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No.: ICC-02/17
Date: 9 February 2018

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 Public Annexes A to C**

**Prosecution response to the Second Order to the Prosecutor to provide
Additional Information**

Source: The Office of the Prosecutor

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

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Detention Section

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Other

1. On 20 November 2017, the Prosecution submitted a “Request for authorisation of an investigation pursuant to article 15” (“Request”), seeking the Chamber’s authorisation to commence an investigation into the situation in the Islamic Republic of Afghanistan (“Afghanistan”).¹
2. On 5 February 2018, the Pre-Trial Chamber issued an order² (“Order”) to the Prosecution to provide:
 - a) Publicly available reports on the treatment of detainees (other than those already submitted) from the United Nations Assistance Mission in Afghanistan (“UNAMA”);
 - b) Publicly available reports on torture (other than those already submitted) from the Afghanistan Independent Human Rights Commission (“AIHRC”);
 - c) Reports on “The situation in Afghanistan and its implications for international peace and security” (for 2003, 2004, 2010, 2013, 2014, 2015 and 2017) from the United Nations Secretary–General (“UNSG”) to the General Assembly;
 - d) Publicly available reports on the topic “Children and armed conflict in Afghanistan” (other than those already submitted) from the UNSG to the General Assembly;
 - e) Further clarification and information, to the extent possible, about the structure and organisation of the Islamic State operating in Afghanistan; and
 - f) Further clarification and information, to the extent possible, about the structure of US forces for the time period after 2008, the interrogation

¹ ICC-02/17-7-Conf-Exp, and public redacted version ICC-02/17-7-Red.

² ICC-02/17-23.

policies of US forces for the time period after 2006; and the conduct of US forces for the time period after 2011.

3. The Prosecution welcomes the opportunity to provide further material to the Chamber. The Prosecution's aim, in the Request, was to provide information to the Chamber, together with supporting material, sufficient to lead to the conclusion that there was "a reasonable basis to proceed with an investigation". The information provided was not a comprehensive survey of all the potential crimes committed nor an exhaustive analysis of the structures, organisation and conduct of the possible perpetrators. It is the Prosecution's expectation that if and when an investigation is authorised and the Prosecution is in a position to proactively take investigative steps, additional information and evidence will become available.
4. In compliance with the Order, the Prosecution hereby provides further material for the consideration of the Chamber.
5. In compliance with paragraphs 4 (a) to (d) of the Order, the Prosecution has registered further reports identified by the Chamber. These are listed in Annex A hereto.
6. In compliance with paragraph 4 (e) of the Order, the Prosecution provides further clarification and information, to the extent possible, on the structure and organisation of the Islamic State operating in Afghanistan, in Annex B.

7. In respect of the portion of paragraph 4 (f) of the Order seeking further clarification and information, to the extent possible, on the structure of US forces for the time period after 2008, the Prosecution refers the Chamber to reports issued by the US Department of Defence in 2009³ and 2010,⁴ but is otherwise unable to provide information and clarification beyond that contained in paragraph 20 of the Request.
8. In respect of the portion of paragraph 4 (f) of the Order concerning the interrogation policies of US forces in Afghanistan after 2006, the Prosecution is unable to provide information and clarification beyond that set out in the US Army's September 2006 Field Manual 2-22.3,⁵ discussed at paragraphs 226 and 244 of the Request, which the Prosecution understands to remain current.
9. In respect of paragraph 4 (f) of the Order seeking further clarification and information, to the extent possible, on the conduct of US forces for the time period after 2011, the Prosecution notes that since January 2015 the status of forces agreement between the United States and Afghanistan prohibits US forces from arresting or imprisoning Afghan nationals or operating detention facilities in Afghanistan.⁶ In light of the change in interrogation policies of US forces in 2006, the reduction in numbers of US forces after 2011, and the changed role of US (and other international) forces in Afghanistan at the beginning of 2015, the Prosecution considers the likelihood of detention-related crimes by US forces after 2011 to be significantly lower than in the period prior to 2006.

³ US Department of Defence, Progress toward Security and Stability in Afghanistan, January 2009, [AFG-OTP-0001-0339](#) at 3666-3667.

⁴ US Department of Defence, Report on Progress Toward Security and Stability in Afghanistan and United States Plan for Sustaining the Afghanistan National Security Forces, April 2010, [AFG-OTP-0001-0513](#) at 0526-0529.

⁵ Department of the Army, FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations, 6 September 2006, [AFG-OTP-0005-4571](#), including at 4666-4667.

⁶ Security and Defence Cooperation Agreement between Afghanistan and the United States, 30 September 2014, [AFG-OTP-0007-3327](#) at 3333.

10. Additionally, in the light of the Chamber's observations at paragraph 3 of the Order, the Prosecution provides further clarification and information, to the extent possible, on the structure, organisation and conduct of the Afghan forces in Annex C.



Fatou Bensouda,
Prosecutor

Dated this 9th day of February, 2018
At The Hague, The Netherlands