

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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*No.: ICC-02/17*  
Date: 2 December 2019

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding  
Judge Howard Morrison  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa  
Judge Kimberly Prost

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**PUBLIC**

**Written Submissions of the Government of the Islamic Republic of Afghanistan**

**Source: The Government of the Islamic Republic of Afghanistan**

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

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## Introduction

1. The Government of the Islamic Republic of Afghanistan (“Afghanistan” or “the Government of Afghanistan”), a State Party to the Rome Statute, fully acknowledges the painful truth that grave international crimes have been committed within its jurisdiction in the period covered by the Prosecutor’s preliminary examination. Bringing justice to the victims of those crimes is a central policy of the democratically elected Government of Afghanistan, as it has emphasised repeatedly to the Assembly of State Parties.<sup>1</sup> In order to achieve that objective, Afghanistan has established the necessary judicial, investigative and prosecutorial infrastructure, has reformed its criminal laws to ensure that they fully address international crimes within the jurisdiction of the ICC (‘the Court’) and, despite extreme practical difficulties, is making determined and tenacious efforts to investigate and prosecute those crimes within its jurisdiction.
2. The resolution of this Appeal holds a deep resonance for Afghanistan in the light of the Government of Afghanistan’s own determination to investigate and prosecute international crimes. Consistent with the significance that it attaches to these landmark proceedings and cognisant that the Pre-Trial Chamber did not have the assistance of any direct submissions from the Government of Afghanistan, it requested an extension of time to file written submissions to the Court and permission to make oral submissions.<sup>2</sup>

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<sup>1</sup> “We believe that justice for all should be a vision of every government and society, and to reach this goal we need to strength the court by supporting its decisions.” Statement of the Ambassador of the Islamic Republic of Afghanistan to the 17<sup>th</sup> session of the Assembly of States Parties, 6 December 2018; See further the Statement of the Ambassador and Permanent Representative of the Islamic Republic of Afghanistan to the United Nations to the 16<sup>th</sup> session of the Assembly of States Parties, 7 December 2017.

<sup>2</sup> Application by the Government of the Islamic Republic of Afghanistan to Extend the Time Limit for Filing Submissions in the Appeal Proceedings and to Make Oral Submissions at the Hearing of the Appeal, ICC-02/17-120.

3. On 26 November 2019, the Appeals Chamber issued its Decision on the request for an extension of time in which it accepted the Government of Afghanistan's request and permitted it to file written observations by 16h00 on Monday 2 December 2019, and to make oral submissions at the appeal hearing.<sup>3</sup>
4. The Government of Afghanistan welcomes the opportunity to make written submissions and hereby files its observations. They will be supplemented by the Government's oral submissions at the oral hearing of the Appeal. In so doing, Afghanistan affirms its commitment to the interests of justice (both national and international). There should be no doubt that Afghanistan is determined to secure the rights of the victims of violations of international law and to bring the perpetrators to justice. It is doing everything within its power to investigate and prosecute international crimes committed within its jurisdiction despite the very considerable practical difficulties correctly identified by the Pre-Trial Chamber.<sup>4</sup>
5. As the State Party within whose jurisdiction the alleged crimes occurred, the Government of Afghanistan is in a unique position to update the Court on the concrete recent steps that it has taken to deliver on its commitment to bring justice for these crimes and to verify from its own experience the severe practical obstacles identified by the Pre-Trial Chamber.
6. In this submission, Afghanistan will explain that it has made significant structural and institutional changes designed to assist and facilitate the investigation and prosecution of international crimes. It has reformed the judiciary in Afghanistan. It has amended its Penal Code to specifically address international crimes within the jurisdiction of the Court. It has also sought to

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<sup>3</sup> Decision on request for extension of time, ICC-02/17-121, para. 3-4.

<sup>4</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 ("Impugned Decision"), 12 April 2019, ICC-02/17-33, paras 91-96.

progress genuine investigations and prosecutions in respect of such crimes. Whilst the Government acknowledges that this appeal is of course not a formal admissibility challenge pursuant to Articles 17, 18 and 19 of the Statute, the Pre-Trial Chamber reached its decision on relevant matters including the interests of justice without the benefit of complete information about the existence and progress of national investigations. Taking into consideration the duty of every State to exercise jurisdiction over international crimes,<sup>5</sup> and the allocation of primary responsibility for the prosecution of international crimes to national systems by the ICC Statute's complementarity framework, Afghanistan submits that the existence of genuine national investigations should lead the Appeals Chamber to conclude that there is no need to overturn the Impugned Decision and authorise an investigation. The current appeals should thus be dismissed. The interests of justice and of the Victims, in particular, will be suitably protected by national investigations and prosecutions.

7. Further, as the State with jurisdiction over the territory in which the crimes occurred, and where many of the perpetrators reside and the overwhelming majority of the evidence is located, Afghanistan is also in a unique position to verify the Pre-Trial Chamber's conclusion that the "complexity and volatility"<sup>6</sup> of the current situation in Afghanistan poses real and substantial problems to any investigation. The Government of Afghanistan notes that in 2016 and 2017, as part of its co-operation with the Office of Prosecutor, the Prosecutor requested and was invited to conduct a visit to Afghanistan. This visit did not however take place in 2017 as the Prosecutor and her delegation declined to come to Afghanistan due to security and instability concerns. No visit has since occurred in 2018 and 2019. In these specific circumstances, including where the Prosecutor is unwilling to travel to the locus in quo, the best chance

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<sup>5</sup> See Preamble to the Rome Statute, para. 6.

<sup>6</sup> Impugned Decision, para. 94.

of an effective investigation currently lies with Afghanistan's national investigation, particularly if supported, where necessary, by the Court exercising positive complementarity.

8. The Government of Afghanistan submits that a Pre-Trial Chamber considering a request by the Prosecutor to authorise an investigation does have the power to consider all of the factors set out in Article 53(1)(c) itself. By Article 15(4) of the Statute, the drafters allocated a supervisory role to the Pre-Trial Chamber in deciding whether to authorise an investigation. In order to perform that important function effectively, and so as to avoid reducing the Pre-Trial Chamber's role in authorising investigations to one of rubber-stamping the Prosecutor's decision, Afghanistan submits that the Pre-Trial Chamber must have the power – and indeed the responsibility – to consider all of the factors set out in Article 53(1)(c) itself. In any Court, the final arbiter of these factors, including the interests of justice must be the Judges not the Prosecutor.
  
9. Further, Afghanistan submits that the term “interests of justice” was deliberately left undefined in the Statute so as to allow the Court the flexibility to apply it to difficult cases. In common with all of the provisions of the Statute, it should be read and construed in accordance with the object and purposes of the Statute. It certainly gives the Pre-Trial Chamber the discretion to take into account the existence and nature of national investigations and the practical obstacles to investigations. The Government of Afghanistan has therefore taken the opportunity to put forward factual information on those issues, trusting the Appeals Chamber to give guidance on the correct application of the “interests of justice” test in the light of all of the evidence and submissions available.

10. Further, the Government of Afghanistan highlights that the Pre-Trial Chamber's decision not to authorise an investigation into the Situation in Afghanistan at this stage<sup>7</sup> is not immutable or irreversible. The Impugned Decision does not result "in the complete denial of the Victims' rights to inter alia truth, justice and reparation".<sup>8</sup> On the contrary, finding that an investigation at this precise moment in time would not be in the interests of justice, necessarily and desirably leaves open the possibility of authorising an investigation in the future should circumstances change.

11. Finally, if the Appeals Chamber concludes that the issues now raised by Afghanistan in relation to its national investigations and prosecutions are not to be decided in this appeal, and that the Pre-Trial Chamber erred in its approach, Afghanistan would respectfully invite the Appeal Chamber not to authorise an investigation itself but to remit this matter back to the Pre-Trial Chamber to reconsider its decision with the benefit of the Appeals Chamber's guidance on the meaning of the "interests of justice" and to take into account all the evidence including these submissions about national investigations. That would be the most sensible course, rightly consistent with the foundational principles of complementarity and with the interests of justice.

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<sup>7</sup> Impugned Decision, disposition.

<sup>8</sup> *Contra*. Corrigendum of Updated Victims' Appeal Brief, ICC-02/17-73-Corr, para. 14.

**A. Afghanistan is Investigating and Prosecuting the Allegations: a Relevant Consideration**

12. The Government of Afghanistan, as detailed below, has taken resolute and persistent steps to investigate and prosecute international crimes committed within its jurisdiction. It asks the Appeals Chamber to recognise that, despite the daunting and in many respects unprecedented obstacles that it faces, the steps that it has taken to fulfil its duty<sup>9</sup> to exercise jurisdiction over those responsible for international crimes should be commended and supported by the ICC.
13. The Government of Afghanistan acknowledges that this appeal does not concern an admissibility challenge under Article 19 of the Statute. Afghanistan reserves its right to submit such a challenge to the admissibility of any cases that may be brought by the Prosecutor, if that was ever necessary. Further, the Pre-Trial Chamber has entered preliminary conclusions on complementarity in light of the material submitted by the Prosecutor at the time.<sup>10</sup> In contrast to the Prosecutor and the Victims, Afghanistan did not have an automatic right to make submissions on the authorisation of an investigation pursuant to Article 15(3) of the Statute. This is the Government of Afghanistan's first submission to the Court. Afghanistan comes to the Court not as a failed State or a non-State party compelled by a Security Council referral, but as a State Party that is fully committed to the object and purpose of the Statute, to cooperating with the Court and to its own sovereign national investigation and prosecution of international crimes. The facts and circumstances of Afghanistan's concerted efforts to prosecute these crimes domestically are relevant not only to any provisional complementarity assessment but also to

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<sup>9</sup> Rome Statute, Preamble para. 6.

<sup>10</sup> Impugned Decision, paras. 73-79.



the Court's assessment of whether there are substantial grounds to believe that an investigation would not serve the interests of justice.

14. The Pre-Trial Chamber and the Prosecutor correctly acknowledged that the people of Afghanistan have suffered a series of armed conflicts throughout the last four decades.<sup>11</sup> The Government of Afghanistan faces particularly profound challenges not only in relation to the ongoing and intensive armed conflict with the Taliban and other insurgents but also in relation to governance, poverty and development. In response to these acute problems, the Government of Afghanistan adopted the Afghanistan National Peace and Development Framework 2017-2021.<sup>12</sup> An important component of this framework was a commitment to reform the justice sector in order to reinvent the systems for guaranteeing the rule of law. The framework recognised the need to establish a transparent and impartial legal system that is built around the rigorous application of the Constitution of Afghanistan and international conventions on human rights.<sup>13</sup> It emphasises the need to ensure access to justice to all persons,<sup>14</sup> including the Victims in these proceedings.

15. In this regard, and contrary to the Prosecutor's submission to the Pre-Trial Chamber,<sup>15</sup> the Government of Afghanistan stresses that access to justice is available in Afghanistan notwithstanding the 2008 Act of National Reconciliation, General Amnesty and National Stability since, under Article 3, paragraph 3 of the Act the general amnesty "shall not affect the claims of individuals against individuals based upon the rights of people and the criminal offenses relating to personal crimes".<sup>16</sup> The meaning of that provision

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<sup>11</sup> Impugned Decision, para. 15.

<sup>12</sup> Afghanistan National Peace and Development Framework 2017-2021. Available at <https://www.refworld.org/pdfid/5b28f4294.pdf>

<sup>13</sup> *Ibid.*, Section 5.4(a), p21, bullet point 2. See further bullet point 8: "*Taking serious steps to protect human rights and tackle violence against women.*" Afghanistan also highlights the emphasis that the Framework places on delivering justice "*in line with international instruments*" Section 5.4(a), p. 21.

<sup>14</sup> *Ibid.*, bullet point 1.

<sup>15</sup> Impugned Decision, para. 74.

<sup>16</sup> Unofficial English translation available at <https://www.legal-tools.org/doc/7825c2/pdf/>

is that the amnesty does not apply to any relevant criminal prosecution initiated by a complaint made by any victim of a crime.

16. In accordance with the goals set out in the Framework, the Government of Afghanistan has embarked on structural reforms designed to improve the institutional capacity of its judiciary, prosecution and law enforcement. The independence of the judiciary is guaranteed by Article 116 of the Constitution of Afghanistan.<sup>17</sup> Since 2016, the Government of Afghanistan has made strenuous efforts to reform the structure and human resources of the judicial system, including through the creation by the Supreme Court of a new High Committee for Judicial Appointments which is committed to transparency and accountability.<sup>18</sup>

17. Furthermore, Afghanistan has established a dedicated International Crimes Office responsible for the investigation and prosecution of crimes against humanity, genocide and war crimes, which is yet another important step. At the request of the Attorney General, technical assistance has been provided to the Office by the United Nations Assistance Mission in Afghanistan (UNAMA) as it builds up and reinforces its capacity.<sup>19</sup> The establishment of this specialised unit demonstrates the investment that Afghanistan is making in the investigation and prosecution of international crimes.

18. The ongoing criminal investigations relevant to these proceedings are taking place pursuant to the Afghan Penal Code, which was amended in 2017 and entered into force in February 2018 pursuant to a presidential Decree.<sup>20</sup>

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<sup>17</sup> “*The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan.*” Article 116 of the Constitution of Afghanistan, ratified 26 January 2004.

<sup>18</sup> National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Afghanistan, 13 November 2018, A/HRC/WG.6/32/AFG/1, para. 58. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/339/51/PDF/G1833951.pdf?OpenElement>

<sup>19</sup> UNAMA, Afghanistan Protection of Civilians in Armed Conflict Annual Report 2018, February 2019, p. 49.

<sup>20</sup> Afghanistan National Report to UN Human Rights Council, 13 November 2018, para. 10. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/339/51/PDF/G1833951.pdf?OpenElement>

Amongst other things, Part Two of the Penal Code includes specific provisions detailing the crimes of genocide,<sup>21</sup> crimes against humanity,<sup>22</sup> war crimes<sup>23</sup> and aggression.<sup>24</sup> The Penal Code also provides, for the first time in Afghanistan, for individual criminal responsibility for civilian superiors or military commanders who fail to prevent or punish subordinates who commit crimes within the jurisdiction of the Court.<sup>25</sup> It further prevents the perpetrators of international crimes from relying on superior orders as a defence.<sup>26</sup> Moreover, a 2018 amendment to the Criminal Procedure Code guarantees that punishments for the perpetrators of genocide, crimes against humanity and war crimes shall not be pardoned or reduced except in cases concerning minors.<sup>27</sup> The significance of these amendments is that they bring the national criminal law of Afghanistan into full harmony with the provisions of the Rome Statute.

19. Furthermore, the Government of Afghanistan has developed a *National Plan for the Elimination of Torture*;<sup>28</sup> a new Law on the Prohibition of Torture was adopted on 22 April 2017. Article 11 of that Law provides for the establishment of a Commission of Prohibition of Torture, whose duties and authorities are specified in Article 12. In particular, the Commission has the duty and authority to establish committees to investigate cases of torture, to

<sup>21</sup> Penal Code of the Islamic Republic of Afghanistan, in Ministry of Justice, Official Gazette 1260, Special Issue, May 15, 2017, Articles 332-334.

<sup>22</sup> *Ibid.*, Articles 335-336.

<sup>23</sup> *Ibid.*, Articles 337-340.

<sup>24</sup> *Ibid.*, Article 341.

<sup>25</sup> Article 342 of the Penal Code makes provision for the criminal responsibility of “*an armed commander or any person who works as an acting commander in war*” in cases where they are aware or should have been aware of the criminal acts of subordinates and do not take or neglect to take action to prevent them or do not refer the issue to related authorities for review and prosecution. Article 343 of the Penal Code makes the equivalent provision for the criminal responsibility of “*High Ranking Officials*”.

<sup>26</sup> “*Order of superior in genocide, crimes against humanity, war crimes, aggression against state and torture is exemption from the provision stated in Article 121 of this law*”: Article 123 of the Penal Code. Article 121 preserves a limited defence of superior orders in relation to other offences.

<sup>27</sup> “*Punishment for perpetrators of genocide, crimes against humanity, war crimes referred to in Article (1) of the Annex shall not be pardoned or reduced. The pardon and reduction of the punishment of children is an exception.*” Article 10 of Annex 1 to the Criminal Procedure Code, *Causes of Prohibition of Pardon and Reduction of Punishment*.

<sup>28</sup> Afghanistan’s Opening Statement during the sixtieth session of the Committee Against Torture in Geneva, Switzerland, on 27 April 2017. Available at [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AFG/INT\\_CAT\\_STA\\_AFG\\_27267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AFG/INT_CAT_STA_AFG_27267_E.pdf).

ensure the reporting of torture cases to the competent authorities for prosecution, and to follow up the investigation of torture cases with legal and judicial authorities.<sup>29</sup> The Act brings Afghan laws in relation to the prohibition of torture into line with current international standards.<sup>30</sup> As explained by the Representative of Afghanistan in his Address to the Committee Against Torture during its sixtieth session in Geneva, Switzerland, on 27 April 2017, the Government of Afghanistan has invested training in its police forces, its National Directorate of Security and other officials including judges and prosecutors on issues of torture and fair trials. These training sessions were conducted by the Afghanistan Independent Human Rights Commission (AIHRC) and many other institutions operating in the country.<sup>31</sup> Taking into account these developments, in a recent report UNAMA “welcome[d] the concerted efforts of the Government of Afghanistan and takes note of progress made in the implementation of Afghanistan’s National Plan on the Elimination of Torture”.<sup>32</sup> Though still expressing concerns about the number of allegations of mistreatment, UNAMA also noted that the adoption of these measures had led to “tangible improvements compared to the previous reporting period”.<sup>33</sup>

20. Further, Afghanistan has provided the budget and support to enable AIHRC<sup>34</sup> to monitor detention centres and to monitor and verify allegations of torture. Both AIHRC and UNAMA are mandated to watch over the rights of people in detention.<sup>35</sup> This will support the prosecution of any crimes committed in

<sup>29</sup> Articles 12(2), (3) and (5), Law on Prohibition of Torture, Official Gazette No.1256, 22 April 2017.

<sup>30</sup> See for instance Article 15 of the Law on Prohibition of Torture which requires the Committee on Torture to “comply with practices that are annexed in Istanbul Protocol and Additional Protocol of Convention against Torture”.

<sup>31</sup> See *supra* note 28.

<sup>32</sup> UNAMA, the Treatment of Conflict-Related Detainees in Afghanistan: Preventing Torture and Ill-treatment under the Anti-Torture Law, April 2019, Section 3, page 7. Available at <https://www.ohchr.org/Documents/Countries/AF/PreventingTortureReportApril2019.pdf>

<sup>33</sup> *Ibid.*, Executive Summary, page (iii).

<sup>34</sup> AIHRC was established by Article 58 of the Constitution of Afghanistan.

<sup>35</sup> Afghanistan’s Opening Statement during the sixtieth session of the Committee Against Torture in Geneva, Switzerland, on 27 April 2017. Available at [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AFG/INT\\_CAT\\_STA\\_AFG\\_27267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AFG/INT_CAT_STA_AFG_27267_E.pdf).

detention centres. Afghanistan particularly highlights the following passage from the April 2019 report of UNAMA into the treatment of conflict related detainees in Afghanistan, which confirms that Afghanistan is pursuing investigations and prosecutions for significant numbers of international crimes committed in its detention centres:

*“In a letter dated 27 November 2018, NDS [National Directorate of Security] reported to UNAMA that between 1 January 2017 and 15 October 2018, its human rights officers had interviewed a total of 15,721 suspects and accused, individually and in a confidential manner, in NDS central and provincial detention centres. While NDS did not provide any updates on the number of interviews conducted by its human rights officers during the remainder of the period covered by this report (until 31 December 2018), UNAMA considers that this number will have further increased.*

*In a follow-up letter dated 30 January 2019, NDS informed UNAMA that between 1 January 2017 and 31 December 2018, it had received 184 allegations of human rights violations from detainees. Following investigation of these allegations, 13 of these cases were ‘confirmed’, involving 19 personnel of the central and provincial NDS facilities.*

*Fourteen out of the 19 personnel received disciplinary sanctions, which included transfer of jobs and loss of rank (three individuals); written commitments by the perpetrator to avoid ‘such behaviour’ in the future (two individuals); written advice with a record in the personal files (six individuals); and warning letters with a record in the personnel files (three individuals). The cases of five out of the 19 personnel were referred to judicial institutions.”<sup>36</sup>*

21. Afghanistan will not hesitate to investigate its own forces for war crimes. For example, in 2017 members of the Afghan National Border Police were investigated, prosecuted and sentenced to six years’ imprisonment after sexually abusing and shooting a 13-year-old boy who later died.<sup>37</sup>

22. Further, through his actions, President Ashraf Ghani has made it clear that the fight against impunity was a priority for the Government of Afghanistan. On 5

<sup>36</sup> UNAMA, ‘Treatment of Conflict-Related Detainees in Afghanistan: Preventing Torture and Ill-treatment under the Anti-Torture Law’ April 2019, p26-27.

<sup>37</sup> UNAMA, Afghanistan Protection of Civilians in Armed Conflict Midyear Report 2017, July 2017 p.15.

September 2019, the President announced publicly that he had accepted the resignation of the head of the National Directorate of Security (NDS) following the alleged killing by NDS forces of four brothers said to be linked to the group Islamic State.<sup>38</sup> In a tweet,<sup>39</sup> President Ghani stated that he ordered the Attorney General to investigate the incident immediately and bring the perpetrators to justice.

23. Since the Prosecutor's Request to open an investigation was submitted in October 2017, the Government of Afghanistan has launched several new investigations and efforts to prosecute international crimes. The Office of the Prosecution for Internal and External Crimes of the Attorney General's Office has just in the past year referred over 1500 cases involving international and terrorism crimes to the national courts for trial and a further over 6000 cases are being investigated. In addition, the Commission of Prohibition of Torture has already reviewed 176 cases and 54 of them have been handed over to the courts for prosecution, while many more are being investigated. The Government is conscious that since this is a preliminary examination the Prosecutor has yet to name specific subjects or cases. This is not the occasion for an admissibility challenge in which the Government of Afghanistan would need to engage with the same case test set out in Article 17(1)(a) or (b) of the Statute. Moreover, the Government of Afghanistan is limited in the amount of information about those investigations that it can share in a public filing. A number of its most important investigations relate to the Taliban. As set out below, the Taliban deliberately target prosecutors and those perceived to be working with them. In order to protect victims, witnesses and investigators / prosecutors, the investigations must remain highly confidential. The Government is willing to submit further details to the Court and to the

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<sup>38</sup> RadioFreeEurope/RadioLiberty, 'Ghani Accepts Afghan Security Chief's Resignation, Vows 'Zero Tolerance For Civilian Casualties'', 5 September 2019. <https://www.rferl.org/a/ghani-accepts-nds-chief-s-resignation-vows-zero-tolerance-for-civilian-casualties-/30148340.html>

<sup>39</sup> President Ashraf Ghani, Twitter, 5 September 2019. <https://twitter.com/ashrafghani/status/1169589280911560704>

Prosecutor on a confidential and ex parte basis if that would assist the Appeals Chamber in its deliberations.

24. Despite its sincere commitment to investigating and prosecuting international crimes, the Government of Afghanistan does not underestimate the practical barriers which obstruct any investigation (national or international) into these crimes. In spite of the best efforts of the Government of Afghanistan and its international partners, the reality is that Afghanistan remains in the middle of a brutal armed conflict, marked by guerilla warfare and suicide bombing. Attacks by the Taliban and other armed groups continue to cause heavy casualties. As a result, there are many parts of Afghanistan in which it is simply not safe to conduct investigations.
25. On 3 September 2019, the United Nations Secretary General provided his three-monthly update to the Security Council on the situation in Afghanistan. He highlighted that “the security situation remained volatile, with heightened levels of conflict, in particular in the southern, eastern and south-eastern regions”.<sup>40</sup> He noted that “[f]ighting continued at consistently high levels during the reporting period”.<sup>41</sup> He drew attention to particularly intense combat in Kandahar, Helmand and Nangarhar Provinces and high levels of Taliban activity near to the provincial capitals of Farah, Kunduz and Ghazni.<sup>42</sup> Parts of the country remain dominated by armed conflict and other areas are not under the Government’s control at this time. The Government notes with deep concern that whilst civilian casualties in the first half of 2019 were lower than over the same period in 2018, UNAMA still documented 3,812 civilian casualties in that six-month period.<sup>43</sup> The Government for well-known and

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<sup>40</sup> Report of the Secretary-General, the Situation in Afghanistan and its implications for international peace and security, 3 September 2019, A/73/990, para. 3.

<sup>41</sup> *Ibid.*, para. 21.

<sup>42</sup> *Ibid.*, para. 22.

<sup>43</sup> *Ibid.*, para. 29.

understandable reasons struggles to guarantee the safety and security of its people in many locations.

26. Importantly for the present proceedings, armed insurgents including the Taliban have continued to target the Afghan national and provincial police. The Taliban are known to target *“a wide range of what they consider ‘misbehaving’ people: [...] b) governments – any civilian working for the government or for western diplomatic representations or agencies; c) Members of the Afghan security forces of any ranks; [...] f) Collaborators of the Afghan government – potentially anybody helping the government in any way”*.<sup>44</sup> Other informed commentators have observed that: *“Persons working for the ministries in the forefront of the fight against the Taliban, such as the Ministry of Defense, the Ministry of Interior, or the Ministry of Justice, are a priority”*.<sup>45</sup>

27. Judges, prosecutors and investigators have all been specifically targeted by the Taliban. These attacks have been reported by UNAMA, which has consistently called for the cessation of the deliberate targeting of judges, prosecutors and other judicial staff.<sup>46</sup> In December 2017, the European Asylum Support Office (EASO) pointed out that *“UNAMA reports that significant targets among government officials are judges, prosecutors and other judicial staff. These individuals are singled out, as they are at the forefront of the fight against the Taliban. ... The judiciary is ... designated as a ‘legitimate target’ by the Taliban, as explained in this 2016 statement by the group: ‘The enemy’s supposed judicial bodies could possibly once again pay a hefty price for their crimes. Mujahideen shall also not remain idle towards known individuals or unions and their workers advocating implementation of such crimes and all of them shall categorically be classified as legitimate military targets’. Recent examples include a judge killed by a magnetic IED attached to his car*

<sup>44</sup> Giustozzi, A., ‘Afghanistan: Taliban’s Intelligence and the intimidation campaign’, 23 August 2017.

<sup>45</sup> Siddique, A., Skype interview with EASO, 2 August 2017, cited in ‘EASO Country of Origin Information Report Afghanistan: Individuals targeted by armed actors in the conflict’, December 2017, p.31.

<sup>46</sup> UNAMA, Afghanistan Protection of Civilians in Armed Conflict Annual Report 2018, February 2019, p. 6 ; UNAMA, Afghanistan Protection of Civilians in Armed Conflict Annual Report 2017, February 2018, p. 6 ; UNAMA, Afghanistan Protection of Civilians in Armed Conflict Annual Report 2016, February 2017, p. 11 ; UNAMA, Afghanistan Protection of Civilians in Armed Conflict Annual Report 2015, February 2016, p.10 ; UNAMA, Afghanistan Protection of Civilians in Armed Conflict Annual Report 2014, February 2015, p. 57-58.



*in Jalalabad, Nangarhar in June 2017.”<sup>47</sup>*

28. This situation led the UN Secretary-General to observe, in December 2017, that “[t]he personal security of investigators, judges and prosecutors [in Afghanistan], in particular those working on sensitive or corruption-related cases, remains a source of serious concern”.<sup>48</sup> As noted above, the ICC Prosecutor declined to conduct a visit to Afghanistan in 2017 (having received information and documents from the Government in relation to its national investigation and an invitation to come to Afghanistan) on security grounds. The Prosecutor has not visited Afghanistan in 2018 or 2019.

29. Indeed, the attacks against judges, prosecutors and the police have continued and worsened. The UN Secretary-General noted that on 7 August 2019, there was a complex attack by anti-government forces on the police headquarters of the sixth police division in Kabul.<sup>49</sup> The Afghan national police headquarters in Shahidi Hassass and the provincial police headquarters in Kandahar were targeted by suicide attacks in the same period.<sup>50</sup> On 7 September 2019, an appellate court judge for Paktia Province was killed after gunmen broke into his home.<sup>51</sup> On 18 September 2019, in Herat City, the Taliban attacked judges and protective police, killing one of them.<sup>52</sup> In November 2019, four judges were killed in an ambush by the Taliban in Logar Province.<sup>53</sup>

30. It is important to recognise that these attacks are not only directed at Afghan judges, prosecutors and police forces. International aid workers are also

<sup>47</sup> ‘EASO Country of Origin Information Report Afghanistan: Individuals targeted by armed actors in the conflict’, December 2017, p.32.

<sup>48</sup> Report of the Secretary-General, the situation in Afghanistan and its implications for international peace and security, 15 December 2017, A/72/651-S/2017/1056, para 66.

<sup>49</sup> Report of the Secretary-General, the Situation in Afghanistan and its implications for international peace and security, 3 September 2019, A/73/990, para. 23.

<sup>50</sup> *Ibid.*, para. 23.

<sup>51</sup> Faizi F. ‘Afghan War Casualty Report: September 2019’, New York Times. <https://www.nytimes.com/2019/09/05/magazine/afghan-war-casualty-report.html>

<sup>52</sup> *Ibid.*

<sup>53</sup> Tolo News, “Four Judges Killed in Ambush in Logar: Police”, 7 November 2019. <https://tolonews.com/afghanistan/four-judges-killed-ambush-logar-police>

vulnerable, with the UN Secretary-General noting a rise in the number of attacks on aid workers in 2019.<sup>54</sup> In the last week, UNAMA has also been the target of an attack in Kabul with one fatality.<sup>55</sup>

31. Attacks, including on civilian targets, intensified in the run up to the Presidential Election which took place on 28 September 2018. In October 2019, UNAMA released a report confirming that the Taliban had carried out an extended campaign designed to intimidate Afghan voters.<sup>56</sup> UNAMA confirmed 458 civilian casualties as a result of election-related violence.<sup>57</sup> The results of the election have yet to be announced. The Government notes that further examples of recent attacks which have led to significant loss of life are set out in the Corrigendum of Updated Victims' Appeal Brief.<sup>58</sup>

32. The Government of Afghanistan, as demonstrated by the structural reforms set out above, is determined to overcome the obstacles to its investigations posed by the ongoing armed conflict and the threat posed by the Taliban and others. But it does not wish to paint an unduly rosy picture of the current situation which remains decidedly volatile. It would be naïve to believe that these hurdles can be surmounted simply by imposing an international investigation on Afghanistan. The Prosecutor lacks the military presence to investigate in an active war zone. Outside the direct arena of conflict, international investigators and prosecutors would be just as vulnerable as Afghan investigators. Afghanistan therefore fully understands the Prosecutor's decision not to visit Afghanistan, though that must inevitably severely limit the investigative means available to the Prosecutor. In the circumstances, the Government of Afghanistan believes that, knowing the

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<sup>54</sup> Report of the Secretary-General, the Situation in Afghanistan and its implications for international peace and security, 3 September 2019, A/73/990, para. 71.

<sup>55</sup> <https://unama.unmissions.org/un-afghanistan-condemns-killing-colleague-attack>

<sup>56</sup> UNAMA, October 2019, Special Report: Election-Related Violence, p.1.

<sup>57</sup> [https://unama.unmissions.org/sites/default/files/unama\\_special\\_report\\_-\\_2019\\_election-related\\_violence\\_0.pdf](https://unama.unmissions.org/sites/default/files/unama_special_report_-_2019_election-related_violence_0.pdf)

<sup>58</sup> *Ibid.*

<sup>58</sup> Corrigendum of Updated Victims' Appeal Brief, ICC-02/17-73-CORR para. 148.

territory and understanding the local risks, it is best placed by far to pursue an effective investigation.

**B. The Pre-Trial Chamber can and should consider all of the factors under Article 53(1)(c) of the Statute**

33. A key issue in this appeal is the role of the Pre-Trial Chamber in determining whether the opening of an investigation should be authorised. This is an important question to address in order to decide whether the Pre-Trial Chamber's decision in the present Situation should be upheld.

34. Article 15 of the Statute authorises the Prosecutor to initiate investigations *proprio motu*, under certain prescribed conditions. It is well-established that, under customary international law, as reflected in Article 31 of the Vienna Convention on the Law of Treaties, the Statute "shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose".<sup>59</sup> The ordinary meaning of Article 15 leaves no room for doubt: in cases where the Prosecutor intends to initiate an investigation *proprio motu*, "he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation" (sub-paragraph 3). The Pre-Trial Chamber "shall authorize the commencement of the investigation" if it "considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court" (sub-paragraph 4). If not, it will refuse to authorise the investigation. Such refusal, however, "shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation" (sub-paragraph 5).

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<sup>59</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ("Kenya Article 15 Decision"), 31 March 2010, ICC-01/09-19-Corr, para. 19. On the customary status of the rule codified in Article 31 of the Vienna Convention on the Law of Treaties, see, in particular, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, *I.C.J. Reports 2017*, p. 29, para. 63 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, p. 64, para. 138.

35. The use of the verb “consider”, in sub-paragraph 4, as well as the express reference to the possibility for the Pre-Trial Chamber to refuse to authorise an investigation, in sub-paragraph 5, make it clear that, while the Prosecutor “may *initiate* investigations” (emphasis added), the decision whether there is indeed “a reasonable basis *to proceed* with an investigation” (emphasis added), and whether “the case appears to fall within the jurisdiction of the Court”, ultimately lies with the Pre-Trial Chamber. As a leading commentary puts it, “[t]he Prosecutor’s initiation right is unconditional and discretionary, but carefully balanced by the need for authorisation by a Pre-Trial Chamber”.<sup>60</sup> For the Pre-Trial Chamber’s filtering role to be effective, it must imply a substantive examination of all of the factors relevant to determining whether there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.

36. By providing that the Prosecutor “shall submit to the Pre-Trial Chamber a request for authorization of an investigation, *together with any supporting material collected*” (emphasis added), Article 15(3) ensures that the Pre-Trial Chamber receives the material necessary to enable it to review all the constituent elements of the Prosecutor’s conclusion that “there is a reasonable basis to proceed with an investigation” and then to make its own determination.

37. In accordance with the above-mentioned rule of interpretation, the text of Article 15 of the Rome Statute should also be read in its context. As specified in paragraph 2 of Article 31 of the Vienna Convention on the Law of Treaties, this context comprises, in particular, “the text [of the Statute], including its preamble and annexes”. The Statute is composed of a Preamble, followed by

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<sup>60</sup> O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Hart, Nomos, 3<sup>rd</sup> ed. (2016), p. 730.

128 Articles, divided in 13 Parts. Part 5 is devoted to “Investigation and Examination”. Article 53, which relates specifically to the initiation of an investigation, is of particular relevance when it comes to interpreting Article 15, since it stipulates the factors that the Prosecutor shall consider in determining whether there is “a reasonable basis to proceed” with an investigation, as specified in Rule 48 of the Rules of Procedure and Evidence.<sup>61</sup> As pointed out by the Pre-Trial Chamber, the language used in the *chapeau* of Article 53, paragraph 1 and in Article 15, paragraphs 3 and 4 is identical, and these provisions “prescribe the same standard to be considered both by the Prosecutor and the Pre-Trial Chamber”.<sup>62</sup> It is precisely the – provisional – consideration of these factors by the Prosecutor, in other words the Prosecutor’s application of these legal criteria to the facts at hand, that Article 15 gives the Pre-Trial Chamber the responsibility to review.

38. Article 53(1) of the Statute provides that:

*“[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:*

- a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;*
- b) The case is or would be admissible under article 17; and*
- c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”*

39. It is clear that these factors are cumulative. As explained in an authoritative commentary on the Statute, “[i]t is not necessary for the Prosecutor to go beyond the listed factors to meet the test of ‘reasonable basis to proceed under

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<sup>61</sup> Rule 48 of the Rules of Procedure and Evidence – Determination of reasonable basis to proceed with an investigation under article 15, paragraph 3 – provides that “[i]n determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).”

<sup>62</sup> Kenya Article 15 Decision, para. 21.

[the] Statute'. It is, however, imperative that each of these factors be satisfied".<sup>63</sup> In performing its supervisory role, the Pre-Trial Chamber must accordingly also consider whether each factor is satisfied.<sup>64</sup> In deciding whether to authorise an investigation upon the request of the Prosecutor in the context of Article 15, the Pre-Trial Chamber shall therefore examine, *inter alia*, whether, "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".

40. This interpretation is entirely consistent with the object and purpose of Article 15, which intends to institute and entrench the necessary checks and balances on the powers of the Prosecutor to determine whether a case will be investigated by the ICC or, as the Pre-Trial Chamber put it, "to curb abuse of power on the part of the Prosecutor by subjecting the exercise of his or her *proprio motu* powers to initiate an investigation to judicial scrutiny".<sup>65</sup>

41. Moreover, this interpretation is confirmed by the *travaux préparatoires* of the Rome Statute. As highlighted by the Pre-Trial Chamber in a previous case, Article 15 "is the product of extensive debates and division of views throughout the drafting process and until the end of the Rome Conference. The main point of controversy was whether the Prosecutor should be empowered to trigger the jurisdiction of the Court, of his own motion, in the absence of a referral from a State Party or the Security Council".<sup>66</sup> In particular, it was "feared that providing the Prosecutor with such 'excessive powers' to trigger the jurisdiction of the Court might

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<sup>63</sup> O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Hart, Nomos, 3<sup>rd</sup> ed. (2016), p.1371.

<sup>64</sup> The Pre-Trial Chamber's latest decisions confirm this approach. See, in this regard, Pre-Trial Chamber III, Situation in the Republic of Burundi, Decision on the Prosecutor's Request for Authorization of an Investigation ("Burundi Article 15 Decision"), 25 October 2017, ICC-01/17-9, para. 190; Pre-Trial Chamber I, Situation in Georgia, Decision on the Prosecutor's Request for Authorization of an Investigation ("Georgia Article 15 Decision"), 27 January 2016, ICC-01/15-12, para. 58.

<sup>65</sup> Burundi Article 15 Decision, para. 28.

<sup>66</sup> Kenya Article 15 Decision, para. 17.

*result in its abuse*".<sup>67</sup> The drafters of the Rome Statute therefore sought "a balanced approach that rendered the proprio motu power of the Prosecutor to initiate an investigation acceptable to those who feared it. The intended result was accomplished through the current text of article 15 of the Statute, which subjects the Prosecutor's conclusion that a reasonable basis to proceed proprio motu with an investigation exists to the review of the Pre-Trial Chamber at a very early stage of the proceedings, namely before the Prosecutor may start an investigation into a situation".<sup>68</sup>

42. As summarised by a leading commentary, it is evident from the *travaux* that "the ability of the ICC Prosecutor to initiate investigations proprio motu was the most controversial aspect of the Court's trigger mechanism and was one of the main political/legal issues that had to be resolved before the Statute could be assured of adoption".<sup>69</sup> An analysis of the drafting history highlights that, ultimately, "the role given to the Pre-Trial Chamber as the authoriser of Prosecutor-initiated investigations was the decisive factor for many States. The Pre-Trial Chamber represents the constitutional check on the Prosecutor which some States required in order to accept a proprio motu power to initiate investigations."<sup>70</sup> In light of the clear intentions of the States Parties, the Pre-Trial Chamber, in its Decision on the Prosecutor's Request for Authorization of an Investigation into the situation in Kenya, held that a Prosecutor's Request to investigate *proprio motu* had to be examined "taking into consideration the sensitive nature and specific purpose of this procedure".<sup>71</sup>

43. In her submissions, the Prosecutor acknowledges that, "[t]o the extent that the term 'reasonable basis to proceed' [in Article 15(3) of the Statute] may refer to

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<sup>67</sup> Kenya Article 15 Decision, para. 18.

<sup>68</sup> *Ibid.*

<sup>69</sup> O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Hart, Nomos, 3<sup>rd</sup> ed. (2016), pp. 726.

<sup>70</sup> *Ibid.*, p. 729.

<sup>71</sup> Kenya Article 15 Decision, para. 18.

the *chapeau* of article 53(1), ... the Pre-Trial Chamber may be obliged to determine not only that it concurs with the Prosecutor's assessment under article 53(1)(a) and (b) but also under article 53(1)(c)". She explains that "[t]his would ... be consistent with rule 48, which requires the Prosecution to address these criteria for the purpose of its request under article 15(3), as well as the practice of previous Pre-Trial Chambers".<sup>72</sup> However, the Prosecutor then asserts that the Pre-Trial Chamber should "confine its assessment of the interests of justice to the contours of the assessment *actually conducted by the Prosecutor*".<sup>73</sup> In her view, in cases where the Prosecutor has concluded that there is no substantial reason to believe that an investigation would not serve the interests of justice, "the Pre-Trial Chamber may only consider whether in its view there is any *self-evident or ostensible concern* ... that opening an investigation would not serve the interests of justice".<sup>74</sup>

44. The Government of Afghanistan respectfully submits that such an interpretation runs counter to the plain language of Article 15, which clearly does not limit the Pre-Trial Chamber's role to identifying cases where a reasonable basis to proceed is self-evidently or ostensibly lacking. On the contrary, the Pre-Trial Chamber is mandated in unrestricted terms to evaluate, *inter alia*, whether "there is a reasonable basis to proceed with an investigation" before it can authorise the commencement of the investigation.

45. Moreover, the interpretation advanced by the Prosecutor would deprive Article 15 of its *effet utile*. Contrary to the intention of the drafters of the Statute, it would enable the Prosecutor to limit the scope of the Pre-Trial Chamber's assessment, thereby depriving it of the power expressly conferred upon it to adjudicate whether there are legitimate grounds to open an investigation in a given situation. For the same reasons, the Government of

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<sup>72</sup> Prosecution Appeal Brief, ICC-02/17-74, para. 35.

<sup>73</sup> *Ibid.*, para. 36.

<sup>74</sup> *Ibid.*, paras. 37-39.



Afghanistan cannot agree with the position expressed on behalf of the Victims that the review and examination function of a Pre-Trial Chamber concerning the “interests of justice” is expressly limited to cases where the Prosecutor decided not to open an investigation.<sup>75</sup>

46. Afghanistan thus submits that when the Prosecutor requests authorisation to initiate an investigation under Article 15, the Pre-Trial Chamber possesses the full authority to consider and decide on all of the factors specified in Article 53(1)(c) of the Statute.

### **C. The Assessment of the Interests of Justice**

47. The Government of Afghanistan submits that the term the “interests of justice” was left undefined in the Statute, in order to allow the Court the flexibility to exercise its discretion in difficult and complex cases. Afghanistan has submitted observations on its national investigations and the inherent practical difficulties in order to assist the Court in that assessment, but the final evaluation of the interests of justice must be left to the Court.

48. As to the meaning of the “interests of justice” within Article 53(1)(c), there is no definition of the “interests of justice” in the Statute, the Rules of Procedure and Evidence, the Elements of Crime or the Regulations of the Court. One commentator suggests that this is because that phrase is “used to acknowledge the need for discretion and the inability of legal texts to codify answers to difficult issues”.<sup>76</sup> The absence of any statutory definition means that States Parties, like Afghanistan, defer to the Court to interpret and

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<sup>75</sup> Corrigendum of Updated Victims’ Appeal Brief, ICC-02/17-73-Corr, paras. 107-109; Corrigendum of Victims’ Joint Appeal Brief against 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” of 30 September 2019, ICC-02/17-75, paras. 55-69; Submissions on behalf of victims of cross border aerial bombardment, ICC-02/17, paras. 21-23; and, OPCV Consolidated Submissions pursuant to the “Order Scheduling a Hearing before the Appeals Chamber and Other Related Matters”, ICC-02/17-72-Corr, paras. 39-46.

<sup>76</sup> Schabas, *A Commentary on the Rome Statute*, 2<sup>nd</sup> edition, p. 836.

develop the meaning of the “interests of justice” on a case-by-case basis, taking into account the context and objectives of the Statute as a whole.

49. The Government of Afghanistan further agrees with the Pre-Trial Chamber that the interests of justice should be interpreted with regard to the “effective prosecution of the most serious international crimes” and the “fight against impunity”.<sup>77</sup> The terms used in the Statute, in common with any international treaty, should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>78</sup> Afghanistan notes that the context of a treaty includes its preamble.<sup>79</sup> The Preamble to the Statute makes it clear that the objects and purposes of the Statute include “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation” (emphasis added), “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and “that the International Criminal Court [...] shall be complementary to national criminal jurisdictions”.<sup>80</sup> The Statute also includes a sophisticated complementarity framework pursuant to which national criminal jurisdictions which are investigating or prosecuting the same case have primacy unless the State concerned is unable or unwilling to carry out the investigation or prosecution (see Article 17(1)(a)). The term “the interests of justice” should therefore be interpreted in the light of the fight against impunity and also in the light of the importance of effective national investigations and prosecutions.

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<sup>77</sup> Impugned Decision, para. 89.

<sup>78</sup> Vienna Convention on the Law of Treaties, Article 31(1).

<sup>79</sup> Vienna Convention on the Law of Treaties, Article 31(2).

<sup>80</sup> Rome Statute, Preamble paras 4, 6 and 10.

50. When considering the “interests of justice” it is plainly relevant to take into account the efforts to ensure accountability within any pertinent national jurisdiction. National investigations are logically relevant and appropriately taken into account on the ordinary meaning of the “interests of justice”, construed in the light of the object and purpose of the Statute which places great emphasis on the elimination of impunity through measures at the national level. Moreover, the Government of Afghanistan notes that the Prosecutor’s Policy Paper on the Interests of Justice identifies “other justice mechanisms” as an “other potential consideration under Article 53(1)(c)”.<sup>81</sup> In this regard, the Prosecutor “fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in pursuit of a broader justice”.<sup>82</sup> Drawing on a range of academic publications, the Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua also highlighted the broad range of factors which might be considered under the interests of justice test including national alternative justice mechanisms.<sup>83</sup> If it is relevant to assess alternative justice mechanisms, it must also be relevant to take into account regular national investigations and prosecutions.

51. The Pre-Trial Chamber concluded that an investigation into the Situation in Afghanistan would not be in the interests of justice at this stage,<sup>84</sup> because it found that the “the prospects for a successful investigation and prosecution [are] extremely limited”.<sup>85</sup> That conclusion was based in particular on three factors: (i) the length of time elapsed between the alleged crimes and the request to open an investigation; (ii) the scarce co-operation obtained by Prosecutor; and (iii) the likelihood that relevant evidence and relevant

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<sup>81</sup> Prosecutor’s Policy Paper on the Interests of Justice, September 2007, p. 7.

<sup>82</sup> *Ibid.*, p. 8.

<sup>83</sup> ICC-02/17-33-Anx-Corr, Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, para. 39; D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, in 14 *European Journal of International Law* 481 (2003), pp. 493-498.

<sup>84</sup> Impugned Decision, disposition (a).

<sup>85</sup> Impugned Decision, para. 96.

suspects might still be available and within the reach of the Prosecutor's investigative efforts.<sup>86</sup> In essence, those three factors appear to Afghanistan to voice the same core concern: the availability of evidence and the efficacy of an investigation.

52. The material relied on by the Pre-Trial Chamber in support of the practical difficulties in investigating in Afghanistan is verified by the Government's above submissions on the current situation in Afghanistan.<sup>87</sup> In particular, the Pre-Trial Chamber's reference to the "complexity and volatility of the political climate"<sup>88</sup> is mirrored by the recent comments of the UN Secretary-General cited above.<sup>89</sup> The difficulties that the Government of Afghanistan has encountered in its own investigations, as set out above, underscore that the Pre-Trial Chamber's factual conclusions were correct. In particular:

- a. Whilst the Government of Afghanistan appreciates that "post-conflict environments are typically uncondusive to investigation",<sup>90</sup> regrettably Afghanistan has not yet arrived at a post-conflict environment. All of the current evidence summarised above, including some evidence submitted and relied upon by other participants in the appeal,<sup>91</sup> shows that Afghanistan is in fact in the middle of an armed conflict. The conflict is currently more intense in certain key provinces such as Kandahar and Helmand than in others, but the recent killings summarised above confirm that the serious risk of attacks is ever present and is not confined to certain provinces or areas only;
- b. The evidence, including the most recent evidence from the past few months, confirms that terrorist groups including the Taliban

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<sup>86</sup> Impugned Decision, para. 92.

<sup>87</sup> *Supra*, Part A.

<sup>88</sup> Impugned Decision, para. 94.

<sup>89</sup> *Supra*, para 25-31.

<sup>90</sup> Corrigendum of Updated Victims' Appeal Brief, ICC-02/17-73-Corr, para. 134.

<sup>91</sup> *Ibid.*, para. 148.

deliberately target the United Nations, international aid workers and law enforcement agencies such as the police force. In its own attempts to investigate these crimes, despite proceeding cautiously with full knowledge of the local territory and allegiances, the Government of Afghanistan has lost committed prosecutors and investigators. Whilst the Government of Afghanistan is determined to fulfil its own duty to prosecute international crimes and to pursue justice for the victims despite these threats, it bears emphasis that should the ICC Prosecutor wish to carry out investigations in Afghanistan, it would be impossible to guarantee the investigators' safety. Afghanistan underscores that in these special circumstances, it does not criticise the Prosecutor for declining to visit Afghanistan when invited in 2017 or thereafter, though the inability of the Prosecutor to carry out investigations in Afghanistan, in contrast to the investigations actually being carried out by the Government of Afghanistan, is relevant to the assessment of the interests of justice;

- c. The Government of Afghanistan notes that the Pre-Trial Chamber was particularly concerned about the surrender of suspects. Conflict with the Taliban and other associated armed insurgency groups is obviously ongoing. Afghanistan cannot currently surrender potential suspects from those groups to the Court because they are outside of the control of the Government. If they were to fall within the Government's control or custody, the Government would prosecute them in Afghanistan, as it is presently seeking to do.

53. Having endeavoured to assist the Court by setting out relevant factual material in more detail than was available to the Pre-Trial Chamber, Afghanistan's position is that it is not necessary to overturn the Pre-Trial

Chamber's decision and to authorise an investigation because Afghanistan is determinedly investigating and prosecuting international crimes itself.

**D. A Decision not to Authorise an Investigation is not Immutable**

54. The Government of Afghanistan is concerned that the Victims, and to an extent the Prosecutor, may read more far-reaching consequences into the Pre-Trial Chamber's decision than it merits. The Impugned Decision does not mean that the Prosecutor will never be able to open an investigation into Afghanistan, nor that the Victims will never achieve their goal of truth, justice and reparation. Instead the Decision was expressly based on the circumstances existing at the material time; when those circumstances change, and taking into account the state of the national proceedings, the Prosecutor may request the authorisation of an investigation if it were necessary to do so.

55. In the disposition of the Impugned Decision, the Pre-Trial Chamber "decides that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice".<sup>92</sup> The preceding paragraphs make it clear that the Chamber founded its decision on "the current circumstances of the situation in Afghanistan"<sup>93</sup> and the "complexity and volatility of the political climate still surrounding the Afghan scenario".<sup>94</sup> These statements make it absolutely clear that the Pre-Trial Chamber was not ruling out an investigation into the Situation in Afghanistan for all time.

56. Moreover, the Statute expressly preserves the right of the Prosecutor to seek authorisation to open the same situation on further occasions. Article 15(5) provides that "the refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by

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<sup>92</sup> Impugned Decision, disposition.

<sup>93</sup> *Ibid.*, para. 96.

<sup>94</sup> *Ibid.*, para. 94.

Prosecutor based on new facts or new evidence regarding the same situation". In addition to any rights to seek reconsideration based on changed circumstances, Article 15(5) makes it clear that new facts or new evidence can be presented to the Pre-Trial Chamber at any time in support of a new request to authorise the investigation.

57. The Government of Afghanistan submits that this is consistent with the admissibility and complementarity framework more broadly. In particular, Article 18 of the Statute creates a procedure whereby in addition to its right to challenge admissibility under Article 19 of the Statute at the appropriate time, a State may request the Prosecutor to defer to its national investigation and 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."<sup>95</sup> That procedure does not yet apply to this Situation as an investigation has not been opened.<sup>96</sup> Its significance to this Appeal is that it shows that the Statutory complementarity framework does countenance situations in which an investigation can be deferred, subject to review every six months, periodic updates from the State concerned or upon a change in circumstances.<sup>97</sup> Declining to authorise an investigation until circumstances change does not therefore run contrary to the Statute, but is in harmony with procedures elsewhere set out in the Statute such as Article 18.

58. The possibility of a future renewed application for authorisation to open an investigation is significant to the resolution of this Appeal. The Government of Afghanistan submits that it highlights that there is no need to authorise an investigation at this time. Bearing in mind the complementarity regime and the location of the majority of the suspects, witnesses and evidence, the proper and the most practicable course is to allow Afghanistan the chance to

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<sup>95</sup> Article 18(2).

<sup>96</sup> Article 18(1).

<sup>97</sup> See Articles 18(3) and (5).

investigate first. The Government would willingly commit to provide the Court, the Prosecutor and the Victims with an update on its investigative activities on a regular basis. After each report, the Prosecutor could assess the situation and may always seek authorisation again if the progress of national investigations is deemed to be inadequate. But Afghanistan seeks the opportunity to undertake its own national investigations and prosecutions in the first instance in accordance with the cornerstone complementarity principles and provisions of the Statute.

**E. Alternatively the matter should be remitted to the Pre-Trial Chamber**

59. To the extent that the Appeals Chamber considers that the present submissions are beyond the scope of the current appeal, and further determines that the Pre-Trial Chamber erred, or for other reasons, the Government of Afghanistan, *in the alternative*, invites the Appeals Chamber to give guidance on the correct interpretation of the interests of justice, in the light of the learned submissions presented on this Appeal, and then to remit the matter to the Pre-Trial Chamber to reconsider in the light of the Appeals Chamber's ruling and in light of all of the evidence and submissions, including those now presented by Afghanistan.

60. This alternative course, takes into account that the submissions and materials now filed by the Government of Afghanistan were not considered and ruled on by the Pre-Trial Chamber. Moreover, Afghanistan affirms its commitment to co-operate with the Court and its intention to participate fully in future proceedings before the Court. It would also ensure that the Prosecution and the Victims are able to present their submissions in respect of the interests of justice to the Pre-Trial Chamber (which they have submitted they were not allowed to do previously).



61. It is thus a pragmatic and feasible procedure to follow that will preserve Afghanistan's sovereign right to conduct its own investigations and prosecutions, and be heard on these matters, while ensuring that the Pre-Trial Chamber in its fresh deliberations will be bound to apply the ruling of the Appeals Chamber after hearing from all the parties.

### Conclusion

62. The Court was created to end impunity through supporting effective national and international prosecutions. The Government of Afghanistan is wholeheartedly committed to ending impunity, co-operating with the Court and to vindicating the rights of the Victims. In order to achieve those goals, it has made significant institutional reforms and committed significant resources. The steps that the Government has undertaken have been welcomed by the international community.<sup>98</sup>

63. Despite the challenges the Government faces, it is determined to investigate and prosecute these crimes. Pursuant to the complementarity framework, national investigations should be given the chance to flourish, with the support of the Court and in the spirit of positive complementarity.

64. The right course in these circumstances is for the Court to support the Government of Afghanistan in continuing its national investigations. This path will not lead to impunity or to a denial of the victims' rights. It will lead to justice in national proceedings in the first instance, retaining the last resort of international proceedings if national investigations stumble and if the

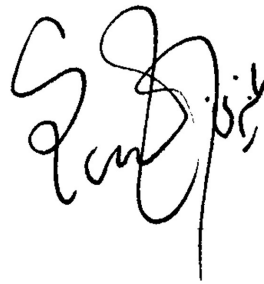
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<sup>98</sup> For instance, following its third Universal Periodic Review before the UN Human Rights Council at which many States welcomed the positive developments in Afghanistan, Afghanistan accepted the vast majority of recommendations made. The Working Group concluded that "*This demonstrates a solid commitment of Afghanistan to promote and protect human rights*": Addendum to Report of the Working Group on the Universal Periodic Review: Afghanistan, 18 June 2019, A/HRC/41/5/Add.1, para. 4.

circumstances are such that an international investigation may offer effective justice to the victims.

65. The present appeals should thus be dismissed, and no international investigation should be authorised at this stage.

66. Alternatively, the matter should be remitted to the Pre-Trial Chamber for renewed consideration based on the ruling of the Appeals Chamber, and in light of the submissions and materials of Afghanistan.



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**Dr M. Homayoon Azizi**  
**Ambassador of the Islamic Republic of Afghanistan in The Netherlands,**  
**Permanent Representative of the Government of the Islamic Republic of**  
**Afghanistan**



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**Rodney Dixon QC**  
**Counsel for the Government of the Islamic Republic of Afghanistan**

Dated this 2<sup>nd</sup> day of December 2019

At The Hague, The Netherlands