

Annex D

(Public)

DECLARATION OF [REDACTED]

I, [REDACTED], confirm and attest to the following,

1. I am [REDACTED]
[REDACTED]
2. Previously, [REDACTED]
[REDACTED]
3. [REDACTED]
[REDACTED]
4. [REDACTED] I routinely met with officials of the ICC and organized events between members of Afghan civil society and officials within the Office of the Prosecutor (“OTP”) or Registry. During these meetings, I, and other members of Afghan civil society, routinely complained of the lack of outreach and information by the OTP and Registry to victim groups in Afghanistan, and the general lack of information concerning the rights of victims under the ICC’s legal texts available to Afghan victims.
5. In July and November 2019, following Pre-Trial Chamber II’s denial of the OTP’s article 15(3) request, I submitted declarations as part of *amicus curiae* briefs submitted before Pre-Trial Chamber II and the Appeals Chamber, on behalf of 17 human rights organizations in Afghanistan. In those declarations I opined about the importance of an ICC investigation to transitional justice efforts in Afghanistan, failed outreach efforts of the ICC and Afghan civil society in 2017 in conjunction with the article 15(3) representation process, and steps the ICC can take to prevent repeating its mistakes in Afghanistan and in its outreach efforts.
6. [REDACTED] I have met with thousands of Afghan victims, other Afghan civil society leaders, and members of the Afghan government. [REDACTED]
[REDACTED] In these conversations, matters pertaining to the ICC would occasionally arise. I can confidently say that none of the individuals with whom I spoke had received information concerning recent matters at the ICC, including the Afghan Government’s deferral request, or information concerning the rights of victims under the Court’s legal texts. In general, Afghan victims and Afghan civil society are uninformed about what is going on at the ICC and believe that the Court’s investigation has fallen victim to politics.

Communications with the Registry concerning outreach and information

7. Since at least 2017, I have, directly and indirectly through my attorneys, been in contact with OTP and Registry representatives concerning the absence of information and outreach relating to the Court's investigation into crimes committed in Afghanistan, and the rights of victims and affected communities under the Rome Statute.
8. Below is a chronology of communications between me and my attorney with representatives of the OTP and Registry. These recollections are provided to the best of my knowledge and only parts I consider to be relevant are excerpted below:

Communications with the Registry

9. [REDACTED] I and several members of civil society from Afghanistan [REDACTED] met with the [REDACTED] the ICC Spokesperson, and representatives of Victims Participation and Reparations Section ("VPRS"). [REDACTED]
[REDACTED]
[REDACTED] also informed me that the Public Information and Outreach Section ("PIOS") had no mandate or requirement to do any work on the Afghanistan Situation. During our consultations and interactions with representatives from VPRS, PIOS and the Office of Public Counsel for Victims ("OPCV") during this time, we also received conflicting information concerning the role of each section regarding outreach and information, often in an apparent attempt to point blame for the lack of outreach to-date on the other organ.
10. On 5 February 2020, [REDACTED] submitted a letter, via email, to the Registrar, noting, *inter alia*: (1) that we had received conflicting information concerning the roles of PIOS, VPRS, and OPCV concerning victim outreach and engagement; (2) that no efforts to reach out to the Afghan population was made during the OTP's decade-long preliminary examination; (3) that the Registry's outreach efforts during the article 15(3) representation period was mired with problems and shortcomings, none of which had been remedied since then; and (4) identifying a number of steps that were necessary for an effective outreach plan in the context of Afghanistan, including a "mapping of how Afghan people access information across different democratic characteristics, including gender, age, race, and geographic location."
11. On 28 February 2020, the Registrar submitted a response letter by email describing the role of each division in providing outreach and information but noting that the Registry had no mandate to provide outreach and information to victims prior to the OTP's opening of an investigation unless ordered by a pre-trial chamber. The Registrar did not address our concerns regarding the problems and shortcomings in outreach and information to date.

12. On 9 April 2020, counsel for the Organizations met with the Registry and [REDACTED], where they again emphasized the need for a mapping document, and noted deficiencies in outreach as it related to the Situation in Afghanistan. We highlighted the very real danger of disinformation and misinformation concerning the ICC in Afghanistan given the absence of authoritative information from ICC officials. Finally, we noted that Afghan civil society members were increasingly the target of violent attacks in Afghanistan and that the Registry's reliance on civil society to distribute information put them in harm's way. We were informed that the Registry intended to hire a consultant to assist in preparing a mapping document and with outreach concerning the Afghanistan investigation. We were told that future communications should go to [REDACTED].
13. On 7 July 2020, counsel for the Organizations emailed [REDACTED]. We also noted that it was important that a consultant be hired as soon as possible and that the individual have sufficient linguistic and work history as to understand the specific situation in Afghanistan. We again emphasized the lack of any outreach to Afghan victims to date.
14. On 17 July 2020, [REDACTED] responded by email noting that they were "in the process of finalizing the terms of reference for the identification of the consultant who will assist the outreach team on the mapping related to the situation in Afghanistan." [REDACTED].
15. On 22 July 2020, in advance of meeting with [REDACTED] counsel for the Organization submitted a comprehensive outline for a mapping report. We also identified areas with which we offered to help the Registry in light of our own subject-matter expertise and familiarity with Afghanistan.
16. On 23 July 2020, I and counsel for the Organizations met with [REDACTED]. During the video conference call, we informed [REDACTED] that there had been no outreach to Afghan victims or affected communities since at least 5 March 2020 and that, importantly, no information concerning the Afghan Government's deferral request nor the rights of victims during the investigative stage had been disseminated either by VPRS or PIOS. [REDACTED] informed us that the OTP had not been cooperating with the Registry in providing information to disseminate. We also discussed the mapping project and the retention of a consultant for the Afghanistan situation. We expressed concern that there would be no requirement that the planned consultant know Afghan languages or have any experience with Afghanistan, noting in particular that "[m]onitoring the effectiveness of any communication strategy would be impossible without knowing the [local] language[s]." [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] informed us that PIOS would be organizing trainings for Afghan media and Afghan civil society, but did not indicate when. [REDACTED]
[REDACTED]
[REDACTED]

17. [REDACTED]
18. On 11 September 2020, [REDACTED] emailed me and counsel for the Organizations noting that he would continue all interactions with us on behalf of the Registry.
19. On 30 September 2020, counsel for the Organizations contacted [REDACTED] by email, copying the Registrar, noting that “no outreach to Afghans has been conducted since the Appeals Chamber’s decision to authorize the investigation”, that “[a]fter weeks of canvassing our clients and Afghan victims, we found that they have not been informed of the Court’s activities in the Afghanistan investigation or about the rights of victims, particularly during investigations”, and “[a]s a result, the victims have so far been wholly deprived of the opportunity to respond to the most recent developments in the Afghanistan investigation”. Counsel also informed [REDACTED] that no mapping report seems to be in process and that given that it had been almost three years since the OTP first requested authorization of its investigation “it is not clear as to how a robust strategy for outreach still does not exist in this matter.”
20. On 22 October 2020, [REDACTED] responded to counsel for the Organizations and me by email, noting *inter alia*, that they were still in the process of identifying “the right person to provide a mapping report of the main stakeholders in Afghanistan” and that they “hope to be able to inform [us] in the coming weeks of the name of the selected candidate”. [REDACTED] did not respond to our concern that no information had been disseminated to Afghan victims since at least March 2020 despite significant developments in the case. I have received no further information from [REDACTED] or any other Registry representative since that time.
21. On 22 March 2021, counsel for the Organizations contacted the Registrar and [REDACTED] by email again requesting an update as to the preparation of a mapping document. We also asked whether information sessions had been organized for Afghan civil society and journalists, as suggested by [REDACTED] during our 23 July 2020 meeting, and whether funds specific to the Afghanistan investigation had been requested from the Assembly of State Parties (“ASP”). Counsel also noted that in recent reports to the ASP, VPRS and PIOS had noted that they had disseminated information about judicial developments in the Afghanistan Situation to victims. Counsel noted that this was false as no such information had been provided since the Appeals Chamber decision, as had been detailed in prior communications to the Registrar, despite significant developments in the investigation. Counsel also asked whether any action or review had been undertaken in relation to the [REDACTED]. We requested a response by 2 April 2021.

22. On 6 April 2021, ██████ responded to counsel's email. He noted that a consultant had finally been retained and that mapping document was being drafted and would be completed by June. He also noted that ██████ did not respond to our concerns that no information had been shared since the Appeals Chamber Judgment in March 2020. He also did not respond to our question as to whether the Registry had requested funds to ensure effective outreach in the Afghanistan Situation.
23. On the same day, counsel responded to ██████ thanking him for the additional information, but noting that "we're still unclear as to what information has been disseminated *since* the Appeals Chamber judgment." Counsel in particular noted, again, that no information had been shared concerning (1) the Afghan Government's deferral request under article 18(2), including the fact that one was made; (2) the fact that the Afghan Government has provided supplemental information in support of that request; (3) the OTP's suspension of all investigative activities in relation to crimes committed in Afghanistan, as relayed by the OTP to the Assembly of State Parties in November; and (4) the rights of Afghan victims and affected communities during the investigative stage. Counsel noted that "[w]e consider this to be an important gap in outreach and information since these issues affect the [justiciable] rights owned by victims, including that under article 68(3) as these developments clearly impact their 'personal interests'. Without being informed of these developments, victims lose (and are losing) the opportunity to exercise their rights as provided for under the Court's legal texts in relation to these matters." Counsel also noted that ██████ had failed to answer our question as to whether the Registry had requested funds for outreach.
24. On 16 April 2021, ██████ responded to counsel, noting, in relevant part, that he understood that there "remain questions with respect to the Registry's communications that were not sufficiently clarified in my previous email." ██████ explained that "[t]he subsequent developments concerning the deferral request made by the Government of Afghanistan, including any decisions taken by the Prosecutor with regard to investigative activities in the situation, are issues first and foremost for the OTP to address." ██████ also noted that "[i]n its budget request for 2021, the Registry explicitly mentioned outreach activities in relation to the Afghanistan Situation" and that "the Registry will continue to seek new ways to maximise the use that can be made of the existing budget and in this respect the role played by civil society will be indispensable."

Communications with the OTP

25. On 1 May 2020, counsel for the Organizations emailed the Prosecutor and the ██████, attaching a confidential letter and memorandum ██████ concerning the Afghan Government's request under article 18(2) of the Rome Statute. In the memo, the Organizations noted, *inter alia*, that article 18(2) only required the OTP to defer its investigation as it related to the specific "persons" identified by the Afghan Government. The memo also suggested that the OTP retain an expert on Afghan criminal law and procedure, noting that:

Afghanistan has multiple systems for investigating and prosecuting international crimes. Its processes are complex, the jurisprudence mixed, and most of the key legal texts and decisions are only available in Pashto and Dari. Further, much of the legal decisions made in Afghanistan are intermixed with the complex political situation on the ground. Altogether, it would be impossible for the OTP to properly assess any of the above-mentioned benchmarks and questions without the assistance of an expert on Afghan criminal law and procedure.

The Organizations have had extensive interactions with representatives of the then-Situation Analysis Section, and the [REDACTED]. Based on those experiences, we consider that your Office would benefit from additional staff with specific expertise and knowledge concerning Afghanistan's complex legal and political situation such as to properly be able to dissect and understand information provided by the Afghan Government.

The memo also requested "that your Office strive to make public as much information as possible [from the Afghan Government's deferral request so as] to ensure that victims and the affected communities are kept apprised of the circumstances and to allow our Organizations to provide additional feedback, where appropriate and helpful to your deliberations." Appended to this declaration is a copy of that memo.

26. On 15 June 2020, given the absence of any response, counsel for the Organizations contacted the Prosecutor again by email, [REDACTED], asking, *inter alia*, whether any information concerning the Afghan Government's request could be made public, and requesting information concerning "efforts to keep victims and other members of the affected communities apprised of your Office's ongoing efforts".
27. On 18 June 2020, [REDACTED] responded by email. He confirmed that the Afghan Government had submitted materials supporting their article 18(2) request, but that the OTP was not in a position to share that information with the public. He did not describe what efforts the OTP was taking to keep victims and affected communities apprised as to the investigation.
28. On 22 June 2020, counsel for the Organizations responded to [REDACTED] by email asking to meet to understand more about the OTP's outreach efforts.
29. On 15 July 2020, counsel emailed [REDACTED] again, asking, *inter alia*, whether the OTP had communicated the fact that the Afghan Government had provided supplemental information in support of its article 18(2) request more broadly since "the issue implicates the justiciable rights of victims" and we "consider the fact that [the Afghan Government has] responded and the nature of their request to be relevant to keeping the affected communities apprised as to the ongoing situation in the investigation."
30. On 4 August 2020, I met with [REDACTED] and other OTP representatives together with counsel and other representatives from Afghan civil society. During our meeting, we asked the OTP to provide insight into their interpretation of article 18(2), namely whether it considered that it required deferral of the entire OTP investigation, or just that part of the investigation against the persons named by the Afghan Government. We also asked the

OTP whether they had staff with linguistic experience or prior work in Afghanistan reviewing the materials submitted by the Afghan Government. Finally, we asked whether the OTP had a timeline for reviewing the materials submitted by the Afghan Government, noting in particular that the preliminary examination had lasted an exorbitant amount of time and had significantly impacted the trust of Afghan victims and civil society in the OTP's genuine willingness and interest in undertaking an investigation into crimes committed in Afghanistan. In response, we were informed: (1) that the OTP had not settled on its understanding of article 18(2); (2) that the OTP did not have an individual, consultant or otherwise, with language or cultural competencies relevant to Afghanistan reviewing the materials submitted by the Afghan Government; and (3) that the OTP had no timeline for its review of the materials and would not share one if and when it did.

31. On 5 August 2020, counsel and I emailed [REDACTED] and other OTP representatives noting, *inter alia*, that “we find it difficult to accept the position that the Office is still analyzing what the law requires or permits given the article’s plain terms and the limited legislative history” and that the “legal interpretation that the Office intends to apply [...] has a significant impact on the rights of victims and affected communities and should be shared as soon as possible, particularly as to prevent any perceived politicization of the matter.” We also noted “[i]f Afghanistan is a priority, as you mentioned, taking the step of ensuring that a member of your team has the relevant language and cultural competencies, as was very recently done in the Myanmar investigation, should not be that heavy of a lift and we believe will contribute substantially to ensuring that your Office is able to engage the Afghanistan investigation in a manner that avoids the pitfalls of the last decade.”
32. On 17 March 2021, counsel and I emailed [REDACTED] again. We noted that after canvassing victims and civil society organizations in Afghanistan, “[a]ll of them have expressed that they have yet to receive any information concerning your investigation or their rights, as provided for by the Rome Statute.” We also noted that Registry representatives had informed us that they had been inhibited by the OTP’s lack of cooperation in sharing information with PIOS or VPRS. We noted that in light of these facts, that the OTP should provide information concerning the efforts that the OTP is undertaking to disseminate information regarding its investigation to Afghan victim and affected communities. We also asked (1) whether the OTP had concluded its analysis of the Afghan Government’s request and, if not, when it intended to do so; (2) whether the Office had finalized its legal understanding of what article 18(2) requires and if it could now share that position; and (3) whether the OTP could share general, non-confidential, information concerning the Afghan Government’s request, such as the number of subjects the materials identify, the size of the submission, and the number of incidents of which the Afghan Government requests deferral. Finally, we noted that in recent submissions to the ASP, the OTP had indicated that it was “not currently taking active steps” in the Afghanistan investigation “while respecting its duties under the Statute.” We asked how the OTP was fulfilling its obligations under article 54(1)(b) to “ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court” in light of the circumstances. We requested a response by 2 April 2021.

33. On 18 March 2021, [REDACTED] responded by emailing, noting, in relevant part, “[w]e will revert to you as soon as practicable, within the limitations imposed on the Office by confidentiality and professional obligations.”
34. On 12 April 2021, counsel emailed [REDACTED] asking to “see when you intended to respond to our below requests.” On the same day, [REDACTED] responded, writing “Internal consultations have taken much longer than anticipated due to a number of unforeseen intervening factors including the more than usual heavy schedules of key management and Afghan team personnel. Discussions are however progressing well and I hope to respond to you more fully in the near future once all the complex technical legal issues have been fully analyzed.”
35. On 19 April 2021, [REDACTED] responded to myself and counsel noting, in relevant part, that “the Office at this moment cannot divulge any information that breaches or undermines the confidentiality obligations it has towards the Government of Afghanistan whilst it is considering the deferral request”. [REDACTED] referred to the Prosecution’s “notification of the status of the Islamic Republic of Afghanistan’s article 18(2) deferral request”- ICC-02/17-142 filed on Friday, 16 April 2021. He noted that “I am constraint to comment on the Office’s legal position on the scope of article 18(2) whilst this verification process continues.” With regards to information concerning the investigation team, [REDACTED] noted that “such information pertains to internal OTP matters that are not divulged to third parties for a variety of reasons including security and maintaining the integrity of the Office’s work.” Finally, with regards to counsel’s note that we intended to seek judicial intervention, [REDACTED] noted that “while the Office is still verifying and assessing the confidential material in its possession – and is yet to receive – in the course of its continuing engagement with the Afghan authorities, taking matters to the PTC at this delicate stage would, in the Office’s view, be unhelpful.”
36. On the same day counsel responded noting “I understand that your email repeats the information provided in the public notice filed by the Prosecutor on Friday, but note that it still doesn’t address the majority of our questions, including whether the Office is even undertaking investigative activities and what efforts the Office is taking to disseminate information to Afghan victims and the affected communities. We also disagree with the suggestion that the legal requirements of article 18(2) cannot be understood or shared without the information presented by the Afghan government being assessed, especially since over a year has passed since the Afghan government first notified you of its request.” Counsel noted that we intended to seek judicial intervention “to secure our clients’ rights now and in the long-term” and offered [REDACTED] an opportunity to review this declaration to propose additional redactions.
- [REDACTED]
- [REDACTED]

Appendix Removed