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Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-02/17  
Date: 17 May 2021

**PRE-TRIAL CHAMBER II**

**Before:** Judge Rosario Salvatore Aitala, Presiding Judge  
Judge Antoine Kesia-Mbe Mindua  
Judge Tomoko Akane

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Response to Motion Seeking Remedies for Information and Effective Outreach  
(ICC-02/17-143-Anx1)**

**Source:** Office of the Prosecutor

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

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants**

**The Office of Public Counsel for Victims**

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**States Representatives**

**Amicus Curiae**

## REGISTRY

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**Registrar**  
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**  
Ms Spojmie Ahmady Nasiri

## Introduction

1. The Prosecutor obtained judicial authorisation to open an investigation into the situation in Afghanistan on 5 March 2020, based on her independent conclusion that there was a reasonable basis to believe that serious crimes within the jurisdiction of the Court had been committed—and potentially would continue to be committed. She had sought this authorisation on her own motion, in November 2017, and respectfully maintained her view that the conditions for opening an investigation were met by appealing the initial decision of the Pre-Trial Chamber, in 2019, declining to authorise an investigation.
2. The Prosecutor took these steps—each of them significant—because she is committed to delivering accountability and justice for the victims of the alleged crimes, within the framework of the Statute. She maintained this view, and initiated the investigation in this situation, in the face of specific coercive measures directed against her personally by a State. The determination of the Prosecutor to carry out her mandate according to the law could not be more evident.
3. In this period, on 26 March 2020, the Prosecutor was seised of a request to defer her investigations in the situation to those said to be carried out by the Government of the Islamic Republic of Afghanistan (“Afghanistan”), under article 18(2) of the Rome Statute (“Deferral Request”). This was the first—and only—time that such a request has been made in the history of the Court. It is now for the Prosecutor to determine whether she will concur in the Deferral Request, or apply to the Pre-Trial Chamber to continue the investigation. This determination, and the necessary analysis, is no less a part of the investigative process established under the Statute than the interviewing of witnesses or the collection of evidence—indeed, the Statute requires any matters under article 18(2) to be resolved first. Consequently, the Prosecutor’s fidelity to the Statute in this regard cannot be construed as any failure to carry out the investigative process. To the contrary, it is critical that the Prosecutor is

allowed to complete her independent analysis of the merits of the Deferral Request with due expedition, as the Statute requires.

4. Consistent with the requirements of the Statute, the Prosecutor and members of her Office (“the Prosecution”) duly engaged with the Afghan national authorities and informed the Pre-Trial Chamber (and the public) of these activities.<sup>1</sup> Afghanistan provided the Prosecution with voluminous materials said to relate to its domestic investigations. In this context, the Prosecutor is duty bound to consider whether Afghanistan has met its burden and substantiated the Deferral Request with tangible evidence that relevant investigations have taken place or are taking place. In this regard, most recently, Prosecution representatives met with representatives of the Government of Afghanistan on 7 May 2021.<sup>2</sup>

5. No decision on the Deferral Request has yet been made by the Prosecutor. Indeed, the assessment is presently at a critical stage—not only is judicial intervention at the current time unwarranted, but it may be counter-productive.

6. As the Appeals Chamber has re-affirmed in this situation, the Prosecutor is vested with independent responsibility for the conduct of investigations.<sup>3</sup> In this context, she exercises broad discretion on all matters pertaining to the identification of lines of inquiry, and the selection and prioritisation of cases, as well as the internal management of processes and deliberations in that context pertaining to complementarity.

7. The activities of the Prosecution in considering a request under article 18(2)—just like its activities in carrying out an investigation more generally—are without prejudice to the activities of the Registry in carrying out its own functions under the Statute. Indeed, consistent with the independence of the Prosecutor, the activities of

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<sup>1</sup> See [ICC-02/17-139](#) (“Notification of Request for Deferral”); [ICC-02/17-142](#) (“Updated on Status of Request for Deferral”).

<sup>2</sup> See e.g. [ICC, ‘The Office of the Prosecutor and high-level delegation from the Islamic Republic of Afghanistan hold productive meetings at the Seat of the Court,’ 9 May 2021.](#)

<sup>3</sup> [ICC-02/17-138 OA4](#) (“Afghanistan Appeal Judgment”), para. 63.

the Registry are entirely separate from the conduct of the investigation. Consequently, and while the Prosecution underlines that it wholeheartedly supports the conduct of appropriate outreach activities by the Court—especially with a view to the effective participation of victims in future judicial proceedings under article 68(3)—the Prosecution does not consider it appropriate to take a position in this forum on matters pertaining primarily to the management of Registry activities.

8. The Prosecution does, however, acknowledge that much of its substantive work at present is subject to conditions of confidentiality. As such, the Prosecution has not been in a position to supply the Registry with particulars of its current activities which might appropriately be communicated to the public.

### **Submissions**

9. The Prosecution appreciates and welcomes the engagement of Afghan civil society organisations with the Court, and that of individual citizens in Afghanistan, including in their prior role in these proceedings as an *amicus curiae* (“Applicants”).<sup>4</sup> As the Applicants recognise in their motion, the Prosecution has engaged with Afghan civil society organisations since the preliminary examination of the Afghanistan Situation. This engagement continues, as appropriate, depending on the phase of the situation and specific issues at hand. Indeed, the Office has sought information from them on several occasions that might assist the Prosecution’s assessment of the Deferral Request. This request is reiterated here.

10. At the same time, consistent with the cardinal principle and obligation of independence in article 42, the Prosecution must retain broad discretion in determining how much information it will share with stakeholders concerning the conduct of the investigation. This discretion is vital in order to maintain the integrity and effectiveness of the investigation itself, which is a central part of the Prosecutor’s

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<sup>4</sup> See [ICC-02/17-143-Anx1](#) (“Request”), para. 7.

mandate. The Applicants expressly highlight that they seek just such an effective investigation, and do not seek confidential information.<sup>5</sup>

11. The Applicants now seek a range of remedies from the Pre-Trial Chamber, which in different ways would seek to impose obligations upon the Registry and the Prosecution.

12. Consistent with the principles described above, the Prosecution takes no position on those measures associated with the execution of the mandate of the Registry (“Registry Remedies”), nor the manner in which the activities of the Registry should be supervised.<sup>6</sup> The Prosecution commits itself, as ever, to working cooperatively with the Registry, within the constraints of the independence of the Prosecutor established by article 42 of the Statute.

13. However, the Prosecution must oppose the further request by the Applicants for remedies pertaining to the activities of the Prosecution in carrying out the investigation (“Prosecutorial Remedies”), specifically judicial orders requiring the Prosecution to:

- share mutual responsibility with the Registry for Registry activities, or otherwise to comply with Registry instructions;<sup>7</sup>
- file quarterly public reports with the Pre-Trial Chamber on “the OTP’s investigative activities, including outreach measures taken to date, planned outreach, obstacles preventing appropriate outreach, and steps that the OTP is undertaking to ensure an *effective* investigation as required by article 54(1)(b) of the Statute, such as the number and competency of

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<sup>5</sup> See e.g. [Request](#), paras. 44-45.

<sup>6</sup> See [Request](#), para. 44 (specifically that “(1) the [...] Registry be ordered to establish, by a date set by the Chamber, a system of public information and outreach activities [...] (2) such system consider factors specific to Afghanistan [...] and (4) the Registry [...] file quarterly reports with this Chamber on outreach efforts”).

<sup>7</sup> [Request](#), para. 44 (seeking an order for “the OTP and Registry [...] to establish [...] a system of public information and outreach activities”, and an order for “the OTP [...] to cooperate and collaborate with the Registry in devising such system”).

staff dedicated to the investigation and non-confidential information concerning investigative steps taken to date” with sufficient specificity “to allow victims an opportunity to challenge or otherwise supplement the information in them”;<sup>8</sup>

- provide information on “its interpretation of article 18(2)”, apparently in advance of the Prosecutor’s determination of the Deferral Request;<sup>9</sup>
- provide additional information about the basis on which the Afghan national authorities made their request under article 18(2);<sup>10</sup> and
- comply with a specified timeline (whether set by the Pre-Trial Chamber or the Prosecution itself) in reaching a decision on the Deferral Request.<sup>11</sup>

14. In particular, the Prosecutorial Remedies should not be granted because they presuppose that the Applicants have standing akin to a right of participation in the conduct of the investigation. As the Court has consistently affirmed, the right of participation under article 68(3) is limited to “judicial proceedings”. At the present time, no such judicial proceedings are on foot in this situation. Furthermore, and in any event, the Prosecutorial Remedies are unnecessary, premature, or inconsistent with the broad discretion afforded to the Prosecutor in conducting the investigation independently, including in reaching her own view of the Deferral Request.

15. Consistent with the Prosecution’s practice in this matter to date, however, the Prosecutor reiterates that she will reach a decision on the Deferral Request with due expedition, and that her decision will be publicly notified. The subsequent proceedings will be regulated by article 18 of the Statute. To any extent that the Prosecutor’s decision gives rise to judicial proceedings, the Prosecution will support victim participation at the appropriate time, including from the Applicants.

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<sup>8</sup> [Request](#), para. 44.

<sup>9</sup> [Request](#), para. 45.

<sup>10</sup> [Request](#), para. 45.

<sup>11</sup> [Request](#), para. 45.

*There is no right of participation in the conduct of an investigation, which is not a 'judicial proceeding' for the purpose of article 68(3)*

16. The Applicants do not have standing as legal participants in the investigation process, or even to seek information to enable such participation. As such, there is no legal basis for them to request the Prosecutorial Remedies.

17. The Prosecution recalls that some of the Applicants, represented by the same counsel currently appearing before the Court, were formerly permitted to assist the Pre-Trial Chamber and the Appeals Chamber as an *amicus curiae*, with respect to the Court's determination under article 15(4) of the Statute. However, that matter is now resolved, leading to the opening of this investigation, and consequently the Applicants may no longer be considered as an *amicus curiae* without a fresh application under rule 103 of the Rules. No such application has been made.

18. Indeed, the Applicants do not suggest that they have standing to address the Pre-Trial Chamber as an *amicus curiae*, but rather consider that "[t]hey have standing to bring this motion and seek remedy from this Chamber in accordance with article 68(3) of the Statute."<sup>12</sup> In particular, they assert that "information and effective outreach [...] are rights owed to the [Applicants] that are currently being denied",<sup>13</sup> while conceding that as yet "no accused has been arrested" and "no trials have begun".<sup>14</sup>

19. While article 68(3) does indeed establish a right for victims to participate in the judicial proceedings of the Court, it has been consistently held that the investigation carried out by the Prosecution does not constitute a judicial proceeding in this sense. Thus, as the Appeals Chamber has definitively stated, "an investigation is not a judicial proceeding[] but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed

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<sup>12</sup> [Request](#), para. 16.

<sup>13</sup> [Request](#), para. 16.

<sup>14</sup> [Request](#), para. 16.

responsible.”<sup>15</sup> This does not mean that victims may not “make representations *to the Prosecutor* on any matter pertaining to the investigation and to their interests”,<sup>16</sup> but it does preclude the Pre-Trial Chamber from granting or recognising “the procedural status of victim entailing a general right to participate in the investigation” — “a position that can find no justification under the Statute, the Rules of Procedure and Evidence, or the Regulations of the Court.”<sup>17</sup>

20. Victims may of course participate in judicial proceedings “affecting investigations”,<sup>18</sup> such as those which may ensue if the Prosecutor applies to the Pre-Trial Chamber under article 18(2), or which are otherwise provided by the Statute.<sup>19</sup> But as a former Pre-Trial Chamber recognised when considering the extent to which victims might be able to request it to consider exercising its own *proprio motu* powers:

[N]either article 54 of the Statute nor any other provision provides for judicial oversight of the Prosecutor’s compliance with article 54(1) as such. Accordingly, the [Pre-Trial] Chamber is not competent to intervene in the Prosecutor’s activities carried out within the ambit of article 54(1) of the Statute. This is without prejudice to the Chamber taking into account, as an issue of fact, the proper conduct of the Prosecutor’s investigation, when exercising its powers under articles 53(3), 58 or 61 of the Statute.<sup>20</sup>

21. This analysis precisely accords with the Appeals Chamber’s recent reaffirmation that “monitoring of the scope of the Prosecutor’s investigation by the pre-trial chamber is contrary to the statutory scheme regulating the respective functions and powers of these two organs with respect to investigations”, and that

<sup>15</sup> [ICC-01/04-556 OA4 OA5 OA6](#) (“DRC Appeal Judgment”), para. 45.

<sup>16</sup> [DRC Appeal Judgment](#), para. 53 (emphasis added).

<sup>17</sup> [DRC Appeal Judgment](#), paras. 56-58.

<sup>18</sup> [DRC Appeal Judgment](#), para. 56.

<sup>19</sup> See also [ICC-01/09-159](#), paras. 7-9 (“Kenya Decision”).

<sup>20</sup> [Kenya Decision](#), para. 13.

the specific functions of the Pre-Trial Chamber at this procedural stage are set out in articles 56 and 57, as well as provisions such as article 18.<sup>21</sup>

22. Consequently, it follows from the established law and practice of the Court that article 68(3) does not grant victims standing to participate in the investigation, but only in judicial proceedings affecting the investigation—and that these proceedings are limited to those which are expressly contemplated in the Statute. The Request does not suffice to create such a proceeding, nor does the Pre-Trial Chamber seem to be vested with a relevant *proprio motu* power which it might consider exercising at the invitation of the Applicants. The Applicants may, of course, continue to make representations to the Prosecution, and the Prosecution continues to welcome such engagement. The Prosecution also reiterates that it supports victim participation in any judicial proceedings which may ultimately ensue from the Deferral Request.

23. The Applicants address none of this jurisprudence, but instead seek to distinguish the recent decision of the Appeals Chamber holding that victims do not have standing as *parties* to an article 15 decision<sup>22</sup>—just as article 68(3) does not render victims *parties* to the judicial proceedings in which they may participate under that provision.<sup>23</sup> But this is a different issue, which is not directly relevant to the legal matters arising from the Request. Nor is it true that the Applicants must be granted some form of standing to participate in the investigation in order to vindicate their right to information about the investigation or to preserve their rights to participate in any judicial proceedings.<sup>24</sup> They may well have means of recourse—other than participation under article 68(3)—to seek an improvement in the conduct of outreach activities by the Registry, such that they may access information which the Prosecutor determines should be made public, and be promptly apprised of judicial proceedings in which they participate.<sup>25</sup> But they do not have a right to

<sup>21</sup> [Afghanistan Appeal Judgment](#), para. 63.

<sup>22</sup> [Request](#), paras. 18-21.

<sup>23</sup> [DRC Appeal Judgment](#), para. 55.

<sup>24</sup> *Cf.* [Request](#), paras. 16, 22-30.

<sup>25</sup> *See above* para. 12 (taking no position on the Registry Remedies sought by the Applicants).

information which is regarded as confidential, and this is necessary to preserve the integrity of the investigation against the attention of less benevolent actors. Consequently, they have no legal interest which would justify the standing they claim.

*The Prosecutorial Remedies are not necessary*

24. In any event, a request for a judicial remedy must always be shown to be necessary, as a precondition to that remedy being granted. This is the foundation of the principle of judicial economy, and an important safeguard in ensuring that the organs of the Court continue to function with the necessary flexibility to accomplish their mandates—especially in times when the limited availability of resources is a significant concern.

25. The Applicants fail to show the necessity of the Prosecutorial Remedies. As the following paragraphs explain, the Prosecutorial Remedies are either not required to address the identified concerns, or duplicate practices which are already implemented by the Prosecution, or duplicate functions which properly belong to the Registry.

The Prosecutorial Remedies are not required to address the identified concerns

26. The Prosecutorial Remedies are unrelated to the concerns identified in the Request, and therefore cannot be considered as necessary to address those harms. In particular, the Applicants assert that outreach efforts “to Afghan victims and affected communities have ceased” since March 2020,<sup>26</sup> and that there are “deficiencies in the outreach strategy established prior to the opening of the current investigation” (such as “zero outreach strategies specific to women and children, poor methods for distributing information and receiving feedback, and over-reliance

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<sup>26</sup> [Request](#), para. 35.

on civil society organisations”).<sup>27</sup> They express concern that victims and affected communities may lose confidence in the Court,<sup>28</sup> and its ability to operate despite “foreign powers intent on preventing justice and accountability”.<sup>29</sup> The Prosecution takes no position on whether these concerns are well-founded. Yet, on their face, they relate to the mechanics of the outreach operations conducted by the Registry, and could not be affected by any judicial order directed to the Prosecution.

27. The subtext of the Applicants’ argument may be that—in their view—the Court’s outreach operations would be further improved if the Registry could share more information with the public concerning the investigation conducted by the Prosecution. Yet even if this were so, to some degree and for the sake of argument, it would still have no bearing on the more pressing question whether outreach efforts have ceased or not, the groups and communities which may be addressed by those efforts, or the means by which they are carried out. Furthermore, it is speculative—and perhaps incorrect—to assume that outreach is improved simply by sharing more information. To the contrary, the confidentiality of ongoing criminal investigations is often fundamental in many legal systems, and yet those legal systems remain vibrant and accountable to the public at large. It cannot simply be assumed that the effectiveness of public information and outreach necessarily depends on intruding into that confidentiality.

28. Furthermore, while the Prosecution accepts that the Applicants act in good faith and seek to promote the effectiveness of the investigation,<sup>30</sup> this does not mean that their view is necessarily the correct one, or in any event that it would be appropriate for such measures to be imposed by judicial order. To the contrary, such questions are for the Prosecutor to consider in discharging her obligations under articles 42 and 54 of the Statute. They may need to be balanced with other relevant considerations,

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<sup>27</sup> [Request](#), para. 36. *See also* para. 37.

<sup>28</sup> [Request](#), para. 38.

<sup>29</sup> [Request](#), para. 39.

<sup>30</sup> *See* [Request](#), para. 38. *See also* para. 40.

of which the Prosecutor may be aware. Indeed, to the extent that judicially imposed measures may conflict with the Prosecution's own strategy, or imply that the Prosecution will not act appropriately without external compulsion, they would seem to undermine the very legitimacy of the independent investigation conducted by the Prosecution that the Applicants seek to promote and protect.

The Prosecutorial Remedies duplicate practices which are already implemented by the Prosecution

29. The Prosecution already shares appropriate "non-confidential" information concerning the conduct of the investigation in this situation, as demonstrated by the public notifications of its activities in response to the Deferral Request. It does not share information which it regards as confidential, and the Applicants expressly note that they do not request such a measure.

30. For the avoidance of doubt, the Prosecution notes that it regards the information specifically sought by the Applicants as confidential—details of the staff employed in the investigation, and their professional expertise, are matters which the Prosecution will not share because of the need to ensure confidentiality. Even when engaging with oversight bodies in the context of budget discussions the Prosecution only shares information that is needed strictly for budgetary purposes and protects the identity of the staff involved.<sup>31</sup> This applies not only to this situation, but all situations. Likewise, at present, the Prosecution treats the details of the exchange with Afghan national authorities as confidential because that is the basis on which they have engaged with the Office.<sup>32</sup> Since the Applicants do not seek confidential information, and do not dispute that the Prosecutor is uniquely competent to determine what information concerning the investigation is confidential, no judicial order in these respects can be considered necessary.

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<sup>31</sup> See [Request](#), para. 44.

<sup>32</sup> See [Request](#), para. 45.

The Prosecutorial Remedies duplicate functions which properly belong to the Registry

31. In seeking to make the Prosecution and the Registry mutually responsible for the conduct of public information and outreach work in this situation, as the Request seems to do (albeit ambiguously), the Applicants would seem to impose on the Prosecution functions which properly belong to the Registry.<sup>33</sup> This is confirmed by the two decisions cited in the Request,<sup>34</sup> which treat the establishment of a system for public information and outreach—and through it the dissemination of the appropriate information to victims and affected communities—primarily as the responsibility of the Registry through its specialised sections and units, including the Public Information and Outreach Section, the Victims Participation and Reparations Section and the Victims and Witnesses Unit.

32. Requiring the Prosecution to duplicate the efforts of the Registry, or treating the Prosecution as responsible for the efforts of the Registry, is inconsistent with the structural separation between these organs of the Court, and the principle of judicial economy and the good management of the Court's resources more generally. It is the Registry which is resourced and organised to carry out public information and outreach activities on behalf of the Court. While the Prosecution may adopt its own internal strategy for public information and outreach in a situation, and as necessary work with the Registry in that respect, this does not mean that the Prosecution assumes responsibility for the management of the system itself.

33. However, as emphasised above, the Prosecution cooperates and coordinates with the Registry as required, within the constraints of its independent mandate under the Statute, and will continue to do so. It is cognisant of the victims' needs for

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<sup>33</sup> Alternatively, as noted above, the Request would seem to make the Prosecution answerable to the Registry in the conduct of public information and outreach work—which would be inconsistent on its face with article 42(1) of the Statute.

<sup>34</sup> See e.g. [ICC-01/18-2](#) (“*Palestine* Information and Outreach Decision”); [ICC-01/19-28](#) (“*Bangladesh/Myanmar* Information and Outreach Decision”).

information, but it must balance this with the necessity of confidentiality—especially since delivery of an effective investigation is also in the victims’ interests.

*The Prosecutorial Remedies are premature*

34. Insofar as the Prosecutorial Remedies relate to the mechanics of the article 18(2) process, they seem to reflect anticipated concerns with regard to the Prosecutor’s decision about the Deferral Request, which have not yet come to pass. This not only shows, again, that the proposed remedies are unnecessary, but also that they are inappropriate since they should not prejudge the Prosecutor’s independent decision under article 18(2).

35. Indeed, the Request appears to be premised on the factual misapprehension that the Prosecutor has *already* “acquiesce[d] to the Afghan Government’s deferral request”,<sup>35</sup> which is incorrect. To the contrary, as indicated above, the Prosecutor is reaching a critical stage in its assessment of the Deferral Request. No decision with regard to article 18(2) has yet been taken by the Prosecutor. Rather, as the Prosecution has sought to make clear in its public notifications, it has engaged with the Government of Afghanistan to confirm and clarify the basis on which the deferral is sought. The Prosecutor will then decide on the appropriate course of action, with appropriate expedition. The Prosecution underlines that it is fully cognisant of the possibility of measures under article 18(6), which may be invoked if necessary.

36. If necessary, based on her independent analysis, the Prosecutor will apply to the Pre-Trial Chamber to continue the investigation notwithstanding the content of the Deferral Request. Nothing in this regime permits the Applicants or any other person to trigger litigation before the Court to compel the Prosecutor to disclose her view of the applicable law in advance and in isolation from the facts to which it is applied. Nor is it clear in any event how such information would assist the

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<sup>35</sup> [Request](#), para. 40.

Applicants, or victims or affected communities more generally, since many of their key areas of concern are likely to rest in the *application* of the law to the facts. The best interests of all concerned, therefore, are safeguarded by the Prosecutor proceeding to render her decision under article 18(2) with due expedition and in due course, rather than doing so piecemeal and in a fashion which is unlikely to satisfy the interests of any of the Court's stakeholders.

***The Prosecutorial Remedies are inconsistent with the independence of the Prosecutor***

37. To the extent that the Prosecutorial Remedies seek to impose judicially enforced deadlines for the conduct of core investigative activities—such as the assessment of the Deferral Request—this would seem to be inconsistent with the independence of the Prosecutor, as guaranteed by article 42 of the Statute. By its nature, assessment of the Deferral Request entails the comparison of the investigative measures in progress by the Government of Afghanistan with the potential cases which may be pursued by the Prosecution, within the parameters of a situation. The Applicants do not show any legal basis for their request. Indeed, the Statute dictates the contrary.

38. In this respect, the Appeals Chamber has not only emphasised that, under article 42(1) of the Statute, the Prosecutor has independent responsibility for the conduct of investigations, but also stated that “articles 56 and 57 of the Statute identify specific functions that may be exercised by the pre-trial chamber during the investigation.”<sup>36</sup> Neither of these provisions permits the Pre-Trial Chamber to set a deadline for the conclusion of any step in the investigative process. Nor does anything in article 18 permit the Pre-Trial Chamber to take such action; rather, article 18(2) makes clear that any intervention by the Pre-Trial Chamber shall be made “*on the application of the Prosecutor*”.<sup>37</sup>

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<sup>36</sup> [Afghanistan Appeal Judgment](#), para. 63. See also [ICC-02/05-185](#) (“Darfur Rule 103 Decision”), para. 12 (“once the investigation into a situation has been initiated, the Prosecution is, according to article 54 of the Statute, the organ of the Court primarily entrusted with the investigation”).

<sup>37</sup> [Statute](#), art. 18(2) (emphasis added).

39. As these submissions have stressed, and consistent with the public notifications already made in this situation, the Prosecutor will in due course reach a decision on the Deferral Request. Depending on her decision, this may or may not result in judicial proceedings. But no such proceedings are currently active in this situation, and article 18 creates no mechanism for them to be initiated except by the Prosecutor.

40. The Applicants also express concern that “proceedings in this Situation have disproportionately focused on crimes committed by international forces, to the detriment of other crimes”, and imply that this may also be perceived as being true of the Prosecution’s investigation.<sup>38</sup> Notwithstanding the earnest good intentions of the Applicants, this concern is speculative, and lacks foundation. The Prosecutor is vested with broad discretion in selecting lines of inquiry and cases, and has publicly stated that she will exercise this discretion with a view to “represent[ing] as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished.”<sup>39</sup> Consequently, there is no basis to apprehend that the Prosecution will not investigate any alleged crimes committed, impartially and independently.

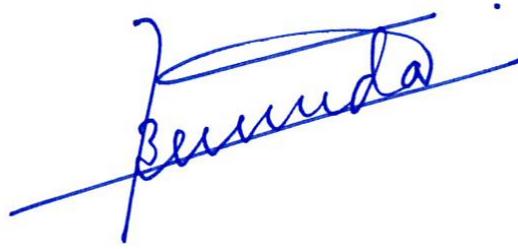
### **Conclusion**

41. For all these reasons, the Request should be dismissed insofar as it seeks the Prosecutorial Remedies. The Prosecution takes no position with regard to the Registry Remedies, and defers to the assessment of the Pre-Trial Chamber in that regard.

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<sup>38</sup> [Request](#), para. 41.

<sup>39</sup> [ICC OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016](#), para. 8.



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Fatou Bensouda, Prosecutor

Dated this 17<sup>th</sup> day of May 2021

At The Hague, The Netherlands