings with cables, pipes, hoses or wooden sticks (including on the soles of the feet); punching, hitting and kicking all over the body including jumping on the detainee's body; twisting and wrenching of detainees' genitals; use of cigarette lighters to burn the soles of the feet; subjecting detainees to electric shocks; suspension by the wrists for lengthy periods from chains or other devices attached to the wall, ceiling, iron bars or other fixtures; stress positions; forced prolonged standing including in extremely hot or cold conditions; forced standing and sitting down or squatting repeatedly; forced drinking of excessive amounts of water; denial of food, water and prayer time; threats of execution and/or sexual assault. Several incidents of removal of fingernails and toenails, and of stuffing cloth or plastic bags in a detainee's mouth in order to asphyxiate detainees were also reported.²⁴¹

167. Moreover, the information available provides a reasonable basis to believe that torture was inflicted against persons who were either *hors de combat*, or civilians taking no active part in the hostilities, for purposes of obtaining information or a confession, or as a form of punishment. Detainees reported that different forms of torture were often used on them with increasing levels of pain, particularly when they refused to confess to

²³⁹ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5547, 5556-5557, 5582-5584, 5592-5594, 5603.

²⁴⁰ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3576-3579.

²⁴¹ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3577; UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5558-5562; UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2917; UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4175, 4193.

the crime of which they were accused, or failed to provide or confirm information that was requested or suggested. Most detainees reported that the torture stopped once they made a forced confession, sometimes in front of a video camera, or when they thumb-printed a paper that documented a confession.²⁴²

168. UNAMA's findings are corroborated by the AIHRC, which conducts regular monitoring of detention facilities pursuant to its mandate as Afghanistan's national human rights institution. AIHRC reported that based on its own monitoring and interviews of detainees held in facilities run by the NDS and the ANP, detainees were subjected to a variety of interrogation methods by government officials, who inflicted severe physical or mental pain and suffering constituting torture, using the same means and methods as those reported by UNAMA.²⁴³
169. In January 2013, then-President Hamid Karzai appointed a fact-finding delegation to investigate the allegations of torture contained in UNAMA's report published that month.²⁴⁴ The delegation's report confirmed the prevalence of torture in Afghan Government detention facilities, finding 136 confirmed cases of torture out of 284 detainees they had interviewed (48%). However, it rejected UNAMA's findings that torture was systematic

²⁴² [REDACTED]. UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5559. *See also* UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2919-2920, 2930; [REDACTED].

²⁴³ See Afghanistan Independent Human Rights Commission, "Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan", 17 March 2012, AFG-OTP-0003-3951 at 3962-3966 ("AIHRC, Treatment of Conflict-Related Detainees").

²⁴⁴ Afghanistan Office of the President, "President Karzai Orders Investigation into UN Report on Abuse of Detainees in Afghan Detention Facilities", 22 January 2013, AFG-OTP-0003-0307.

in certain facilities, and rejected associated allegations of rape and sexual abuse.²⁴⁵

170. Senior NDS officials have admitted that detainees were subjected to cruel treatment in the NDS facilities under their authority. The chief of investigations at NDS Kandahar told UNAMA in August 2011 that NDS investigators “punish” insurgents as normal methods of obtaining information, and stated that “we have to use some methods for terrorists so they confess and give us information about what they have been doing”.²⁴⁶ Likewise, the head of NDS Keshim District and the head of interrogation of NDS Badakhshan both acknowledged to the AIHRC in 2011 that they had abused a detainee.²⁴⁷

171. Both AIHRC and UNAMA have also reported on the torture or ill-treatment of persons by the national police at the time of arrest, at check posts, at district headquarters, and at provincial headquarters.²⁴⁸ UNAMA’s 2015 report found nearly half of detainees interviewed in Kandahar, Herat and Baghlan provinces had been tortured by ANP or ANBP, and documented 49 cases of torture and cruel treatment in 18 other provinces.²⁴⁹ UNAMA’s 2017 report found a 14% increase from 2015 in the number of detainees (77) allegedly tortured by ANP or ANBP. Among 77 detainees, 20 were boys under the age of 18. The 2017 report documented

²⁴⁵ UNAMA 2015 Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129, Annex III: Press Conference by the President’s fact-finding delegation announcing the conclusions of its investigative work, 11 February 2013, AFG-OTP-0003-5541 at 5663 and 5664.

²⁴⁶ UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2926.

²⁴⁷ AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 3973.

²⁴⁸ UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2905; *See also* AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 3962, 3974.

²⁴⁹ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5594.

the highest levels of abuse in Kandahar and Nangarhar provinces, while also documenting reports of violations in 20 other provinces.²⁵⁰

172. UNAMA has further documented allegations of torture and cruel treatment by local police units in different provinces of Afghanistan.²⁵¹ For example, in 2015, UNAMA reported that between February 2013 and December 2014, 18 of the 42 interviewed detainees held by ALP units in 11 different provinces across the country had been tortured or ill-treated,²⁵² while in 2017 it documented reports of 22 detainees in 12 different provinces who were severely beaten by ALP either at the time of arrest or during detention.²⁵³

173. In 2013, UNAMA interviewed 34 individuals detained by the ANA and found 13 sufficiently credible and reliable allegations of torture or cruel treatment during ANA custody.²⁵⁴ In 2015, UNAMA similarly found sufficiently credible and reliable evidence of torture or ill-treatment by the ANA in 18 out of 58 detainees interviewed in 9 different provinces across the country.²⁵⁵ In 2017, UNAMA reported on eight cases of torture or ill-treatment of detainees while in ANA custody prior to being transferred to the ANP or NDS.²⁵⁶

²⁵⁰ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3579.

²⁵¹ UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4208.

²⁵² UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5604.

²⁵³ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3579-3580.

²⁵⁴ UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4207.

²⁵⁵ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5607.

²⁵⁶ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3580.

ii. Outrages upon personal dignity

174. On the basis of the information available, there is a reasonable basis to believe that members of the ANSF have committed the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment, pursuant to article 8(2)(c)(ii).
175. In particular, the information available provides a reasonable basis to believe that NDS and ANP officials deliberately degraded and humiliated the dignity of conflict-related detainees under their control.
176. As set out above in paragraph 166, the acts inflicted were so humiliating and degrading of the dignity of the victims that any reasonable person would be outraged by such conduct.²⁵⁷ The detainees were at the mercy of their captors who inflicted upon them dehumanising abuses such as depriving them of food, water, as well as their personal prayer time.²⁵⁸
177. The alleged perpetrators further humiliated victims and abused their dignity by subjecting them to acts of physical and psychological torture and other forms of inhuman treatment. Forced to confess serious crimes such as murder, detainees were denied the right to safeguards from abuse, such as access to medical care and defence lawyers, perpetrating the feeling of being at the mercy of their captors with no hope of freedom.²⁵⁹
178. Victims were either *hors de combat* by detention or civilians detained for security reasons related to the armed conflict in Afghanistan. They were

²⁵⁷ “The humiliation of the victim must be so intense that any reasonable person would be outraged.” See *Prosecutor v. Kunarac et al.*, ICTY Appeals Chamber, [Judgement](#), IT-96-23 & IT-96-23/1-A, 12 June 2002 (“[Kunarac Appeals Judgement](#)”), para. 162.

²⁵⁸ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5559.

²⁵⁹ UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4161-4163.

predominantly male conflict-related detainees under the control of the NDS and ANP in national detention facilities across Afghanistan.

iii. **Sexual violence**

179. On the basis of the information available, there is a reasonable basis to believe that members of the ANSF have committed the war crime of sexual violence pursuant to article 8(2)(e)(vi).

180. The war crime of “other forms of sexual violence” requires that “[t]he perpetrator committed an act of a sexual nature against one or more persons [...] by force or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent”; while such conduct must be “of a gravity comparable to that of serious violations of article 3 common to the four Geneva Conventions”.²⁶⁰

181. There is a reasonable basis to believe that NDS and ANP officials committed acts of sexual violence against predominantly male conflict-related detainees under coercive circumstances. Such physical and psychological acts of violence were used as a method of interrogation to maximise the severity of physical and mental pain and thereby to punish, control and degrade the detainees.

²⁶⁰ Elements of Crimes, article 8(2)(e)(vi)-6, paras.1-2.

182. The conduct was of a gravity comparable to that of a serious violation of common article 3 to the four Geneva Conventions, since the severity of the humiliation, pain and suffering caused was comparable to acts that would constitute outrages upon personal dignity, cruel treatment and torture. The sexual and gender-based component of the conduct described below, nonetheless, is more accurately reflected as the crime of “other forms of sexual violence”, given the nature of the conduct and its context, its manner of commission, and impact.²⁶¹
183. Specifically, NDS and ANP officials allegedly inflicted deliberate injuries to the genitalia of victims by twisting, squeezing, beating or burning their penises and/or testicles including with pliers or wrench-like device; administering electric shocks to the testicles; hanging weights from the testicles; and whipping their penises and testicles with cables. Detainees described these coercive acts as extremely painful and causing some of them to lose consciousness as a result.²⁶² Afghan officials reportedly also targeted the victims’ sexuality by means of intimidation and threats of force and of sexual assault. Victims endured the constant fear of being subject to physical and sexual violence, including that they would be beaten and killed and their sexual organs destroyed.²⁶³ These acts were destructive of the sexual integrity of the victims.

²⁶¹ With regard to a different set of facts *see separately Prosecutor v. Muthaura et al*, Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, [ICC-01/09-02/11-382-Red](#), 23 January 2012 (“Muthaura Confirmation Decision”), paras. 264-266.

²⁶² UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2917, 2921, 2923; UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4194-4195, 4198; UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5587, 5607; AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 3966.

²⁶³ UNAMA 2013 Report on Conflict-Related Detainees, AFG-OTP-0003-4133 at 4194-4195; UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5558-5559, 5587.

c. Existence of a plan or policy or large scale occurrence

184. The information available does not clearly indicate whether the alleged crimes by members of ANSF against conflict-related detainees have been committed as part of one or more plans or policies at the facility, district or provincial level. However, the information available indicates that the alleged crimes were committed on a large scale.²⁶⁴

185. Although the existence of a plan or policy or on the large scale occurrence of crimes is not a pre-requisite for the Court to exercise jurisdiction over war crimes,²⁶⁵ such information has assisted the Prosecution in determining whether there is a reasonable basis to believe that those alleged crimes were committed and in its admissibility assessment for gravity.

d. Nexus between the individual acts and the armed conflict

186. The information available indicates that the crimes referred to above took place in the context of and were associated with the armed conflict in Afghanistan. The relevant crimes were committed against conflict-related detainees suspected of being Taliban fighters, suicide attack facilitators, producers of IEDs, or for otherwise being implicated in crimes associated with the armed conflict, and primarily occurred in the context of interrogations. Accordingly, the requisite link can be established between the alleged acts committed by members of the ANSF and the armed conflict in Afghanistan.

²⁶⁴ The existence of a plan, policy or large-scale commission is not a jurisdictional prerequisite under article 8; [Bemba Trial Judgment](#), para. 126.

²⁶⁵ [Bemba Trial Judgment](#), para. 126.

C. Acts allegedly committed by members of the US armed forces and members of the CIA

187. The information available provides a reasonable basis to believe that in the period since 1 May 2003, members of the US armed forces have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)) and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict. The information available provides a reasonable basis to believe that in the period since 1 July 2002, members of the CIA have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(c)(ii)); and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict, both on the territory of Afghanistan as well as on the territory of other States Parties to the Statute.
188. The total number of persons allegedly subjected to acts of torture, cruel treatment, outrages upon personal dignity and/or rape and other forms of sexual violence by members of the US armed forces or by the CIA in the context of the situation in Afghanistan varies according to different sources. Sources also do not always provide clear distinctions between persons detained in the context of Afghanistan and other armed conflicts or counter-terrorist activities.²⁶⁶ The Prosecution has excluded persons who

²⁶⁶ The Report of the Senate Select Committee on Intelligence, for example, determined that as part of the CIA's global detention and interrogation programme the CIA "did not conduct a comprehensive or accurate accounting of the number of individuals it detained". The Report found that the CIA "detained *at least* 119 individuals, of whom *at least* 39 were subjected to the CIA's enhanced interrogation techniques" (emphasis added), The Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5714. Added to this number are allegations concerning the use of "standard" as opposed to "enhanced" interrogation techniques against specific detainees, but which nonetheless constituted crimes within the jurisdiction of the Court. [REDACTED].

were originally detained in the context of the armed conflict in Afghanistan, but subject to alleged crimes on the territory of States that are not party to the Statute, such as on the US naval base at Guantanamo Bay, in the Republic of Cuba (“Cuba”). The Prosecution has limited its findings to those crimes that were allegedly committed in the context of and associated with the armed conflict in Afghanistan and are sufficiently linked to the present situation.²⁶⁷

189. Within the above parameters, the Prosecution has identified to the reasonable basis threshold a number of victims within a broader total range of reported victims that appear to have a nexus to the conflict. As such, and for the purpose of this Request, the information available provides a reasonable basis to believe that at least 54 detained persons (selected from a wider range of reported victims) were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the US armed forces on the territory of Afghanistan, primarily in the period 2003-2004. The information available further provides a reasonable basis to believe that at least 24 detained persons (selected from a wider range of reported victims) were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the CIA on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania), primarily in the period 2003-2004.

²⁶⁷ See also paras. 49, 246-252.

1. War Crimes

a. Classification of the armed conflict

190. For the reasons set out above in paragraphs 125-128, the conduct allegedly committed by members of the US armed forces and the CIA took place in the context of or was associated with an armed conflict not of an international character.

b. Underlying acts constituting war crimes

i. Torture and cruel treatment

191. On the basis of the information available, there is a reasonable basis to believe that members of the US armed forces and the CIA have committed the war crime of torture and cruel treatment pursuant to article 8(2)(c)(i).²⁶⁸

192. In particular, there is a reasonable basis to believe that members of the US armed forces and the CIA applied a series of techniques, often cumulatively and consistently for extended periods, against detainees for the purpose of extracting information. The Prosecution recalls in this context that there is no requirement that the threshold of severity is met by each single act of torture or cruel treatment; the severity of pain and suffering of the victim may instead result from a consistent course of conduct.²⁶⁹

²⁶⁸ The terms “members of the US armed forces” and “members of the CIA” as used in this Request includes personnel, contractors and other persons under their effective command and control or effective authority and control.

²⁶⁹ *Prosecutor v. Krnojelac*, ICTY Trial Chamber II, [Judgement](#), IT-97-25-T, 15 March 2002 (“Krnojelac Trial Judgement”), paras. 182-183. *See also*, *Prosecutor v. Brđanin*, ICTY Appeals Chamber, [Judgement](#), IT-99-36-A, 3 April 2007, para. 251, citing *Prosecutor v. Naletilić and Martinović*, ICTY Appeals Chamber, [Judgement](#), IT-98-34-A, 3 May 2006 (“Naletilić and

193. There is a reasonable basis to believe that the following techniques, among others, were used against detainees by members of the US armed forces and the CIA, in varying combinations:

- (i) incommunicado detention and prolonged and continuous solitary confinement;²⁷⁰
- (ii) sensory deprivation, including by hooding, imposition of constant conditions of darkness or light, or removal of external stimuli using black-out goggles and sound-blocking earphones;²⁷¹
- (iii) sensory overstimulation, including by exposure to loud music, other forms of noise, and bright or flashing lights;²⁷²
- (iv) other forms of manipulation of the environment,²⁷³ especially exposure to extreme heat or cold;²⁷⁴
- (v) exploitation of phobias and cultural, religious and sexual taboos, including by use of dogs, enforced nudity, “diapering” (requiring detainees to urinate or to defecate on themselves or in their clothing),

Martinović Appeals Judgement”), para. 299; *Prosecutor v. Delalić et al.*, ICTY Trial Chamber, [Judgement](#), IT-96-21-T, 16 November 1998 (“Delalić Trial Judgement”), para. 467; ECtHR, *Ireland v. United Kingdom*, Case no. 5310/71, [Judgment](#), 18 January 1978, para. 162.

²⁷⁰ Report of the Senate Select Committee on Intelligence AFG-OTP-0003-5696 at 5706, 5864-5865, 5840 and Appendix 2 of the Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-6702; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6680; PHR, *Break Them Down*, AFG-OTP-0004-3552 at 3559, 3566, 3616-3625; [REDACTED].

²⁷¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5770, 5772, 5781; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613, 6680; CFC-AO Detainee Operations Inspection Report, 26 June 2004 (“Jacoby Report”), AFG-OTP-0003-4793 at 4824; Physicians for Human Rights, “Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and its Impact”, June 2008 (“PHR, Broken Laws Broken Lives”), AFG-OTP-0004-3365 at 3449; The Rendition Project, “Ridha al-Najjar”, AFG-OTP-0005-3265; [REDACTED].

²⁷² Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6680; CIA, *Combined Use of Interrogation Techniques*, AFG-OTP-0003-7970 at 7974; PHR, *Broken Laws Broken Lives*, AFG-OTP-0004-3365 at 3452; [REDACTED].

²⁷³ Department of Justice, Office of the Inspector General, “A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq”, May 2008, AFG-OTP-0004-1833 at 1936 (“DOJ Review of FBI Involvement in Interrogations”).

²⁷⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5777, 5798; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6680; [REDACTED].

sexual humiliation or insults, offensive use of items of religious significance;²⁷⁵

- (vi) imposition of “stress positions” designed to induce muscle fatigue, including by requiring detainees to stand against a wall with their body weight resting against their hands and feet, or to maintain uncomfortable positions for extended periods of time;²⁷⁶
- (vii) suspension, such as from the ceiling in a vertical shackling position as to enforce sleep deprivation or otherwise inflict pain;²⁷⁷
- (viii) sleep deprivation and/or manipulation, brought about through a variety of means including stress positions, loud noise or music, bright lights;²⁷⁸
- (ix) food deprivation and/or manipulation, including by inducing or satisfying hunger or disrupting sleep;²⁷⁹
- (x) varying degrees of physical assault, including grasping, slaps, blows or kicks, rough treatment including the “rough take down”,²⁸⁰ and

²⁷⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784, 6136; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613; Jacoby Report, AFG-OTP-0003-4793 at 4797; PHR, Break Them Down, AFG-OTP-0004-3552 at 3611-361; [REDACTED].

²⁷⁶ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613; DOJ Review of FBI Involvement in Interrogations, AFG-OTP-0004-1833 at 1936; U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency *Re: Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*”, 10 May 2005, AFG-OTP-0005-5021 at 5029; PHR, Broken Laws Broken Lives, AFG-OTP-0004-3365 at 3449; PHR, Leave no Marks, AFG-OTP-0004-3495 at 3514-3517; [REDACTED].

²⁷⁷ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5770, 5774, 5777; CIA, Combined Use of Interrogation Techniques, AFG-OTP-0003-7970 at 7975, 7983; The Report of The Constitution Project’s Task Force on Detainee Treatment, AFG-OTP-0004-3820 at 4223; [REDACTED].

²⁷⁸ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705, 5886-5887; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613, 6680; U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency *Re: Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*”, 10 May 2005, AFG-OTP-0005-5021 at 5031-5032; PHR, Break Them Down, AFG-OTP-0004-3552 at 3560, 3567; [REDACTED].

²⁷⁹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5772, 5784, 6135-6136; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6680; DOJ Review of FBI Involvement in Interrogations, AFG-OTP-0004-1833 at 1936; [REDACTED].

measures to simulate or threaten forms of assault which could cause graver physical injury (such as “walling”, by which detainees would, by controlled means, be slammed against an artificial wall);²⁸¹

- (xi) cramped or close confinement to restrict the scope of physical movement, for example by placing detainees in boxes;²⁸²
- (xii) sexual violence, including by means of “rectal rehydration” or “rectal feeding” applied with excessive force;²⁸³ and
- (xiii) suffocation by water, or the practice of so-called “waterboarding”, which simulated drowning (and, potentially, imminent death) by pouring water over a cloth covering the mouth and nose of a restrained person, as well as the placing of detainees in icy water baths, hosing them down or deluging them with water, including while restrained.²⁸⁴

194. A number of these interrogation techniques *per se* meet the threshold of severity and thus amount to torture or cruel treatment, as they necessarily

²⁸⁰ For a description, *see below* para. 197.

²⁸¹ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613; CIA, Combined Use of Interrogation Techniques, AFG-OTP-0003-7970 at 7975-7977; PHR, Leave No Marks, AFG-OTP-0004-3495 at 3517-3518; PHR, Broken Laws Broken Lives, AFG-OTP-0004-3365 at 3454-3455; [REDACTED].

²⁸² CIA, Combined Use of Interrogation Techniques, AFG-OTP-0003-7970 at 7978; U.S. Department of Justice Office of Legal Counsel, “Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency: *Interrogation of al Qaeda Operative*”, 1 August 2002, AFG-OTP-0004-2314 at 2315-2316; [REDACTED].

²⁸³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821; Annas, G. J. and Crosby, S. S., “Post-9/11 Torture at CIA ‘Black Sites’ – Physicians and Lawyers Working Together”, *New England Journal of Medicine*, 11 June 2015 (“New England Journal of Medicine, Torture at CIA Black Sites”), AFG-OTP-0004-3129 at 3130-3131; [REDACTED].

²⁸⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784 at footnote 315, 5826-5828; U.S. Department of Justice Office of Legal Counsel, “Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency: *Interrogation of al Qaeda Operative*”, 1 August 2002, AFG-OTP-0004-2314 at 2316-2317, 2324, 2328; U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency *Re: Application of 18 U.S.C. §§2340-2340A to Certain Techniques in the Interrogation of a High Value al Qaeda Detainee*”, 10 May 2005, AFG-OTP-0005-5021 at 5029-5030, 5033-5035, 5054-5055, 5061-5065; HRW, “Open Letter to Attorney General Alberto Gonzales”, 5 April 2006, AFG-OTP-0004-2860 at 2861; [REDACTED].

cause severe pain or suffering.²⁸⁵ These include the use of sexual violence,²⁸⁶ severe isolation,²⁸⁷ suffocation by water or waterboarding,²⁸⁸ hooding under special conditions,²⁸⁹ threats of torture,²⁹⁰ and the use of dogs to induce fear.²⁹¹ Other techniques may amount to torture or cruel treatment when used for prolonged periods of time or in combination with other acts. These include stress positions,²⁹² isolation and sensory deprivation,²⁹³ exposure to extreme temperatures,²⁹⁴ sensory overstimulation,²⁹⁵ prolonged sleep deprivation,²⁹⁶ food deprivation,²⁹⁷ and

²⁸⁵ Elements of Crimes, article 8(2)(c)(i)-3 and 8(2)(c)(i)-4.

²⁸⁶ [Kunarac Appeals Judgement](#), paras. 150-151; [Delalić Trial Judgement](#), paras. 495-496.

²⁸⁷ ECtHR, *Babar Ahmad and others vs. The United Kingdom*, Appl. No. 24027/07, [Judgment](#), 24 September 2012, para. 206; Physicians for Human Rights and Human Rights First, “Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality”, August 2007, AFG-OTP-0004-3495 at 3535-3539 (“PHR, Leave No Marks”); Grassian, S., “Psychiatric Effects of Solitary Confinement”, *Washington University Journal of Law and Policy*, Vol. 22, (January 2006), AFG-OTP-0004-2337.

²⁸⁸ Human Rights Committee, *Rodríguez v. Uruguay*, Communication 322/1988, Views, CCPR/C/51/D/322/1988, 9 August 1994, paras. 2.1, 12.1, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 5, [CCPR/C/OP/5](#) at p.26; UN Committee against Torture, “Concluding Observations on USA”, CAT/C.USA/CO/2, 25 July 2006, AFG-OTP-0003-7774 at 7779, para 24.

²⁸⁹ UN Committee against Torture, “Concluding observations, Israel”, A/52/44, 10 September 1997, AFG-OTP-0006-0127 at 0127-0128, paras. 255-257.

²⁹⁰ Inter-American Court of Human Rights (“IACtHR”), *Tibi v. Ecuador*. [Judgment](#), 7 September 2004, para. 147; *See also* IACtHR, *Baldeón-García v. Peru*, [Judgment](#), 6 April 2006, para. 119; and Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No.74/1980, Views, A/38/40, 29 March 1983, paras. 8.3 and 10, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 2, [CCPR/C/OP/2](#) at pp. 93-98.

²⁹¹ UN Committee against Torture, “Concluding Observations on USA”, CAT/C.USA/CO/2, 25 July 2006, AFG-OTP-0003-7774, at 7779, para. 24.

²⁹² “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China”, E/CN.4/2006/6/Add.6, 10 March 2006, AFG-OTP-0006-0204 at 0217, para. 45.

²⁹³ “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. P. Kooijmans”, E/CN.4/1986/15, 19 February 1986, AFG-OTP-0006-0263 at 0294, para. 119; [Krnojelac Trial Judgement](#), para. 183.

²⁹⁴ United States Court of Appeals of the Seventh Circuit, *Lhazom v. Gonzales*, 430 F.3d 833 (2005) AFG-OTP-0007-2105; “Situation of Detainees at Guantánamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt”, E/CN.4/2006/120, 15 February 2006, AFG-OTP-0006-0331 at 0354-0355, paras. 51-52.

²⁹⁵ Committee against Torture, “Concluding observations, Israel”, A/52/44, 10 September 1997, AFG-OTP-0006-0127 at 0127-0128, paras. 255-257.

²⁹⁶ Committee against Torture, “Concluding observations, Israel”, A/52/44, 10 September 1997, AFG-OTP-0006-0127 at 0127-0128, paras. 255-257; UN Committee against Torture, “Consideration of

deliberately placing detainees in cramped conditions.²⁹⁸ Moreover, these techniques were apparently designed to exploit and build upon the physiological and mental effects resulting from the deliberate manipulation of the environment and the conditions of detention.²⁹⁹

195. As the jurisprudence of the ICTY has held, when assessing the seriousness of the acts charged as torture, a Chamber must take into account all the circumstances of the case, including both objective and subjective factors. This includes the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the physical or mental effect of the treatment on the victim, the manner and method used, and the position of inferiority of the victim, and the social, cultural and religious background of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.³⁰⁰ Permanent injury is not a

reports submitted by States Parties under Article 19 of the Convention, Concluding observations, Israel”, A/57/44, 25 September 2002, AFG-OTP-0006-0385 at 0386, para. 6(a)(ii).

²⁹⁷ [Krnojelac Trial Judgement](#), para. 183.

²⁹⁸ [Krnojelac Trial Judgement](#), para. 135.

²⁹⁹ See Central Intelligence Agency, “Background Paper on CIA’s Combined Use of Interrogation Techniques”, 30 December 2004, AFG-OTP-0003-7970 at 7974 (“CIA, Combined Use of Interrogation Techniques”)

³⁰⁰ *Prosecutor v. Kvočka et al.*, ICTY Trial Chamber, [Judgement](#), IT-98-30/1-T, 2 November 2001 (“Kvočka Trial Judgement”), para. 143; *Prosecutor v. Mrkšić et al.*, ICTY Trial Chamber, [Judgement](#), IT-95-13/1-T, 27 September 2007, para. 514; [Krnojelac Trial Judgement](#), para. 182; *Prosecutor v. Limaj et al.*, ICTY Trial Chamber, [Judgement](#), IT-03-66-T, 30 November 2005, para. 237; *Prosecutor v. Haradinaj et al.*, ICTY Trial Chamber, [Public Judgement with Confidential Annex](#), IT-04-84bis-T, 29 November 2012, para. 417; [Naletilić and Martinović Appeals Judgement](#), para. 300; *Prosecutor v. Brđanin*, ICTY Trial Chamber, [Judgement](#), IT-99-36-T, 1 September 2004 (“Brđanin Trial Judgement”), para. 484; and *Prosecutor v. Martić*, Trial Chamber, [Judgement](#), IT-95-11-T, 12 June 2007, para. 75.

requirement for torture; evidence of the suffering need not even be visible after the commission of the act;³⁰¹ while damage to mental health must also be taken into account.³⁰² Moreover, the conditions of detention may, in and of themselves, constitute cruel treatment.³⁰³

196. The information available indicates that the above techniques were applied cumulatively and repeatedly to detainees over extended periods of time, causing severe physical or mental pain or suffering.³⁰⁴ Victims of such conduct exhibited behavioural and psychological symptoms, including “visions, paranoia, insomnia,” and attempts at self-mutilation.³⁰⁵
197. CIA detainees at the “Cobalt” detention facility in Afghanistan, for example, were “walked around naked or were shackled with their hands above their heads for extended periods of time”, and “were subjected to what was described as a ‘rough take down,’ in which approximately five CIA officers would scream at a detainee, drag him outside of his cell, cut

³⁰¹ [Brđanin Trial Judgement](#), para. 484.

³⁰² [Kvočka Trial Judgement](#), para. 149.

³⁰³ In the context of the grave breach of inhumane treatment, see *Prosecutor v. Kordić & Čerkez*, ICTY Trial Chamber, [Judgement](#), IT-95-14/2-T, 26 February 2001, para.800 (and accompanying factual findings at paras. 774, 783, 790, 794, 795; *Prosecutor v. Blaškić*, ICTY Trial Chamber, [Judgement](#), IT-95-14-T, 3 March 2000, para.700 (and accompanying factual findings at paras. 688, 690, 692, 694, 695, 697, 698); *Prlic et al*, Trial Judgement, paras.115, 117-120. See also [Delalic Trial Judgement](#), para.443, holding “[t]he offence of cruel treatment under common article 3 carries the same meaning as inhuman treatment in the context of the “grave breaches” provisions.” The content of the crime of inhuman treatment under art 8(2)(a)(ii) and cruel treatment under article 8(2)(c)(i) are also treated identically in the Elements of Crimes; see A. Zimmermann/R. Geiß, ‘Article 8’, in O. Triffterer/ K Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, (C.H. Beck/Hart/Nomos, 3rd ed., 2016), p.551 at mn.894.

³⁰⁴ See CIA, *Combined Use of Interrogation Techniques*, AFG-OTP-0003-7970 at 7971, 7979-7987, 7975 (“it is the cumulative effect of these techniques, used over time and in combination with other interrogation techniques [...] which achieve interrogation objectives”); U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency *Re: Application of 18 U.S.C. §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*”, 10 May 2005, AFG-OTP-0005-5067 at 5074. See also PHR, *Break Them Down*, AFG-OTP-0004-3552 at 3564-3565; Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705, 5797-5798; [REDACTED]; CIA, *Combined Use of Interrogation Techniques*, AFG-OTP-0003-7970 at 7979-7987.

³⁰⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5835. See also Human Rights Watch, “Open Letter to Attorney General Alberto Gonzales”, 5 April 2006, AFG-OTP-0004-2860 at 2861.

his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched".³⁰⁶

198. The information available indicates that members of the US armed forces and members of the CIA applied techniques inflicting pain or suffering for the purpose of obtaining information or "actionable intelligence" from detainees.³⁰⁷ In particular, the development of new interrogation techniques in 2002 appear to have been designed to solve the problem of the existing interrogation methods "not producing actionable intelligence".³⁰⁸
199. The detainees subjected to such acts, while *hors de combat*, were suspected of being members of the Taliban and/or Al Qaeda or of cooperating with those groups. In particular, detainees were interrogated for their (actual or perceived) knowledge of Taliban and Al Qaeda operations and planned attacks, locations of Taliban and Al Qaeda leaders or training camps, and other intelligence information about each organisation.³⁰⁹
200. Persons detained by US armed forces were held in various locations within Afghanistan, often having been initially detained and "screened" at a Forward Operating Base ("FOB") and then subsequently transferred to

³⁰⁶ See Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706.

³⁰⁷ See Elements of Crimes, art. 8(2)(c)(i)-4, para.2. See Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5764, 5799, 5893-5899.

³⁰⁸ See Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6608; The Report of The Constitution Project's Task Force on Detainee Treatment Report of the Constitution Project, AFG-OTP-0004-3820 at 3899-3900.

³⁰⁹ See generally, Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5893-6121; US White House, President Bush, "Executive Order 13440: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency", 20 July 2007, AFG-OTP-0005-2803 at 2804.

another facility or facilities.³¹⁰ Reported detention facilities include those within Bagram Airbase, where the majority of the alleged acts of torture and cruel treatment occurred,³¹¹ and Kandahar Airbase, as well as at some FOBs, including Gardez (in Paktya province), and Asadabad (in Kunar province).

201. The detention of persons as part of the interrogation programme established by the CIA was not officially acknowledged. The facilities used, colloquially known as ‘black sites’, and their location were kept secret. The information available indicates that at least four such facilities were situated on the territory of Afghanistan: “Cobalt”, “Gray”, “Orange” and “Brown”.³¹² “Cobalt”, also known as “the Salt Pit”, was operational from September 2002 until approximately April 2004, and reportedly held 64 detainees during this period.³¹³ One senior CIA officer described “Cobalt” itself as an enhanced interrogation technique, and the chief of interrogations described it as a dungeon, with exceptionally harsh conditions intended to maximise sensory deprivation and disorientation.³¹⁴ The exact locations of the three other detention sites in Afghanistan—“Gray”, “Orange”, and “Brown”—are not publicly known. “Gray” held

³¹⁰ As of May 2005, the US had two theatre-level holding facilities and 20 Forward Operating Bases in Afghanistan; Office of the Inspector General of the Department of Defense, “Review of DoD-Directed Investigations of Detainee Abuse”, 25 August 2006, AFG-OTP-0003-8611 at 8622-8623 (“OIG Review of DoD Investigations”).

³¹¹ [REDACTED].

³¹² These are not the original code names used by the CIA but rather, new identifiers designated for purposes of the Senate Select Committee on Intelligence’s report published in December 2014. Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5731, 5782. On the locations related to each colour code *see* Washington Post, “The Senate Intelligence Committee’s report on the CIA’s detention and interrogation program”, 9 December 2014, AFG-OTP-0005-5732 at 5733; The Rendition Project, “Secret Detention”, undated, AFG-OTP-0005-5736 at 5737.

³¹³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5712, 5782; Paglen, T., “The Black Sites: The Salt Pit, Northeast of Kabul, Afghanistan”, 2006, AFG-OTP-0005-5740. [REDACTED].

³¹⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706, 5770-5772.

eight detainees in 2003, “Orange” held 34 detainees between 2004 and 2006 (including persons transferred from “Cobalt”), and “Brown” held 12 detainees between 2006 and 2008.³¹⁵

202. A number of other so-called CIA “black sites” were located outside of Afghanistan on the territory of other States Parties. As set out above in paragraphs 49 and 248-251 and further detailed in confidential *ex parte* Annex 2C, a number of conflict-related detainees accused of participating in the armed conflict in Afghanistan, such as members of the Taliban or Al Qaeda, were allegedly transferred to these detention centres and subjected to acts constituting crimes within the jurisdiction of the Court.³¹⁶ Since such crimes were allegedly committed in the context of and associated with the armed conflict in Afghanistan,³¹⁷ they are sufficiently linked to and fall within the parameters of the present situation.³¹⁸

203. Detention facility “Blue” appears to have been located in a national intelligence facility in Stare Kiejkuty, Poland and was operational from December 2002 until September 2003.³¹⁹ During that time at least five victims were allegedly subjected to acts of torture and cruel treatment.³²⁰ One Al Qaeda detainee was allegedly waterboarded 183 times within the

³¹⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5782.

³¹⁶ See further discussion of why acts allegedly committed in those detention centres have a nexus to the armed conflict in Afghanistan, paras. 321-326.

³¹⁷ [Ongwen Confirmation Decision](#), para. 107.

³¹⁸ [Georgia Article 15 Decision](#), paras. 62-64.

³¹⁹ See Open Society Justice Initiative, “Globalizing Torture: CIA Secret Detention and Extraordinary Rendition”, February 2013, AFG-OTP-0004-3147 at 3247-3248 (“OSJI, Globalizing Torture”); Council of Europe Parliamentary Assembly, “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, 11 June 2007, AFG-OTP-0005-5758 at 5793-5797 (“Second Marty Report”); ECtHR, *Al Nashiri v. Poland*, Appl. no. 28761/11, “Judgment”, 16 February 2015 (“*Al Nashiri v. Poland*”), AFG-OTP-0004-5169 at 5336-5340, paras. 405-415; ECtHR, *Abu Zubaydah v. Poland*, Appl. no. 7511/13, “Judgment”, 16 February 2015 (“*Abu Zubaydah v. Poland*”), AFG-OTP-0004-4870 at 5038-5043, paras. 401-415.

³²⁰ [REDACTED].

span of one month at this facility.³²¹ Detention site “Black” appears to have been located in Romania and was operational from September 2003 until approximately November 2005.³²² During that time at least three victims were allegedly subjected to acts of torture and cruel treatment.³²³ “Violet” appears to have been located in Antaviliai, Lithuania and was operational from approximately February 2005 until approximately March 2006.³²⁴ During that time at least two victims were allegedly subjected to acts of torture or cruel treatment.³²⁵

ii. Outrages upon personal dignity

204. On the basis of the information available, there is a reasonable basis to believe that members of the US armed forces and members of the CIA have committed the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment, pursuant to article 8(2)(c)(ii).
205. The Prosecution considers that the required degree of severity, humiliation and degradation has been met, since the alleged conduct described as

³²¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5804-5813; Council of Europe Commissioner for Human Rights, “Memorandum to Ms Laura Codruta Kövesi, Prosecutor General of Romania, RE: Advancing accountability in respect of the CIA Black Site in Romania”, 30 March 2012, AFG-OTP-0005-5741 at 5753 (“Memo to Prosecutor General of Romania”); Central Intelligence Agency Inspector General, “Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)”, 7 May 2004, AFG-OTP-0003-7989 at 8038 (“CIA Inspector General Report”).

³²² See OSJI, Globalizing Torture, AFG-OTP-0004-3147 at 3251-3253; Second Marty Report, AFG-OTP-0005-5758 at 5801-5802; Memo to Prosecutor General of Romania, AFG-OTP-0005-5741 at 5744-5750; Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5818, 5874.

³²³ [REDACTED].

³²⁴ See “Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the Alleged Transportation and Confinement of Persons Detained by the Central Intelligence Agency of the United States of America in the Territory of the Republic of Lithuania”, 26 March 2012, AFG-OTP-0005-5840 at 5845-5846; Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5864, 5875; Amnesty International, “Breaking the Conspiracy of Silence: USA’s European ‘Partners in Crime’ Must Act After Senate Torture Report”, 20 January 2015, AFG-OTP-0004-4697 at 4712-4713 (“AI, Breaking the Conspiracy of Silence”).

³²⁵ [REDACTED].

torture and cruel treatment would also meet the threshold for humiliating and degrading treatment. Nonetheless, it will underscore below certain allegations to highlight the different underlying elements afforded by the crime of outrages against personal dignity as they relate to the alleged treatment of detainees. In this context, the Prosecution recalls that the elements of this crime take into account “the relevant aspects of the cultural background of the victim”.³²⁶

206. According to the information available, detainees were specifically humiliated and degraded to exploit cultural, religious, and sexual taboos. For example, items of religious significance to detainees were reportedly treated in a fashion intended to cause offence, distress, and shame.³²⁷ Allegedly, detainees were deliberately exposed nude to members of the opposite gender, or multiple members of their own gender, or subjected to sexual humiliation or insults as a form of humiliation, in violation of cultural traditions of personal modesty.³²⁸ Reportedly, the use of dogs to threaten and intimidate detainees was also aimed to exploit fear and perceived ritual uncleanness of dogs in Muslim cultures.³²⁹

iii. Rape and other forms of sexual violence

207. The information available provides a reasonable basis to believe that members of the US armed forces and members of the CIA have committed the war crime of rape and other forms of sexual violence pursuant to article 8(2)(e)(vi).

³²⁶ Elements of Crimes, article 8(2)(c)(ii), fn 57.

³²⁷ [REDACTED].

³²⁸ [REDACTED]; Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 6136.

³²⁹ PHR, Break Them Down, AFG-OTP-0004-3552 at 3611.

208. The war crime of rape includes the invasion of the body of the victim by the penetration of the anal opening with any object, when committed, *inter alia*, by force or by threat of force or coercion or by taking advantage of a coercive environment.³³⁰
209. The information available provides a reasonable basis to believe that members of the US armed forces penetrated the anal opening of at least three detainees. Each of the victims was allegedly probed anally by means of cavity searches or with an unknown object, in circumstances of sexual humiliation, including stripped naked in front of others, photographed nude, blindfolded and shackled nude, and/or while being sexually molested.³³¹
210. The information available also provides a reasonable basis to believe that CIA interrogators penetrated the anal opening of at least two detainees by the coercive practices known as “rectal rehydration”, “rectal feeding” or “rectal examination”.³³² Rectal rehydration or rectal feeding entailed positioning the detainee “in a forward-facing position [...] with head lower than torso”, inserting a “tube up as far as you can” into the rectum, and delivering liquids or puréed foods through the tube into the anus of the detainee.³³³ CIA records indicate that rectal examinations were performed with “excessive force”: for example, one detainee was later “diagnosed with chronic haemorrhoids, an anal fissure, and symptomatic

³³⁰ Elements of Crimes, article 8(2)(e)(vi)-1, paras.1-2; [Bemba Trial Judgment](#), para. 99.

³³¹ [REDACTED].

³³² [REDACTED].

³³³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821, fn. 584.

rectal prolapse”.³³⁴ Other detainees were allegedly “threatened with rectal rehydration”.³³⁵

211. These procedures appear to have been used on detainees on hunger strike and detainees who were considered uncooperative.³³⁶ Although “rectal rehydration” and “rectal feeding” were not listed among the officially authorised “enhanced interrogation techniques” (“EITs”), in some instances the use of these practices was authorised by the CIA senior staff on the ground.³³⁷ The CIA justified the use of rectal rehydration on detainees as a “well acknowledged medical technique”, and claimed that one detainee was fed rectally for medical reasons, following a hunger strike.³³⁸

212. Nonetheless, according to the Report of the Senate Select Committee on Intelligence, CIA records showed that one detainee, prior to being subjected to rectal rehydration and rectal feeding, cooperated with nasogastric feedings and was permitted to infuse the fluids and nutrients himself, thus calling into question the medical necessity of such practice.³³⁹ Public health experts have also disputed the existence of any medical justification for rectal feeding, which they describe as “a technique of sexual assault” of which goal is “dominance and punishment”.³⁴⁰ Indeed, on occasion individual CIA medical officers have characterised these

³³⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821, fn. 584; [REDACTED].

³³⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821, fn. 584; [REDACTED].

³³⁶ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821, fn. 584.

³³⁷ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5820-5821.

³³⁸ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5836, fn 680.

³³⁹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821, fn. 584, 5836.

³⁴⁰ New England Journal of Medicine, Torture at CIA Black Sites, AFG-OTP-0004-3129 at 3130-3131.

procedures “as a means of behavior control”,³⁴¹ or to have enabled the interrogator’s “total control over the detainee”.³⁴²

213. In addition, the information available provides a reasonable basis to believe that 12 detainees in the custody of US armed forces and 8 detainees in the custody of the CIA were subjected to conduct constituting “other forms of sexual violence” under the coercive circumstances of detention.³⁴³

214. The level of severity of the conduct described below is comparable in gravity to conduct constituting the war crime of “outrages upon personal dignity, in particular humiliating and degrading treatment” under article 8(2)(c)(ii) of the Statute.³⁴⁴ The sexual and gender-based component of the conduct described below, nonetheless, is more accurately reflected as the crime of “other forms of sexual violence”, given the nature of the conduct and its context, its manner of commission, and impact.³⁴⁵ Moreover, the conduct described below appears to have been inflicted with the specific intention to sexually humiliate the detainees concerned, in exploitation of cultural, religious and sexual taboos, in order to cause offence, distress, and shame.³⁴⁶

215. Chambers of the ICTR and ICTY have held that acts of sexual violence, considered within the meaning of outrages upon personal dignity, humiliating and degrading treatment, need not be limited to physical

³⁴¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5821, fn. 584.

³⁴² Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5803.

³⁴³ Elements of Crimes, article 8(2)(e)(vi)-6, para.1.

³⁴⁴ Elements of Crimes, article 8(2)(e)(vi)-6, para.2.

³⁴⁵ With regard to a different set of facts *see separately* [Muthaura Confirmation Decision](#), paras.264-266.

³⁴⁶ *See above* para. 206.

invasion of the body or even physical contact.³⁴⁷ A trial chamber of the Special Court for Sierra Leone has further held that sexual acts constituting outrages upon personal dignity can be aggravated by the addition of a public element that deepens the humiliation and degradation.³⁴⁸

216. In particular, the information available provides a reasonable basis to believe that the 20 detainees concerned were subjected to acts involving forced nudity, often in combination with other techniques, including during interrogations;³⁴⁹ photographing detainees naked;³⁵⁰ public exposure to female soldiers while detainees showered;³⁵¹ sexual humiliation;³⁵² being shown pornographic material with a picture of the detainee's mother;³⁵³ physical molestation;³⁵⁴ sexual assault by a female soldier;³⁵⁵ and beatings on testicles.³⁵⁶

217. There is a reasonable basis to believe that the acts of rape and/or other forms of sexual violence set out in this section occurred in a coercive environment, in which the detainees experienced fear of violence, duress, and psychological oppression. Furthermore, these acts occurred in circumstances that negated the detainee's ability to consent, and in some

³⁴⁷ *Prosecutor v. Akayesu*, ICTR Trial Chamber, [Judgement](#), ICTR-96-4-T, 2 September 1998, para. 688; *Prosecutor v. Furundžija*, ICTY Trial Chamber, [Judgement](#), IT-95-17/1, 10 December 1998 (“Furundžija Trial Judgement”), para. 186; [Kunarac Appeals Judgement](#), para. 159; *Prosecutor v. Stakic*, ICTY Trial Chamber, [Judgement](#), IT-97-24-T, 31 July 2003, para. 757.

³⁴⁸ *Prosecutor v. Charles Ghankay Taylor*, SCSL Trial Chamber, [Judgement](#), SCSL-03-01-T, 18 May 2012, para. 1196.

³⁴⁹ [REDACTED].

³⁵⁰ [REDACTED].

³⁵¹ [REDACTED].

³⁵² [REDACTED].

³⁵³ [REDACTED].

³⁵⁴ [REDACTED].

³⁵⁵ [REDACTED].

³⁵⁶ [REDACTED].

instances by force, when the detainee was restrained in a vulnerable position.

c. Existence of a plan or policy or large scale occurrence

218. The design and implementation of the interrogation techniques referred to above have been documented in a number of internal documents produced by various organs of the US Government released to the public and confirmed by the public findings of relevant Congressional inquiries.

219. In particular, such interrogation techniques were designed and implemented as part of a policy to obtain actionable intelligence, and appear to have been discussed, reviewed, and authorised within the US armed forces, the US DOD, the CIA, and other branches of the US Government. The US Senate Committee on Armed Services found that “[t]he abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees”.³⁵⁷

220. As set out above in paragraph 194, a number of these interrogation techniques *per se* meet the threshold of severity and thus amount to torture or cruel treatment, as they necessarily cause severe pain or suffering, while other techniques may amount to torture or cruel treatment when used for prolonged periods of time or in combination with other acts.

³⁵⁷ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6441. See also conclusion #19 of the same report, at 6458.

221. Although the existence of a plan, policy or large-scale commission is not a pre-requisite for the Court to exercise jurisdiction over war crimes,³⁵⁸ the information summarised below has assisted the Prosecution in determining that there is a reasonable basis to believe that the alleged crimes were committed and in assessing the gravity of the crimes.

i. Interrogation policies of the US armed forces

222. The US Army Field Manual 34-52 on intelligence interrogation (1992) did not permit the use of physical contact, deprivation of sleep, or withholding of food, water or clothing.³⁵⁹ Nevertheless, by 2003 aggressive interrogation techniques were being used against detainees in Afghanistan,³⁶⁰ with “review and approval” of commanding officers.³⁶¹

223. This followed an earlier executive directive of 7 February 2002 which authorised *inter alia* that common article 3 of the Geneva Conventions was not to apply to Al Qaeda or Taliban detainees, and that Al Qaeda and Taliban detainees, although they had to be treated “humanely”, were not to be accorded prisoner of war status under the Geneva Convention (III) relative to the Treatment of Prisoners of War.³⁶² Military and civilian

³⁵⁸ [Bemba Trial Judgment](#), para. 126.

³⁵⁹ Department of the Army, “FM 34-52: Intelligence Interrogation”, 28 September 1992, AFG-OTP-0005-4376 at 4380-4381, 4391-4392, 4438-4444. See also Church Report, AFG-OTP-0003-4294 at 4493; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6607; “Final Report of the Independent Panel to Review DoD Detention Operations”, August 2004, AFG-OTP-0003-4667 at 4705, 4777 (“Schlesinger Report”).

³⁶⁰ Church Report, AFG-OTP-0003-4294 at 4305-4306, 4498; OIG Review of DoD Investigations, AFG-OTP-0003-8611 at 8635-8636.

³⁶¹ “Sworn statement” (Annex to the Fay Report on Investigation of Intelligence Activities At Abu Ghraib), 21 May 2004, AFG-OTP-0005-4955 at 4959; Church Report, AFG-OTP-0003-4294 at 4493.

³⁶² US President Bush, “Memorandum for the Vice President *et al.* Re. Human Treatment of al Qaeda and Taliban Detainees”, 7 February 2002, AFG-OTP-0004-4683 at 4684. This decision was based on advice from the Department of Justice Office of Legal Counsel, Gonzales, A.R., “Memorandum for the President”, 25 January 2002, AFG-OTP-0002-4900 at 4901-4903.

officials had also begun to develop more aggressive interrogation techniques for use on detainees transferred from Afghanistan to Guantanamo Bay.³⁶³

224. In January 2003, at the request of the commander of US armed forces in Afghanistan (Combined Joint Task Force 180 or “CJTF-180”)³⁶⁴, the Deputy Staff Judge Advocate submitted a memorandum addressed to US Central Command (CENTCOM) describing techniques being employed in Afghanistan, based on the experience of interrogators from December 2001 to January 2003.³⁶⁵ The memorandum was sent to the DOD Working Group on Interrogations and the Office of the Secretary of Defense.³⁶⁶ In August 2004, Deputy Commander US Central Command LTG John Abizaid stated that the 24 January 2003 memorandum had been “thoroughly reviewed” by the Working Group.³⁶⁷ The memorandum addressed “battlefield” techniques and techniques used upon detainees at the Bagram Collection Point,³⁶⁸ including: use of female interrogators to create “discomfort” and to gain more information; sleep adjustment; use of individual fears; removal of comfort items; use of safety [stress] positions; isolation; deprivation of light and sound; hooding during interrogations; and mild physical contact.³⁶⁹ It also recommended the use of deprivation of clothing to induce shame and discomfort; food deprivation; sensory overload;

³⁶³ Department of Defense Joint Task Force 170, “Memorandum for Commander, Joint Task Force 170, Re: Request for Approval of Counter-Resistance Strategies”, 11 October 2002, AFG-OTP-0002-4993 at 4993, 5004-5006.

³⁶⁴ CJTF-180 was the overall corps-level headquarters of US forces in Afghanistan and reported directly to US Central Command (CENTCOM). It was renamed as CJTF-76 in April 2004. *See above* paras. 69-70.

³⁶⁵ Church Report, AFG-OTP-0003-4294 at 4493; Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613.

³⁶⁶ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613.

³⁶⁷ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6573.

³⁶⁸ DOJ Review of FBI Involvement in Interrogations, AFG-OTP-0004-1833 at 1935.

³⁶⁹ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613. *See also* Schlesinger Report, AFG-OTP-0003-4667 at 4777.

controlled fear through the use of muzzled, trained dogs; and light and noise deprivation.³⁷⁰ The memorandum strongly recommended all of these methods be officially approved by DOD leadership,³⁷¹ although neither CENTCOM nor the Joint Staff responded to the memo. CJTF-180 “interpreted this silence to mean that the techniques then in use [...] were unobjectionable to higher headquarters and therefore could be considered approved policy”.³⁷²

225. After the deaths of two detainees in custody at Bagram, CJTF-180 rescinded authorisation for five techniques on 27 February 2003.³⁷³ All other interrogation methods remained in effect until March 2004, when the CJTF-180 Command approved a new interrogation policy.³⁷⁴ The new policy permitted measures including sleep adjustment, stress positions, sensory deprivation, sensory overload, dietary manipulation, and environmental manipulation.³⁷⁵

226. Following the reports of detainee abuse in Abu Ghraib, Republic of Iraq (“Iraq”), the revised detention and interrogation policy issued for Iraq, which explicitly prohibited certain techniques, was extended to

³⁷⁰ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613.

³⁷¹ Church Report, AFG-OTP-0003-4294 at 4493.

³⁷² Church Report, AFG-OTP-0003-4294 at 4306, 4498.

³⁷³ “[T]he practices of handcuffing the detainee as a means of enforcing sleep deprivation; hooding a detainee during questioning; and any form of physical contact used for the purposes of interrogation,” were withdrawn. Church Report, AFG-OTP-0003-4294, at 4306, 4531. The relevant paragraph at 4531 was redacted in the version of the Church Report released in 2006, but was later declassified and released in 2009. The subsequently declassified pages are available at AFG-OTP-0003-7968 at 7969.

³⁷⁴ CJTF-180 Detainee Operations Standard Operating Procedures. *See* Jacoby Report, AFG-OTP-0003-4793 at 4820; Schlesinger Report, AFG-OTP-0003-4667 at 4777; Church Report, AFG-OTP-0003-4294 at 4501-4502.

³⁷⁵ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6679-6680; DOJ Review of FBI Involvement in Interrogations, AFG-OTP-0004-1833 at 1936; Jacoby Report, AFG-OTP-0003-4793 at 4824.

Afghanistan in June 2004.³⁷⁶ In response to further constraints imposed by Congress through the Detainee Treatment Act (December 2005), the US Army issued Field Manual 2-22.3, which applied to all DOD detention operations. The Manual restored the Geneva Conventions as the basis for the treatment and interrogation of all detainees and explicitly prohibited certain practices such as forced nudity, sexual acts or poses, use of military working dogs during interrogations, inducing hypothermia or heat injury, and deprivation of food, water or medical care.³⁷⁷

227. [REDACTED].³⁷⁸ The Review of Department of Defense Detention Operations and Detainee Interrogation Techniques (“Church Report”), which reviewed interrogation operations in the Republic of Iraq, Afghanistan and Guantanamo Bay, concluded that “[a]n early focus of our analysis was to determine whether DOD had promulgated interrogation policies or guidance that directed, sanctioned or encourages the abuse of detainees. We found that this was not the case”.³⁷⁹ The Final Report of the Independent Panel to Review DoD Detention Operations (“Schlesinger Report”) similarly found “[n]o approved procedures called for or allowed the kinds of abuses that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials of military authorities”.³⁸⁰

228. Nonetheless, the available information shows that: (i) CJTF-180 Command approved an interrogation policy that included the use of the enhanced

³⁷⁶ Church Report, AFG-OTP-0003-4294 at 4306; DOJ Review of FBI Involvement in Interrogations, AFG-OTP-0004-1833 at 1936.

³⁷⁷ Department of the Army, “FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations”, 6 September 2006, AFG-OTP-0005-4571 at 4665-4669.

³⁷⁸ [REDACTED].

³⁷⁹ Church Report, AFG-OTP-0003-4294 at 4300.

³⁸⁰ Schlesinger Report, AFG-OTP-0003-4667 at 4673.

interrogation techniques described above;³⁸¹ (ii) this interrogation policy was brought to the attention of DOD Working Group on Interrogations and to the Office of the Secretary of Defense (although it was neither formally approved nor rejected);³⁸² (iii) there is a reasonable basis to believe that a number of conflict-related detainees in Afghanistan were in fact subjected to those techniques; and (iv) there is a reasonable basis to believe such conduct constitutes torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence.

***ii.* Interrogation policies of the CIA**

229. The interrogation programme of the CIA was formally approved within the CIA and other branches of the US Government. In contrast to the US armed forces, CIA interrogators sought high-level and express approval (not always obtained) for the use of certain enhanced interrogation techniques on specific individuals.³⁸³

230. On 17 September 2001, the CIA was granted unprecedented counterterrorism authorities, including the authority to covertly capture and detain individuals posing “a continuing, serious threat of violence or death to U.S. persons and interests or [...] planning terrorist activities”. The covert action Memorandum of Notification signed by the then US President conferring such authority made no reference to interrogations or coercive interrogation techniques.³⁸⁴

³⁸¹ Report of the Senate Armed Services Committee, AFG-OTP-0003-6428 at 6613; Church Report, AFG-OTP-0003-4294 at 4493; DOJ Review of FBI Involvement in Interrogations, AFG-OTP-0004-1833 at 1935; Schlesinger Report, AFG-OTP-0003-4667 at 4777.

³⁸² Church Report, AFG-OTP-0003-4294 at 4306, 4498.

³⁸³ See, e.g., Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5857.

³⁸⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5732; “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms

231. Initially, the CIA considered that the detention facilities would have to meet U.S. prison standards and that interrogation methods would have to comply with “commonly accepted practices deemed lawful by U.S. courts”.³⁸⁵ However, by July 2002 the CIA held several meetings at the headquarter level to discuss “novel interrogation methods” on Abu Zubaydah, the CIA’s first detainee.³⁸⁶
232. During the course of those meetings a contract psychologist proposed using techniques derived from the US military’s SERE (Survival, Evasion, Resistance and Escape) school, which were designed to simulate the abusive treatment service members might undergo if captured.³⁸⁷ According to the Senate Select Committee on Intelligence, this psychologist together with another colleague “devised the CIA’s enhanced interrogation techniques and played a central role in the operation, assessments, and management of the CIA’s Detention and Interrogation Program”. In particular, the two contract psychologists developed the enhanced interrogation techniques that were approved for use against Abu Zubaydah and subsequent CIA detainees, and personally conducted

while countering terrorism, Ben Emmerson”, U.N. Doc. A/HRC/22/52, 17 April 2013, AFG-OTP-0004-4607 at 4611, para. 15.

³⁸⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5733.

³⁸⁶ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5753. *See also* Department of Justice Office of Professional Responsibility, “Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Suspected Terrorists”, 29 July 2009, AFG-OTP-0005-5127 at 5164-5165 (“DOJ OPR Report”) on the divergent approaches taken by the FBI and CIA to the interrogation of Abu Zubaydah, which was initially intended to be conducted jointly, leading to the FBI recalling its agents.

³⁸⁷ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5753. In the Senate Report the two contract psychologists are referred to by the pseudonyms Grayson Swigert and Hammond Dunbar.

interrogations of some of its most significant detainees using these techniques.³⁸⁸

233. The EITs were based on a previously untested theory of interrogation called ‘learned helplessness’, described as “the theory that detainees might become passive and depressed in response to adverse or uncontrollable events, and would thus cooperate and provide information”.³⁸⁹ The deposition of the former director of the CIA’s CTC, in a civil case brought against the two psychologists, described that the “particular goal of EITs would be to dislocate the subject’s expectations and overcome his resistance and thereby motivate him to provide the information the CIA was seeking” and that “in working to achieve this goal, the interrogation could produce a range of mental states in the subject, including, but not limited to, fear, learned helplessness, compliancy, or false hope”.³⁹⁰

234. After the July 2002 meetings, the CIA's CTC drafted a letter to the US Attorney General asking the DOJ for “a formal declination of prosecution, in advance, for any employees of the United States, as well as any other personnel acting on behalf of the United States, who may employ methods in the interrogation of Abu Zubaydah that otherwise might subject those

³⁸⁸ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5713-5714, 5753-5758; DOJ OPR Report, AFG-OTP-0005-5127 at 5164-5165.

³⁸⁹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5721, fn. 32.

³⁹⁰ US District Court for the Eastern District of Washington, *Salim v. Mitchell*, No. 2:15-cv-286-JLQ, transcripts of videotaped deposition of Jose Rodriguez, Washington, D.C., 7 March 2017, AFG-OTP-0007-0070 at 0154 (referring to what Dr. Mitchell had explained to him). The case was brought by the American Civil Liberties Union on behalf of three former CIA detainees held in Afghanistan during 2002-2003, Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and the late Gul Rahman, who died as a result of his torture. On 17 August 2017, on the eve of the case going to trial, the plaintiffs and defendants settled the lawsuit under the terms of a confidential settlement and agreed to a joint statement which two psychologists “acknowledge that they worked with the CIA to develop a program for the CIA that contemplated the use of specific coercive methods to interrogate certain detainees”. ACLU, “On eve of trial, psychologists agree historic settlement in ACLU case on behalf of three torture victims”, 17 August 2017, AFG-OTP-0007-0501, at 0502.

individuals to prosecution". The letter indicated that the more aggressive methods it intended to use on Abu Zubaydah would otherwise be prohibited by the torture statute, "apart from potential reliance upon the doctrines of necessity or of self-defense".³⁹¹

235. In a meeting that took place on 13 July 2002, CIA officials described 12 proposed interrogation techniques to attorneys from the NSC and the Office of Legal Counsel ("OLC") and asked for a formal, definitive DOJ opinion regarding their lawfulness.³⁹² Following the meeting, the same day, Deputy Assistant Attorney General John Yoo wrote a letter to John A. Rizzo, Acting General Counsel of the CIA, providing an initial guidance on the scope of the crime of torture, as set forth in Sections 2340-2340A of title 18 of the US Code, noting that a more detailed memorandum would follow.³⁹³

236. On 1 August 2002, the OLC issued two memoranda. The first, addressed to Alberto R. Gonzales, Counsel to the President, adopted a narrow interpretation of the legal prohibition on torture under Sections 2340-2340A of title 18 of the US Code, limiting the definition of physical pain to acts equivalent in intensity to "the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death"; or purely mental pain or suffering resulting in "significant psychological harm of significant duration, e.g., lasting for months or even years". In this context, the memorandum limited itself only to the prohibition on torture and acknowledged that "certain acts may be cruel,

³⁹¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5754; DOJ OPR Report, AFG-OTP-0005-5127 at 5175.

³⁹² Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5754.

³⁹³ Letter from Deputy Assistant Attorney General John Yoo to John A. Rizzo, Acting General Counsel of the Central Intelligence Agency, dated 13 July 2002, AFG-OTP-0007-1600.

inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's prohibition against torture".³⁹⁴

237. The second memorandum, addressed to John Rizzo, and which referred to the conclusions contained in the first memoranda, analysed the legality of ten specific interrogation techniques proposed by the CIA. The memorandum concluded that the combined application of the following ten techniques on an "as-needed basis" and in an "escalating fashion" was approved: attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in confinement box, and waterboarding.³⁹⁵

238. The second memorandum concluded that none of the proposed ten techniques would inflict a threshold of pain that is "difficult for the individual to endure and is of an intensity akin to the pain accompanying physical injury". It applied this standard "[e]ven when all of these methods are considered combined in an overall course of conduct".³⁹⁶ The legal opinion on this non-satisfaction of this threshold was upheld also in the case of waterboarding: based on the description, analysis and assistances provided to it by the CIA, the memorandum concluded that the procedure "inflicts no pain or actual harm whatsoever" and was "simply a controlled acute episode, lacking the connotation of a protracted period of

³⁹⁴ U.S. Department of Justice Office of Legal Counsel, "Memorandum for Alberto R. Gonzales, Counsel to the President *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*", AFG-OTP-0005-4971 at 4971. *See also* CIA Inspector General Report, AFG-OTP-0003-7989 at 8094, para.253.

³⁹⁵ U.S. Department of Justice Office of Legal Counsel, "Memorandum for John A. Rizzo, Acting General Counsel of the Central Intelligence Agency, *Re: Interrogation of al Qaeda Operative*", 1 August 2002, AFG-OTP-0004-2314 at 2315-2317.

³⁹⁶ U.S. Department of Justice Office of Legal Counsel, "Memorandum for John A. Rizzo, Acting General Counsel of the Central Intelligence Agency, *Re: Interrogation of al Qaeda Operative*", 1 August 2002, AFG-OTP-0004-2314 at 2324.

time generally given to suffering”.³⁹⁷ The memorandum further recalled the CIA’s indication that “these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition”, and advised that the proposed techniques would in any event not violate the criminal prohibition on torture because of the absence of any specific intent by the interrogation team to inflict severe physical or mental pain or suffering.³⁹⁸ Subsequent memoranda issued by the OLC between 2003 and 2005 validated these methods and additional ones such as “dietary manipulation”, “water dousing” and nudity.³⁹⁹

239. The Senate Select Committee on Intelligence later found that the CIA had “repeatedly provided inaccurate information to the Department of Justice” when the OLC’s legal opinions were being shaped.⁴⁰⁰ It also discredited the legal justifications relied upon by the CIA in its claim that the techniques were “necessary to save lives” and could constitute “a novel application of

³⁹⁷ U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: *Interrogation of al Qaeda Operative*”, 1 August 2002, AFG-OTP-0004-2314 at 2324.

³⁹⁸ U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: *Interrogation of al Qaeda Operative*”, 1 August 2002, AFG-OTP-0004-2314 at 2324, 2331.

³⁹⁹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5857, 5866-5867; U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency Re: *Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*”, 10 May 2005, AFG-OTP-0005-5021; DOJ OPR Report, AFG-OTP-0005-5127 at 5253-5289.

⁴⁰⁰ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706, 5944-5946, fn. 1298. The Senate Report notes that the CIA representations referenced by the OLC include that the use of the CIA’s enhanced interrogation techniques was “necessary” to obtain “critical,” “vital,” and “otherwise unavailable actionable intelligence” that was “essential” for the U.S. government to “detect and disrupt” terrorist threats, and that “[the CIA] ha[s] informed [the OLC] that the CIA believes that this program is largely responsible for preventing a subsequent attack within the United States”. See *contra* Report of the Senate Select Committee on Intelligence, Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio, And Coburn, AFG-OTP-0007-1121 at 1132-1133.

the necessity defense” – arguments relied upon by the OLC.⁴⁰¹ Instead, the Senate Committee found that CIA justification for the use of those techniques rested on inaccurate claims of their effectiveness, while evidence showed that they had not in fact proven an effective means of acquiring intelligence or gaining cooperation from detainees.⁴⁰² The OLC’s approval, for the first time, of the use of 10 specific coercive interrogation techniques against Abu Zubaydah was similarly found to be based “on inaccurate CIA representations about Abu Zubaydah’s status in al-Qa’ida and the interrogation team’s ‘certain[ty]’ that Abu Zubaydah was withholding information about planned terrorist attacks”.⁴⁰³

240. On 28 January 2003, the CIA Director signed formal interrogation and confinement guidelines for the CIA detention and interrogation programme.⁴⁰⁴ Contrary to the earlier understanding that CIA detention facilities would have to meet US prison standards, the confinement guidelines required only a detention facility be sufficient to meet basic health needs. As a result, the Senate Report notes that “even a facility like DETENTION SITE COBALT, in which detainees were kept shackled in complete darkness and isolation, with a bucket for human waste, and without notable heat during the winter months, met the standard”.⁴⁰⁵

⁴⁰¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706-5707. *See also* U.S. Department of Justice Office of Legal Counsel, “Memorandum for Alberto R. Gonzales, Counsel to the President *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*”, AFG-OTP-0005-4971 at 4972: “under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A [the criminal prohibition against torture]”.

⁴⁰² Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5704-5705. *See contra* Report of the Senate Select Committee on Intelligence, Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio, And Coburn, AFG-OTP-0007-1121 at 1133-1144.

⁴⁰³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5707.

⁴⁰⁴ Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001, signed by George Tenet, Director of Central Intelligence, 28 January 2003, cited in Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5783.

⁴⁰⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5783.

241. The CIA Director’s guidelines listed 12 “enhanced techniques” that could be used with prior approval from the Director of the Counter-Terrorism Centre at CIA headquarters, including two techniques that had not been previously approved by the 2002 OLC memo: diapering for prolonged periods and the abdominal slap.⁴⁰⁶ However, the guidelines left unclear the status of other interrogation practices that had been employed at CIA sites and whether, for example, the use of the “rough take down”,⁴⁰⁷ the use of cold water showers,⁴⁰⁸ and prolonged light deprivation were prohibited.⁴⁰⁹ CIA headquarters later approved requests to additionally use water dousing, forced nudity, and dietary manipulation, despite the fact that those techniques had also not been reviewed by the Department of Justice.⁴¹⁰

242. A further aspect of the CIA Director’s guidelines was that they provided broad authorisation for the use of certain “standard techniques” (distinguished from “enhanced techniques”)—including sleep deprivation of up to 72 hours, reduced calorie intake, use of loud music, isolation, and the use of diapers “generally not to exceed 72 hours”. These techniques

⁴⁰⁶ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784.

⁴⁰⁷ For a description, *see above* para. 197.

⁴⁰⁸ The Senate Report contains a description of a cold water shower by a CIA linguist: “Rahman was placed back under the cold water by the guards at [[CIA OFFICER I]]’s direction. Rahman was so cold that he could barely utter his alias. According to [the on-site linguist], the entire process lasted no more than 20 minutes. It was intended to lower Rahman’s resistance and was not for hygienic reasons. At the conclusion of the shower, Rahman was moved to one of the four sleep deprivation cells where he was left shivering for hours or overnight with his hand chained over his head.”; Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784, fn. 314.

⁴⁰⁹ *See* Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784.

⁴¹⁰ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784, 5826. These methods were subsequently reviewed and approved by the OLC in May 2005. *See* U.S. Department of Justice Office of Legal Counsel, “Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency *Re: Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*”, 10 May 2005, AFG-OTP-0005-5021.

only required advanced approval “whenever feasible”.⁴¹¹ This allowed CIA officers significant discretion to determine who could be subjected to “standard” interrogation techniques, when they could be applied, and when it was not “feasible” to request advance headquarters approval. As the Senate Report observes: “consistent with the interrogation guidelines, throughout much of 2003, CIA officers (including personnel not trained in interrogation) could, at their discretion, strip a detainee naked, shackle him in the standing position for up to 72 hours, and douse the detainee repeatedly with cold water—without approval from CIA Headquarters if those officers judged CIA Headquarters approval was not ‘feasible.’ In practice, CIA personnel routinely applied these types of interrogation techniques without obtaining prior approval”.⁴¹²

243. After the US Congress passed the Detainee Treatment Act in December 2005, the CIA temporarily suspended its interrogation program.⁴¹³ In September 2006, President Bush formally acknowledged the existence of the CIA program and announced that the remaining 14 detainees in CIA custody would be transferred to military custody at Guantanamo Bay.⁴¹⁴ It appears the CIA did not use enhanced interrogation techniques again until July 2007, when it sought and received approval, confirmed by Executive Order,⁴¹⁵ to use six enhanced interrogation techniques⁴¹⁶ in the

⁴¹¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784.

⁴¹² Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5784 (footnote omitted).

⁴¹³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5718.

⁴¹⁴ White House, “President Discusses Creation of Military Commissions to Try Suspected Terrorists,” 6 September 2006, AFG-OTP-0005-2840 at 2841-2843.

⁴¹⁵ US White House, President Bush, “Executive Order 13440: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency”, 20 July 2007, AFG-OTP-0005-2803.

⁴¹⁶ Sleep deprivation, dietary manipulation, facial grasp, facial slap, abdominal slap, and the attention grab.

interrogation of its last detainee, at Detention Site “Brown” in Afghanistan.⁴¹⁷

244. On 22 January 2009, President Obama issued Executive Order 13491, which required the CIA to “close as expeditiously as possible any detention facilities that it currently operates and [...] not operate any such detention facility in the future” and prohibited any US Government employee from using interrogation techniques other than those in US Army Field Manual 2-22.3 on Human Intelligence Collector Operations.⁴¹⁸ Specifically, US Army Field Manual 2-22.3 requires: “[a]ll captured or detained personnel, regardless of status, shall be treated humanely ... and no person in the custody or under the control of DOD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in US law”. It goes on to set out a non-exhaustive list of prohibited actions when used in conjunction with intelligence interrogations, including: forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; using duct tape over the eyes; applying beatings, electric shock, burns, or other forms of physical pain; “waterboarding”; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; and depriving the detainee of necessary food, water, or medical care.⁴¹⁹

⁴¹⁷ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5883-5887.

⁴¹⁸ US White House, President Obama, “Executive Order 13491 of January 22, 2009: Ensuring Lawful Interrogations”, 27 January 2009, AFG-OTP-0005-5416 at 5419.

⁴¹⁹ Department of the Army, “FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations”, 6 September 2006, Sections 5-74 and 5-75, AFG-OTP-0005-4571 at 4666-4667.

245. In summary, compared to the localised approval of certain interrogation techniques within the US military command structure in Afghanistan, the CIA's use of the interrogation techniques described above was authorised as official policy. This occurred either pursuant to the parameters authorised by the DOJ or authorisation going beyond those parameters provided by the CIA Director or Director of CTC. In addition, the use of some techniques appears to have been approved by senior CIA staff on the ground. The conduct attributed to the CIA also appears to have been particularly grave. This includes the use of "waterboarding", applied repeatedly on certain detainees; the combination and intensity with which techniques were applied; the apparent use of "rectal rehydration" and "rectal feeding" as a means of behavioural control; the conditions of detention which, also officially authorised, exacerbated humiliating and degrading treatment; as well as the effective blanket authorisation for the use of certain 'standard techniques' which resulted in frequent detainee abuse.

d. Nexus between the individual acts and the armed conflict

246. The information available indicates that the alleged crimes referred to above took place in the context of and were associated with the armed conflict in Afghanistan. In particular, those crimes were allegedly committed against conflict-related detainees suspected of being members of the Taliban and/or Al Qaeda or otherwise suspected of cooperating with them.

247. In the case of the US armed forces, the alleged crimes primarily occurred in the context of interrogations designed to obtain intelligence in the context of US military operations in Afghanistan.⁴²⁰
248. In the case of the CIA, its detention program was global in nature and included persons with no direct connection to the conflict in Afghanistan, such as persons detained in connection with other armed conflicts or otherwise suspected of planning attacks against the United States. However, the Prosecution has limited its findings in this Request to those individuals who bear a nexus to the armed conflict in Afghanistan and against whom crimes within the jurisdiction of the Court were allegedly committed whilst on the territory of a State Party. This includes in particular individuals suspected to have links with or information about Al-Qaeda “core” or “central” group, allegedly responsible for the 11 September 2001 attacks.⁴²¹ Although formally a civilian agency, CIA personnel appear to have participated directly in hostilities and coordinated operations with the US military throughout its participation in the armed conflict in Afghanistan.⁴²² Moreover, CIA and military

⁴²⁰ See, e.g., White House, “President Discusses Creation of Military Commissions to Try Suspected Terrorists,” 6 September 2006, AFG-OTP-0005-2840 at 2841; U.S. White House, President Bush, “Military Order of November 13, 2001– Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”, 16 November 2001, AFG-OTP-0005-2834 at 2836; US White House, President Bush, “Executive Order 13440: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency”, 20 July 2007, AFG-OTP-0005-2803 at 2803; UN Human Rights Committee, “Addendum: Replies of the United States of America to the list of issues”, U.N. Doc. CCPR/C/USA/Q/4/Add.1, 13 September 2013, AFG-OTP-0005-5849 at 5866, para. 86.

⁴²¹ See above para. 61.

⁴²² See generally Anderson, K., “The CIA is Coming,” 26 October 2012, *Hoover Institution*, AFG-OTP-0005-6032 at 6032; Anderson, K., “Readings: Civilian Intelligence Agencies and the Use of Armed Drones, by Ian Henderson,” *Lawfare*, 27 June 2014, AFG-OTP-0005-1025; Devreaux, R., “Manhunting in the Hindu Kush: Civilian Casualties and Strategic Failures in America’s Longest War,” *The Intercept*, 15 October 2015, AFG-OTP-0003-3044; “Operation Haymaker,” published by *The Intercept*, 15 October 2015, AFG-OTP-0003-3075.

interrogators reportedly shared intelligence, “debriefed” each other’s detainees, and transferred detainees to one another’s custody.⁴²³

249. For the crimes allegedly committed by members of the CIA outside of Afghanistan, the respective victims that are the focus of this Request and included in confidential *ex parte* Annex 2C, were captured in the context of the armed conflict in Afghanistan and allegedly subjected to mistreatment on the territories of States Parties Poland, Romania and Lithuania. Included in this category are persons who were initially captured on the territory of third States, such as Pakistan.⁴²⁴

250. The Prosecution recalls that US-led OEF was triggered by the attacks on the US of 11 September 2001, and its goal was to fight Al Qaeda and the Taliban Government which harboured Al Qaeda and its leadership.⁴²⁵ After the fall of Taliban Government, Al Qaeda “core” fled to the Federally Administered Tribal Areas in Pakistan, where it continued its operations, including with respect to the ongoing armed conflict in Afghanistan.⁴²⁶ Thus, the capture of persons suspected of belonging to or being associated with the Al Qaeda leadership or with the Taliban in the neighbouring region of Pakistan or on the territory of other third States, undertaken in the context of or associated with the ongoing armed conflict in Afghanistan, and the later alleged mistreatment of such persons on the territory of a State Party, combine to provide the requisite nexus and

⁴²³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5774-5775, 5830-5831, 5869, 5881; The Report of the Constitution Project’s Task force on Detainee Treatment, AFG-OTP-0004-3820 at 4224.

⁴²⁴ [REDACTED].

⁴²⁵ *See above*, para. 15.

⁴²⁶ *See above* para .61.

jurisdictional base for the exercise of ICC jurisdiction.⁴²⁷ By contrast, the Prosecution has excluded persons who were originally detained in the context of the armed conflict in Afghanistan, but subject to alleged crimes on the territory of States that are not Party to the Statute, such as on the US naval base at Guantanamo Bay, Cuba. It has also excluded persons detained and allegedly mistreated on the territory of a State Party, but with no clear nexus to the armed conflict in Afghanistan, such as the detention of persons allegedly linked to other “franchise” Al Qaeda groups or other terrorist organisations.⁴²⁸

251. The Prosecution further recalls, in this context, that the transfer of a detainee outside of a theatre of armed conflict does not render the protections to which he/she is entitled under international humanitarian law inapplicable. Indeed, there is no territorial limitation on the application of common article 3 of the Geneva Conventions provided that the acts in question take place in the context of an armed conflict.⁴²⁹ Among the detainees in these locations were persons suspected of being members of the Taliban and/or Al Qaeda “core”, or otherwise suspected of cooperating with them, and were interrogated to obtain information to assist the US military operations in Afghanistan.

252. Accordingly, for the reasons set out above, the requisite link can be established between the crimes allegedly committed by members of the US armed forces and members of the CIA and the armed conflict.

⁴²⁷ For similar reasons the capture of persons alleged to be participating in the armed conflict in Afghanistan on the territory of other third States, such as the United Arab Emirates or Iraq, and their later transfer to, and alleged mistreatment on, the territory of States Parties, provides the required nexus and jurisdictional competence; [REDACTED].

⁴²⁸ See *above* para. 61.

⁴²⁹ ICRC, “Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016”, 9 May 2016, accessed at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>, article 3, paras. 466-467.

D. Other acts allegedly committed by members of international armed forces

253. The Prosecution has also examined allegations of other crimes committed by members of international armed forces, but at this stage has not reached a determination that there is a reasonable basis to believe, at this stage, that crimes within the jurisdiction of the Court have occurred. This determination is without prejudice to any findings that may result from an investigation into the situation.

254. In particular, it has been alleged that during the initial phase of the armed conflict in Afghanistan, international forces had transferred detainees in their custody to the ANSF without assuring themselves that the receiving authority was willing and able to apply principles of humane treatment and protection of detainees enshrined in the 1949 Geneva Conventions.⁴³⁰ The information available shows that at least six ISAF troop contributing countries subsequently concluded separate Memorandums of Understanding with the Afghan Government to govern the transfer of detainees, with varying levels of monitoring of transferred detainees.⁴³¹ In response to UNAMA's findings on the practice of torture against detainees in Afghan custody, ISAF further devised a six-phase remediation plan and inspection regime, which included suspending the transfer of detainees to

⁴³⁰ See *Prosecutor v. Mrkšić et al.*, ICTY Appeals Chamber, [Judgement](#), IT-95-13/1-A, 5 May 2009, para. 70, finding the duty of detaining authorities to protect detainees in their custody enshrined in Geneva Convention III extends to situations of non-international armed conflict as an expression of customary international law. See also ICRC 2016 Updated Commentary to Geneva Convention I, para. 710.

⁴³¹ See Afghanistan Independent Human Rights Commission, "Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan", 17 March 2012, AFG-OTP-0003-3951 at 3980 ("AIHRC, Treatment of Conflict-Related Detainees"). The six countries are the United Kingdom, Canada, Australia, Denmark, Norway and the Netherlands. The MoU signed by Canada in 2005 initially did not include monitoring mechanism; under public pressure in 2007, Canada signed a new MoU that addressed this gap. See AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 3987.

facilities identified by UNAMA as practising torture and conducting a certification process of facilities where torture had been discovered (through inspection, training and review of allegations).⁴³² While the effectiveness of the monitoring programmes and inspection regimes appear to vary and credible allegations of torture in Afghan-led facilities have continued to be reported, the information available at this stage does not provide a reasonable basis to believe that members of international forces have knowingly placed detainees transferred into Afghan custody at risk of torture and other forms of cruel treatment or have failed to take effective measures to correct the situation or to request the return of the prisoners. Nonetheless, these and other allegations can be subjected to proper investigation and analysis if an investigation of the Situation is authorised.

255. There is also information concerning civilian casualties caused by international military forces. Since 2009, when UNAMA began to record such casualties systematically, it has documented approximately 1,820 civilian deaths. This includes approximately 1,330 deaths from aerial operations conducted by both manned and remotely piloted aircraft; approximately 350 deaths allegedly caused by ground search and raid operations (also known as “night raids”) against members of opposing non-state armed groups; and approximately 140 deaths allegedly caused by “force protection” incidents (also known as “escalation of force” incidents) where civilians deliberately or inadvertently disregarded warnings to maintain distance from military convoys or checkpoints,

⁴³² AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 3981-3983.

resulting in military forces taking measures to prevent perfidious or clandestine attacks.⁴³³

256. The Prosecution recalls that in non-international armed conflicts, article 8(2)(e)(i)-(iv) criminalises attacks against the civilian population and other designated persons and objects. The civilian population need not be the sole target of the attack.⁴³⁴ Moreover, an indiscriminate attack may, in certain circumstances, constitute an intentional attack against a civilian population within the meaning of article 8(2)(e)(i), for example through the use of weaponry that has indiscriminate effects.⁴³⁵

257. Having reviewed the information available on a large number of incidents attributed to the international forces, the Prosecution has determined that, although these operations resulted in incidental loss of civilian life and harm to civilians, in most incidents that information does not provide a reasonable basis to believe that the military forces intended the civilian population as such, or individual civilians not taking direct part in hostilities, to be the object of the attack.

258. In many of these incidents, members of anti-government armed groups appear to have conducted operations in close proximity to civilians (such as the May 2009 air strike in Bala Baluk district, Farah province⁴³⁶ and the

⁴³³ UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3528-3529; UNAMA 2015 Annual Report, AFG-OTP-0005-0515 at 0584; UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5524; UNAMA, 2013 Annual Report, AFG-OTP-0003-5192 at 5257, 5259-5260; UNAMA 2012 Annual Report, AFG-OTP-0003-6236 at 6281, 6284; UNAMA 2011 Annual Report, AFG-OTP-0001-4141 at 4176, 4178-4179; UNAMA 2010 Annual Report, AFG-OTP-0001-4334 at 4383, 4387, 4389; UNAMA 2009 Annual Report, AFG-OTP-0001-1836 at 1858-1859; UNAMA 2008 Annual Report, AFG-OTP-0001-2144 at 2169-2170.

⁴³⁴ [Katanga Trial Judgment](#), para. 802.

⁴³⁵ [Katanga Trial Judgment](#), para. 802.

⁴³⁶ [REDACTED].

May 2010 “night raid” in Surkh-Rod district, Nangarhar province),⁴³⁷ or apparently sought to use civilians as human shields (such as the June 2007 attacks in Chora district, Uruzgan province).⁴³⁸ In some incidents, civilians appear to have been mistakenly identified and targeted as fighters (such as the September 2012 air strike in Alingar district, Laghman province⁴³⁹).

259. In another incident on 3 October 2015, an US armed forces gunship air crew attacked the Kunduz Trauma Centre operated by *Médecins Sans Frontières* during military operations in the city of Kunduz.⁴⁴⁰ At least 42 persons were reportedly killed with up to 30 persons injured,⁴⁴¹ and the main hospital building was substantially destroyed.⁴⁴² According to a US military investigation, “the personnel involved did not know that they were striking a medical facility”, despite confirming that “MSF official provided the correct grid coordinates for the MSF Trauma Center to several U.S. government officials and that the location was properly entered on the U.S. military’s ‘No Strike List’ database”.⁴⁴³ The investigation concluded that a “combination of factors caused both the Ground Force Commander and the air crew to believe mistakenly that the air crew was firing on the intended target, an insurgent-controlled site

⁴³⁷ [REDACTED].

⁴³⁸ [REDACTED].

⁴³⁹ [REDACTED].

⁴⁴⁰ MSF, “Initial MSF internal review: Attack on Kunduz Trauma Centre, Afghanistan”, November 2015, AFG-OTP-0005-3288 (“MSF, Initial Internal Review”); UNAMA, “Afghanistan Human Rights and Protection of Civilians in Armed Conflict: Special Report on Kunduz Province”, December 2015, AFG-OTP-0005-3229 at 3245 (“UNAMA, Special Report on Kunduz Province”).

⁴⁴¹ NATO Resolute Support Mission, “Statement on the Kunduz MSF Hospital Investigation” 25 November 2015, AFG-OTP-0005-3184 at 3185.

⁴⁴² MSF reported that 42 victims included 14 staff members, 24 patients and 4 caretakers. *See* MSF, “MSF Factsheet – Kunduz Hospital Attack”, 8 February 2016, AFG-OTP-0005-3303. For the destruction of the hospital, *see* MSF, “MSF Condemns Air Strikes on Kunduz Hospital”, 3 October 2015 AFG-OTP-0005-3302; MSF, Initial Internal Review, AFG-OTP-0005-3288 at 3297 and 3299; Foreign Policy Magazine, “Inside MSF Hospital Kunduz”, October 2015, AFG-OTP-0005-3166.

⁴⁴³ CENTCOM, “Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions”, 28 April 2016, AFG-OTP-0007-3495 at 3495 and 3497.

approximately 400 meters away from the MSF Trauma Center”, citing “human errors, compounded by process and equipment failures” as well as “[f]atigue and high operational tempo”.⁴⁴⁴ Although the information available indicates that MSF had taken a number of concrete measures to increase the visibility of the hospital and inform the parties of its location, including during the course of the incident,⁴⁴⁵ the Prosecution is unable at this stage to conclude that there is a reasonable basis to believe that the MSF medical facility was intentionally attacked.

260. More recently, during the preparation of this Request, the Prosecution received media reports and article 15 communications concerning allegations attributed to special forces of a number of international forces operating in Afghanistan. The Prosecution was unable to adequately analyse the information and the sources provided in view of the limited time at its disposal from the moment it was made aware of the allegations, without further delaying the submission of this Request. Should an investigation be opened, these and other alleged crimes that may occur after the commencement of the investigation, as well as any attendant assessments concerning complementarity and gravity, could be assessed further within the scope of the authorised situation.

⁴⁴⁴ CENTCOM, “Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions”, 28 April 2016, AFG-OTP-0007-3495 at 3495-3496. *See also* CENTCOM, “April 29: CENTCOM releases investigation into airstrike on Doctors Without Borders trauma center”, 29 April 2016, AFG-OTP-0007-3323; NATO Resolute Support Mission, “Statement on the Kunduz MSF Hospital Investigation” 25 November 2015, AFG-OTP-0005-3184 at 3185; K. Clark, “Ripping Up the Rule Book? US investigation into the MSF hospital attack”, AAN, 27 November 2015, AFG-OTP-0005-3192 at 3194, 3197, 3199, 3204; The Guardian, “Kunduz hospital attack: US forces did not act on MSF warnings for 17 min”, 25 November 2015, AFG-OTP-0005-4367; New York Times, “How a cascade of errors led to the U.S. airstrike on an Afghan hospital”, 29 April 2016, AFG-OTP-0007-2970.

⁴⁴⁵ MSF, Initial Internal Review, AFG-OTP-0005-3288 at 3293-3294 and 3296.

VIII. ADMISSIBILITY

261. In deciding whether to initiate an investigation, the Prosecutor must also consider, pursuant to article 53(1)(b) and rule 48, whether “the case is or would be admissible under article 17”.
262. At the article 15 stage, admissibility is assessed in relation to “potential cases” which may be brought. These potential cases are defined by criteria such as: (i) the persons or groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping a future case or cases; and (ii) the crimes within the Court’s jurisdiction allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping a future case or cases.⁴⁴⁶
263. As for the level of specificity and detail required to make an admissibility determination, the Prosecution has borne in mind the nature of the present stage, the low evidentiary threshold which applies, and the object and purpose of the article 15 stage. Accordingly, the identification by the Prosecution of the incidents and persons or groups of persons relevant to the above test “at this stage is preliminary, and as such, this may change as a result of the investigation”.⁴⁴⁷ Moreover, the assessment of the persons or groups of persons allegedly involved “involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened)”.⁴⁴⁸ The Appeals Chamber has observed that “the contours of the likely cases will often be relatively vague ... Often, no individual

⁴⁴⁶ [Kenya Article 15 Decision](#), para. 59; [Côte d’Ivoire Article 15 Decision](#), paras. 190-191.

⁴⁴⁷ [Georgia Article 15 Decision](#), para. 37. *See also* [Kenya Article 15 Decision](#), para. 50.

⁴⁴⁸ [Georgia Article 15 Decision](#), para. 51. *See also* [Kenya Article 15 Decision](#), para. 60.

suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear".⁴⁴⁹

264. Bearing in mind the above guidance, with respect to the persons or groups of persons identified, the Prosecution relies on the information set out in Section VI(D) and in confidential *ex parte* Annexes 3A-C of this Request.⁴⁵⁰
265. With respect to information about crimes allegedly committed during incidents that are likely to be the focus of an investigation, the Prosecution attaches confidential *ex-parte* Annexes 2A-C setting out a sample of over 200 incidents which reflect the gravest incidents and the main types of victimisation. The very large number of alleged crimes reported since 2003 in the context of the armed conflict means that the conduct identified in this Request represents only the most prevalent and well-documented allegations.
266. In the event that an investigation into the Situation is authorised, the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons, provided that the cases brought forward for prosecution are sufficiently linked to the authorised situation.⁴⁵¹

⁴⁴⁹ *Prosecutor v. Ruto et al.*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', [ICC-01/09-01/11-307](#), 30 August 2011 ("Ruto Admissibility Appeals Judgment"), para. 39; *Prosecutor v. Muthaura et al.*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', [ICC-01/09-02/11-274](#), 30 August 2011 ("Muthaura Admissibility Appeals Judgment"), para. 38.

⁴⁵⁰ Regulation 49(2)(c) similarly requires identification of the persons involved or, alternatively, a description of the persons or groups of persons involved.

⁴⁵¹ [Kenya Article 15 Decision](#), paras. 74-75; *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, "Decision on the 'Defence Challenge to the Jurisdiction of the Court'", [ICC-01/04-01/10-451](#), 26 October 2011, paras. 21 and 27.

A. Complementarity

267. Article 17(1)(a) and (b) establishes a twofold test for complementarity: (i) whether, at the time of the proceedings in respect of an admissibility challenge, there is an on-going investigation or prosecution of the same case at the national level (first limb); and, if this is answered in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigations or prosecutions (second limb).⁴⁵² Inaction by a State under the first limb renders a case admissible before the Court, subject to an assessment of gravity under article 17(1)(d).⁴⁵³ The Prosecution conducts its determination(s) on complementarity in relation to the potential cases that are likely to be the focus of an investigation by the Prosecution.
268. The Prosecution recalls that the admissibility provisions of the Statute are founded on the complementary relationship between the ICC and “national criminal jurisdictions”.⁴⁵⁴ As such, in principle, it is only national criminal investigations and/or prosecutions of a State that can trigger the application of article 17(1)(a)-(c). The Prosecution observes that a number of the national inquiries described below do not appear to have had full investigatory powers or conducted full criminal inquiries. Nonetheless, they generally appear to have been established by the competent

⁴⁵² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, [ICC-01/04-01/07-1497](#), 25 September 2009 (“Katanga Admissibility Appeals Judgment”), paras. 1 and 75-79; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, “Decision on the admissibility of the case against Abdullah Al-Senussi”, [ICC-01/11-01/11-466-Red](#), 11 October 2013, para. 26; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, [ICC-01/11-01/11-239](#), 7 December 2012, para. 6; *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, “*Corrigendum to Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of process Challenges’*”, [ICC-01/05-01/08-962-Corr](#), 19 October 2010, paras. 107-109.

⁴⁵³ [Katanga Admissibility Appeals Judgment](#), para. 78.

⁴⁵⁴ Article 1 of the Statute.

prosecutorial or judicial authorities, comprised of law enforcement personnel, and to have had some judicial and investigative powers as well as the authority to identify cases for further criminal investigation.⁴⁵⁵ As such, out of an abundance of caution, and to ensure completeness of its analysis, the Prosecution has considered their findings within the remit of article 17(1)(a)-(b) as national criminal investigations, even if on their face these initiatives would appear to fall outside the technical scope of the term.

1. National proceedings in Afghanistan

a. Proceedings concerning the alleged crimes committed by members of the Taliban and affiliated armed groups

269. The information available indicates that at this stage 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 Taliban and affiliated armed groups as set out in this Request and confidential *ex parte* Annexes 2A and 3A.

270. Members of anti-government armed groups captured and detained in the context of the armed conflict have principally been accused of committing crimes against the State codified in the 1976 Penal Code, the 1987 Penal Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan, and the 2008 Law on Combat against Terrorist Offences.⁴⁵⁶

⁴⁵⁵ See below paras. 302-304, 316-323.

⁴⁵⁶ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5545, fn. 2.

271. The Government of Afghanistan adopted a national action plan on transitional justice in 2005, which included a set of actions geared towards the “establishment of effective and reasonable accountability mechanisms.”⁴⁵⁷ This plan stated that no amnesty should be provided for war crimes, crimes against humanity and other gross violations of human rights, and set out other activities geared towards truth-seeking and documentation, and the promotion of reconciliation and national unity.⁴⁵⁸ The action plan remains unimplemented and appears to have become obsolete.⁴⁵⁹
272. Nonetheless, the Afghan parliament passed a general amnesty in 2007, which entered into force in 2009.⁴⁶⁰ The amnesty law provides legal immunity to all belligerent parties including “those individuals and groups who are still in opposition to the Islamic State of Afghanistan,”⁴⁶¹ without any temporal limitation or any exception for international crimes.⁴⁶² That law appears not to have precluded individual victims of

⁴⁵⁷ Afghanistan: “Peace, Reconciliation and Justice in Afghanistan: Action Plan of the Government of the Islamic Republic of Afghanistan”, 7 June 2005, AFG-OTP-0004-5465 at 5474.

⁴⁵⁸ Afghanistan: “Peace, Reconciliation and Justice in Afghanistan: Action Plan of the Government of the Islamic Republic of Afghanistan”, 7 June 2005, AFG-OTP-0004-5465 at 5475.

⁴⁵⁹ See generally, Gossman, P. and Kouvo, S., “Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan”, *Afghanistan Analysts Network*, June 2013, AFG-OTP-0003-0203 at 0204; Kouvo, S., “A Plan Without Action: The Afghan Government’s Action Plan for Peace, Justice and Reconciliation”, *Afghanistan Analysts Network*, July 2012, AFG-OTP-0003-0089 at 0091; IRIN News, “Afghanistan: Justice action plan heading for oblivion”, 14 April 2010, AFG-OTP-0004-5503.

⁴⁶⁰ Law on Public Amnesty and National Stability, 13 Qaus 1387 (3 December 2008). The Government has not translated the law into English; an (unofficial) English translation has been published by the Afghanistan Analysts Network, “National Reconciliation, General Amnesty, and National Stability Law”, undated, AFG-OTP-0004-5871 (“AAN, Translation of Law on Public Amnesty and National Stability”). See also HRW, “Afghanistan: Repeal Amnesty Law”, 10 March 2010, AFG-OTP-0003-1403 (“HRW, Afghanistan: Repeal Amnesty Law”).

⁴⁶¹ AAN, Translation of Law on Public Amnesty and National Stability, AFG-OTP-0004-5871, article 3(2).

⁴⁶² The 2007 Amnesty Law was incorporated in the peace agreement concluded between the Government of Afghanistan and Hezb-i-Islami armed group on 29 September 2016. The Hezb-i-Islami leader Gulbuddin Hekmatyar and its other members were granted a broad amnesty which would prevent national prosecution for grave violations of international humanitarian law and human

alleged crimes from bringing claims before national judicial institutions that would trigger domestic investigation into a particular crime.⁴⁶³

273. More recently, efforts have been taken by the Government of Afghanistan to build its capacity to meet its obligations under the Rome Statute and to facilitate national investigations and prosecutions of ICC crimes. In particular, in 2014 the Government of Afghanistan updated the country's Criminal Procedure Code in order, *inter alia*, to exempt Rome Statute crimes from the ordinary statutes of limitations.⁴⁶⁴ The Government of Afghanistan has also promulgated a new Penal Code which now explicitly incorporates Rome Statute crimes and specifies superior responsibility as an available mode of liability. The Penal Code Bill was adopted by Afghanistan's parliament in May 2017.⁴⁶⁵

274. [REDACTED].

275. In the light of the information available, the Prosecution has assessed that the potential case(s) it has identified in this Request and confidential *ex parte* Annexes 2A and 3A concerning crimes allegedly committed by members of the Taliban and affiliated armed groups would currently be admissible, meaning that there is no conflict of jurisdiction between Afghanistan and the Court. This assessment remains provisional and can

rights, including war crimes, crimes against humanity and genocide; UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3458.

⁴⁶³ AAN, Translation of Law on Public Amnesty and National Stability, AFG-OTP-0004-5871, article 3(3).

⁴⁶⁴ *Afghanistan Official Gazette*, No. 1132 (2014). See original Dari and Pashto texts at AFG-OTP-0007-2978; unofficial translation at AFG-OTP-0007-3383. See also Hazim, A. M., 'Toward Cooperation Between Afghanistan and the International Criminal Court', 49 *The Geo. Wash. Int'l L. Rev.* (2017), AFG-OTP-0007-2885 at 2907-2908.

⁴⁶⁵ *Afghanistan Official Gazette*, No. 1260 (2017). See original Dari text at AFG-OTP-0007-3317. See also Shajjan & Associates Attorneys and Counselors at Law, "Penal Code of Afghanistan 2017 Endorsed", 15 May 2017, AFG-OTP-0007-2973 at 2974.

be revisited in the light of any information that the Afghan authorities choose to provide in the context of article 18 proceedings or during the course of subsequent case-specific investigative inquiries, should the Chamber grant this Request.

b. Proceedings concerning the alleged crimes committed by members of the ANSF

276. The information available indicates that at this stage 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 ANSF as set out in this Request and confidential *ex parte* Annexes 2B and 3B.

277. Despite the notoriety, scale and systemic nature of the allegations of torture and cruel treatment, in particular in a number of NDS and ANP detention facilities,⁴⁶⁶ to date the Afghan authorities appear to have instituted only a very limited number of proceedings relating to the torture or cruel treatment of conflict-related detainees. Further, those proceedings were instituted only against low level interrogators, direct perpetrators, and/or at most their immediate superiors, and not against those who appear to be most responsible for such criminal conduct.⁴⁶⁷

⁴⁶⁶ See above paras. 164-168.

⁴⁶⁷ See e.g. UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3609, 3615, 3621-3625, noting, *inter alia*, (at 3615) that of the 181 detainees who provided credible accounts to UNAMA of being tortured or ill-treated in Afghan custody during the reporting period, 72 (42 per cent) stated that they had complained about their ill-treatment to the Afghan authorities, but there were only two cases where the detainees were aware that any action had been taken by the authorities.

278. In furtherance of Presidential Decree 129, the Attorney General's Office reportedly reviewed the confirmed cases of torture found by a Presidential fact-finding commission appointed in January 2013.⁴⁶⁸ Out of 133 incidents of alleged torture reviewed by the Attorney General's Office, 55 were referred for criminal investigation. All 55 cases were subsequently dismissed following investigation and no indictments or prosecutions resulted. According to the information provided by the Attorney General's Office of Afghanistan to UNAMA, cases were dismissed *inter alia* on the basis that the victim had withdrawn the allegation, the victim could not be located, or there were no visible marks of torture on the victim.⁴⁶⁹
279. In 2014, the Afghan authorities reportedly prosecuted two NDS officers for torture, stemming from an incident occurring in spring 2013 when two ISAF officers reportedly witnessed two NDS officers torturing a detainee in the main NDS detention facility in Tirin Kot district, Uruzgan province. The primary court in Uruzgan sentenced the two NDS officers to eight months imprisonment, a sentence that was subsequently appealed to the military court in Kandahar on the basis that it was too low. No further information is available at this time.⁴⁷⁰
280. In October 2015, two ANA Special Forces personnel were reportedly convicted and sentenced to six years of imprisonment for threatening to rape a girl in Uruzgan province in order to coerce her mother into providing intelligence information (upheld by the Supreme Court).⁴⁷¹

⁴⁶⁸ Afghanistan: Presidential Decree on Torture, 28 Delwa 1391 (16 February 2013), unofficial English translation Afghanistan Analysts Network, AFG-OTP-0004-7675 at 7676; UNAMA 2015 Report on Conflict-Related Detainees, Annex IV: Presidential Decree 129, AFG-OTP-0003-5541 at 5666.

⁴⁶⁹ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5621-5623.

⁴⁷⁰ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5567.

⁴⁷¹ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3608.

281. In another case, three ANA personnel were reportedly convicted for beating a captured insurgent to death in Helmand on 20 June 2015, and were sentenced to 18 years and 16 years of imprisonment (upheld by the Supreme Court in January 2016).⁴⁷²
282. In April 2017, the Afghan Government provided UNAMA with a document from the Ministry of the Interior detailing cases where members of the ANSF were referred for criminal investigation, prosecuted and in some cases convicted of criminal offences between 1 January 2015 and 31 December 2016. These cases concerned 46 incidents, 12 involving ANP/ANBP personnel, 32 involving ALP personnel, and 2 involving members of pro-government militia. However, UNAMA reported that the list included “crimes not evidently falling within the definition of torture and ill-treatment of conflict-related detainees”.⁴⁷³ Only four cases involved allegations of beatings by members of the ANP/ANBP that the list classified as “torture” and only five involved similar allegations of “torture” against members of the ALP, with no information provided by the Government on the outcome of these cases, save for one case involving the alleged murder by an ALP who was eventually acquitted and released by the provincial court.⁴⁷⁴
283. UNAMA further reported that the Afghan Ministry of Defence had provided a list of 22 cases from 2013 to 2016 where members of the ANA had been convicted of a range of serious crimes including the deliberate

⁴⁷² UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3608.

⁴⁷³ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3619, noting the inclusion in the list of cases involving “robbery and violence against a female”, “killing 2 persons and injuring 8 at a funeral”, “arbitrary entry to a home”, and “forced marriage.”

⁴⁷⁴ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3619

killing of civilians, beating of prisoners of war to death, and committing violence against women; although it was unclear whether any of these cases fell within the scope of torture and ill-treatment of conflict-related detainees.⁴⁷⁵

284. In other cases, rather than being subject to criminal investigation, officials implicated in torture appear to have been temporarily suspended from their position or reassigned from one facility to another. According to the AIHRC, the provincial directors of NDS facilities in Khost and Laghman, where UNAMA and AIHRC had found systematic torture, were reassigned as the head of NDS for Gardez province and deputy NDS head for Nangarhar province, respectively.⁴⁷⁶ Other high-ranking NDS officials implicated in the cruel treatment of detainees were likewise suspended or removed from their positions in those facilities, but remained employed by the NDS. None faced any criminal proceedings for their alleged role in detainee abuse.⁴⁷⁷ UNAMA similarly found that NDS and ANP officials with responsibility over facilities where torture and ill-treatment were documented between 2011-2014, such as provincial directors, detention facility directors, chief interrogators, and chiefs of counter-terrorism units, remained employed, often in the same facility.⁴⁷⁸

285. UNAMA has further noted that in terms of non-judicial investigations of torture carried out by the Afghan authorities, the processes by which the NDS, the Ministry of the Interior and the ANA internally review and then

⁴⁷⁵ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3620. UNAMA goes on to note the “Ministry of Defence does appear to be taking concrete steps to ensure that ANA personnel found to have committed serious crimes are brought to justice”.

⁴⁷⁶ AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 4012-4013.

⁴⁷⁷ AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 4013-4014.

⁴⁷⁸ UNAMA 2015 Report on Conflict-Related Detainees, AFG-OTP-0003-5541 at 5567.

refer complaints of torture to the competent judicial authorities remain opaque. Its 2017 report notes: “given the difficulties faced by the Afghan authorities in effectively holding alleged perpetrators of torture to account – whether through effective judicial investigations and prosecutions, or meaningful internal disciplinary procedures – the ability of victims of torture to claim their right to an effective judicial or administrative remedy appears to be very limited”.⁴⁷⁹

286. The Committee against Torture similarly observed in its June 2017 concluding observations on the Second Report submitted by Afghanistan:

“The Committee takes note of the information provided by the State party that some National Directorate of Security officials were dismissed or demoted owing to their acts of ill-treatment and torture; welcomes the establishment of Human Rights Units in 21 provinces to prevent ill-treatment and torture in detention centres of the National Directorate of Security; and commends the commitment of the General Attorney to investigate and prosecute all cases discussed during the dialogue between the delegation and the Committee. The Committee remains concerned however by the deficiencies in effectively investigating and prosecuting complaints of torture and ill-treatment perpetrated by law enforcement officials during the detention and interrogation of national security-related detainees, as evidenced by the particularly low rate of prosecutions and condemnations. The Committee considers that internal administrative sanctions should never preclude an effective investigation into and prosecution of complaints of torture and ill-treatment. The Committee is concerned by the numerous and credible allegations that complaints of torture and ill-treatment are dismissed due to the absence of documentation of physical signs of torture, possibly because no medical examination was conducted or was conducted too late to document them.”⁴⁸⁰

⁴⁷⁹ UNAMA 2017 Report on Conflict-Related Detainees, AFG-OTP-0006-3571 at 3616.

⁴⁸⁰ Committee against Torture, Concluding observations on the second periodic report of Afghanistan, CAT/C/AFG/CO/2, 12 June 2017, AFG-OTP-0006-3144 at 3146.

287. [REDACTED].

288. In sum, despite the particularly high prevalence of prohibited acts against conflict-related detainees in certain detention facilities run by the NDS or ANP,⁴⁸¹ the information available does not indicate that relevant national proceedings have been carried out against those most responsible for such alleged crimes. Accordingly, the Prosecution has assessed that the potential case(s) it has identified in this Request and confidential *ex parte* Annexes 2B and 3B concerning crimes allegedly committed by members of the ANSF would currently be admissible, meaning that there is no conflict of jurisdiction between Afghanistan and the Court. This assessment remains provisional and can be revisited in the light of any information that the Afghan authorities choose to provide in the context of article 18 proceedings or during the course of subsequent case-specific investigative inquires, should the Chamber grant this Request.

289. Moreover, no national investigations or prosecutions have been conducted or are ongoing in Afghanistan with respect to crimes allegedly committed by members of international forces, in line with status of forces agreements in place between Afghanistan and the United States 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.⁴⁸²

⁴⁸¹ See above paras. 164-168.

⁴⁸² See Agreement regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense present in Afghanistan in connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, entry into force 28 May 2003, AFG-OTP-0004-6374 at 6376 and 6380; Art.13, Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America, 30 September 2014, AFG-OTP-0007-3327 at 3344; art. 11, Agreement Between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of

2. National proceedings in the US

290. The Prosecution sought from the US authorities, but did not receive, specific information on national proceedings that it could rely on. [REDACTED].⁴⁸³ [REDACTED].

291. [REDACTED].⁴⁸⁴ [REDACTED].⁴⁸⁵

292. [REDACTED].⁴⁸⁶

293. [REDACTED].⁴⁸⁷

294. [REDACTED].

295. The information available provides only clusters of statistics and references to processes undertaken, with little or no actual substantiation of what has been undertaken in relation to specific cases. The Prosecution recalls, in this regard, that the Appeals Chamber has indicated that a State challenging the admissibility of a case has the burden of proof to show that a case is inadmissible.⁴⁸⁸ “To discharge that burden, a State must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing”.⁴⁸⁹ Even

NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan”, 30 September 2014, AFG-OTP-0004-5898 at 5907.

⁴⁸³ [REDACTED].

⁴⁸⁴ [REDACTED].

⁴⁸⁵ [REDACTED].

⁴⁸⁶ [REDACTED].

⁴⁸⁷ [REDACTED].

⁴⁸⁸ [Ruto Admissibility Appeals Judgment](#), para. 62; [Muthaura Admissibility Appeals Judgment](#), para. 61.

⁴⁸⁹ [Ruto Admissibility Appeals Judgment](#), para. 62; [Muthaura Admissibility Appeals Judgment](#), para. 61.

though no formal challenge has been brought or is indeed possible at this early stage in the procedure, the Prosecution has applied this standard given current comparable circumstances, namely: (i) the fact that the US appears to dispute the Prosecution's complementarity assessment; (ii) efforts have been made to verify relevant domestic proceedings; and (iii) little or no substantiation has been obtained as a result.⁴⁹⁰

296. In particular, despite a number of efforts undertaken, the Prosecution has been unable to obtain specific information with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court, of which it has identified at least 54 victims in this Request and in confidential *ex parte* annex 2C.⁴⁹¹ In the circumstances, the Prosecution is left with no alternative but to conclude that any potential case related to the treatment of detainees by the US armed forces in Afghanistan would currently be admissible. This assessment remains provisional and can be revisited in the light of any information that the US authorities choose to provide in the context of article 18 proceedings or during the course of subsequent case-specific investigative inquires, should the Chamber grant this Request.

297. With respect to alleged crimes committed by members of the CIA, the US DOJ has determined that it will not prosecute any person who acted in good faith within the scope of the legal guidance given by the OLC

⁴⁹⁰ [REDACTED].

⁴⁹¹ *See above* para. 189.

regarding the interrogation of detainees.⁴⁹² In addition, only limited inquiries appear to have been undertaken against persons who acted outside of the scope of that guidance, including for the use of techniques that were not authorised by the OLC, or use of authorised techniques in ways that diverged from the specific authorisation given, or because enhanced interrogation techniques were applied by interrogators who had not been authorised to use them.⁴⁹³ Nor has the use of “standard techniques” appeared to have undergone any investigative scrutiny. As with information relating to the DOD, the Prosecution did not obtain any concrete information from the US authorities on alleged cases of detainee abuse committed by members of the CIA beyond what was in the public domain.

298. For the reasons set out above, the findings below are based on publicly available information contained in open sources.

a. Proceedings concerning the alleged crimes committed by members of the US armed forces

299. The information available indicates that at this stage 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 as set out in this Request and confidential *ex parte* Annexes 2C and 3C.

⁴⁹² US Department of Justice, Office of Public Affairs, “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees”, 30 June 2011, AFG-OTP-0004-5961 at 5961; US DOJ, Preliminary Review into the Interrogation of Certain Detainees, AFG-OTP-0004-5959 at 5959.

⁴⁹³ *See below* paras. 313-328.

300. Although the US has asserted that it has conducted thousands of investigations into detainee abuse, there is limited information available on the persons or conduct concerned. To the extent discernible, such investigations and/or prosecutions appear to have focussed on alleged acts committed by direct physical perpetrators and/or their immediate superiors. None of the investigations appear to have examined the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the US armed forces of the interrogation techniques set out in this Request.

301. A number of investigations have been conducted into DOD detention operations and its detainee interrogation programme, as well as into DOD directed investigations into alleged detainee abuse. There is limited information available in these and other publicly available sources, however, regarding specific investigations and/or prosecutions related to the alleged ill-treatment of detainees by members of the US armed forces.⁴⁹⁴ Instead, the information available typically categorises domestic activity in clusters of statistics.

302. For example, the Church Report indicated that as of September 2004, 27 investigations in response to allegations of detainee abuse by DOD personnel in Afghanistan had been initiated, involving 65 service members

⁴⁹⁴ The armed services did not begin publishing information on court martial proceedings until July 2013 (in the case of the Navy and Marine Corps) and October 2014 (in the case of the Army); US Navy, "SECNAV Announces New Initiatives to Help Combat Sexual Assault", 18 July 2013, AFG-OTP-0005-2846; Army Times, "Army: New courts-martial roundup adds transparency", 4 February 2015, AFG-OTP-0005-2848. *See also* Correspondents' Reports in *Yearbook of International Humanitarian Law* for the US, (available from 2011 onwards) AFG-OTP-0007-2034 at 2038-2039. The Constitution Project, Task Force on Detainee Treatment, "Disposition of Abuse Allegations: Individuals Alleged to Have Engaged in Wrongful Conduct in Connection with the Treatment of Detainees", also identifies six physical perpetrators, based on public reporting, that appear to have been prosecuted for assault, abuse, maltreatment, or maiming detainees during 2002; AFG-OTP-0005-2886.

and 25-50 detainees. Investigations either concluded that the allegations were unsubstantiated, or resulted in administrative action against the perpetrator, such as issuing a letter of reprimand or suspended them from further operations involving detainees.⁴⁹⁵

303. The Schlesinger Report identified approximately 300 allegations of detainee abuse in Afghanistan, Iraq and Guantanamo Bay as of mid-August 2004, resulting in 155 completed investigations and 66 substantiated cases. The report observed: "Abuses of varying severity occurred at differing locations under differing circumstances and context. They were widespread and, though inflicted on only a small percentage of those detained, they were serious both in number and in effect. No approved procedures called for or allowed the kinds of abuses that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials of military authorities. Still, the abuses were not just the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels."⁴⁹⁶

304. The 2006 report of the DOD Office of the Inspector General on DoD-Directed Investigations of Detainee Abuse reported that 653 criminal investigations related to the treatment of detainees were ongoing or completed as of January 2006, primarily involving alleged assault, murder and theft.⁴⁹⁷ The review evaluated the thoroughness and timeliness of criminal investigations into allegations of abuse involving detainees in Iraq and Afghanistan through a sample review of 50 closed investigative files, and identified problem areas it considered reflected systemic

⁴⁹⁵ Church Report, AFG-OTP-0003-4294 at 4529-4530.

⁴⁹⁶ Schlesinger Report, AFG-OTP-0003-4667 at 4673.

⁴⁹⁷ OIG Review of DoD Investigations, AFG-OTP-0003-8611 at 8698.

deficiencies. In relation to the reporting of detainee abuse, it concluded: “Allegations of detainee abuse were not consistently reported, investigated, or managed in an effective, systematic, and timely manner because clear procedural guidance and command oversight were either inadequate or non-existent. As a result, no single entity within any level of command was aware of the scope and breadth of detainee abuse”.⁴⁹⁸ A separate report issued by the Office of the Inspector General of the DoD, transmitted by the Deputy Inspector General for Policy and Oversight, reviewing the same sample of 50 cases, found *inter alia* that a number of the reviewed cases had been negatively affected by factors such as delayed referrals from the relevant Army unit to the US Army Criminal Investigation Command, or were missing key investigative steps, including in terms of medical records, autopsies and review of use of deadly force against detainees.⁴⁹⁹

305. The US provided an overview of investigations into alleged detainee abuse as part of its periodic report to the Committee against Torture. The US delegation stated that the DOD had conducted “thousands of investigations since 2001, and prosecuted or disciplined hundreds of service members for mistreatment of detainees and other misconduct.”⁵⁰⁰ Nonetheless, in its 2014 concluding observations the Committee noted that the US had “provided minimal statistics on the number of investigations, prosecutions, disciplinary proceedings and corresponding reparations” and that it “did not receive sufficient information about the sentences and

⁴⁹⁸ OIG Review of DoD Investigations, AFG-OTP-0003-8611 at 8626.

⁴⁹⁹ Office of the Inspector General of the Department of Defense, Investigative Policy & Oversight, *Review of Criminal Investigations of Alleged Detainee Abuse*, Project No. IPO 2004C005, 25 August 2006, AFG-OTP-0007-1418 at 1431.

⁵⁰⁰ See Committee against Torture, “Concluding observations on the combined third to fifth periodic reports of the United States of America”, U.N. Doc. CAT/C/USA/CO/3-5, 19 December 2014 (“CAT/C/USA/CO/3-5”), AFG-OTP-0003-7784 at 7789, para. 13.

criminal or disciplinary sanctions imposed on offenders”, resulting in the Committee’s inability to assess the State’s compliance with its duty under the Convention to ensure, *inter alia*, prompt and impartial investigation wherever there is reasonable grounds to believe that an act of torture has been committed.⁵⁰¹

306. In its 2015 update for the Human Rights Committee, the US further specified that “more than 70 investigations concerning allegations of detainee abuse by military personnel in Afghanistan conducted by the DoD resulted in trial by courts-martial, close to 200 investigations of detainee abuse resulted in either non-judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level. The remainder were determined to be unsubstantiated, lacking in sufficient inculpatory evidence, or were included as multiple counts against one individual.”⁵⁰² Specific public information on the incidents and persons forming the subject of those proceedings is, however, scant. Accordingly, the Prosecution was unable to identify any individual in the armed services prosecuted by courts martial for the ill-treatment of detainees within the Court’s temporal and territorial jurisdiction.⁵⁰³

⁵⁰¹ CAT/C/USA/CO/3-5, AFG-OTP-0003-7784 at 7789, para. 13, 13(a).

⁵⁰² US Department of State, “One-Year Follow-up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights”, 31 March 2015, AFG-OTP-0007-4229 at 4233, para.8. *See similarly* US Department of State, “One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports on Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, 27 November 2015, AFG-OTP-0005-2828 at 2830, para. 31.

⁵⁰³ The Department of Defense Office of the Inspector General *Review of Criminal Investigations of Alleged Detainee Abuse* additionally noted that the majority of reported cases concerned Iraqi detainees or citizens, AFG-OTP-0007-1418 at 1429.

307. A global review by a group of NGOs into 330 cases of alleged ill-treatment of detainees in US custody in Afghanistan, Iraq and Guantanamo Bay from 2001-2006 involving over 600 US personnel found that 54 persons were known to have been convicted by court-martial, of which 40 received prison sentences, 30 of which were for sentences of less than one year. Among the cases examined, only three officers were convicted for detainee abuse, all three for direct participation and for criminal acts committed in Iraq.⁵⁰⁴

308. In terms of institutional oversight, in 2006 the Office of the Inspector General (OIG) of the DOD conducted a review of DOD-directed investigations of detainee abuse, including in Afghanistan, and of the 13 senior-level reports. These inspections were administrative enquiries rather than criminal proceedings, although some of them had the mandate to make recommendations relating to individual accountability. A number of these reports concluded that abuses resulted from unclear policy guidance, insufficient training, and command failures.⁵⁰⁵

309. Other alleged crimes falling outside the scope of authorised policies appear to have been investigated and prosecuted by the authorities. This includes the murder of 16 civilians in Kandahar province by Army Staff Sergeant Robert Bales on 11 March 2012, resulting in a guilty plea and a conviction to life imprisonment without parole;⁵⁰⁶ the killing of three civilians in Kandahar province (Maiwand district) in 2010 by Staff

⁵⁰⁴ Center for Human Rights and Global Justice at NYU Law School, HRW, and Human Rights First, "By the Numbers: Findings of the Detainee Abuse and Accountability Project", Vol. 18, No. 2 (April 2006), AFG-OTP-0002-3690 at 3693-3694, 3702-3703.

⁵⁰⁵ See OIG Review of DoD Investigations, AFG-OTP-0003-8611 and the 13 reports summarised in Appendixes C-O.

⁵⁰⁶ The Guardian, "Robert Bales sentenced to life in prison for Afghanistan massacre", 23 August 2013, AFG-OTP-0006-3946,

Sergeant Calvin Gibbs and other members of the 5th Stryker Combat Brigade, 2nd Infantry Division;⁵⁰⁷ the involuntary manslaughter convictions imposed upon former private military contractors Christopher Drotleff and Justin Cannon, upheld by US Court of Appeals (4th Circuit) for shooting and killing two passengers in a vehicle after a traffic accident;⁵⁰⁸ and the 3 February 2009 guilty plea by Don Ayala, a civilian contractor in Afghanistan, to voluntary manslaughter for the death of an individual on 4 November 2008.⁵⁰⁹

310. Although not directly relevant for the complementarity assessment, a number of civil actions have also been brought in the US concerning allegations of DOD detainee abuse in Afghanistan, including *Ali v Rumsfeld*⁵¹⁰ and *Allaithi v Rumsfeld*⁵¹¹.

311. To summarise, despite the assurances of the competent authorities that the DOD has conducted all relevant inquiries, and despite a number of efforts it has undertaken, the Prosecution has been unable to obtain specific information or evidence with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court, of

⁵⁰⁷ New York Times, “Soldier Is Convicted of Killing Afghan Civilians for Sport, 10 November 2011, AFG-OTP-0006-3943.

⁵⁰⁸ *US v Drotleff et al*, US Court of Appeal (Fourth Circuit), 29 November 2012, No. 11-4677/11-4744, AFG-OTP-0006-3648.

⁵⁰⁹ US Attorney’s Office Eastern District of Virginia, “Civilian Contractor Pleads Guilty to Voluntary Manslaughter of Afghan Detainee”, 3 February 2009, AFG-OTP-0006-3156. For a survey of a number of other prosecuted cases see Amnesty International, “Left in the Dark”, AFG-OTP-0003-0336 at 0407-0408.

⁵¹⁰ *Ali et al v Rumsfeld et al*, US Court of Appeals for the District of Columbia, 649 F.3d 762 (2011), AFG-OTP-0006-3672.

⁵¹¹ *Allaithi v. Rumsfeld*, US Court of Appeals for the District of Columbia, 753 F.3d 1327 (2014), AFG-OTP-0006-3657.

which it has identified at least 54 victims in this Request and confidential *ex parte* Annexes 2C and 3C. In the circumstances, the Prosecution has provisionally determined that the potential cases related to the treatment of those 54 detainees would be admissible at this stage.

b. Proceedings concerning the alleged crimes committed by members of the CIA

312. The information available indicates that at this stage 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 CIA as set out in this Request and confidential *ex parte* Annexes 2C and 3C.

313. In terms of the CIA's historical approach towards accountability in relation to its detention and interrogation programme, the Report of the Senate Select Committee on Intelligence found that the CIA "actively avoided or impeded congressional oversight of the program"⁵¹², "impeded effective White House oversight and decision-making"⁵¹³, and "impeded oversight by the CIA's Office of Inspector General".⁵¹⁴ The Senate Report further found that, rather than furthering inquiries, the CIA "coordinated the release of classified information to the media, including inaccurate information concerning the effectiveness of the CIA's enhanced

⁵¹² Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5707. *See contra* Report of the Senate Select Committee on Intelligence, Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio, And Coburn, AFG-OTP-0007-1121 at 1144-1146.

⁵¹³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5708. *See contra* Report of the Senate Select Committee on Intelligence, Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio, And Coburn, AFG-OTP-0007-1121 at 1146-1147.

⁵¹⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5710. *See contra* Report of the Senate Select Committee on Intelligence, Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio, And Coburn, AFG-OTP-0007-1121 at 1151-1153.

interrogation techniques”⁵¹⁵ and “marginalized and ignored numerous internal critiques, criticisms, and objections concerning the operation and management of the CIA's Detention and Interrogation Program”⁵¹⁶. The CIA also ordered the destruction of videotapes documenting CIA interrogations, in response to proposals in the US Senate to establish an independent commission to investigate detention policies and allegations of detainee abuse.⁵¹⁷

314. The Senate Report further found that the CIA “rarely reprimanded or held personnel accountable for serious and significant violations, inappropriate activities, and systemic and individual management failures”, noting that “CIA officers and CIA contractors who were found to have violated CIA policies or performed poorly were rarely held accountable or removed from positions of responsibility.” As the Report observed:

Significant events, to include the death and injury of CIA detainees, the detention of individuals who did not meet the legal standard to be held, the use of unauthorized interrogation techniques against CIA detainees, and the provision of inaccurate information on the CIA program did not result in appropriate, effective, or in many cases, any corrective actions. CIA managers who were aware of failings and shortcomings in the program but did not intervene, or who failed to provide proper leadership and management, were also not held to account.

On two occasions in which the CIA inspector general identified wrongdoing, accountability recommendations were overruled by senior CIA leadership. In one instance, involving the death of a CIA detainee at COBALT, CIA Headquarters decided not to take disciplinary action against an officer involved because, at the time,

⁵¹⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5710. *See contra* Report of the Senate Select Committee on Intelligence, Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio, And Coburn, AFG-OTP-0007-1121 at 1153.

⁵¹⁶ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5716.

⁵¹⁷ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 6164 and 6165.

CIA Headquarters had been “motivated to extract any and all operational information” from the detainee. In another instance related to a wrongful detention, no action was taken against a CIA officer because, “[t]he Director strongly believes that mistakes should be expected in a business filled with uncertainty,” and “the Director believes the scale tips decisively in favor of accepting mistakes that over connect the dots against those that under connect them.” In neither case was administrative action taken against CIA management personnel.⁵¹⁸

315. The limited inquiries and/or criminal proceedings that were initiated appear to have been focussed on the conduct of direct perpetrators and to persons who did not act in good faith or within the scope of the legal guidance given by the OLC regarding the interrogation of detainees. The conduct of those who purportedly acted in good faith and within the boundaries of the legal guidance was excluded from scope of possible prosecution from the outset, regardless of the nature and gravity of that conduct.⁵¹⁹ In addition, no proceedings appear to have been conducted to examine the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques set out in this Request.

316. On 7 May 2004, the Inspector General of the CIA produced a special report following a request from the CIA’s Deputy Director for Operations for the Office of the Inspector General to investigate, *inter alia*, allegations that Agency personnel had used unauthorised interrogation techniques with a detainee, as well as information questioning whether certain covert Agency activities at an overseas detention and interrogation site might

⁵¹⁸ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5716 (internal footnotes removed).

⁵¹⁹ US Department of Justice, Office of Public Affairs, “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees” 30 June 2011, AFG-OTP-0004-5961 at 5961; US DOJ, Preliminary Review into the Interrogation of Certain Detainees, AFG-OTP-0004-5959 at 5959.

involve violations of human rights (public redacted version released in August 2009).⁵²⁰

317. As a result of the review, two cases were referred to the DOJ for potential prosecution. The first involved a CIA contractor's alleged use of unauthorised techniques on an individual who died while under interrogation at Asadabad Base (Kunar province, Afghanistan) in June 2003.⁵²¹ The second involved allegations of "unauthorized, improvised, inhumane, and undocumented detention and interrogation techniques," although all other details were redacted.⁵²²

318. In June 2004, the CIA contractor responsible for the death of the detainee at Asadabad Base was indicted on four assault charges, including assault with intent to cause bodily harm and assault resulting in serious bodily injury.⁵²³ He was eventually convicted and sentenced to a hundred month term of imprisonment.⁵²⁴ Federal prosecutors explained that they lacked a basis for other criminal charges because the victim's family removed his body from Asadabad Base after his death and refused to allow an autopsy, so they lacked evidence as to the cause of death.⁵²⁵ The conviction was upheld by the US Court of Appeals for the Fourth Circuit, but the sentence was remanded to the District Court which imposed a term of imprisonment of eighty months.⁵²⁶

⁵²⁰ CIA Inspector General Report, AFG-OTP-0003-7989 at 7994 and 7995.

⁵²¹ CIA Inspector General Report, AFG-OTP-0003-7989 at 8071 and 8072, 8096 and 8097.

⁵²² CIA Inspector General Report, AFG-OTP-0003-7989 at 8095.

⁵²³ U.S. Department of Justice, "CIA Contractor Indicted for Assaulting Detainee Held at U.S. Base in Afghanistan," June 17, 2004, AFG-OTP-0006-3727.

⁵²⁴ US Court of Appeals for the Fourth Circuit, *United States v. Passaro*, 577 F.3d 207 (2009), AFG-OTP-0004-6339 at 6341 ("*U.S. v. Passaro*, 577 F.3d 207 (2009)").

⁵²⁵ *U.S. v. Passaro*, 577 F.3d 207 (2009), AFG-OTP-0006-3948 at 6350, fn. 1.

⁵²⁶ United States Attorney's Office, Eastern District of North Carolina, "Government Contract Employee Re-Sentenced for Assault Charge," 6 April 2010, AFG-OTP-0004-5953.

319. The CIA Inspector General report also found that a number of other unauthorised techniques had been used during interrogations, including mock executions, intimidation with a handgun and power drill, threats of death and of sexually assaulting members of a detainee's family, use of cigar and cigarette smoke to induce vomiting, and repeated use of waterboarding (183 times in the case of Khalid Shaykh Muhammad, and at least 83 times in the case of Abu Zubaydah) which exceeded OLC authorisation specifying that "repetition will not be substantial."⁵²⁷ A number of these incidents were referred earlier to the DOJ for investigation and potential prosecution, but did not result in prosecution.⁵²⁸

320. On 29 July 2009, the Office of Professional Responsibility of the DOJ issued its final report arising from its investigations into the conduct of members of the OLC when providing legal guidance related to the use by the CIA of enhanced interrogation techniques. The Office of Professional Responsibility concluded "former Deputy AAG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid

⁵²⁷ CIA Inspector General Report, AFG-OTP-0003-7989 at 8034 to 8038, 8062 to 8066, 8083 to 8084 and 8096 to 8097. See also Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5714, which found, in the context of the global CIA programme, "[a]t least 17 detainees were subjected to CIA enhanced interrogation techniques without authorization from CIA Headquarters. Additionally, multiple detainees were subjected to techniques that were applied in ways that diverged from the specific authorization, or were subjected to enhanced interrogation techniques by interrogators who had not been authorized to use them. Although these incidents were recorded in CIA cables and, in at least some cases were identified at the time by supervisors at CIA Headquarters as being inappropriate, corrective action was rarely taken against the interrogators involved".

⁵²⁸ Department of Justice Office of Professional Responsibility, "Report: Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists", 29 July 2009, AFG-OTP-0005-5127 at 5217-5220, 5222 and 5223 to 5227 ("DOJ OPR Report").

legal advice”⁵²⁹ and that “former AAG Jay Bybee committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice”.⁵³⁰ It also recommended that the DOJ review certain declinations of prosecution regarding incidents of detainee abuse.

321. On 24 August 2009, the Attorney General announced that the Office of Professional Responsibility had submitted to him its report regarding the OLC memoranda related to enhanced interrogation techniques. He stated that he had reviewed the Office of Professional Responsibility’s report, the full, still-classified version of the 2004 CIA Inspector General’s report, as well as other relevant information available to the Department, and concluded that the information available warranted the opening of “a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.”⁵³¹

322. Assistant United States Attorney John Durham, who had been appointed in 2008 by the then-Attorney General to investigate the destruction of CIA videotapes of detainee interrogations, was further mandated to conduct the review in order to recommend to the Attorney General “whether there is sufficient predication for a full investigation into whether the law was violated in connection with the interrogation of certain detainees”. The Attorney General, nonetheless, stated: “I have made it clear in the past that

⁵²⁹ DOJ OPR Report, AFG-OTP-0005-5127 at 5392.

⁵³⁰ DOJ OPR Report, AFG-OTP-0005-5127 at 5392. *See also* US Department of Justice, “Opening Statement before the Committee Against Torture, David Bitkower, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice”, 12 November 2014, AFG-OTP-0003-7800 at 7813, observing that “the Department has withdrawn prior legal opinions that permitted mistreatment”.

⁵³¹ US Department of Justice, Office of Public Affairs, “Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees”, 24 August 2009, AFG-OTP-0004-5959 (“US DOJ, Preliminary Review into the Interrogation of Certain Detainees”).

the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals”.⁵³² Accordingly, the scope of Mr Durham’s inquiry was limited to examining “primarily whether any unauthorized interrogation techniques were used by CIA interrogators, and if so, whether such techniques could constitute violations of the torture statute or any other applicable statute”.⁵³³

323. Following a two year review, that “examined any possible CIA involvement with the interrogation of 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001”, on 30 June 2011 the DOJ announced that it was opening a full criminal investigation into the deaths of two individuals in CIA custody overseas, and that it had concluded that further investigation into other allegations was not warranted.⁵³⁴ These investigations were closed in August 2012 after the DOJ determined that the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.⁵³⁵

⁵³² US DOJ, Preliminary Review into the Interrogation of Certain Detainees, AFG-OTP-0004-5959.

⁵³³ US Department of Justice, Office of Public Affairs, “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees” 30 June 2011, AFG-OTP-0004-5961 at 5961.

⁵³⁴ US Department of Justice, Office of Public Affairs, “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees”, 30 June 2011, AFG-OTP-0004-5961 (“US DOJ, Statement of the Attorney General”). See also US District Court for the Southern District of New York, *The New York Times Company and Charlie Savage vs. United States Department of Justice*, No. 1:14-CV-03777-JPO, Declaration of John H. Durham, 8 December 2014, AFG-OTP-0006-0460 at 0466.

⁵³⁵ US Department of Justice, Office of Public Affairs, “Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees”, 30 August 2012, AFG-OTP-0004-5957, at 5958.

324. In its concluding observations of 2014, the Committee against Torture expressed concerns about this decision not to prosecute and punish the alleged perpetrators, and more broadly over “the ongoing failure on the part of the State party to fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad, evidenced by the limited number of criminal prosecutions and convictions”.⁵³⁶ In relation to the Durham inquiry, the Committee noted that former CIA detainees held in US custody abroad appeared not to have been interviewed, and also called into question the decisions not to prosecute and punish the alleged perpetrators in the cases involving deaths in CIA custody. It also expressed concern about the absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel which triggered Mr Durham’s initial mandate.⁵³⁷

325. The Office of Professional Responsibility’s findings of professional misconduct were subsequently reviewed by Associate Deputy Attorney General David Margolis. His memorandum of 5 January 2010 concluded that the OLC lawyers exercised “poor judgement” as opposed to “professional misconduct” and therefore fell short of meriting referral to the state bar disciplinary authority.⁵³⁸ In particular, Mr Margolis held that the Office of Professional Responsibility failed to identify the violation of “a known, unambiguous obligation or standard” for a finding of

⁵³⁶ Committee against Torture, “Concluding observations on the combined third to fifth periodic reports of the United States of America”, U.N. Doc. CAT/C/USA/CO/3-5, 19 December 2014, AFG-OTP-0003-7784 at 7787-7788, para. 12.

⁵³⁷ Committee against Torture, “Concluding observations on the combined third to fifth periodic reports of the United States of America”, U.N. Doc. CAT/C/USA/CO/3-5, 19 December 2014, AFG-OTP-0003-7784 at 7787-7788, para. 12.

⁵³⁸ David Margolis, Associate Deputy Attorney General, “Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Suspected Terrorists” (“Margolis Review”), 5 January 2010, AFG-OTP-0006-0770 at 0837.

professional misconduct.⁵³⁹ He further considered whether Mr Yoo and Mr Bybee acted contrary to the unambiguous obligation not to provide advice to their client that was knowingly or recklessly false or issued in bad faith, to provide competent representation, and to explain the matter to the extent reasonably necessary to permit the client to make an informed decisions. Mr Margolis distanced himself from “an endorsement of the legal work that underlies those memoranda”, observing that the memoranda contained discussion and analysis that was “flawed”,⁵⁴⁰ and “errors were more than minor”.⁵⁴¹ He further observed that “these memoranda represent an unfortunate chapter in the history of the Office of Legal Counsel”⁵⁴², that the Bybee memo “consistently took an expansive view of executive authority and narrowly construed the torture statute while failing to expose (much less refute) countervailing arguments and overstating the certainty of its conclusions”.⁵⁴³ However, it ultimately held that “Yoo and Baybee did not violate a clear obligation or standard” within the meaning of the applicable professional misconduct standard.⁵⁴⁴

326. The scope of the Office of Professional Responsibility’s report and Margolis’s Review of that report was limited to whether the OLC lawyers breached the standards of professional misconduct. This was examined in terms of, *inter alia*, the duty not to provide advice that was knowingly or recklessly false or issued in bad faith, and to provide work that is competent (including the appropriate level of thoroughness) and that explains a matter to the extent reasonably necessary to permit the client to

⁵³⁹ Margolis Review, AFG-OTP-0006-0770 at 0771.

⁵⁴⁰ Margolis Review, AFG-OTP-0006-0770 at 0804, 0812, 0833.

⁵⁴¹ Margolis Review, AFG-OTP-0006-0770 at 0834.

⁵⁴² Margolis Review, AFG-OTP-0006-0770 at 0836.

⁵⁴³ Margolis Review, AFG-OTP-0006-0770 at 0837.

⁵⁴⁴ Margolis Review, AFG-OTP-0006-0770 at 0837.

make informed decisions regarding the representation.⁵⁴⁵ Neither the Office of Professional Responsibility's report nor Margolis's Review ruled on the correctness of the legal opinions as a matter of law. While the Prosecution does not take a view on findings set against the applicable standards of professional misconduct, it considers that the scope of authorisation provided by the legal opinions breached the applicable prohibitions under the Rome Statute and international law more generally against torture, cruel treatment and outrages against upon personal dignity.

327. Although not directly relevant for the complementarity assessment, a number of civil actions have also been brought in the US concerning allegations of DOD detainee abuse in Afghanistan, including *Mohamed et al v Jeppesen Dataplan*,⁵⁴⁶ *El-Masri v US*,⁵⁴⁷ and *Salim v. Mitchell*.⁵⁴⁸

328. To summarise, there have been criminal investigations and/or prosecutions related to the treatment of conflict-related detainees where CIA interrogations actually resulted in death in custody. Other processes include a number of institutional oversight reviews; a professional standards review of the legal opinions provided by OLC lawyers; a preliminary review (including the capacity to recommend criminal investigations) of all allegations relating to CIA detainee abuse, but which excluded in advance from its ambit the prosecution of anyone who acted

⁵⁴⁵ Margolis Review, AFG-OTP-0006-0770 at 0795-0796; compare at 0780 *et seq.*, discussing the standard applied by the OPR.

⁵⁴⁶ *Mohamed et al v Jeppesen Dataplan*, US Court of Appeals for the Ninth Circuit, 614 F.3d 1070 (2010), AFG-OTP-0006-3764.

⁵⁴⁷ *El-Masri v US*, US Court of Appeals for the Fourth Circuit, 479 F.3d 296 (2007), AFG-OTP-0007-1491 See separately *El-Masri v The Former Yugoslav Republic of Macedonia*, 13 December 2012, Grand Chamber, European Court of Human Rights, Application No. 39630/09, AFG-OTP-0006-3819.

⁵⁴⁸ *Salim v. Mitchell*, US District Court for the Eastern District of Washington, No. 2:15-CV-286-JLQ, AFG-OTP-0007-2113.

in good faith within the legal guidance provided by the OLC, and resulted in a recommendation that led to two of the criminal investigations related to death in CIA custody, discussed earlier. A number of private action civil claims were also initiated, which were either dismissed procedurally or, in one case, settled out of court. By contrast, there appears to have been no criminal investigation or prosecution of any person who devised, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques constituting torture, cruel treatment or outrages upon personal dignity, whether in relation to those that were formally authorised by the OLC or those that went beyond the scope of the legal guidance.

3. National proceedings in Poland, Romania, Lithuania

329. In relation to proceedings conducted in other States, criminal investigations are reportedly on-going in Poland, Romania and Lithuania regarding alleged crimes committed in relation to the CIA detention facilities on their respective territories.⁵⁴⁹

330. The Polish Prosecutor General's office initiated an investigation in 2008 of alleged Polish complicity in the CIA detention facility on its territory, and a Polish newspaper reported in 2012 that the former head of Polish intelligence, Zbigniew Siemiatkowski, was being charged with violating Polish and international law, although such charges never materialised.⁵⁵⁰ The investigation has reportedly been delayed by a lack of US Government

⁵⁴⁹ The Office of the Prosecutor requested information on these national proceedings to Poland (on 28 July 2015), Lithuania (26 January 2017) and Romania (6 March 2017) and received a response from each on 18 September 2015, 15 February 2017 and 4 October 2017, respectively.

⁵⁵⁰ For further details of the investigation, *see Abu Zubaydah v. Poland*, AFG-OTP-0004-4870 at 4926-4937, paras. 125-166; OSJI, *Globalizing Torture*, AFG-OTP-0004-3147 at 3249-3250.

cooperation.⁵⁵¹ In its final judgments rendered in two cases on 2 February 2015, the European Court of Human Rights found that “the criminal investigation in Poland fell short of the standards of the ‘effective investigation’ that should have been carried out in accordance with Article 3.”⁵⁵² [REDACTED].⁵⁵³

331. In Romania, in May 2012 preliminary criminal proceedings were initiated on behalf of one of the CIA detainees allegedly held in that country, Abd al Rahim al Nashiri. The Prosecutor’s Office of Romania registered the complaint and initiated an investigation that is reportedly still on-going. A complaint was subsequently submitted to the European Court of Human Rights on behalf of the same detainee in August 2012.⁵⁵⁴ [REDACTED].⁵⁵⁵

332. In Lithuania, on 22 January 2010 the Prosecutor General opened an investigation, No. 01-2-00016-10, into allegations of illegal transportation and detention of CIA detainees on Lithuanian territory based on the Findings of the Parliamentary Investigation by the Parliamentary Committee on National Security and Defence concerning these allegations. An initial determination in January 2014 by the national prosecutor to terminate the investigation was revoked and an investigation re-opened on 22 January 2015 following the release of the US Senate Report’s findings in relation to CIA-run detention facilities in Lithuania. Separately, on 13

⁵⁵¹ AI, *Breaking the Conspiracy of Silence*, AFG-OTP-0004-4697 at 4706. [REDACTED].

⁵⁵² *Abu Zubaydah v. Poland*, AFG-OTP-0004-4870 at 5085-5086, para. 544; *see also Al Nashiri v. Poland*, AFG-OTP-0004-5169 at 5369, para. 499 (“the proceedings... have failed to meet the requirements of a ‘prompt’, ‘thorough’ and ‘effective’ investigation for the purposes of Article 3 of the Convention.”).

⁵⁵³ [REDACTED].

⁵⁵⁴ ECtHR, *Al Nashiri v. Romania*, Appl. no. 33234/12, “Statement of Facts”, 1 June 2012, AFG-OTP-0004-5399 at 5451, para. 103-105; OSJI, *Globalizing Torture*, AFG-OTP-0004-3147 at 3253-3554. *See also*, Open Society Foundation, “CIA Torture in Romania: Europe’s Top Human Rights Court Hears Al-Nashiri Complaint”, 29 June 2016, AFG-OTP-0007-0682.

⁵⁵⁵ [REDACTED].

February 2014, the Lithuanian Prosecutor General opened investigation No. 01-2-00015-14 into allegations that the Lithuanian authorities participated in the transfer, secret detention, torture, and inhuman and degrading treatment of a CIA detainee. On 6 February 2015, the Lithuanian Prosecutor General joined investigations No. 01-2-00016-10 and No. 01-2-00015-14 into a single investigation No. 01-2-00015-14.⁵⁵⁶

333. The scope of this investigation appears limited to Lithuanian nationals accused of unlawful transportation of persons across the state border and abuse of office, although the Lithuanian Government stated that “it may be extended if sufficient factual data is collected, other significant circumstances emerge, or other alleged criminal offences are detected in the course of the criminal proceedings”.⁵⁵⁷ [REDACTED].⁵⁵⁸

334. If the Chamber authorises an investigation into the Situation, the Prosecution will continue to assess the progress of any relevant national proceedings in order to determine whether they encompass the same persons and substantially the same conduct as identified in the course of any investigations by the Prosecution, and if so, whether they are genuine.

4. Conclusion on complementarity

335. On the basis of the information set out above, it is apparent that either no national investigations or prosecutions have been conducted or are

⁵⁵⁶ Human Rights Committee, Concluding observations on the third periodic report of Lithuania; addendum, Information received from Lithuania on follow-up to the concluding observations, CCPR/C/LTU/CO/3/Add.2, 12 February 2016, AFG-OTP-0007-0687 at 0693-0694, paras. 33-34.

⁵⁵⁷ Human Rights Committee, Concluding observations on the third periodic report of Lithuania; addendum, Information received from Lithuania on follow-up to the concluding observations, CCPR/C/LTU/CO/3/Add.2, 12 February 2016, AFG-OTP-0007-0687 at 0694, para. 34.

⁵⁵⁸ [REDACTED].

ongoing against the persons or groups of persons set out in this Request and its confidential *ex parte* annexes, or the information available is insufficient to identify the contours of any relevant national proceedings. The Prosecution submits therefore that the potential cases against members of the Afghan authorities, members of the Taliban or affiliated armed groups, and the members of the US armed forces and the CIA that would likely arise from an investigation of the situation would be currently admissible. If the Chamber authorises an investigation into the Situation, the Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction at the article 18 stage.

B. Gravity

336. The gravity assessment in this Request has been conducted against the backdrop of the potential cases that are likely to arise from an investigation into the Situation.⁵⁵⁹ The Prosecution recalls that a gravity assessment involves a generic examination of whether the persons or groups of persons relevant to the assessment capture those who may bear the greatest responsibility for the alleged crimes committed. The assessment must also be done from both a quantitative and a qualitative viewpoint, and factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims, are all indicators of the gravity of a given case.⁵⁶⁰ Accordingly, the Prosecution's submissions

⁵⁵⁹ [Kenya Article 15 Decision](#), paras. 50, 58, and 188; [Côte d'Ivoire Article 15 Decision](#), para. 202.

⁵⁶⁰ [Kenya Article 15 Decision](#), paras. 60-62; [Côte d'Ivoire Article 15 Decision](#), paras 203-205; [Georgia Article 15 Decision](#), para. 51.

on gravity relate to an assessment of gravity of one or more potential cases, rather than the gravity of the entire Situation.

1. Crimes allegedly committed by members of the Taliban and affiliated armed groups

337. Based on the information available, the potential case(s) concerning alleged crimes committed by members of the Taliban and affiliated armed groups are of sufficient gravity to justify further action by the Court.

338. The persons or groups of persons identified in accordance with regulation 49(2)(c) include persons with levels of responsibility in directing, ordering, facilitating or otherwise contributing to the commission of alleged crimes.

339. As set out in Section VII(A), an extensive catalogue of crimes were alleged to have been committed by members of the Taliban and affiliated armed groups, as part of a widespread and systematic attack, involving the multiple commission of prohibited acts and in furtherance of an organisational policy.

340. Moreover, these alleged crimes led to a high number of direct and indirect victims. The temporal range for the indicative statistics set out below varies according to the reporting period. Thus, over the period 2009-2016, 50,802 civilian casualties (17,700 deaths and 33,032 injuries) were attributed to anti-government armed groups, mostly from their use of IEDs as well as suicide and complex attacks.⁵⁶¹ Over the same period, targeted and deliberate killings by anti-government armed groups have

⁵⁶¹ UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3498. *See above* fn. 145.

resulted in 6,903 civilian deaths.⁵⁶² Attacks directed against educational and religious facilities, and humanitarian assistance personnel, also took place on a large scale. Between 2006 and 2008, 1153 attacks or threats towards the education sector were reported,⁵⁶³ while 60 attacks on civilian mullahs or places of worship such as mosques were recorded between 2012-2014, resulting in 45 civilians killed and 62 injured.⁵⁶⁴ At least 399 attacks against humanitarian aid workers have been recorded since May 2003, resulting in 325 deaths, 212 injured and 363 aid workers kidnapped.⁵⁶⁵ These crimes are alleged to have occurred in every province throughout the territory of Afghanistan, with increasing frequency each year as the insurgency gained in strength.

341. The information available suggests that much of the alleged conduct was committed with particular cruelty or in order to instil terror and fear among the local civilian population. Victims were deliberately targeted on a discriminatory basis based on their actual or perceived political allegiance or on gender grounds, with attacks particularly directed to civic and community leaders.⁵⁶⁶ Other crimes were committed in a manner calculated to inflict maximum harm and injury on the largest number of victims, such as through suicide bombings in crowded public gatherings, including in mosques during Friday prayers.⁵⁶⁷ The widespread use of perfidious tactics has also placed the civilian population at increased risk

⁵⁶² UNAMA 2016 Annual Report, AFG-OTP-0006-3441 at 3512.

⁵⁶³ CARE, Knowledge on Fire, AFG-OTP-0002-0641 at 0667.

⁵⁶⁴ UNAMA 2013 Annual Report, AFG-OTP-0003-5192 at 5240; UNAMA 2014 Annual Report, AFG-OTP-0003-5419 at 5489.

⁵⁶⁵ Humanitarian Outcomes (2015), *Aid Worker Security Database*, AFG-OTP-0007-0697.

⁵⁶⁶ See above paras. 74-75, 88-91, 112-121.

⁵⁶⁷ See above paras. 75, 98-99, 101-107, 145-150.

of attack from governmental and international forces, contributing to increased civilian casualties.⁵⁶⁸

342. The duration over which these crimes have been committed on a near daily basis has had a severe social and psychological impact on the Afghan population. The campaign of targeted killings of politicians, government workers, tribal and community leaders, teachers and religious scholars has also deprived local Afghan communities of functioning institutions. In many parts of the country, the Afghan population has been denied access to humanitarian assistance and basic government services, including health care, as a direct consequence of the insurgent strategy of targeting government workers and aid workers, including medical staff and deminers. Large areas have become effectively out of bounds to humanitarian assistance workers, while continued attacks against foreigners have forced many international aid organisations to cease their operations in the country, and made the effective delivery of humanitarian aid or development programs much more difficult for those that remain.⁵⁶⁹

343. The alleged crimes have had a particularly broad and severe impact on women and girls. Girls' education has come under sustained attack, thereby depriving thousands of girls of their right to education. Women who were left as sole income-providers for their households after the death or injury of their husbands have experienced long-lasting social and economic consequences, with poverty forcing many women to give their

⁵⁶⁸ See above paras. 154-157.

⁵⁶⁹ See above paras. 142-144.

daughters in marriage in exchange for debts or to take their children out of school often to work.⁵⁷⁰

2. Crimes allegedly committed by members of the ANSF

344. Based on the information available, the potential case(s) concerning alleged crimes committed by members of the ANSF are of sufficient gravity to justify further action by the Court.

345. The persons or groups of persons identified in accordance with regulation 49(2)(c) include persons with levels of responsibility with respect to the interrogation of detainees within a given facility or region, as well as in developing, authorising, directing, supervising and implementing the commission of alleged crimes.

346. As set out in Section VII(B), the alleged crimes have been committed on a large scale, with reports that torture has been practised institutionally in certain facilities. High percentages of detainees have reported having been subjected to torture or cruel treatment by the NDS, ANP, ANA or ALP. Facilities in which torture was found to be prevalent or systematic are located in multiple provinces across the country and are not limited to any one particular geographical region.⁵⁷¹

347. In this context, the Prosecution recalls that the prohibition against torture represents a peremptory norm of international law (*jus cogens*).⁵⁷² As the

⁵⁷⁰ See above paras. 116-121.

⁵⁷¹ See above paras. 163-173.

⁵⁷² *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99; [Furundžija Trial Judgement](#), paras. 153-154; [Delalic Trial Judgement](#), para. 454.

International Court of Justice has held, the prohibition is “grounded in a widespread international practice and on the *opinio juris* of States ... appears in numerous international instruments of universal application ... has been introduced into the domestic law of almost all States”, adding “acts of torture are regularly denounced within national and international fora”.⁵⁷³

348. The ICTY has held that the prohibition against torture “is absolute and non-derogable in any circumstances”⁵⁷⁴ and “applies at all times”.⁵⁷⁵ The United Nations Committee Against Torture, in its General Comment no.2, has similarly observed that “no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction”, including such justification as “a state of war or threat thereof, internal political instability or any other public emergency” or “any threat of terrorist acts or violent crime as well as armed conflict, international or non-international”. The Committee has also held that “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”, and further noted the “special gravity” of the crime of torture.⁵⁷⁶

349. The Committee Against Torture has further observed that the non-derogability of the prohibition of torture is also reflected in the long-standing principle, embodied in article 2(3) of the Torture Convention, that

⁵⁷³ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99.

⁵⁷⁴ [Delalic Trial Judgement](#), para. 454.

⁵⁷⁵ [Krnjelac Trial Judgement](#), para. 182. See also [Furundžija Trial Judgement](#), para. 139.

⁵⁷⁶ Committee Against Torture, General Comment No. 2, [CAT/C/GC/2](#), 24 January 2008, paras. 5, 6, 11.

an order of a superior or public authority can never be invoked as a justification of torture. As the Committee has observed:

... subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures ... it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.⁵⁷⁷

350. The manner in which these crimes are alleged to have been committed also appears to have been particularly cruel, prolonged and severe, calculated to inflict maximum pain and has included acts of sexual violence.⁵⁷⁸ Moreover, detainees were forced to give false confessions, upon pain of further punishment, resulting in detainees who may be innocent remaining incarcerated for extended periods of time, further depriving them and their families of their fundamental rights.⁵⁷⁹ Moreover, senior NDS officials have admitted that detainees were subjected to cruel treatment in the NDS facilities under their authority.⁵⁸⁰

351. The alleged crimes had severe short-term and long-term impact on detainees' physical and mental health, including permanent physical injuries. During the interrogation itself, the pain experienced by some

⁵⁷⁷ Committee Against Torture, General Comment No. 2, [CAT/C/GC/2](#), 24 January 2008, para.26.

⁵⁷⁸ *See above* paras. 166, 183.

⁵⁷⁹ *See above* para. 167.

⁵⁸⁰ *See above* para. 170.

detainees was severe enough to cause them to lose consciousness. Some detainees are described as “broken husks” after abuse, being unable to sleep, experiencing chronic pain, and forgetting the simplest things, such as remembering to pull down their pants when they use the toilet.⁵⁸¹

3. Crimes allegedly committed by members of the US armed forces and members of the CIA

352. Based on the information available, the potential case(s) concerning alleged crimes committed by members of the US armed forces and members of the CIA are of sufficient gravity to justify further action by the Court.

353. The persons or groups of persons identified in accordance with regulation 49(2)(c) include persons who devised, authorised or bore oversight responsibility for the implementation by members of the US armed forces or members of the CIA of the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court.

354. As noted above in paragraphs 347-349, the prohibition against torture represents a peremptory norm of international law (*jus cogens*). The alleged crimes appear to have been committed with particular cruelty, involving the infliction of serious physical and psychological injury, over prolonged periods, and including acts committed in a manner calculated to offend cultural and religious taboos, and leaving victims deeply traumatised.⁵⁸² Detainees who were subjected to EITs and extended isolation exhibited

⁵⁸¹ Smith, G., “From Canadian custody into cruel hands”, *Globe and Mail*, 23 April 2007, AFG-OTP-0003-5318 at 5319.

⁵⁸² See above paras. 206, 214. [REDACTED].

psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.⁵⁸³

355. With respect to the US armed forces, the alleged crimes appear to have been inflicted on a relatively small percentage of all persons detained by US armed forces which, during the time period when the alleged crimes occurred, totalled approximately 10,000 persons.⁵⁸⁴ The alleged acts also appear to have occurred during a limited time period, after which the use of all such techniques by US armed forces worldwide was formally rescinded and the US Army Field Manual restored the Geneva Conventions as the basis for the treatment and interrogation of all detainees. Nonetheless, the acts allegedly committed were serious both in their number and in their effect, and although implemented pursuant to authorised interrogation policies adopted locally rather than at headquarters level, implicated personal responsibility within the command structure.⁵⁸⁵

356. The treatment of CIA detainees appears to have been particularly grave on a qualitative assessment. The Report of the Senate Select Committee on Intelligence noted that interrogations of CIA detainees “were brutal and far worse than the CIA represented to policymakers and others”⁵⁸⁶. The report notes that the CIA applied its enhanced interrogation techniques “with significant repetition for days or weeks at a time”, with techniques “used in combination, frequently concurrent with sleep deprivation and

⁵⁸³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706, 5834-5835.

⁵⁸⁴ Church Report, AFG-OTP-0003-4294 at 4398.

⁵⁸⁵ Schlesinger Report, AFG-OTP-0003-4667 at 4673.

⁵⁸⁶ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705.

nudity”.⁵⁸⁷ It also disavowed CIA representations that the CIA initially used an “open, nonthreatening approach,” or that interrogations began with the “least coercive technique possible” and escalated to more coercive techniques only as necessary.⁵⁸⁸

357. The Senate Report further noted that waterboarding undertaken by the CIA was “physically harmful, inducing convulsions and vomiting”, noting, for example, that Abu Zubaydah became “completely unresponsive, with bubbles rising through his open, full mouth”, while it noted internal CIA records which described the waterboarding of Khalid Shaykh Mohammad as evolving into a “series of near drownings”.⁵⁸⁹ The Senate Report further described the use of sleep deprivation, involving keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads; as well as cases of detainees experiencing disturbing hallucinations during prolonged sleep deprivation. The CIA also reportedly gave the interrogation of high value detainees “precedence” over their medical care, resulting in the deterioration and exacerbation of physical injuries⁵⁹⁰.

358. As to the psychological impact on CIA detainees, “[t]he CIA led several detainees to believe they would never be allowed to leave CIA custody alive, suggesting to one detainee that he would only leave in a coffin-shaped box.⁵⁹¹ One interrogator reportedly told another detainee that he would never go to court, because “we can never let the world know what I

⁵⁸⁷ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705.

⁵⁸⁸ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705.

⁵⁸⁹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705, 6144.

⁵⁹⁰ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5705, 5832-5834.

⁵⁹¹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706 and 5763.

have done to you”.⁵⁹² CIA officers also threatened at least three detainees with harm to their families including threats to harm the children of a detainee, threats to sexually abuse the mother of a detainee, and a threat to “cut [a detainee's] mother's throat”.⁵⁹³ The Senate Report further found that “multiple CIA detainees who were subjected to the CIA's enhanced interrogation techniques and extended isolation exhibited psychological and behavioral issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation”, noting “[m]ultiple psychologists identified the lack of human contact experienced by detainees as a cause of psychiatric problems”.⁵⁹⁴

359. The conditions of confinement for CIA detainees were also particularly harsh. Such conditions appear to have formed an integral part of the interrogation process and of the overall treatment to which CIA detainees subjected.⁵⁹⁵ Conditions were “especially bleak early in the program”, with CIA detainees at the COBALT detention facility representing some of the most inhumane conditions,⁵⁹⁶ with the chief of interrogations describing COBALT as a “dungeon” and another senior CIA officer reported to have stated that COBALT itself was an EIT.⁵⁹⁷

360. The information available is limited by the clandestine nature of the detention and interrogation programme; efforts to conceal the number and identity of victims; the denial of access to national and international reporting mechanisms mandated to monitor and report on the conditions of detention; as well as the destruction of CIA videotapes of detainee

⁵⁹² Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706.

⁵⁹³ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706. .

⁵⁹⁴ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706.

⁵⁹⁵ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5706, 5770.

⁵⁹⁶ *See above* para. 240.

⁵⁹⁷ *See above* para. 201.

interrogations. As noted above, some victims appear to have been forced to sign documents stating that they had not been mistreated under a threat of continued detention and abuse, or were reportedly intimidated through threats of harm to their family members.⁵⁹⁸

361. The CIA detained a significantly smaller number of detainees than the US armed forces, although the full scope of the CIA programme remains difficult to discern. As the Senate Report found that “the CIA did not conduct a comprehensive or accurate accounting of the number of individuals it detained” and observed that “[a] full accounting of CIA detentions and interrogations may be impossible, as records in some cases are non-existent, and, in many other cases, are sparse and insufficient”.⁵⁹⁹ Those allegations that the Prosecution has identified as having a nexus to the armed conflict in Afghanistan and which form the subject of the potential cases identified in this Request and the accompanying Annexes nonetheless meet the gravity threshold set out in article 17(1)(d) for the reasons set out above.

362. In addition, several factors also indicate underreporting with respect to alleged mistreatment of conflict-related detainees by members of the US armed forces and by members of the CIA.⁶⁰⁰ Socio-cultural norms and religious factors particular to Afghan society may have caused incidents of detainee abuse to be under-reported, especially in cases of sexual violence such as forced nudity and sexual humiliation.⁶⁰¹ These victims may have been particularly loath to report the abuse they experienced owing to the

⁵⁹⁸ Article 15 communication [REDACTED].

⁵⁹⁹ Report of the Senate Select Committee on Intelligence, AFG-OTP-0003-5696 at 5714-5715.

⁶⁰⁰ Article 15 communication [REDACTED].

⁶⁰¹ Article 15 communication [REDACTED].

shame, guilt and fear of being stigmatised by their communities. In addition, the Prosecution received information that victims have been afraid to report the abuse because interrogators had threatened to harm their families if they did, and for fear of retaliation and reprisals from local Afghan authorities, Afghan Government officials and anti-government elements.⁶⁰² Some of those victims who decided to speak publicly about the abuse they experienced were threatened, harassed or attacked after doing so.⁶⁰³ In addition, to date there has been no reporting mechanism in place that has attempted to collect accounts from witnesses and survivors located in remote and insecure areas of Afghanistan or that has been available to victims who have been willing to come forward with their testimonies.⁶⁰⁴

363. Families of victims were often left in a state of uncertainty about the fate of their sons, brothers and fathers; their communities came under suspicion of harbouring loyalties to the Taliban or Al Qaeda or were tainted by accusations against their members. The information available suggests that victims were deeply traumatised by their treatment in DOD or CIA custody.⁶⁰⁵

IX. INTERESTS OF JUSTICE

364. The Prosecution recalls the gravity of the alleged crimes identified and described in this Request. The seriousness and extent of war crimes and crimes against humanity allegedly committed in Afghanistan, highlighted

⁶⁰² Article 15 communication [REDACTED].

⁶⁰³ Article 15 communication [REDACTED].

⁶⁰⁴ Article 15 communication [REDACTED].

⁶⁰⁵ [REDACTED].

by the extended period of time over which crimes have been and continue to be committed, the wide range of perpetrators among all the parties to the conflict, the recurring patterns of criminality, and the limited prospects for accountability at the national level, all weigh heavily in favour of an investigation.

365. Victims of alleged crimes within the context of the situation have manifested their interest in seeing justice done. The Prosecution has sought to ascertain the interests of victims, through direct consultations with victims' organisations in Afghanistan as well as through an examination of communications and publicly available information.
366. Afghanistan's Independent Human Rights Commission conducted a nationwide consultation in 2005 of victims' views on transitional justice and reconciliation measures to address Afghanistan's legacy of human rights abuse. Following an eight-month consultation process involving 4,151 individual interviews and 200 focus group discussions with over 2,000 participants covering 32 of Afghanistan's 34 provinces, the Commission published the results of the consultation.⁶⁰⁶
367. The report found that the desire for criminal justice was strong among those surveyed and that many participants considered criminal trials for conflict-related human rights violations a necessity, *inter alia* in order to prevent future violations, as a means to avoid revenge killings, to restore the dignity of victims, and to bring about reconciliation. 85% of all respondents considered that a judicial process would aid reconciliation

⁶⁰⁶ AIHRC, "A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan", 25 January 2005, AFG-OTP-0003-3748 ("AIHRC, A Call for Justice").

while 11% thought the opposite.⁶⁰⁷ 61% of respondents rejected an amnesty for war criminals, and most respondents did not want to wait long for criminal justice, with 44.9% indicating they would like to see trials now, as opposed to within 2 years (25.5%), 2-5 years (18.8%), or more than five years (8.4%). A majority of respondents were of the view that trials could be restricted either to those who had committed serious violations and their commanders, or commanders only.⁶⁰⁸

368. Respondents overwhelmingly ranked security as their most serious and immediate concern. However, many participants saw a link between security and justice. Three quarters of respondents (76%) thought that bringing war criminals to justice in the near future would increase security in Afghanistan, while 7.6% believed this would result in decreased security (12.9% did not have an opinion).⁶⁰⁹

369. The nationwide consultation conducted by the AIHRC led to the Government's adoption of the national Action Plan for Peace, Reconciliation and Justice.⁶¹⁰ In spite of the commitments contained therein, the action plan was not implemented and the parliament instead adopted a national amnesty law.⁶¹¹

370. While follow-up surveys or consultations on a national level have not been possible in the ensuing years, more recent conferences and meetings of war victims suggest that victims continue to express similar views. A Victims' *Jirga* (Council or Assembly) convened in Kabul in 2010 produced

⁶⁰⁷ AIHRC, A Call for Justice, AFG-OTP-0003-3748 at 3766.

⁶⁰⁸ AIHRC, A Call for Justice, AFG-OTP-0003-3748 at 3767-3768.

⁶⁰⁹ AIHRC, A Call for Justice, AFG-OTP-0003-3748 at 3763-3764.

⁶¹⁰ *See above* para. 271.

⁶¹¹ HRW, Afghanistan: Repeal Amnesty Law, AFG-OTP-0003-1403.

a concluding statement calling for, *inter alia*, ending the culture of impunity and immediately nullifying the Amnesty Law; investigating perpetrators of crimes against humanity and war crimes including those presently on-going; and for the international community to support the transitional justice process in Afghanistan.⁶¹²

371. Fifteen civil society organisations in Afghanistan signed a joint letter to the Prosecutor in November 2012, calling for immediate action by the ICC to address the situation in their country.⁶¹³ In September 2013, during the visit of the UN High Commissioner for Human Rights to Afghanistan, 28 Afghan NGOs published an open letter calling on the ICC to open investigations into crimes committed in Afghanistan since 2003 and to respond to victims' need for redress.⁶¹⁴ More recently, in the context of alleged war crimes committed during the Taliban's take-over of Kunduz city from 28 September to 13 October 2015, the Transitional Justice Coordination Group (TJCG) demanded an ICC investigation, and the AIHRC called upon the Government to refer the situation to the ICC Prosecutor if it is unable to prosecute those responsible for the war crimes.⁶¹⁵ These are indicative of a strong interest on the part of the victims in seeing justice done.⁶¹⁶

⁶¹² Transitional Justice Coordination Group - Afghanistan, "The Victims' Jirga", 9 May 2010, AFG-OTP-0003-3106 at 3107; Mojumdar, A., "Afghanistan peace jirga's unlikely critics: victims of war crimes", *Christian Science Monitor*, 3 June 2010, AFG-OTP-0003-1012. *See also* Transitional Justice Coordination Group – Afghanistan, "The Statement of the One-Day Conference on Justice and Reconciliation," 21 January 2011, AFG-OTP-0003-3099.

⁶¹³ [REDACTED].

⁶¹⁴ [REDACTED].

⁶¹⁵ TJCG, Press Release Concerning War Crimes and Crimes Against Humanity in Kunduz, 4 October 2015, AFG-OTP-0003-3097; AIHRC, "The Report on the Investigation of Human Rights and Humanitarian Rights Situation in Kunduz Province Armed Conflict", 17 October 2015, AFG-OTP-0003-6776 at 6783.

⁶¹⁶ *See also* TJCG, "Transitional Justice Coordination Group Statement on Continuing the ICC's Investigation into Potential War Crimes in Afghanistan: No to Silence on War Crimes", 15 December 2015, AFG-OTP-0003-3104; Afghan Civil Society Organisations, "Afghan People's 10-

372. In light of the mandate of the Prosecutor and the object and purpose of the Statute, and based on the information available, the Prosecution has identified no substantial reasons to believe that the opening of an investigation into the situation would not serve the interests of justice.

X. PROCEDURAL ISSUES

373. The Prosecution informs the Chamber that, in compliance with rule 50 of the Rules, once this Request is filed, the Prosecutor will provide notice to victims and their representatives of her intention to request authorisation to commence an investigation and inform them that pursuant to regulation 50(1) of the Regulations of the Court, they have until 31 January 2018 to make representations to the Pre-Trial Chamber through the Victims Participation and Reparations Section (“VPRS”) of the Registry, pursuant to the Chamber’s Order of 9 November 2017.⁶¹⁷ The Prosecution will append to its notice a link to the form and related guidelines developed by the VPRS and approved by the Chamber’s Order, to be made available in English, Pashto and Dari.

374. The notice to victims will be posted on the ICC website and sent to the ICC’s media contact database of about 4,000 entries worldwide, including Afghan media outlets. These include the main national TV and radio

Point Road Map for Peace”, 10 June 2014, AFG-OTP-0003-0533 at 0534 (Section 4: Promote Human Rights, Rule of Law and Tackle Impunity); FIDH and Armanshahr Foundation Open Asia, “Human Rights at a Crossroads: The need for a rights-centred approach to peace and reconciliation in Afghanistan”, 2012, AFG-OTP-0003-1204.

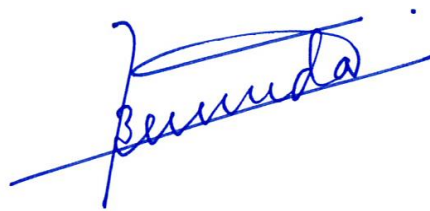
⁶¹⁷ *Situation in the Islamic Republic Of Afghanistan*, Pre-Trial Chamber III, ‘Order to the Victims Participation and Reparation Section Concerning Victims’ Representations’, 9 November 2017, ICC-02/17-6 09, para.12.

stations, news agencies, news sites, online and print media, which it is anticipated will make prominent reference to the notice. [REDACTED].

375. The Prosecution will provide the notice foreseen in article 18(1) of the Statute upon a decision of the Chamber to authorise an investigation into the situation in Afghanistan.

XI. RELIEF REQUESTED

376. For the reasons set out above and on the basis of the information presented and the supporting material, the Prosecution respectfully requests the Pre-Trial Chamber to authorise the commencement of an investigation into the Situation in the Islamic Republic of Afghanistan in relation to 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 and were committed on the territory of other States Parties in the period since 1 July 2002.



Fatou Bensouda, Prosecutor

Dated this 20 November 2017

At The Hague, The Netherlands