

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **8 October 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

Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorise resumption of investigation under article 18(2) of the Statute'

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr Karim A. A. Khan
Mr Manoj Sachdeva

Counsel for Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

The Islamic Republic of Afghanistan

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Secretary-General of the United Nations
The Bureau of the Assembly of States Parties

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this ‘Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor’s “Request to authorise resumption of investigation under article 18(2) of the Statute”’.

I. Procedural history

1. On 12 April 2019, the Chamber rendered the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (the ‘Article 15 Decision’);¹ on 31 May 2019, Judge Antoine Kesia-Mbe Mindua issued his concurring and separate opinion.²
2. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised an investigation into ‘alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002’.³
3. On 15 April 2020, the Chamber received the Prosecutor’s ‘Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute’⁴ notifying the Chamber of the Government of the Islamic Republic of Afghanistan’s request of 26 March 2020 seeking a deferral of the Prosecutor’s investigation into the situation in the Islamic Republic of Afghanistan (the ‘Afghanistan’) pursuant to article 18(2) of the Rome Statute (the ‘Deferral Request’).⁵
4. On 16 April 2021, the Chamber received the Prosecutor’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request’, informing the

¹ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, [ICC-02/17-33](#).

² Concurring and Separate Opinion of Judge Kesia-Mbe Mindua, 31 May 2019, [ICC-02/17-33-Anx-Corr](#), annexed to Article 15 Decision, and a [public annex](#) (explanatory note).

³ Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, [ICC-02/17-138](#), with Separate Opinion of Judge Luz del Carmen Ibáñez Carranza, [ICC-02/17-138-Anx-Corr](#) and a public annex [ICC-02/17-138-Anx-Corr](#) (explanatory note).

⁴ [ICC-02/17-139](#).

⁵ [ICC-02/17-139-Anx1](#).

Chamber of the latest communications with Afghanistan in the context of the Deferral Request.⁶

5. On 27 September 2021, the Chamber received the Prosecutor’s ‘Request to authorise resumption of investigation under article 18(2) of the Statute’ (the ‘Request’).⁷

6. On 1 October 2021, a document titled ‘Response to “Request to authorize resumption of investigation under article 18(2) of the Statute” (ICC-02/17-161)’ (the ‘1 October 2021 Submission’), submitted by Ms Spojmie Ahmady Nasiri and Mr Nema Milaninia (the ‘Submitters’), was filed in the record of the situation in Afghanistan.⁸

II. The Prosecutor’s submissions

7. The Prosecutor asserts that, following the Deferral Request and ‘prior to August 2021, the Prosecution had not yet reached a final determination whether to seek to resume the Court’s investigation under article 18(2)’.⁹

8. The Prosecutor further recalls a number of recent development in Afghanistan, including the following: (i) ‘forces opposed to the government of President Ghani’ have launched offensives in various provinces across the country since 4 May 2021, have entered the capital Kabul on 15 August 2021, when President Ashraf Ghani left the country, and, on 7 September 2021, ‘announced a leadership structure through which they would carry their *de facto* control of the territory’ of Afghanistan.¹⁰

9. The Prosecutor submits that these events ‘are sufficiently clear’, have ‘an undisputed basis in fact’ and amount to a ‘fundamental change in circumstances’; accordingly, considering also their implications ‘including for law enforcement and judicial activity in Afghanistan’ and the fact that ‘domestic proceedings within the scope of the Deferral Request cannot meet the requirements of articles 17 and 18’, the Prosecutor reached the conclusion that it was necessary to submit the Request, notwithstanding the Deferral Request.¹¹ In the view of the Prosecutor, whilst ‘the

⁶ [ICC-02/17-142](#).

⁷ [ICC-02/17-161](#), with Confidential Annex A.

⁸ ICC-02/17-164.

⁹ Request, paras 8, 14. *See also* paras 15-18.

¹⁰ Request, para. 4.

¹¹ Request, paras 5, 7, 19-27.

Afghanistan authorities might have been willing and able to investigate and prosecute alleged crimes genuinely *prior* to the events of August 2021, they are now no longer able to do so'.¹²

10. The Prosecutor further submits that, in deciding upon the Request, the Chamber does not 'need [to] rule on the applicable standard of review', both 'due to the extraordinary nature of the circumstances in Afghanistan' and to the fact that 'it is the Prosecutor who conducts the primary review of the scope of the national proceedings identified in a State's request for deferral'.¹³ Finally, the Prosecutor notes that he has 'given notice to the Embassy of the Islamic Republic of Afghanistan in the Netherlands of its intention to file' the Request.¹⁴

11. The Prosecutor requests the Chamber to: (i) issue an order on an expedited basis, setting the procedure to be followed in deciding this request in accordance with rule 55(1) of the Rules of Procedure and Evidence (the 'Rules');¹⁵ (ii) set an expedite schedule for the reception of any potential observations;¹⁶ and (iii) issue an expedited decision authorising the resumption of the investigation in the Situation in Afghanistan, notwithstanding the Deferral Request.¹⁷

III. Determination by the Chamber

12. The Chamber notes the applicable law, and in particular article 18 of the Rome Statute (the 'Statute') and rules 53 to 55 of the Rules.

¹² Request, para. 19.

¹³ Request, para. 9, note 14 and references cited therein.

¹⁴ Request, para. 12. *See also* Confidential Annex A to the Request.

¹⁵ Request, para. 30.

¹⁶ Request, paras 11, 12.

¹⁷ Request, paras 1, 7, 30.

13. Article 18(2) of the Statute reads as follows:

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

14. Rule 54(1) of the Rules provides that:

An application submitted by the Prosecutor to the Pre-Trial Chamber in accordance with article 18, paragraph 2, shall be in writing and shall contain the basis for the application. The information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber.

15. Rule 55(2) of the Rules provides that:

The Pre-Trial Chamber shall examine the Prosecutor's application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation.

16. The Chamber notes that article 18 of the Statute as a whole is at the heart of the complementarity regime which underpins the Statute and governs the relationship and the sharing of responsibilities between the Court and the States in the investigation and prosecution of the most serious crimes. More specifically, article 18(2) of the Statute, on which the Request is premised, encapsulates the idea of a process of dialogue, between the Court and the Prosecutor on the one hand, and the relevant State, from whom observations can and should be sought pursuant to rule 55(2) of the Rules, on the other. It is of the essence, for this dialogue to take place and the principle of complementarity to be orderly, meaningfully and effectively implemented, that there be no uncertainty as to the representation and competent authorities of the concerned State. Contrary to what stated by the Prosecutor, the Request cannot therefore be legally adjudicated without addressing the 'question of which entity actually constitutes the State authorities of Afghanistan since 15 August 2021'; rather, this question is central to the triggering of the procedure under article 18(2) of the Statute.

17. The Prosecutor states that the events having taken place on the territory of Afghanistan as of 15 August 2021 'may constitute an unconstitutional transition of power', as a consequence of which there would 'be no basis to presume any continuity

of policies' with those examined by the Office of the Prosecutor when assessing the Deferral Request.

18. The Chamber notes that statements or assumptions of political nature have no place in a Court of law. Crucially, issues relating to a State's representation, or to the transition of power within a given State, are complex matters of international and constitutional law, as such not suitable to be addressed, or trivialised, by way of general, sweeping and unsubstantiated assertions. It stresses that it is not within the Prosecutor's, the Chamber's or any organ of the Court's purview to determine any of those matters, especially in a scenario where, for several reasons including the fast pace of relevant developments, and the short time elapsed since they materialised, there is still a large margin of uncertainty as to the legal implications of those events, including for the purposes of international law and international relations.

19. Accordingly, the Chamber considers that, for it to be in a position to make an informed decision and hence properly establish the procedure under article 18(2) of the Statute, it needs to receive reliable and updated information as to the identification of the authorities currently representing Afghanistan. Because of their respective institutional mandates, the entities suitable to provide this type of information at this stage are (i) the Secretary-General of the United Nations, as the depository of the original of the Statute and of instruments of ratification, acceptance, approval or accession to it pursuant to articles 126 and 128 of the Statute, and (ii) the Bureau of the Assembly of States Party, the Court's governing body, to both of which Afghanistan is, and remains, a party.

20. Finally, the Chamber is mindful of the need to promptly and urgently take all steps which are necessary and appropriate with a view to preserving evidence of crimes within the jurisdiction of the Court, all the more so when the situation on the ground is so volatile as to create the concrete risk that such evidence might not be available at a later stage. Accordingly, the Prosecutor is reminded that article 18(6) of the Statute states that:

Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

21. The Chamber notes that this provision, worded in terms which make apparent its exceptional nature and the ensuing need to adopt a strict approach in its interpretation and implementation, provides a crucial tool specifically aimed at the preservation of evidence pending the complex procedure and determinations required for adjudicating matters of complementarity, including a request under article 18(2) of the Statute; accordingly, the Prosecutor is invited to exercise the utmost diligence in resorting to it.

22. As regards the 1 October 2021 Submission, the Chamber notes that, pursuant to article 18(2) of the Statute, the sole parties to the proceedings triggered by the Prosecutor's request to be authorised to resume an investigation notwithstanding a State's request for deferral, are the Prosecutor, on the one hand, and the relevant State, on the other. The statutory framework neither provides an opportunity for *potential* victims to intervene at this stage¹⁸ nor for the participation of other persons or entities without leave of the Chamber. Accordingly, the Submitters, who style themselves as 'Legal Representative for Victims' and 'Counsel for Respondents', namely 'the Afghan civil society and Afghan victims of war',¹⁹ lack legal standing to participate in the proceedings triggered by the Prosecutor's Request and, as a result, the 1 October 2021 Submission must be dismissed *in limine*.

23. In addition, the Chamber regrets that the 1 October 2021 Submission was filed directly into the record (instead of through a transmission filing) and understands that this was due to a clerical error within the Registry. Whilst there would be no reason to now create a new transmission filing, the Chamber expects the Registry to carefully comply with its instructions in this matter.

¹⁸ See for instance, J. T. Holmes, 'Jurisdiction and Admissibility' in R. S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 343.

¹⁹ ICC-02/17-164, pp. 1, 2, 4, para. 1.

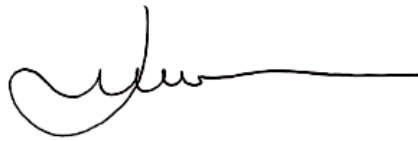
FOR THESE REASONS, THE CHAMBER

REQUESTS the Secretary-General of the United Nations and the Bureau of the Assembly of States Parties of the International Criminal Court to submit information on the identification of the authorities currently representing the Islamic Republic of Afghanistan by Monday 8 November 2021;

ORDERS the Registry to transmit this decision to the Secretary-General of the United Nations and to the Bureau of the Assembly of States Parties of the International Criminal Court;

DISMISSES *in limine* the 1 October 2021 Submission.

Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala
Presiding Judge



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Friday, 8 October 2021

At The Hague, The Netherlands