

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/17**

Date: **20 April 2021**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public with Public Annexes D-G, and  
Confidential, only available to the Prosecution, Annexes A-C  
Motion Seeking Remedies for Information and Effective Outreach**

**Source: Legal Representative for Victims**

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**  
Ms Spojmie Ahmady Nasiri

**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* Representatives

## **REGISTRY**

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**Registrar**  
Mr Peter Lewis, Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**  
Mr Nigel Verrill, Chief

**Detention Section**

**Victims Participation and Reparations Section**  
Mr Philipp Ambach, Chief

**Other**

## I. INTRODUCTION

1. Petitioners, individuals and Afghan civil society organisations who are victims of crimes under investigation by the OTP, request that Pre-Trial Chamber II ("Chamber") order the Registry and the OTP, as detailed in paragraphs 43-46 below, to: (1) issue quarterly reports on their outreach efforts and the OTP's investigative activities; (2) provide more information concerning the Afghan Government's article 18(2) deferral request,<sup>1</sup> including the OTP's legal understanding of article 18(2); and (3) order a deadline for the OTP's review of the Afghan Government's request.

2. For over four decades, war in Afghanistan has killed and injured children, men, and women, without discrimination. Violence against civilians has only increased since the Appeals Chamber authorised the OTP's investigation in March 2020. In May 2020, Afghan new-borns were executed by terrorists before they could see the light of day.<sup>2</sup> In the first three months of 2021 alone, more than 1,700 civilians were killed or wounded, a 29% increase compared to the same period last year, including a 37% and 23% increase in casualties amongst women and children, respectively.<sup>3</sup> Placing bombs on civilian vehicles and conducting street executions are now everyday events. A targeted campaign of assassinations against media, civil society, and human rights activists have forced those targeted to flee the country or go into hiding, silencing the voices of an otherwise active segment of Afghan society.<sup>4</sup> Impunity reigns supreme in Afghanistan.

3. It is under these circumstances that Petitioners examine the Registry's and the OTP's actions. In light of persistent threats of death, injury, and persecution to the

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<sup>1</sup> [OTP Article 18\(2\) Notification](#).

<sup>2</sup> Mujib Mashal & Fahim Abed, *From Maternity Ward to Cemetery, a Morning of Murder in Afghanistan*, NY Times, 12 May 2020, available at <https://nyti.ms/32s8Z23>.

<sup>3</sup> UNAMA, *Afghanistan: Protection of Civilians in Armed Conflict, First Quarter Update, 1 January to 31 March 2021*, available at <https://bit.ly/2Q6rGYi>. See also Annex F, paras. 14-23.

<sup>4</sup> Annex F, paras. 14-23. See also Zabihullah Ghazi & Thomas Gibbons-Neff, *Three Women Working for a News Outlet Are Gunned Down in Afghanistan*, NY Times, 2 March 2021, available at <https://nyti.ms/3mWnlTg>.

average civilian in Afghanistan, effective outreach and information are necessary lifelines for Petitioners to access the Court's proceedings affecting their rights.

4. To date, however, the Registry and the OTP have failed to formulise or execute an effective outreach strategy aimed at ensuring Afghan victims are aware of their Statutory rights such as to enable their participation. Further, despite the OTP's most recent filing,<sup>5</sup> which is lacking in important details and comes only after Petitioners threatened litigation,<sup>6</sup> victims lack timely and adequate information on the investigation and relevant developments in the Afghanistan Situation.

5. In an attempt to address these issues, Petitioners and their counsel, have met with OTP and Registry representatives since at least December 2019 to express their concerns concerning the lack of information and transparency.<sup>7</sup> With those efforts having been exhausted, the Petitioners' right to effective outreach and information cannot be remedied without this Chamber's intervention.

## II. STATEMENT OF FACTS

### A. Relevant procedural history

6. On 12 April 2019, this Chamber denied authorisation of an investigation into crimes committed in Afghanistan, noting, in relevant part, that the OTP's lengthy preliminary examination "make[s] the prospects for a successful investigation and prosecution extremely limited", and "far from honouring the victims' wishes and aspirations that justice be done", such circumstances "would result in creating

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<sup>5</sup> [Article 18\(2\) Status](#).

<sup>6</sup> Annexes C & D, paras. 32-35. Petitioners also intend to file a response to the Article 18(2) Status noting the absence of important details and requesting clarification.

<sup>7</sup> See Annexes C & D.

frustration and possibly hostility vis-à-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to service.”<sup>8</sup>

7. On 11 July 2019, 17 Afghan human rights organisations submitted an *amicus curiae* brief noting, in relevant part, that the Decision “was rendered without adequate input by Afghan victims and Afghan society”. The brief detailed significant issues with the Registry’s outreach efforts and its impact on participation by different segments of Afghan society, particularly Afghan women and girls.<sup>9</sup> On 4 December 2019, the same organisations made oral arguments before the Appeals Chamber again describing the Court’s flawed outreach process.<sup>10</sup>

8. On 5 March 2020, the Appeals Chamber overturned this Chamber’s decision and authorised the OTP’s investigation into crimes committed in Afghanistan.<sup>11</sup>

9. On 15 April 2020, the OTP notified the Chamber of the Afghan Government’s article 18(2) request that the OTP defer its investigation.<sup>12</sup> On 16 April 2021, the OTP updated the Chamber as to its review of that request.<sup>13</sup>

## **B. Relevant factual history**

10. For the past three years, representatives from 17 Afghan human rights organisations have liaised with representatives in the Registry and the OTP for the purpose of rectifying the Court’s flawed outreach efforts and the absence of information concerning the Situation. In March 2020, these organisations were joined by an additional 11 Afghan human rights organisations in these efforts.

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<sup>8</sup> [Decision](#), para. 96.

<sup>9</sup> [Amicus Curiae Written Submissions](#), paras. 19-27. *See also* Confidential Witness Declaration, ICC-02/17-57-ConfAnxC, 11 July 2019, paras. 11-24; Confidential Witness Declaration, ICC-02/17-57-ConfAnxD, 11 July 2019, paras. 6-19; Confidential Witness Declaration, ICC-02/17-57-ConfAnxE, 11 July 2019, paras. 25-39; [Amicus Curiae Authorities Supporting Oral Submissions](#), pp. 15-16 (providing public summaries of these declarations).

<sup>10</sup> [Amicus Curiae Oral Submissions](#), pp. 92-97.

<sup>11</sup> [Appeals Chamber 5 March 2020 Judgment](#).

<sup>12</sup> [OTP Article 18\(2\) Notification](#).

<sup>13</sup> [OTP Article 18\(2\) Status](#).

Communications with OTP and Registry representatives are detailed in Confidential Annex C and public redacted Annex D, and summarised below:

11. From at least December 2019, representatives from Afghan civil society met with Registry representatives, including the Registrar and representatives in VPRS and PIOS. During these communications:

- it was reiterated that the Registry's flawed outreach in December 2017 and January 2018 had yet to be remedied, meaning that the distribution lists relied upon by VPRS and PIOS for communicating with victims still suffered from the selection and reporting biases complained of by Afghan civil society in prior filings, including no strategy of providing information to women, children and minorities;
- since the Appeals Chamber Judgment neither the Registry nor the OTP had informed victims and affected communities of: the Afghan Government's article 18(2) request; the OTP's suspension of investigative activities in the Situation; or the rights of Afghan victims during the investigation stage;
- it did not appear as if the Registry had requested, let alone received, funds specific to ensuring effective outreach in the Afghanistan Situation; and,
- expressing concern that the Registry had not completed a mapping document of stakeholders in Afghanistan, a pre-requisite document prepared in other Situations to ensure effective outreach.

12. The organisations noted that in the absence of outreach by the Registry, most of the work was left to Afghan civil society, despite the fact that Afghan organisations are increasingly under attack for their human rights work in-country. Further, counsel for these organisations submitted an administrative complaint against the

Head of Outreach at PIOS for biased remarks, unprofessionalism, and a failure to exercise her professional duties.

13. While belated progress appears to be made on the mapping report, none of the other issues have been adequately addressed by the Registry.

14. During the same period of time, Afghan civil society representatives met with the OTP, including the Head of the JCCD. During these meetings, they:

- requested information concerning the OTP's outreach efforts to Afghan victims, noting that while the OTP had stated to the ASP that it was no longer taking "active steps" in the investigation,<sup>14</sup> similar information had not been disseminated to Afghan victims;
- requested information demonstrating how the OTP was respecting its obligations under the Statute, namely to undertake an "effective investigation" as required by article 54(1)(b) given its statement to the ASP;
- requested information concerning the OTP's interpretation of article 18(2)—namely whether they considered it required deferral of the OTP's *entire* investigation or only against "those persons" identified by the Afghan Government as signified in that article's plain language;
- requested general information concerning the Afghan Government's request, including the number of persons and incidents identified in the request; and,
- requested information as to *when* the OTP expected to complete its review of the information provided by the Government, noting with concern that the

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<sup>14</sup> See Report on the Activities of the International Criminal Court, [ICC-ASP/19/9](#), 16 November 2020 ("ASP Report"), para. 6 (noting "the Office is not currently taking active steps while respecting its duties under the Statute.").

preliminary examination had taken an exorbitant amount of time and affected the trust of Afghan victims and Afghan civil society in the Court.

15. To date, OTP representatives have denied Afghan victims and civil society almost all of the information they have requested.

### III. SUBMISSIONS

#### A. Petitioners have standing to pursue these claims

##### *a. The Statute establishes standing*

16. Petitioners are all victims of the crimes currently under investigation by the OTP.<sup>15</sup> They have standing to bring this motion and seek remedy from this Chamber in accordance with article 68(3) of the Statute. That article affords victims an opportunity to submit their “views and concerns” on matters affecting their personal interests, so long as it is not prejudicial to, or inconsistent with, the rights of the accused or a fair and impartial trial. Here, information and effective outreach, as discussed below, are rights owed to the Petitioners that are currently being denied. Further, no accused has been arrested, no trials have begun, and the remedy being sought has no bearing on any right belonging to an accused, present or future.

##### *b. Standing is necessary so that Petitioners have an effective remedy*

17. Standing also ensures that Petitioners have access to justice and to an effective remedy; rights long-recognised under international human rights law, and form part of customary international law.<sup>16</sup> At the core of these rights is the opportunity that persons who have been harmed have the opportunity to seek redress by the Court.<sup>17</sup>

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<sup>15</sup> See Annex B.

<sup>16</sup> [Opinion of Judge Carranza to Appeals Chamber Decision](#), paras. 39-50.

<sup>17</sup> *Id.*, para. 50.



Without standing, victims would have no ability to vindicate their substantive rights and remedy the harms they have suffered and continue to suffer.

18. While the Appeals Chamber recently denied that the right to an effective remedy granted victims' standing to appeal an article 15 decision,<sup>18</sup> the present motion is different in four respects. *First*, the Appeals Chamber's decision was premised on the reasoning that there was "no allegation in the instant case that the Court is responsible for any of the alleged violations of human rights from which the right to an effective remedy could follow."<sup>19</sup> In footnote 47, the Appeals Chamber recognised that "a right to an effective remedy can arise if it is an international organisation that has committed the violation or has a process by which rights have been restricted."<sup>20</sup> Here, the allegation is precisely that the Court, through its organs, is responsible for the alleged violations.

19. *Second*, the Appeals Chamber noted that standing was unnecessary since "victims have had the opportunity to effectively access this Court and participate in various proceedings relating to the Prosecutor's Request [...]."<sup>21</sup> There is no equivalent circumstance here as no other party has sought to vindicate the rights implicated by this motion.

20. *Third*, the Appeals Chamber reasoned that the article 82(1) right to appeal was specifically limited to a "party", which it concluded referred to the "Prosecution" in the context of article 15.<sup>22</sup> Here, no article limits the right of victims to access justice to vindicate a violation of their rights to information and effective outreach.

21. *Finally*, the concerns underlying the Appeals Chamber's decision of potentially opening the floodgates of court actions is not present with respect to this motion.

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<sup>18</sup> [Appeals Chamber 4 March 2020 Decision](#), para. 23.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, fn. 47 (citations omitted).

<sup>21</sup> *Id.*, para. 23.

<sup>22</sup> *Id.*, paras. 16-21.

The present motion is grounded in objective rights possessed by Petitioners uniquely, and relate to serious failings in the delivery of those rights. The facts are told in the present motion and attached declarations chronicling the repeated efforts of Afghan civil society urging the OTP and the Registry to take seriously their obligations to victims. It is also told in the *amicus curiae* submissions and accompanying declarations submitted to this Chamber in July 2019 and to the Appeals Chamber in December 2019. The Court has ample information to support a holding that would limit the suggested reporting mandates on the OTP and Registry to the circumstances present in this Situation.

**B. Afghan victims have the right to information and effective outreach**

*a. The Court's legal texts establish an independent right to information and outreach*

22. The Court's legal texts establish that the OTP must provide victims with information on an on-going investigation and that the OTP and Registry must conduct outreach to victims to inform them of their rights and to keep them apprised of the Court's activities, including during ongoing investigations.

23. The Regulations of the Registry ("RoR") requires the Registry to "ensure the public dissemination of appropriate, neutral and timely information concerning the activities of the Court through public information and outreach programs."<sup>23</sup> The Registry must establish "[p]ublic information programmes [...] aimed at fostering public understanding and support for the work of the Court" and "[o]utreach programmes [...] aimed at making the Court's judicial proceedings accessible to those communities affected by the situations and cases before the Court".<sup>24</sup> These

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<sup>23</sup> RoR, Regulation 5*bis*.

<sup>24</sup> *Id.*

duties are intended to effectuate “the Registry’s mandate to provide information pursuant to rule 13, sub-rule 1 of the Rules of Procedure and Evidence”.<sup>25</sup>

24. The Regulations of the OTP (“RoP”) impose similar obligations.<sup>26</sup> They require the OTP to “disseminate information on its activities to, and respond to enquiries from [...] victims, non-governmental organisations and the public, with a particular focus on the communities affected by the work of the Office” and to “contribute to the Court’s outreach strategies and activities.”<sup>27</sup> The OTP must also “seek and receive the views of the victims at all stages of its work in order to be mindful of and take into account their interests.”<sup>28</sup> These principles are equally encapsulated in the OTP’s Code of Conduct, which requires its members to “ensure that victims are informed of their rights in accordance with the Statute and the Rules.”<sup>29</sup>

*b. Information and effective outreach are necessary for all other victim rights*

25. Unlike other international criminal systems, victims have explicit rights under the Statute, pursuant to which the rights to information and effective outreach undergirds all other rights in ICC proceedings. This includes the right of victims to have their views and concerns presented under article 68(3) of the Statute.

26. Reasonable, timely, and accurate notice and information allows victims to assert their rights and facilitates their participation at all stages of ICC proceedings. Information on the Afghan Government’s request to seemingly defer the *entire* investigation and the OTP’s consideration and interpretation of that request and the relevant law, for example, directly implicates the interests of victims. If the OTP and the Registry fail to inform victims of these major developments and what rights

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<sup>25</sup> *Id.*

<sup>26</sup> RoP, Regulation 15.

<sup>27</sup> *Id.*

<sup>28</sup> RoP, Regulation 16.

<sup>29</sup> [OTP Code of Conduct](#), para. 67(b).

victims have in such circumstances, as is currently the case, victims and their legal representatives are unable to participate in the proceedings, in violation of their due process rights.<sup>30</sup>

27. Pre-Trial Chamber I and III recently highlighted the importance of information and effective outreach to the fulfilment of other victim rights.<sup>31</sup> Both Chambers held that the Court must enable victims to exercise their right to participate in ICC proceedings through the provision of adequate information on the proceedings and effective outreach.<sup>32</sup> These due process protections are necessary to ensure that victims have a reasonable and meaningful opportunity to participate in proceedings that implicate their rights, and the outreach and information that is provided must be “effective” given the particular circumstances of the situation.<sup>33</sup>

28. The reasoning and conclusions of those Chambers are affirmed and supported by ASP statements. The ASP has repeatedly acknowledged that the rights of victims depends on “effective” outreach to victims and affected communities, directly linking the right of victims to participate with “the need to continue to optimize and adapt outreach activities” and ensuring that victims and affected communities have access to accurate information.<sup>34</sup>

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<sup>30</sup> See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified.”). In the context of the United States Crime Victims’ Rights Act, for example, legislators observed that “notice provisions are important because if a victim fails to receive notice of a public proceeding the criminal case at which the victim’s right could otherwise have been exercised the right has effectively been denied.” 105 Cong. Rec. S4267-68 (daily ed. 22 April 2004) (statement of Sen. Kyl).

<sup>31</sup> *Palestine Situation*, [13 July 2018 Decision](#); *Bangladesh/Myanmar Situation*, [20 January 2020 Decision](#).

<sup>32</sup> *Palestine Situation*, [13 July 2018 Decision](#), para. 8; *Bangladesh/Myanmar Situation*, [20 January 2020 Decision](#), para. 7.

<sup>33</sup> *Palestine Situation*, [13 July 2018 Decision](#), paras. 7, 11; *Bangladesh/Myanmar Situation*, [20 January 2020 Decision](#), para. 9.

<sup>34</sup> The impact of the Rome Statute system on victims and affected communities, 8 June 2010, [RC/Res.2](#), para. 3. See also Strengthening the International Criminal Court and the Assembly of States Parties, [ICC-ASP/16/Res.6](#), 14 December 2017, para. 94; Strengthening the International Criminal Court and the Assembly of States Parties, 17 December 2014, [ICC-ASP/13/Res.5](#), para. 71; Strengthening the International Criminal Court and the Assembly of States Parties, 27 November 2013, [ICC-ASP/12/Res.8](#), para. 51; The impact of the Rome Statute system on victims and affected communities, 8 June 2010, [RC/Res.2](#), sixth preambular paragraph.

29. The right of victims to information and effective outreach have also long been recognised under international human rights law as a component part of a victim's right to an "adequate and effective" investigation.<sup>35</sup> The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>36</sup> and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>37</sup> note that access to justice and remedies is conditioned on the timely provision of information to victims on their rights and developments in the proceedings.<sup>38</sup> The EC's Victims' Rights Directive similarly guarantees victims a right to information.<sup>39</sup> Guidance from the EC's Directorate-General for Justice makes clear that "[t]he rationale behind this provision requires the criminal justice authorities to provide extensive information proactively *ex officio*, rather than the onus being on victims to seek out such information for themselves."<sup>40</sup>

30. Finally, the right to adequate information and effective outreach is a principle deeply rooted in Afghan legal tradition. In Afghanistan, victims are provided the right to actively engage in all parts of the criminal process.<sup>41</sup> Their rights include "[a]ccess to information concerning the proceedings and prosecution results of the case in different stages of legal prosecution."<sup>42</sup> "The police, prosecutor's office and court" have an affirmative duty "within their area of jurisdiction, [to] take and

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<sup>35</sup> See Statute, art. 21. See also [Appeals Chamber 4 March 2020 Decision](#), para. 23.

<sup>36</sup> UN Doc. [A/RES/40/34](#), 29 November 1985, paras. 5-6.

<sup>37</sup> UN Doc. [A/RES/60/147](#), 21 March 2006, para. 12(a).

<sup>38</sup> This fact is also emphasized by the UNODC in its commentaries to the Declaration. UNODC, [Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (1999), p. 45. See also UNODC, [Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (1999), p. 19.

<sup>39</sup> Council of the European Union, [Directive 2012/29/EU Establishing minimum standards on the rights, support and protection of victims of crime](#), 25 October 2012 ("Directive 2012/29/EU"), arts. 3, 4.

<sup>40</sup> European Commission, [DJ Justice Guidance Document on Directive 2012/29/EU](#), December 2013 ("EC DJ Guidance Document"), pp. 13-14. See also European Parliamentary Research Services, [The Victims' Rights Directive 2012/29/EU: European Implementation Assessment](#), December 2017, pp. 52-53 ("[t]he main requirement of [the right to information] is to ensure victims *effectively* understand the information they are provided with.") (emphasis added).

<sup>41</sup> [Criminal Procedure Code](#), Islamic Republic of Afghanistan (2014), arts. 6, 189-201.

<sup>42</sup> *Id.*, art. 6(1)(5).

enforce required measures to ensure that the victim has access to his or her rights," including the right to information about criminal proceedings.<sup>43</sup>

*c. Adequate information and outreach are essential for historically marginalised groups*

31. Adequate and effective information and outreach is particularly important for victims from historically marginalised or vulnerable groups, such as women, children, and minorities.<sup>44</sup> In "emphasiz[ing] the right of equal access to justice for all, including members of vulnerable groups" the UN General Assembly has highlighted the "importance of awareness-raising concerning legal rights."<sup>45</sup> Without considering the circumstances of marginalised or vulnerable groups, the Court aggravates the discriminatory treatment of these groups.<sup>46</sup> For similar reasons, the EC's Directorate-General for Justice requires that officials take a "pro-active approach" when dealing with victims and to duly consider the "individual needs and personal circumstances of victims" when determining how to provide information.<sup>47</sup> And noting that, "the extent or details of information may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime."<sup>48</sup>

32. Adequate and effective outreach to female victims of crimes must be tailored to their specific needs, which has not been done in this Situation. As noted by the

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<sup>43</sup> *Id.*, art. 6(2).

<sup>44</sup> Human Rights Committee, General Comment No. 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#), 26 May 2004, para. 15.

<sup>45</sup> UNGA Resolution 67, UN Doc. [A/RES/67/1](#), 30 November 2012, para. 14.

<sup>46</sup> UNDP, [A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice](#) (2003), pp. 141, 157 ("If legal awareness campaigns stop at the middle level and do not reach down to the grassroots and community levels, they will be unable to reach the entire community especially the most disadvantaged. [...] It is part of the duty of the formal justice system to reach out to disadvantaged groups and provide them with access to information through legal awareness and literacy programmes so that they know what services are available and how to seek remedies for their grievances.").

<sup>47</sup> [EC DJ Guidance Document](#), p. 14. *See also* EC Victims' Rights Directive: Frequently asked Questions, available at <https://bit.ly/3sGM9Ad> ("[t]he form of communication must be adapted to the specific needs of every victim" and "must be adapted in particular to the victims' age, language or any disability.").

<sup>48</sup> [EC DJ Guidance Document](#), p. 15 (emphasis omitted).

CEDAW Committee, article 3 of the Convention on the Elimination of all Forms of Discrimination Against Women requires the development of targeted outreach activities and the distribution of information “about available justice mechanisms, procedures and remedies in various formats, and also in community languages such as through specific units or desks for women.”<sup>49</sup> As far as Petitioners are aware, neither the Registry nor the OTP have taken any of these measures specifically designed to ensure information reaches Afghan women and girls.

33. The specific needs of children too have been ignored by the OTP and the Registry in its outreach efforts contrary to the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. Guideline 19 provides that child victims and witnesses should be informed of any judicial mechanism responsible for enforcement of their rights.<sup>50</sup> As noted by the UNHCHR, “[c]hildren’s access to information about their rights and ways of promoting their safeguard and implementation [...] is a crucial dimension of access to justice.”<sup>51</sup> “[C]hildren should be provided with information and advice that is adapted to their age, maturity and circumstances. It should be conveyed in language children are able to understand and which is gender- and culture-sensitive, and supported by child-sensitive materials and information services.”<sup>52</sup>

34. Finally, outreach and information efforts should also address the specific needs of minority groups. Article 4(1) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities requires that such measures be designed so “that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any

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<sup>49</sup> CEDAW General Recommendation No. 33, UN Doc. [CEDAW/C/GC/33](#), 23 July 2015, para. 17(c).

<sup>50</sup> UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Res. [2005/20](#), 22 July 2005, para. 19.

<sup>51</sup> Report of the UNHCHR, Access to justice for children, UN Doc. [A/HRC/25/35](#), 16 December 2013, para. 18.

<sup>52</sup> *Id.* at para. 19.

discrimination and in full equality before the law.”<sup>53</sup> These safeguards apply broadly to any minority groups based on their language and culture, including foreign nationals, recent immigrants or racial, linguistic or cultural minorities.<sup>54</sup> Here, the lack of linguistically or culturally appropriate legal information provided by the OTP and the Registry to minority groups in Afghanistan further exacerbates the difficulties that these groups already face in Afghanistan.

### **C. The OTP and Registry have not provided information and effective outreach to Afghan victims**

35. Since the Appeals Chamber authorised the investigation into crimes committed in the Afghanistan situation in March 2020, the Registry’s and OTP’s outreach efforts and information to Afghan victims and affected communities have ceased. To the best of Petitioners’ knowledge:

- Neither the Registry nor the OTP has established an organised plan to provide outreach or information to Afghan victims or affected communities with a focus on ensuring information is received by vulnerable communities.
- The OTP does not appear to be sufficiently cooperating with the Registry’s outreach efforts to Afghan victims.
- In the over a decade since this Situation was announced, the Registry has still not prepared a mapping document – a prerequisite planning document for any outreach efforts.
- Basic information, such as whether an investigation is even being pursued, is routinely denied to Afghan victims.

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<sup>53</sup> UN Doc. [A/RES/47/135](#), 3 February 1993.

<sup>54</sup> Minorities in the Criminal Justice System, [Contribution of the United Nations Network on Racial Discrimination and Protection of Minorities to the Eighth session of the Forum on Minority Issues](#), 24-25 November 2015, p. 7.



36. Significantly, the OTP and the Registry have not addressed the serious deficiencies in the outreach strategy established prior to the opening of the current investigation in December 2017 and January 2018, as highlighted by Afghan civil society in multiple filings, and by the Independent Expert Review.<sup>55</sup> These include having zero outreach strategies specific to women and children, poor methods for distributing information and receiving feedback, and over-reliance on civil society organisations, putting those organisation's employees in harm's way.

37. Victims, the affected communities, the Court's reputation, and the OTP's own investigation have already suffered real, and potentially irreversible, consequences as a result of the OTP's and the Registry's deficient outreach and information efforts:

- **Victims have not been informed of their rights:** The Registry and the OTP have not informed Afghan victims and affected communities of their rights, particularly when and how they can participate at the investigative stage.<sup>56</sup>
- **Most victims, particularly Afghan women and children, have been excluded:** Only 10 representations were received at the preliminary examination stage by or on behalf of women. Only 9 representations were by or on behalf of individuals between zero and 18 years of age.<sup>57</sup>
- **The Situation lacks sufficient transparency:** This past Friday – more than a year after the Afghan Government made its article 18(2) request – was the first time that VPRS had circulated information that the Afghan Government had requested the OTP to defer its investigation and had provided supporting material.<sup>58</sup> To-date, neither the Registry nor the OTP had informed victims as

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<sup>55</sup> [Amicus Curiae Written Submissions](#), paras. 19-27; [Amicus Curiae Oral Submissions](#), pp. 92-97; [Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report](#), 30 September 2019, paras. 857, 866.

<sup>56</sup> See Annexes C and D, paras. 16, 19, 23. *Contra* [ASP Report](#), para. 9.

<sup>57</sup> [VPRS Report](#), pp. 11-12.

<sup>58</sup> Annexes C and D, paras. 16, 19, 21, 23.

to the status of the investigation, including whether the OTP has paused all investigative activities as seemingly reported to the ASP and to Fox News in an op-ed by the former President.<sup>59</sup> This despite numerous and repeated requests for such information to the OTP by victim groups over the past year and an appeal that the Office be more transparent.<sup>60</sup>

38. The absence of effective outreach and information have already impacted the OTP's future ability to undertake an effective investigation and these proceedings. And there are also implications relating to racial equity. *First*, victims and members of the affected communities, including would-be witnesses and intermediaries, have lost confidence in the Court.<sup>61</sup> Afghan victims have suffered over four decades of impunity for crimes perpetrated against them. Justice and accountability have consistently been sacrificed for political expediency and false promises of peace.

39. Compounding the already unfortunate reality for Afghan victims is the consistent and devastating interference in Afghan governance by foreign powers intent on preventing justice and accountability mechanisms that may target them. In their effort to change course, Afghan victims and Afghan civil society supported an Afghanistan investigation because they believed the Court would operate neutrally, thoughtfully, and independently. But as far as victims are now concerned, due to the lack of outreach and information, the Court has proven to be as ineffective as justice actors in Afghanistan. In a manner, the Afghan Government's continued failure to provide justice and accountability to victims is understandable because governance is shadowed by ongoing hostilities; the Court's actions are less understandable.

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<sup>59</sup> [ASP Report](#), para. 6 (“the Office is not currently taking active steps while respecting its duties under the Statute.”); Chile Eboe-Osuji, *US wrong to sanction International Criminal Court prosecutor*, Fox News, 6 October 2020, available at <https://fxn.ws/3v1c5YJ> (“Since March 5 [...] Bensouda has not actually moved on the file. She has frozen activity while considering a request by Afghanistan to cease further action and allow the Afghan national justice system space to exercise its primary jurisdiction.”). *But see* Annexes C and D, paras. 16, 19, 21, 23.

<sup>60</sup> Annexes C and D, paras. 25-35.

<sup>61</sup> Annexes C and D, para. 6; Annex E, para. 17.

40. Aggravating these concerns is the fact that, to Afghan victims and Afghan insiders, the OTP appears more concerned by politics than in executing its mandate. Victims point to the disproportionate length of the OTP's preliminary examination in the Afghanistan Situation as compared to other Situations, particularly those relating to crimes committed in Africa. They note the OTP's current acquiescence to the Afghan Government's deferral request, despite the OTP's conclusion only three years ago that "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" or by members of the Afghan National Security Forces.<sup>62</sup> Indeed, they note that the rule of law in Afghanistan has only weakened and violence has only increased since then.<sup>63</sup> The unfortunate but prevailing wisdom in Afghanistan is that political, not legal, considerations – such as US sanctions – have dictated the course of the OTP's investigation over the last year. Even if such speculation is false, the absence of information and effective outreach concerning the OTP's investigation have weakened the Court's stature in Afghanistan and allowed misinformation to reign.

41. *Second*, in part due to the absence of Afghan victims' genuine participation in these proceedings, proceedings in this Situation have disproportionately focused on crimes committed by international forces, to the detriment of other crimes. The vast majority of crimes in Afghanistan, and the vast majority of the crimes that continue to keep Afghanistan in conflict, are committed by armed militias.<sup>64</sup> Yet, to date, the proceedings have been dominated by discussions concerning crimes committed by international forces. As an example, only one of the six legal teams representing

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<sup>62</sup> [OTP Article 15 Request](#), paras. 269, 276.

<sup>63</sup> See e.g. Mehdi J. Hakimi, *The Rule of Law Crisis in Afghanistan*, Georgetown Journal of International Law, 7 September 2020; Ali Yawar Adili et al, *The Stagnation of Afghanistan's State Institutions: Case studies of the Supreme Court, Senate, provincial councils and the constitutional oversight commission*, Afghanistan Analysts Network, 31 March 2021, available at <https://bit.ly/3ak1tMs>. See also Annex E, paras. 6-13.

<sup>64</sup> This fact was admitted by the OTP: See Summary of the Prosecutor's Request for authorisation of an investigation pursuant to article 15, available at <https://bit.ly/3uUk2ie> (noting 17,000 civilian deaths since 2009 attributed to the Taliban alone, while only 54 persons being subject to harm by international forces).

victims before this Chamber and the Appeals Chamber represented Afghan victims; four were dedicated to victims of CIA detention facilities. And neither this Chamber, nor the Appeals Chamber, undertook measures to ensure a more balanced representation of victim interests. The result of this failing not only negatively impacted Afghan victims but is likely the reason for such fierce opposition by foreign countries. That lack of balance served neither Afghan victims nor the Court.

42. *Finally*, Afghans themselves have not been genuinely part of these proceedings. Of the 31 individuals appearing before the Appeals Chamber only *two*, the Afghan ambassador and one *amicus curiae* attorney, were Afghan. None of the LRVs, including any OPCV representative, was Afghan. None were fluent in Afghan languages. None, to Petitioner's knowledge, had even visited Afghanistan. While the efforts of the individuals who appeared to-date are most certainly well-meaning and their advocacy of high quality, the result is that Afghan victims have become objects, proxies, and spectators in a process, which at its core, concerns *their* interests. In doing so, the optics have deepened criticism that the Court serves Western interests and excludes the very communities whose hardships and suffering are on trial. The only way to ameliorate that perception and the lack of racial equity in these proceedings to-date is through ensuring and prioritising the proper distribution of timely information about the Court, its proceedings, the OTP's investigation, and the rights of victims to the affected communities. To be clear, there are many capable and qualified Afghan lawyers who dedicate their lives to victim advocacy relating to war crimes committed in Afghanistan. That so few have appeared before this Court is not due to their disinterest, but an unfortunate result of the Court's strategy of primarily engaging with Western "elites".

#### IV. RELIEF SOUGHT

43. Petitioners request that this Chamber adopt an order on information and outreach like those issued by Pre-Trial Chambers I and III in the *Situation in the State of Palestine* and in the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, respectively.<sup>65</sup>

44. Specifically, Petitioners request that: (1) the OTP and Registry be ordered to establish, by a date set by the Chamber, a system of public information and outreach activities with the victims of the Afghanistan Situation and the affected communities; (2) such system consider factors specific to Afghanistan, including the languages spoken, local customs and traditions, literacy rates and access to media and technology, and undertake measures specifically designed to ensure outreach is catered to women, children and minorities; (3) the OTP be ordered to cooperate and collaborate with the Registry in devising such system to ensure that accurate and timely information about its investigation is disseminated; and (4) the Registry and OTP file quarterly reports with this Chamber with updates on outreach efforts *and* 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 staff dedicated to the investigation and non-confidential information concerning investigative steps taken to-date. These reports should be public and sufficiently specific to allow victims an opportunity to challenge or otherwise supplement the information in them. Petitioners consider that these measures are necessary to ensure that the Chamber is properly apprised from all relevant stakeholders as to the effectiveness of outreach efforts and so that the Chamber can properly assess whether the Court's organs are meeting their legal obligations under the Court's legal texts.

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<sup>65</sup> *Palestine Situation*, [13 July 2018 Decision](#); *Bangladesh/Myanmar Situation*, [20 January 2020 Decision](#).

45. Petitioners also request that the OTP be ordered to provide information on: (1) its interpretation of article 18(2), namely whether they have deferred the entire investigation or just components thereof; and (2) additional non-confidential information about the Afghan Government's request, such as the number of persons and the type of incidents identified in the request. Further, the Petitioners request that the Chamber order a deadline by which the OTP is required to finalise its analysis of the Afghan Government's request, or, alternatively order the OTP to provide a timeline for the completion of its analysis.

46. Investigations are bound by justiciable legal parameters, as provided by article 54, and by obligations owed to victims, as highlighted in this motion. While the Prosecution has the discretion to allocate its resources as it finds appropriate, its discretion during investigations is not unfettered. The OTP's duties, and the rights of victims, are articulated in the Statute to give them meaning and enforceability. And the information requested by this motion, including quarterly reporting, while novel, squarely addresses the need for further checks and balances in this Situation. The requested relief is also necessary to enable victims the opportunity to possibly challenge the OTP's interpretation of article 18(2) and otherwise have their "views and concerns" presented on an essential matter relating to their personal interests – namely an *effective* investigation in this Situation.



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**Spojmie Ahmady Nasiri**  
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Dated this 20<sup>th</sup> day of April 2021  
At San Francisco, USA