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**International
Criminal
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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 Submissions on Behalf of Certain Victims Who Participated in the
Litigation Under Article 15(4) (ICC-02/17-146-Anx and ICC-02/17-148-Anx)**

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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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 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 Prosecution took these steps—each of them significant—because it is committed to delivering accountability and justice for the victims of the alleged crimes in this situation, within the framework of the Statute. The Prosecution maintained this view, and initiated the investigation in this situation, in the face of specific coercive measures directed against the Prosecutor and her Office. The Prosecutor’s determination 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. Of course, as this assessment takes place, the Prosecutor can at any time invoke article 18(6) should it be necessary.

4. Consistent with the requirements of the Statute, the Prosecution duly engaged with the Afghan national authorities and informed the Pre-Trial Chamber (and the public) of these activities.¹ Afghanistan provided the Prosecution with voluminous materials said to relate to its domestic investigations. In this context, the Prosecution 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, representatives of the Prosecution met with representatives of the Government of Afghanistan on 7 May 2021.²

5. No decision on the Deferral Request under article 18(2) 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.³ 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.

¹ See ICC-02/17-139 (“Notification of Request for Deferral”); ICC-02/17-142 (“Update on Status of Request for Deferral”).

² 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.](#)

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

Submissions

7. The Prosecution appreciates and welcomes the engagement of victims of the crimes alleged in this situation, and supports their participation in the judicial proceedings to come, as provided by article 68(3) of the Statute. In particular, the Prosecution acknowledges the invaluable efforts of the victims who participated in the article 15(4) litigation (“the Guantanamo Applicants” and “the Cross-Border Applicants”), leading to the opening of this investigation.⁴

8. The Guantanamo and Cross-Border Applicants now seek judicial intervention in the Prosecutor’s ongoing deliberation upon the Deferral Request to seek to compel the Prosecution to clarify its interpretation of its scope, to justify that interpretation, to publicly state the progress of certain aspects of the investigation, and to complete the Prosecutor’s deliberation on the Deferral Request by a certain date.⁵ Although styled as “responses” to the Prosecution’s Update on Status of Request for Deferral, the Prosecution regards the Submissions in fact as fresh motions—to which the Prosecution is entitled to respond in this filing—since they raise new matters and seek new relief, in a manner which could not reasonably have been foreseen.⁶

9. The Prosecution must respectfully oppose the relief sought in the Submissions because it seems to be predicated on the misapprehension that the Guantanamo and Cross-Border Applicants have standing to participate in the conduct of the investigation. Yet 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. In any event, the relief sought in the Submissions is premature, speculative, and inconsistent with the statutory independence of the Prosecutor in conducting investigations.

⁴ See ICC-02/17-146-Anx (“Guantanamo Applicants’ Submissions”), para. 5; ICC-02/17-148-Anx (“Cross-Border Applicants’ Submissions”) (together, “the Submissions”).

⁵ Guantanamo Applicants’ Submissions, paras. 1, 49; Cross-Border Applicants’ Submissions, paras. 5, 13.

⁶ The Prosecution further recalls that it raised this question before the Pre-Trial Chamber (*see* ICC-02/17-147; ICC-02/17-149), and was simply instructed to file “responses” to the Guantanamo Applicants’ Submissions and the Cross-Border Applicants’ Submissions, “if so wished”, “within the deadlines considered applicable”: *see* E-mail from Pre-Trial Chamber II, dated 10 May 2021.

10. Consistent with the Prosecution's practice in this matter to date, however, the Prosecutor reiterates that it will reach a decision on the Deferral Request with due expedition, and that its decision will be publicly notified. The subsequent proceedings will be regulated by article 18 of the Statute. To the extent that the Prosecutor's decision gives rise to judicial proceedings, the Prosecution will support and welcome victim participation at the appropriate time, including from the Guantanamo and Cross-Border Applicants.

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)

11. The Guantanamo Applicants assert that they have standing to file the Submissions, and to seek relief from the Pre-Trial Chamber, under article 68(3) of the Statute.⁷ By contrast, the Cross-Border Applicants seem to rely on both article 68(3) and article 15(3) as a basis for their claim of standing.⁸

12. While the Prosecution recalls that both the Guantanamo and Cross-Border Applicants were entitled to participate in the litigation concerning the decision whether to authorise the opening of an investigation, under article 15(3), this question has now been conclusively resolved by the actual opening of the investigation. Accordingly, article 15(3) cannot be a basis for the continued participation of victims. Article 68(3) is the *lex specialis*.

13. The Guantanamo Applicants misconstrue the applicable law under article 68(3), which provides materially that, "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings *determined to be appropriate by the Court*"

⁷ Guantanamo Applicants' Submissions, para. 25.

⁸ Cross-Border Applicants' Submissions, paras. 3-4.

(emphasis added).⁹ They further assert without reference to authority that “[p]roceedings’ have been found to include an investigation.”¹⁰

14. Yet to the contrary, 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 responsible.”¹¹ This does not mean that victims may not “make representations *to the Prosecutor* on any matter pertaining to the investigation and to their interests”,¹² 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.”¹³

15. Victims may of course participate in judicial proceedings “affecting investigations”,¹⁴ 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.¹⁵ 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

⁹ Compare Guantanamo Applicants’ Submissions, para. 25 (“Article 68(3) allows victims’ views and concerns to be presented and considered *at any stage of ICC proceedings* in which their personal interests are affected”, emphasis added).

¹⁰ Guantanamo Applicants’ Submissions, para. 25.

¹¹ ICC-01/04-556 OA4 OA5 OA6 (“DRC Appeal Judgment”), para. 45.

¹² DRC Appeal Judgment, para. 53 (emphasis added).

¹³ DRC Appeal Judgment, paras. 56-58.

¹⁴ DRC Appeal Judgment, para. 56.

¹⁵ See also ICC-01/09-159, paras. 7-9 (“Kenya Decision”).

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.¹⁶

16. 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 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 18.¹⁷ Nor do the precedents cited by the Guantanamo Applicants show any contrary approach,¹⁸ insofar as they relate to proceedings *prior* to the formal opening of an investigation,¹⁹ or relate to a matter in which a chamber may exercise *proprio motu* powers in a judicial proceeding.²⁰

17. 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 Submissions do 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 Guantanamo and Cross-Border Applicants. Given the subordinate status of the Rules of Procedure and Evidence

¹⁶ Kenya Decision, para. 13.

¹⁷ Afghanistan Appeal Judgment, para. 63.

¹⁸ Guantanamo Applicants' Submissions, para. 28 (footnote 47, citing ICC-RoC46(3)-01/18-37 ("Bangladesh/Myanmar Article 19(3) Decision"), para. 21; ICC-01/18-14 ("Palestine Invitation to Submit Observations"), para. 13; ICC-01/19-38-Corr ("Bangladesh/Myanmar Hearings Decision"), paras. 17-19, 23.

¹⁹ See Bangladesh/Myanmar Article 19(3) Decision; Palestine Invitation to Submit Observations.

²⁰ See Bangladesh/Myanmar Hearings Decision, especially paras. 22-27.

relative to the Statute, rules 89, 91, and 93 cannot confer any right of participation that article 68(3) does not permit.²¹

18. The Guantanamo and Cross-Border 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 could ensue from the Deferral Request under article 18(2). While the Prosecution does not consider that the Guantanamo and Cross-Broder Applicants' prior participation in litigation under article 15(3) and (4) permits them to participate in the investigation as such, it agrees that the rule 89 process may appropriately be foregone in the event of any judicial proceedings pertaining to the investigation, such as those arising under article 18(2).²²

The Submissions are premature and inconsistent with the independence of the Prosecutor

19. In any event, irrespective of the question of standing, the Prosecution notes that the Submissions are premised on anticipated concerns with regard to the article 18(2) process, which have not yet come to pass. For example, both the Guantanamo and Cross-Border Applicants express their view of the correct interpretation of article 18(2), and speculate whether this may also be the approach of the Prosecutor when she determines whether or not to make an application to the Pre-Trial Chamber under article 18(2).²³ At least by implication, both the Submissions seek to pre-litigate the question "whether the Prosecutor is directing herself properly in law as to the obligations imposed by Article 18(2) of the Statute",²⁴ by means of forcing the Prosecutor to explain her own legal interpretation in advance of her decision under article 18(2).

²¹ Cf. Guantanamo Applicants' Submissions, para. 28.

²² See Guantanamo Applicants' Submissions, para. 31.

²³ See Guantanamo Applicants' Submissions, paras. 35-45, especially paras. 41-44; Cross-Border Applicants' Submissions, paras. 5-11.

²⁴ Cross-Border Applicants' Submissions, para. 14.

20. Such an approach is inconsistent with the principle of judicial economy, and the procedure established by the Statute. Article 18(2) makes clear that it is for the Prosecutor, first, to determine the basis of a request for deferral and the appropriate course of action. If necessary, she will then apply to the Pre-Trial Chamber to continue the investigation notwithstanding the content of that request for deferral. Nothing in this regime permits any other person to trigger litigation before the Court to compel the Prosecutor to render her decision before she has concluded the analysis of the request for deferral that she thinks necessary, or to disclose her view of the applicable law in advance and in isolation from the facts to which it is applied.

21. The relief sought in the Submissions would also seem to be inconsistent with the independence of the Prosecutor, as guaranteed by article 42(1) of the Statute, in several respects.

22. First, the Submissions seek to impose a judicially enforced deadline for the conduct of core investigative activities. Such activities necessarily include the assessment of requests for deferral under article 18(2) which, by their nature, entail the comparison of the investigative measures in progress by a State Party 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.

23. 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.”²⁵ 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

²⁵ [Afghanistan Appeal Judgment](#), para. 63. See also ICC-02/05-185, 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”).

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*”.²⁶

24. 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. No decision with regard to article 18(2) has yet been taken. Depending on her decision, this may or may not result in judicial proceedings; if such proceedings do ensue, the Guantanamo and Cross-Border Applicants will have the opportunity to participate. When the Prosecutor reaches her decision, the legal basis for that decision will be clear.

25. Second, the Submissions question the extent to which the Prosecution is discharging its duty under article 54(1)(b) to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.²⁷ As previously noted, the Pre-Trial Chamber has previously agreed that such matters are not subject to judicial oversight, except incidentally in the context of other judicial proceedings.²⁸

26. In any event, the Guantanamo and Cross-Border Applicants’ concern is speculative, and lacks foundation. The Prosecutor is vested with broad discretion in selecting and prioritising 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.”²⁹ Consequently, there is no basis to apprehend that the Prosecution will not investigate the alleged crimes committed impartially and independently. But the manner in which she does this, and the

²⁶ Statute, art. 18(2) (emphasis added).

²⁷ Guantanamo Applicants’ Submissions, paras. 46-48.

²⁸ See above para. 15 (quoting Kenya Decision, para. 13).

²⁹ [ICC OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016](#), para. 8.

relative priority she assigns certain investigative activities remain a matter solely for her to decide—not least in view of the fact that she alone is in a position to appreciate the entirety of the calls at any one time upon the limited resources of her Office, across all situations and cases.

Conclusion

27. For all these reasons, the Submissions should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 17th day of May 2021

At The Hague, The Netherlands