

**Original: English****No. ICC-02/17 OA5****Date: 4 April 2023****THE APPEALS CHAMBER****Before:****Judge Piotr Hofmański, Presiding  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc Perrin de Brichambaut  
Judge Solomy Balungi Bossa  
Judge Gocha Lordkipanidze****SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN****Public document****Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation"**

**Judgment 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, Prosecutor  
Ms Helen Brady

**Legal Representatives of Victims**

Ms Nada Kiswanson van Hooydonk  
Ms Katherine Gallagher  
Ms Margaret L. Satterthwaite  
Ms Nikki Reisch  
Mr Tim Moloney  
Ms Megan Hirst  
Ms Nancy Hollander  
Mr Mikołaj Pietrzak  
Mr Steven Powles  
Mr Conor McCarthy  
Ms Spojmie Ahmady Nasiri  
Mr Nema Milaninia  
Ms Haydee Dijkstal

**The Office of Public Counsel for Victims**

Ms Paolina Massidda  
Ms Sarah Pellet

**State Representatives**

Islamic Republic of Afghanistan

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Other**

Pre-Trial Chamber II

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” of 31 October 2022 (ICC-02/17-196),

*Issues* the following

## JUDGMENT

The Impugned Decision is amended to align with the scope of the Prosecutor’s investigation in the Afghanistan situation “in relation to 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 in the period since 1 July 2002”, as previously determined by the Appeals Chamber.

## REASONS

### I. INTRODUCTION

1. On 20 November 2017, the Prosecutor filed a request for authorisation of an investigation into crimes allegedly committed in the Islamic Republic of Afghanistan (hereinafter: “Afghanistan”) since 1 May 2003, as well as related crimes allegedly committed in other States Parties since 1 July 2002 (hereinafter: “Article 15 Request”),<sup>1</sup> which Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) rejected on 12 April 2019 (hereinafter: “Article 15 Decision”).<sup>2</sup>

2. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised the Prosecutor “to commence an investigation ‘in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as

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<sup>1</sup> [Public redacted version of “Request for authorisation of an investigation pursuant to article 15”](#), ICC-02/17-7-Red, para. 376. A confidential redacted *ex parte* version (only available to Prosecution), ICC-02/17-7-Conf-Exp was notified on the same day.

<sup>2</sup> [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan](#), ICC-02/17-33.

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 in the period since 1 July 2002” (hereinafter: “Appeals Judgment of 5 March 2020” or “Appeals Judgment”).<sup>3</sup>

3. Following a request by the government of Afghanistan seeking a deferral of the Prosecutor’s investigation,<sup>4</sup> on 27 September 2021, the Prosecutor requested authorisation to resume the investigation in accordance with article 18(2) of the Statute (hereinafter: “Article 18(2) Request”),<sup>5</sup> which the Pre-Trial Chamber granted on 31 October 2022 (hereinafter: “Impugned Decision”).<sup>6</sup>

4. The present appeal concerns a challenge raised by the Prosecutor against one paragraph of the Impugned Decision in which, according to the Prosecutor, the Pre-Trial Chamber erred in law and in fact, by disregarding and/or misinterpreting the scope of the Court’s jurisdiction in this situation, as settled by the Appeals Chamber in its judgment of 5 March 2020,<sup>7</sup> and by misreading the Article 15 Request, and in particular by considering the ‘Islamic State – Khorasan Province’ as a “new party to the conflict”.<sup>8</sup>

## II. PROCEDURAL HISTORY

5. On 20 November 2017, the Prosecutor filed the Article 15 Request.<sup>9</sup>

6. On 12 April 2019, the Pre-Trial Chamber issued the Article 15 Decision, rejecting the Article 15 Request.<sup>10</sup>

7. On 5 March 2020, the Appeals Chamber issued the Appeals Judgment.<sup>11</sup>

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<sup>3</sup> [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), ICC-02/17-138 (OA4), para. 79.

<sup>4</sup> [Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18\(2\) of the Statute](#), ICC-02/17-139.

<sup>5</sup> [Request to authorise resumption of investigation under article 18\(2\) of the Statute](#), ICC-02/17-161.

<sup>6</sup> [Impugned Decision](#).

<sup>7</sup> See [Prosecution appeal of “Decision pursuant to article 18 \(2\) of the Statute authorising the Prosecution to resume investigation”](#), ICC-02/17-198 (hereinafter: “Appeal Brief”), paras 11-31.

<sup>8</sup> See [Appeal Brief](#), paras 32-37.

<sup>9</sup> [Article 15 Request](#), para. 376.

<sup>10</sup> [Article 15 Decision](#).

<sup>11</sup> [Appeals Judgment](#), para. 79.

8. On 15 April 2020, the Prosecutor notified the Pre-Trial Chamber of a request by the government of Afghanistan seeking a deferral of the Prosecutor’s investigation into the Afghanistan situation (hereinafter: “Article 18(2) Deferral Request”).<sup>12</sup>
9. On 27 September 2021, the Prosecutor filed the Article 18(2) Request.<sup>13</sup>
10. On 31 October 2022, the Pre-Trial Chamber issued the Impugned Decision pursuant to article 18(2) of the Statute, authorising the resumption of the investigation.<sup>14</sup>
11. On 7 November 2022, the Prosecutor submitted his notice of appeal (hereinafter: “Notice of Appeal”).<sup>15</sup>
12. On 22 November 2022, the Prosecutor filed his appeal brief (hereinafter: “Appeal Brief”).<sup>16</sup> In the Appeal Brief, the Prosecutor raises two grounds of appeal, both challenging paragraph 59 of the Impugned Decision.
13. On 23 November 2022, the Appeals Chamber issued its “Order on the conduct of the appeal proceedings”, directing the participating victims, as well as the government of Afghanistan, to submit any responses to the Appeal Brief by 15 December 2022.<sup>17</sup>
14. On 14 December 2022, victims represented by Ms Spojmie Ahmady Nasiri (hereinafter: “LRV 1”) filed their response.<sup>18</sup>
15. On 15 December 2022, the legal representatives of five victims and cross-border victims (hereinafter: “LRV 2”), the Office of Public Counsel for Victims (hereinafter: “OPCV”) and the government of Afghanistan filed their respective responses.<sup>19</sup>

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<sup>12</sup> [Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18\(2\) of the Statute](#), ICC-02/17-139.

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

<sup>14</sup> [Impugned Decision](#).

<sup>15</sup> [Notice of Appeal of “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)](#), ICC-02/17-197.

<sup>16</sup> [Appeal Brief](#).

<sup>17</sup> [Order on the conduct of the appeal proceedings](#), ICC-02/17-200.

<sup>18</sup> [Victims’ Response to “Prosecution appeal of “Decision pursuant to article 18 \(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)” \(ICC-02/17-198\)](#), ICC-02/17-201 (hereinafter: “LRV 1 Response”).

<sup>19</sup> [Response to ‘Prosecution appeal of “Decision pursuant to article 18 \(2\) of the Statute authorising the Prosecution to resume investigation”\(ICC-02/17-196\)’, ICC-02/17-204](#) (hereinafter: “LRV 2 Response”); [Submission on behalf of victims pursuant to the “Order on the conduct of the appeal proceedings” \(No. ICC-02/17-200\)](#), ICC-02/17-202 (hereinafter: “OPCV Response”); [Response to the](#)

16. On 23 December 2022, following a request from the Prosecutor,<sup>20</sup> the Appeals Chamber granted the Prosecutor leave to reply to the response of the LRV 2 by 16 January 2023.<sup>21</sup>

17. On 16 January 2023, the Prosecutor filed a notice to discontinue the appeal pursuant to rule 157 of the Rules of Procedure and Evidence (hereinafter: “Prosecutor’s Notice of Discontinuance” and “Rules”, respectively).<sup>22</sup>

18. On 24 January 2023, the Appeals Chamber issued an order, inviting observations from the participating victims and Afghanistan on the Prosecutor’s Notice of Discontinuance.<sup>23</sup>

19. On 24 January, and 1 and 3 February 2023, the LRV 2,<sup>24</sup> the OPCV, and the legal representative of victims a/00001/21 through a/00007/21 filed their respective observations on the Prosecutor’s Notice of Discontinuance.<sup>25</sup>

20. On 15 February 2023, the Appeals Chamber invited the Prosecutor to file submissions in response to the victims’ observations on the Notice of Discontinuance, which the Prosecutor filed on 22 February 2023.<sup>26</sup>

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[appeal of the Prosecutor against the decision of the Pre-Trial Chamber II entitled “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” of 31 October 2022 \(ICC-02/17-196\)](#), ICC-02/17-203 (hereinafter: “Response of Afghanistan”).

<sup>20</sup> [Prosecution request for leave to reply to “Response to ‘Prosecution appeal of ‘Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation’” \(ICC-02/17-204\)](#), 19 December 2022, ICC-02/17-205.

<sup>21</sup> [Decision on the Prosecutor’s request for leave to reply](#), ICC-02/17-206, p. 3 and para. 10.

<sup>22</sup> [Notice of discontinuance of the appeal of the Prosecutor against the “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(OA5\)](#), ICC-02/17-207.

<sup>23</sup> [Order on the filing of observations on the Prosecutor’s notice of discontinuance of the appeal](#), 24 January 2023, ICC-02/17-208.

<sup>24</sup> The Appeals Chamber notes that the same group of victims as in the LRV 2 Response are represented by two additional counsel.

<sup>25</sup> [Response to ‘Notice of discontinuance of the appeal of the Prosecutor against the “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(OA5\)’](#), ICC-02/17-209 (hereinafter: “LRV 2 Observations on Prosecutor’s Notice of Discontinuance”); [Submissions on behalf of victims pursuant to the “Order on filing of observations on the Prosecutor’s notice of discontinuance of the appeal” \(No. ICC-02/17-208\)](#), ICC-02/17-210 (hereinafter: “OPCV Observations on Prosecutor’s Notice of Discontinuance”); [Submission on behalf of Victims in accordance with the Appeals Chamber’s “Order on the filing of observations on the Prosecutor’s notice of discontinuance of the appeal” of 24 January 2023](#), ICC-02/17-211.

<sup>26</sup> [Prosecution’s response to observations of legal representatives of victims concerning discontinuance of the appeal under rule 157 \(ICC-02/17-209, ICC-02/17-210 and ICC-02/17-211\)](#), ICC-02/17-214 (hereinafter: “Prosecutor’s Response to Victims’ Observations”).

21. On 16 March 2023, the Appeals Chamber found the Prosecutor’s notice of discontinuance of the appeal invalid and decided to proceed to address the merits of the appeal.<sup>27</sup>

22. In the same decision, recalling its decision of 23 December 2022,<sup>28</sup> the Appeals Chamber invited the Prosecutor to file a reply to the LRV 2 Response,<sup>29</sup> which the Prosecutor filed the following day.<sup>30</sup>

### III. STANDARD OF REVIEW

23. Regarding errors of law, the Appeals Chamber has previously held that it

will not defer to the relevant Chamber’s legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.<sup>31</sup>

If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.<sup>32</sup> A decision

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<sup>27</sup> [Decision on Prosecutor’s notice of discontinuance of the appeal](#), 16 March 2023, ICC-02/17-216 (OA5) (hereinafter: “Decision on the Prosecutor’s Notice of Discontinuance”), p. 3 and para. 39.

<sup>28</sup> [Decision on the Prosecutor’s request for leave to reply](#), ICC-02/17-206, p. 3 and para. 10.

<sup>29</sup> [Decision on the Prosecutor’s Notice of Discontinuance](#), p. 3 and para. 40.

<sup>30</sup> [Prosecution reply to “Response to ‘Prosecution appeal of “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation”” \(ICC-02/17-204\)](#), 17 March 2023, ICC-02/17-217 (hereinafter: “Prosecutor’s Reply”).

<sup>31</sup> *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022”](#), 19 December 2022, ICC-01/14-01/22-124-Red (OA3) (hereinafter: “Mokom OA3 Judgment”), para. 19, referring to *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”](#), 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23. *The Prosecutor v. Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’](#), 19 February 2020, ICC-01/12-01/18-601-Red (OA) (hereinafter: “Al Hassan OA Judgment”), para. 38.

<sup>32</sup> *Mokom OA3 Judgment*, para. 20, referring to *Al Hassan OA Judgment*, para. 38; *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”](#), 27 May 2015, ICC-02/11-01/12-75-Red (OA) (hereinafter: “Simone Gbagbo OA Judgment”), para. 40. See also *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*,

is “materially affected by an error of law” if the chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.<sup>33</sup>

24. As to errors of fact,

the Appeals Chamber will determine whether a chamber’s factual findings were reasonable in the particular circumstances of the case. The Appeals Chamber will not disturb a trial chamber’s factual finding only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber’s conclusion could have reasonably been reached from the evidence on the record.<sup>34</sup>

25. The above standard of review will guide the analysis of the Appeals Chamber.

#### IV. RELEVANT PART OF THE IMPUGNED DECISION

26. After having considered that Afghanistan “is not presently carrying out genuine investigations and that it has not acted in a manner that shows an interest in pursuing the Deferral Request”, the Pre-Trial Chamber granted the Prosecutor’s Article 18(2) Request and authorised the resumption of the investigation in the Afghanistan Situation.<sup>35</sup>

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[Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incapacité” \(ICC-02/05-01/20-302\)”, 1 November 2021, ICC-02/05-01/20-503 \(OA8\) \(hereinafter: “Abd-Al-Rahman OA8 Judgment”\)](#), para. 12; [The Prosecutor v. Dominic Ongwen, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’, 17 July 2019, ICC-02/04-01/15-1562 \(OA4\) \(hereinafter: “Ongwen OA4 Judgment”\)](#) para. 45.

<sup>33</sup> [Mokom OA3 Judgment](#), para. 20, referring to [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41. See also [Abd-Al-Rahman OA8 Judgment](#), para. 12; [The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\) of the Regulations of the Court’, 1 July 2021, ICC-01/12-01/18-1562-Red \(OA3\)](#), para. 18; [Ongwen OA4 Judgment](#), para. 45.

<sup>34</sup> [Mokom OA3 Judgment](#), para. 21, referring to [The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”, 19 July 2017, ICC-02/11-01/15-992-Red \(OA10\)](#), para. 16; [The Prosecutor v. Bosco Ntaganda, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’, 30 March 2021, ICC-01/04-02/06-2667-Red \(A3\)](#), paras 27-29.

<sup>35</sup> [Impugned Decision](#), para. 58.



27. Paragraph 58 of the Impugned Decision reads as follows:

[...] the Chamber considers that Afghanistan is not presently carrying out genuine investigations and that it has not acted in a manner that shows an interest in pursuing the Deferral Request. [...] The Chamber therefore grants the Prosecution’s Application and authorises the resumption of the investigation in the Afghanistan Situation. The Chamber emphasises that, notwithstanding the Prosecutor’s 27 September 2021 statement to the media in which a modified focus was referred to, the present authorisation relates to all alleged crimes and actors that were subject to the Prosecution’s ‘Request for authorisation of an investigation pursuant to article 15’, for which the Appeals Chamber has granted authorisation.<sup>36</sup>

28. In paragraph 59 of the Impugned Decision, the Pre-Trial Chamber stated:

[t]he Chamber reminds the Prosecution, however, that any authorisation decision also has a limiting function, because only the crimes falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it, can be the object of its investigation. Alleged crimes unrelated to such situation and conflicts or related to any new armed conflict(s), be they international or non-international in nature, and new parties to such a conflict, fall outside the scope of the investigation as authorised; although the Prosecution may, of course, submit a request under article 15 of the Statute to either broaden an investigation or open a new one.<sup>37</sup>

## V. SUMMARY OF THE SUBMISSIONS

### A. The Prosecutor’s submissions

29. In the Appeal Brief, the Prosecutor raises two grounds of appeal, both challenging paragraph 59 of the Impugned Decision.

30. Under the first ground of appeal, the Prosecutor submits that the Pre-Trial Chamber erred in law by limiting the scope of the Court’s jurisdiction to crimes pre-dating the Article 15 Request or the Appeals Judgment.<sup>38</sup> The Prosecutor avers that the Pre-Trial Chamber disregarded the Appeals Judgment which already set out the parameters of the investigation.<sup>39</sup> In particular, the Prosecutor argues that his

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<sup>36</sup> [Impugned Decision](#), para. 58 (footnotes omitted).

<sup>37</sup> [Impugned Decision](#), para. 59. *See also* fn. 108 (“Appeals Chamber Judgment on the Afghanistan Article 15 Decision, para. 79; and the 20 November 2017 Request”), and fn. 109 (“Compare, e.g., the Prosecutor’s reference to the ‘Islamic State – Khorasan Province’ in his 27 September 2021 press statement”).

<sup>38</sup> [Appeal Brief](#), p. 6.

<sup>39</sup> [Appeal Brief](#), paras 12, 14-23. *See also* [Appeals Judgment](#), para. 79.

investigative powers are limited during the preliminary examination and that, as noted by the Appeals Chamber, he would not be in a position at that stage to exhaustively identify each incident, crime or perpetrator that could be subjected to the investigation.<sup>40</sup>

31. The Prosecutor further argues that, during the preliminary examination, he cannot identify crimes which may occur after his request under article 15(3) of the Statute, and that there is “no reason in law or logic” to require further authorisation for such crimes, if they fall within the parameters of a previously authorised situation or are sufficiently linked to that situation.<sup>41</sup> The Prosecutor submits that he must carry out an investigation into the situation “*as a whole*”, and recalls the Appeals Chamber’s holding that “restricting the authorised investigation to the factual information obtained during preliminary examination would erroneously inhibit the Prosecution’s truth-seeking function”.<sup>42</sup>

32. Furthermore, the Prosecutor submits that the alternative proposed by the Pre-Trial Chamber that the Prosecutor may request further authorisation under article 15(3) of the Statute is “unworkable in practice”, as it may lead him to submit “repeated, and [...] ultimately unnecessary” requests for authorisation as new facts are uncovered.<sup>43</sup> The Prosecutor argues that this course of action is contrary to his independence and mandate under articles 42(1) and 54(1) of the Statute for the conduct of investigations.<sup>44</sup>

33. The Prosecutor further contends that the Pre-Trial Chamber is bound by the Appeals Chamber’s determination of the scope of the Court’s jurisdiction in the Afghanistan situation, which, in his view, was “conclusive and *res judicata*”,<sup>45</sup> and that the binding effect of interlocutory judgments on appeal is essential to the “sound judicial administration of this Court”.<sup>46</sup> Furthermore, the Prosecutor submits that “finality and judicial certainty are especially important with regard to matters such as

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<sup>40</sup> [Appeal Brief](#), para. 19, referring to [Appeals Judgment](#), para. 59.

<sup>41</sup> [Appeal Brief](#), para. 20.

<sup>42</sup> [Appeal Brief](#), para. 21, referring to [Appeals Judgment](#), paras 60, 61.

<sup>43</sup> [Appeal Brief](#), para. 22.

<sup>44</sup> [Appeal Brief](#), para. 22.

<sup>45</sup> [Appeal Brief](#), paras 13, 24.

<sup>46</sup> [Appeal Brief](#), para. 25.

the scope of the Court’s jurisdiction, which not only affect the Court as a whole but also external actors with whom the Court interacts”.<sup>47</sup>

34. Finally, the Prosecutor submits that the approach taken in the Appeals Judgment is consistent with that taken by many other chambers of this Court when defining the scope of the Court’s jurisdiction in other situations, and that similar principles have consistently been applied by chambers acting under article 15(4) of the Statute.<sup>48</sup>

35. Under the second ground of appeal, the Prosecutor submits that the Pre-Trial Chamber erred in fact by misreading the Prosecutor’s Article 15 Request, and, in particular, by qualifying the “Islamic State-Khorasan Province” as “a new party to the conflict”.<sup>49</sup> The Prosecutor argues that he relied on particular incidents and potential cases only for the limited purpose of the Article 15 Request;<sup>50</sup> that any authorised investigation would not be limited to the incidents and groups of perpetrators mentioned;<sup>51</sup> and that he “should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation [...] so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.”<sup>52</sup>

36. Accordingly, the Prosecutor requests that the Appeals Chamber correct the errors identified, reverse and amend paragraph 59 of the Impugned Decision, and confirm the scope of the Court’s jurisdiction in the terms articulated in the Appeals Judgment.<sup>53</sup>

## **B. Victims’ responses**

### *1. LRV 1 Response*

37. The LRV 1 submit that the appeal should be “resolved expeditiously”, as the investigation in the Afghanistan situation “has faced countless delays that have only served to put victims at risk, jeopardized the successful investigation and prosecution of a case including by putting critical evidence at jeopardy of loss, and caused victims

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<sup>47</sup> [Appeal Brief](#), para. 26.

<sup>48</sup> [Appeal Brief](#), paras 29-30.

<sup>49</sup> [Appeal Brief](#), p. 20, paras 32-36.

<sup>50</sup> [Appeal Brief](#), para. 33.

<sup>51</sup> [Appeal Brief](#), para. 34, referring to [Article 15 Request](#), para. 38.

<sup>52</sup> [Appeal Brief](#), para. 35.

<sup>53</sup> [Appeal Brief](#), para. 37.

and other communities affected by the investigation to lose faith in the Court’s ability to effectively render justice”.<sup>54</sup>

38. The LRV 1 further submit that the Impugned Decision was rendered on an incorrect reading of article 18(2) of the Statute.<sup>55</sup> The LRV 1 argue that the government of Afghanistan’s Article 18(2) Deferral Request did not suspend the entire investigation authorised by the Appeals Chamber but only suspended the Prosecutor’s investigation with respect to the specific persons identified by the government of Afghanistan in its article 18(2) notice.<sup>56</sup>

39. The LRV 1 argue that for this reason the Prosecutor’s investigation against the ISK-P had never been suspended and that the Pre-Trial Chamber could not alter or restrict that investigation when rendering the Impugned Decision. They therefore request that the appeal should be granted.<sup>57</sup>

## 2. *LRV 2 Response*

40. The LRV 2 support the Prosecutor’s request that the Appeals Chamber reverse and amend the Impugned Decision in part.<sup>58</sup> They endorse the Prosecutor’s submissions that the Appeals Chamber already articulated the scope of the investigation and of the Court’s jurisdiction; that the Pre-Trial Chamber is bound by the Appeals Chamber’s prior determination; and that the Appeals Judgment is consistent with the Court’s jurisprudence in this regard.<sup>59</sup>

41. At the same time, the LRV 2 request that in amending the Impugned Decision, the Appeals Chamber “clarify and confirm the Prosecutor’s duty to investigate the entire situation.”<sup>60</sup> They submit that “[u]ncertainty has been caused by the [statement made by the Prosecutor on 27 September 2021 (hereinafter: “Statement”)] ‘prioritizing’

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<sup>54</sup> [LRV 1 Response](#), paras 1, 3-9.

<sup>55</sup> [LRV 1 Response](#), paras 2, 10.

<sup>56</sup> [LRV 1 Response](#), paras 2, 10-16.

<sup>57</sup> [LRV 1 Response](#), paras 2, 16-17.

<sup>58</sup> [LRV 2 Response](#), para. 7.

<sup>59</sup> [LRV 2 Response](#), paras 7, 10-11.

<sup>60</sup> [LRV 2 Response](#), para. 8.

parts of the investigation”, which allegedly contradicts the Prosecutor’s obligation to investigate the situation as a whole, under article 54(1) of the Statute.<sup>61</sup>

42. The LRV 2 argue that the Statement must be read as “an unequivocal declaration by the Prosecutor of his intentions”,<sup>62</sup> and that the Prosecutor’s decision to investigate only one of the four components of the Afghanistan situation<sup>63</sup> “impacts the objectivity of his investigation” and constitutes a “legal error”.<sup>64</sup> The LRV 2 further submit that if the Prosecutor’s first ground of appeal is granted based on the submissions in the Appeal Brief, the Prosecutor must be required to comply with the duty “to carry out the investigation into the situation *as a whole*”.<sup>65</sup>

43. In light of the foregoing, the LRV 2 request that the Appeals Chamber reverse and amend paragraph 59 of the Impugned Decision, confirm the scope of the Court’s jurisdiction in the situation, and confirm the Prosecutor’s duty to investigate the situation as a whole.<sup>66</sup>

### 3. OPCV Response

44. The OPCV supports the Prosecutor’s submissions that paragraph 59 of the Impugned Decision disregards the Appeals Judgment on the scope of the Court’s jurisdiction and the Prosecutor’s investigation in the Afghanistan situation.<sup>67</sup>

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<sup>61</sup> [LRV 2 Response](#), p. 6, para. 16, referring to [Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18\(2\) seeking authorisation to resume investigations in the Situation in Afghanistan](#), 27 September 2021. See also [LRV 2 Response](#), paras 17-18, 23-26.

<sup>62</sup> [LRV 2 Response](#), para. 22; [Impugned Decision](#), paras 33-36, 58.

<sup>63</sup> The LRV 2 argue that the Article 15 Request identified the following components in respect of which the Prosecutor concluded that there was reasonable basis to believe crimes within the Court’s jurisdiction occurred: (i) crimes against humanity and war crimes allegedly committed by the Taliban and affiliated armed groups (“Component One”); (ii) war crimes allegedly committed by the Afghan National Security Forces (“Component Two”); and (iii) war crimes allegedly committed by members of the United States armed forces and members of the Central Intelligence Agency (“Component Three”). With regard to other acts allegedly committed by members of the international armed forces (“Component Four”), the (former) Prosecutor explained that, at that stage, she had not reached a determination that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had occurred; however, it was noted that if an investigation was opened the alleged crimes could be assessed further within the scope of the authorised investigation. See [LRV 2 Response](#), paras 12 (referring to [Article 15 Request](#), paras 53-71), 15.

<sup>64</sup> [LRV 2 Response](#), paras 23, 29.

<sup>65</sup> [LRV 2 Response](#), para. 33 (emphasis in original). See also para. 8.

<sup>66</sup> [LRV 2 Response](#), para. 43.

<sup>67</sup> [OPCV Response](#), paras 4, 16.

45. The OPCV agrees with the Prosecutor that the Appeals Chamber has already made a determination on the same issue, involving the same actors; hence the determination is *res judicata* and the Pre-Trial Chamber is bound by it.<sup>68</sup> The OPCV submits that while the victims have a right to know the truth, have access to justice, and request reparations, their rights depend on the Prosecutor’s initiation of an investigation or request for authorisation to open an investigation, and that therefore the proper scope of an authorised investigation has “an impact on the fundamental rights of the victims and their legitimate expectations in terms of truth, justice and accountability”.<sup>69</sup>

46. The OPCV avers that the confusion on the scope of the authorised investigation may cause “stress, anxiety and concern” to the victims, especially because the wording of paragraph 59 suggests that the investigation may be limited in scope and time, therefore also limiting the nature and number of crimes eventually investigated.<sup>70</sup>

47. The OPCV agrees with the Prosecutor that the Pre-Trial Chamber erred in fact when it referred to the “Islamic State-Khorasan Province” as an example of a “new party to the conflict”.<sup>71</sup> The OPCV submits that the group was explicitly referred to in the Article 15 Request.<sup>72</sup>

48. Accordingly, the OPCV requests that the Appeals Chamber grant the Prosecutor’s appeal, reverse the Impugned Decision and confirm the scope of the Court’s jurisdiction in the situation in Afghanistan as determined by its previous judgment.<sup>73</sup>

### **C. Response of Afghanistan**

49. The government of Afghanistan submits that it “echoes all legitimate concerns in relation to atrocities committed in Afghanistan since May 2003”, and that it “strongly advocate[s] for appropriate measures intended to serve justice and prevent future atrocities”.<sup>74</sup>

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<sup>68</sup> [OPCV Response](#), para. 18.

<sup>69</sup> [OPCV Response](#), paras 19-22.

<sup>70</sup> [OPCV Response](#), para. 4.

<sup>71</sup> [OPCV Response](#), para. 32.

<sup>72</sup> [OPCV Response](#), para. 32, referring to [Article 15 Request](#), paras 19, 63.

<sup>73</sup> [OPCV Response](#), para. 35.

<sup>74</sup> [Response of Afghanistan](#), p. 3.

## D. Prosecutor's Reply

50. The Prosecutor submits that certain aspects of the LRV 2's observations, in particular those concerning the Prosecutor's exercise of discretion in managing investigations,<sup>75</sup> "fall outside of the confined scope of the appeal – which solely relates to the Pre-Trial Chamber's apparent redefinition of the scope of the appeal of the Court's jurisdiction in the Afghanistan situation",<sup>76</sup> and, as such, they are "inadmissible and should be summarily dismissed".<sup>77</sup> Moreover, he argues that these observations are "incorrect" because they "misunderstand the Court's legal framework and, in particular, the Prosecutor's duties and prerogatives in the conduct of investigations and prosecutions".<sup>78</sup>

## VI. MERITS

### A. Admissibility of the appeal

51. The Prosecutor challenges paragraph 59 of the Impugned Decision, arguing that the Pre-Trial Chamber (i) erred in law by limiting the scope of the Court's jurisdiction to crimes pre-dating the Article 15 Request or the Appeals Judgment,<sup>79</sup> and (ii) erred in fact by misreading the Article 15 Request, and in particular by qualifying the "Islamic State-Khorasan Province" as "a new party to the conflict".<sup>80</sup>

52. The Prosecutor does not challenge the authorisation of the resumption of the investigation in the Afghanistan situation as such. Rather, his appeal is limited to the above-mentioned paragraph of the Pre-Trial Chamber's reasoning,<sup>81</sup> emphasising that he "does *not* appeal any other part of the Pre-Trial Chamber's reasoning essential to its decision".<sup>82</sup>

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<sup>75</sup> [LRV 2 Response](#), paras 8, 12-43.

<sup>76</sup> [Prosecutor's Reply](#), paras 1, 3-4.

<sup>77</sup> [Prosecutor's Reply](#), paras 1, 4, 6.

<sup>78</sup> [Prosecutor's Reply](#), paras 1, 5.

<sup>79</sup> [Appeal Brief](#), paras 11-31.

<sup>80</sup> [Appeal Brief](#), paras 32-36.

<sup>81</sup> [Appeal Brief](#), para 1, 37 in which the Prosecutor "appeals paragraph 59 of [the Impugned Decision]", and requests the Appeals Chamber to "correct the errors identified, reverse and amend paragraph 59 of the Decision and confirm the scope of the Court's jurisdiction in this situation in the terms previously articulated by the Appeals Chamber." See also [Notice of Appeal](#), para. 1 in which the Prosecutor gave notice of "its appeal of paragraph 59 of [the Impugned Decision]".

<sup>82</sup> [Notice of Appeal](#), para. 2.

53. At the outset, the Appeals Chamber notes that under regulation 64(1)(c) of the Regulations of the Court, a decision may be appealed in whole or in “part”.<sup>83</sup> As a result, the Appeals Chamber considers that an appeal can indeed be directed against part of a decision, provided that the challenged part impacts the clarity or understanding of the decision and, in particular, its operative part. In this respect, the Appeals Chamber stresses the importance of coherence and certainty in a judicial decision,<sup>84</sup> observing that the operative part of a decision must be read with the corresponding reasoning that led to it.<sup>85</sup> In other words, although a question may arise as to the admissibility of an appeal when it is directed against one sentence or paragraph of the impugned decision, the appeal must be considered admissible when the impugned passage, read together with the operative part of the decision, raises doubts as to its understanding. For the reasons that follow, the Appeals Chamber considers that paragraph 59 of the Impugned Decision does create uncertainty as to the scope of the authorised investigation and the Court’s jurisdiction in the Afghanistan situation, and as such, affects the understanding of the operative part of the Impugned Decision. Consequently, the Appeals Chamber considers the appeal to be admissible.

## B. Determination by the Appeals Chamber

54. The Prosecutor raises two grounds of appeal. In light of their interrelated nature, the Appeals Chamber considers it appropriate to address the two grounds of appeal together.

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<sup>83</sup> Regulation 64 (1)(c) of the Regulations of the Court provides that an appeal shall state, *inter alia*, “[w]hether the appeal is directed against the whole decision or part thereof”.

<sup>84</sup> See *The Prosecutor v. Dominic Ongwen*, Annex I to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”, [Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza](#), 15 December 2022, ICC-02/04-01/15-2023-Anx1, paras 1 and 46 (“Certainty and clarity are at the core of the judicial work. All judicial decisions must reflect the reasoning of the Judges in a clear and unambiguous manner. This is an indispensable requirement of fairness”). On the requirement to issue a reasoned opinion, see *The Prosecutor v. Mahamat Said Abdel Kani*, [Public Redacted Version of “Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions””](#), 29 June 2021, ICC-01/14-01/21-111, 17 May 2022, ICC-01/14-01/21-111-Red2 (OA), paras 41-45; see also *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Public Redacted Version of Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 25 March 2022 entitled “Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka”](#), 19 July 2022, ICC-01/14-01/22-70-Red (OA), paras 3, 61; [Mokom OA3 Judgment](#), paras 2, 25, 37.

<sup>85</sup> See also in this sense, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 157.



55. The Appeals Chamber notes that the Pre-Trial Chamber, in the operative part of the Impugned Decision, clearly, and without reservations, “authorise[d] the resumption of the investigation in the situation in Afghanistan”.<sup>86</sup> This is consistent with what the Pre-Trial Chamber stated in paragraph 58 of the Impugned Decision, where, after concluding that Afghanistan was not, at that time, carrying out genuine investigations and that it had not acted in a manner that shows an interest in pursuing the request for a deferral of the investigation, the Pre-Trial Chamber granted the Prosecution’s Article 18(2) Request and “authorise[d] the resumption of the investigation in the Afghanistan Situation”.<sup>87</sup> The Pre-Trial Chamber specified that “the present authorisation relates to all alleged crimes and actors that were subject to the [Article 15 Request], for which the Appeals Chamber has granted authorisation.”<sup>88</sup> The Appeals Chamber observes that the Pre-Trial Chamber, both in paragraphs 58 and 59, recalled and acknowledged the Appeals Judgment, authorising the Prosecutor to commence an investigation, and setting out the scope of the situation and of the Court’s jurisdiction in Afghanistan.<sup>89</sup>

56. The Appeals Chamber, however, notes the language used by the Pre-Trial Chamber in the paragraph challenged on appeal. In paragraph 59 of the Impugned Decision, the Pre-Trial Chamber “remind[ed] the Prosecution [...] that any authorisation decision also has a limiting function, because only the crimes falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it, can be the object of its investigation.”<sup>90</sup> It further added that “[a]lleged crimes unrelated to such situation and conflicts or related to any new armed conflict(s), be they international or non-international in nature, and new parties to such a conflict, fall outside the scope of the investigation as authorised; although the Prosecution may, of course, submit a request under article 15 of the Statute to either broaden an investigation or open a new one.”<sup>91</sup> As an example of “new parties to the conflict”, the Pre-Trial Chamber referred,

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<sup>86</sup> [Impugned Decision](#), p. 26.

<sup>87</sup> [Impugned Decision](#), para. 58.

<sup>88</sup> [Impugned Decision](#), para. 58.

<sup>89</sup> [Impugned Decision](#), paras 58 (*see also* fn. 107), 59 (fn. 108), referring to [Appeals Judgment](#), para. 79.

<sup>90</sup> [Impugned Decision](#), para. 59 (footnote omitted).

<sup>91</sup> [Impugned Decision](#), para. 59 (footnote omitted).

in a footnote, to the “Prosecutor’s reference to the ‘Islamic State – Khorasan Province’ in his 27 September 2021 press statement”.<sup>92</sup>

57. Considering in particular the Pre-Trial Chamber’s reference, in footnote 109, to the Prosecutor’s Statement, and taking into account the submissions and concerns expressed by the Prosecutor and the victims concerning the interpretation of this paragraph, the Appeals Chamber finds that the language used in paragraph 59 of the Impugned Decision is ambiguous and creates uncertainty as to the precise scope of the Court’s jurisdiction and the Prosecutor’s investigation. In particular, the Pre-Trial Chamber appears to limit the scope of the Prosecutor’s investigation in Afghanistan with respect to the crimes and parties as they existed “at the time of the decision authorising the investigation and based on the request to open it”.<sup>93</sup> In other words, it appears to exclude from the authorised investigations crimes that have been committed after the date of the decision authorising the investigation (5 March 2020), and crimes committed by “new parties to the conflict”, potentially including the “Islamic State – Khorasan Province”.

58. In this context, the Appeals Chamber recalls that in the Appeals Judgment of 5 March 2020, it found, *inter alia*, that “the Pre-Trial Chamber erred in finding that the scope of any authorisation granted would be limited to the incidents mentioned in the [Article 15 Request] and those closely linked thereto”,<sup>94</sup> and it authorised the Prosecutor “to commence an investigation ‘in relation to 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 in the period since 1 July 2002’”.<sup>95</sup>

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<sup>92</sup> [Impugned Decision](#), fn. 109.

<sup>93</sup> [Impugned Decision](#), para. 59.

<sup>94</sup> [Appeals Judgment](#), paras 1, 57-64.

<sup>95</sup> [Appeals Judgment](#), para. 79. *See also* the approach and principles applied by the chambers of this Court in defining the scope of the investigation and the Court’s jurisdiction in other situations: for example, Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire*, [Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of the Investigation into the Situation in the Republic of Côte d’Ivoire”](#), 15 November 2011, ICC-02/11-14-Corr, *see in particular* paras 179, 212; Pre-Trial Chamber I, *Situation in Georgia*, [Decision on the Prosecutor’s request for authorization of an investigation](#), 27 January 2016, ICC-01/15-12, paras 63-64; Pre-Trial Chamber III, *Situation in the Republic of Burundi*, [Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute](#)

59. Given that the scope of the Court’s jurisdiction and the Prosecutor’s investigation in the Afghanistan situation has already been ruled upon by the Appeals Chamber, the Appeals Chamber’s determination is *res judicata*, and as such, binding on the Pre-Trial Chamber in this case.<sup>96</sup> Accordingly, to the extent that paragraph 59 of the Impugned Decision appears to limit the scope of the authorised investigation, the Appeals Chamber finds that the Pre-Trial Chamber committed an error of law, by disregarding or misinterpreting the scope of the Court’s jurisdiction in Afghanistan, which had already been authoritatively determined by the Appeals Chamber.

60. The Appeals Chamber considers that as a result of the above error of law, the Pre-Trial Chamber erred also by referencing the “Islamic State-Khorasan Province” as an example of a new party to the conflict and as such “fall[ing] outside the scope of the investigation as authorised”.<sup>97</sup> In any event, the Appeals Chamber notes that the Prosecutor, in the Article 15 Request, specifically referred to the “Islamic State-Khorasan Province” as a group, among other groups, that conducted “a number of

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[on the Authorization of an Investigation into the Situation in the Republic of Burundi” ICC-01/17-X-9-US-Exp, 25 October 2017](#), 9 November 2017, ICC-01/17-9-Red, paras 191-194; Pre-Trial Chamber III, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar](#), 14 November 2019, ICC-01/19-27, see in particular paras 130-133.

<sup>96</sup> See, for example, Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the “Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings”](#), 1 September 2011, ICC-01/09-01/11-313, para. 8 (where the Pre-Trial Chamber noted that because the Appeals Chamber had rendered a judgement on the Government of Kenya’s appeal on the admissibility of the case, the Government of Kenya’s challenge to the admissibility of the case was *res judicata*); Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Decision on the Request for Leave to Appeal the ‘Decision on the “Application for Judicial Review by the Government of the Comoros”’](#), 21 December 2020, ICC-01/13-115, para. 12 (where the Pre-Trial Chamber, by majority, rejected leave to appeal an issue under article 82(1)(d) because it had already been decided by the Appeals Chamber). See also Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, [Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”](#), 7 April 2015, ICC-01/04-02/12-271-Corr (A), para. 246 (in which the Appeals Chamber stated that the “principle of *res judicata*, which is well-established in international law, is defined as “[a] matter that has been adjudicated by a competent court and which therefore may not be pursued further by the same parties”, or as “a thing adjudicated” meaning that “[o]nce a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.” See also *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of Trial Chamber I of 15 January 2019 with written reasons issued on 6 July 2019, 31 March 2021](#), ICC-02/11-01/15-1400-Anx4-Red, para. 272 (where, when discussing the approach to the admissibility of the evidence, Judge Ibáñez Carranza stated that “having been settled by the Appeals Chamber, the correctness of [the preference of the Judges of the majority] to review all evidence submitted at the end of the case had *res judicata* effects for the *Gbagbo and Ble Goudé* case.”).

<sup>97</sup> [Impugned Decision](#), para. 59.

attacks against civilians” at the time,<sup>98</sup> indicating that “[i]f an investigation is authorised, these and other incidents could be subjected to proper investigation and analysis.”<sup>99</sup> Accordingly, the Appeals Chamber finds that the Pre-Trial Chamber committed an error of fact by qualifying the “Islamic State-Khorasan Province” as a new party to the conflict falling outside the scope of the investigation.

61. In the Appeals Chamber’s view, the above errors of the Pre-Trial Chamber have a material impact on the Impugned Decision.

62. Pursuant to rule 158(1) of the Rules, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the particular circumstances of the present case, the Appeals Chamber deems it appropriate to amend the Impugned Decision. More specifically, paragraph 59 of the aforementioned decision is amended to align with the scope of the Prosecutor’s investigation in the Afghanistan situation “in relation to 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 in the period since 1 July 2002”, as previously determined in the Appeals Judgment of 5 March 2020.

63. Finally, the Appeals Chamber recalls that pursuant to article 83(4) of the Statute, read in conjunction with rule 158(2) of the Rules, the judgment of the Appeals Chamber “shall be delivered in open court”. However, in the present circumstances, noting in

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<sup>98</sup> [Article 15 Request](#), para. 19 (“The three largest anti-government armed groups operating in Afghanistan historically have been the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin (“HIG”). Al Qaeda also remains a focus of military operations by international forces in Afghanistan. Since 2015, groups calling themselves Daesh/Islamic State Khorasan Province (“Daesh/ISKP”) have emerged and have been held responsible (or claimed responsibility) for a number of attacks against civilians in Kabul as well in Nangarhar province”), para. 63 (“[...] the conduct of members of other anti-government armed groups operating in Afghanistan are not addressed in this Request. These include the Lashkar-i Taiba, the Tehrik-e Taliban Pakistan (also referred to as the ‘Pakistani Taliban’), and Daesh/ISKP. As noted above, since 2016[,] Daesh/ISKP has reportedly conducted an increasing number of attacks against civilians, including a complex attack on the Mohammad Sardar Daud Khan military hospital in Kabul on 8 March 2017 that caused the death of 22 civilians, and a joint attack with Taliban elements against Mirza Olang village in Sayyad district, Sari Pul province, on 3 August 2017 that resulted in the killing of at least 36 persons (both civilians and persons *hors de combat*). If an investigation is authorised, these and other incidents could be subjected to proper investigation and analysis.” (footnotes omitted)).

<sup>99</sup> [Article 15 Request](#), para. 63.

particular the upcoming judicial recess, the Appeals Chamber finds it appropriate to issue the judgment without a hearing.

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



**Judge Piotr Hofmański**  
**Presiding**



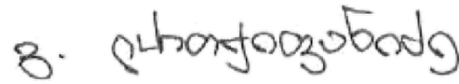
**Judge Luz del Carmen Ibáñez Carranza**



**Judge Marc Perrin de Brichambaut**



**Judge Solomy Balungi Bossa**



**Judge Gocha Lordkipanidze**

Dated this 4<sup>th</sup> day of April 2023

At The Hague, The Netherlands