

Annex E

(Public)

DECLARATION OF EHSAN QAANE

I, Ehsan Qaane, confirm and attest to the following,

1. I am the co-founder of the Transitional Justice Coordination Group (TJCG), a coalition of 28 Afghan individuals and civil society organisations working on raising the voice of war victims in Afghanistan. I currently work for the Afghanistan Analysts Network (AAN) as a Legal and Political Affairs Analyst. I covers political and legal issues for AAN, focusing on political parties, Afghan law, human rights, transitional justice and the International Criminal Court. According to the Swedish International Development Cooperation, "AAN is relevant to the international community's political decision-making processes, as it is one of the few analytical research organisations with an in-depth understanding of Afghanistan."¹
2. I worked as a Visiting Professional with the Office of the Prosecutor of the ICC from November 2015 to April 2016. I also served as the National Coordinator for the International Center for Transitional Justice's (ICTJ) Afghanistan Program, from 2010 to 2012. I was responsible for ICTJ's in-country programming including civil society networking and working with victims' organizations and working on human rights documentation.
3. I also served as a member of the research team with the Afghanistan Independent Human Rights Commission (AIHRC), assisting with the forthcoming conflict-mapping report, the first Afghan-led documentation of human rights violations from 1978-2001. I served as a senior trainer for human rights and transitional justice with the Civil Society and Human Rights Network (CSHRN), an umbrella organization for civil society groups focused on human rights and rule of law in Afghanistan.
4. I co-authored "The Handbook on Transitional Justice", a training manual for civil society, the first of its kind written by and for Afghans.
5. And like most Afghans, I have lost family members, friends and colleagues to the ongoing war in Afghanistan. My family, friends and colleagues have been beaten, tortured, blown-up, murdered, and disappeared.

The state of rule of law in Afghanistan

6. Key elements of the Afghan legal infrastructure are defunct or entirely unavailable. As recently reported by AAN:²

¹ <https://www.alnap.org/system/files/content/resource/files/main/evaluation-of-afghanistan-analysts-network-%28aan%29-.pdf>.

² <https://www.afghanistan-analysts.org/en/reports/political-landscape/the-stagnation-of-afghanistans-state-institutions-case-studies-of-the-supreme-court-senate-provincial-councils-and-the-constitutional-oversight-commission/>.

- The Supreme Court, whose members are appointed by the President and confirmed by the Wolesi Jirga, currently has only six of the nine members specified by the Constitution. This gives it a quorum, but that disappears if even one member is sick, travelling or otherwise absent. Except for the first four years of its existence, the Supreme Court, the final legal authority in the land, has never been composed according to the constitution.
 - The Independent Commission for Overseeing the Implementation of the Constitution has only four out of the seven members specified by its law, making it inquorate and unable to perform its constitutional mandate. All of the members are also beyond their terms. In its eleven years of existence, it has never been fully staffed except for two years, from December 2015 to September 2017.
 - 117 provincial councillors – more than a quarter – have resigned or have died and not been replaced, the majority because of confusion caused by the president ahead of the last presidential election. Provincial councillors have not been subject to elections since 2014, which means the 340 still-serving have been in post extra-constitutionally since 2018 when elections should have taken place.
7. The current state of the Afghan judiciary is that it is highly politicized and not independent. The decisions of the judiciary are not respected and have been severely undermined especially in the last year by the mass release of thousands of prisoners in political deals among the Taliban, the U.S. and the Afghan government.
 8. According to the 2018 National Corruption Survey, the Supreme Court and Attorney General's Office (AGO) are ranked as the first and third most corrupt public institutions by respondents. Many believe that leadership (44%) and employees (25%) of these organizations are corrupt. The Law on Structure and Authority of the AGO allows the organization to reform the prosecutor recruitment processes and make it merit-based to address the issue. However, civil society findings show that current reforms are still insufficient, and the Afghan government has yet to make more significant reforms.
 9. According to the Afghan Constitution the judiciary is independent, but the President is the head of the state. Former President Hamid Karzai and the Current President Ashraf Ghani used this language to indicate he and the Vice-President sit above the judiciary and that the Constitution gives them the right to intervene in the judiciary. Equally, the AGO is placed within the structure of the government, not the judiciary.
 10. This has resulted in political interference impacting the functions of the AGO and the judiciary.
 11. For example, on 2 March 2021, Farid Hamidi, then Afghanistan's Attorney General, abruptly resigned from his post. According to my source in AGO, Mr. Hamidi was politically pressured during the investigation of corruption cases of high-level government officials.
 12. Mr. Hamidi's resignation is also likely to have an impact on the AGO's International Crimes Investigation Department. The department established in the AGO by Mr. Hamidi.

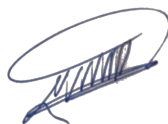
Even under Mr. Hamidi the department was small with no capacity. And the office has no basis under Afghan law. Which means there's a good chance that the new Attorney General, Zabihullah Kalim, can easily remove the department as a component of the AGO.

13. Beyond corruption, fear and violence has dramatically impacted the judiciary and AGO. Since 2016, dozens of judges and prosecutors have been assassinated. Due to the insecurity, most do not want to deal with the crimes committed by the Taliban and related to the Afghan security sector. As a result, investigations and prosecutions of those crimes are few, if at all, especially against high-level figures.

Outreach efforts at the International Criminal Court

14. The representations phase, which extended from December 2017 to the end of January 2018, was a test of sorts of the International Criminal Court's (ICC or the Court) commitment and capacity to engage with victims in Afghanistan and it would be hard to give the Court a passing grade. While the Victims Participation and Reparations Section made as much effort as they could within their limited mandate, they were heavily dependent upon civil society.
15. It appears that parts of the Court have been congratulating themselves for relatively high levels of victims' participation, but the lion's share of work on informing the victims about the right and means to make submissions to the Court fell to civil society activists who undertook this effort at great risk, in a hostile atmosphere.
16. The Court had no outreach or public information activities in the country to try and reach the victims directly, nor did it conduct a national information campaign that could have helped the population to better understand the Court's role, the purpose of victims' representations and how to submit them. Lessons must be learned from this and the Court simply must do better in communicating with victims if an investigation is launched. It was irresponsible to rely on civil society for this sensitive work or to prioritize the security of Court's employees over Afghans.
17. The ICC needs to embark on developing a comprehensive and proactive communications strategy now. The Court cannot be passive, waiting for journalists to approach it, as was the practice in the victim's representation phase and appears to be the practice now. When it comes to media engagement, it is essential that work starts now to identify the information needs, establish effective channels of communications in relevant languages, help raise the understanding of the process and relevant procedures, and ensure that there is a pool of journalists with sufficient knowledge that will act to dispel misperceptions and misinterpretations resulting from the political bias that dominates coverage in a fractured media and political landscape. Investing in dispelling myths about the ICC and clearly explaining concepts such as complementarity and the reasoning behind its decisions, will prove far more valuable than relying on assumptions that journalists and others will simply look for the information on the ICC's website. No website – regardless of how sophisticated – is an effective tool in anticipating and countering hostile propaganda before destructive myths and misperceptions are cemented in the public discourse.

18. In this context, despite the known security challenges (and new problems created by the latest assault on the Court from the U.S. government) the Court's physical presence in Afghanistan is of critical importance. Establishing an office would explicitly communicate the ICC's commitment and ability to perform its core function of dispensing justice in Afghanistan.
19. While I and other Afghan human rights experts fully understand that the Court must adhere to its own security protocols, it would be difficult to expect activists to expose themselves to great risks to disseminate information on Court's behalf, especially considering the modest number and relative weaknesses of organizations on the frontlines of justice in the country, when the Court itself is unwilling to do so. For this to become a reality, the United Nations mission in Afghanistan will have to take on its share of responsibility to provide the Court with cooperation and support – both morally and in practice on-the-ground. While recognizing that the UN has many functions in Afghanistan and needs to protect its independence, it is unambiguously clear that without UN support there will be no hope of an on-ground presence of the ICC, which potentially could see the Court fail in the eyes of Afghans before any meaningful work is undertaken. The hostile stance of the U.S., one of the permanent members of the Security Council, will surely complicate things for the UN, but a modality must be found.
20. The Court has the opportunity to correct course. It must do so, and it must do so quickly. The people of Afghanistan continue to be subjected to intense and unabated war crimes and crimes against humanity. The "peace process" unfolding chaotically at the current moment in Afghanistan is so tainted that it almost certainly will result in neither peace nor justice. Even a thin slice of justice and accountability delivered by the Court will be an important contribution to validating and acknowledging the great collective hurt of the Afghan people.



EHSAN QAANE

Signed this 17th day of April 2021
At Malmo, Sweden