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Pénale
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

**Public
with Confidential Annex A**

Request to authorise resumption of investigation under article 18(2) of the Statute

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution seeks an expedited order under article 18(2) authorising the resumption of its investigation in the *Situation in Afghanistan*, in light of the significant change of material circumstances which became manifest in August 2021.
2. On 16 April 2020, the Prosecution informed the Pre-Trial Chamber that the Government of the Islamic Republic of Afghanistan, led by President Ashraf Ghani, had requested the Prosecutor to defer the entire investigation in the situation.¹ Given the extraordinary circumstances of the COVID-19 pandemic, the government had sought additional time to provide necessary information and supporting materials. This voluminous material was provided to the Prosecution on several occasions thereafter, including 12 June 2020, 15 January 2021, 5 and 7 May 2021, and 10 June 2021.²
3. On 16 April 2021, the Prosecution further updated the Pre-Trial Chamber and the public on the progress of its activities.³ It also subsequently responded to concerns raised by the legal representatives of victims and members of civil society,⁴ and stated that the Prosecutor’s decision on the Deferral Request would be reached with due expedition and publicly notified.⁵
4. Yet meanwhile, from 4 May 2021, Taliban forces opposed to the government of President Ghani had commenced a new offensive in provinces across Afghanistan. By 6 August 2021, they had seized several provincial capitals, and by 15 August 2021, Taliban forces had entered the national capital city, Kabul. On the same day,

¹ [ICC-02/17-139](#) (“Notice of the Deferral Request”); [ICC-02/17-139-Anx1](#) (“Deferral Request”) (asserting that “the investigations and proceedings in Afghanistan cover allegations of crimes committed by Afghan forces, the Taliban and related groups, other terrorist groups and international forces” including “both war crimes and crimes against humanity”).

² See [ICC-02/17-142](#) (“Update on the Deferral Request”), para. 2.

³ See generally [Update on the Deferral Request](#).

⁴ [ICC-02/17-151](#) (“Response to Motion Seeking Remedies for Information and Effective Outreach”); [ICC-02/17-152](#) (“Response to Submissions on behalf of Certain Victims”). The motions by the legal representatives of victims and members of civil society were subsequently dismissed *in limine*: [ICC-02/17-156](#) (“Decision on Applications concerning Information and Effective Outreach”).

⁵ See e.g. [Response to Motion Seeking Remedies for Information and Effective Outreach](#), para. 15.

President Ashraf Ghani left Afghanistan. By the following day, at an emergency meeting of the UN Security Council on 16 August 2021, Member States referred to the “disintegrat [ion]” of the “leadership of the central Government” in Afghanistan, and the “de facto control” of the Taliban over much of the territory.⁶ On 30 August 2021, in Resolution 2593 (2021), the UN Security Council reaffirmed its strong commitment to the sovereignty, independence, territorial integrity, and national unity of Afghanistan, and encouraged “all parties to seek an inclusive, negotiated political settlement”.⁷ On 7 September 2021, the Taliban announced a leadership structure through which they would carry out their *de facto* control of the territory. Reportedly, Mullah Mohammad Hasan Akhund has been appointed as the most senior figure, with Mullah Abdul Ghani Baradar and Mawlawi Abdul Salam Hanafi appointed as his deputies.

5. As a result of these developments, the Prosecutor has now determined that it is necessary to request the authorisation of the Pre-Trial Chamber to resume the investigation in the *Situation in Afghanistan*, notwithstanding the Deferral Request. Notice of this intention was communicated by letter from the Prosecutor to the Embassy of the Islamic Republic of Afghanistan to the Netherlands, on 3 September 2021, in conformity with rule 54(2).⁸

6. In this context, the Prosecution recalls that the scope of the Afghanistan Situation encompasses “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”.⁹ As such, the Court may exercise its jurisdiction over any article 5 crime committed

⁶ UN Security Council, ‘The situation in Afghanistan,’ 16 August 2021, UN Doc. S/PV.8834 (“UN Security Council Emergency Meeting”), p. 4 (remark by the representative of Norway). *See also* pp. 7 (remark by the representative of Kenya, referring to “the effective collapse of the Afghan Government and a takeover by the insurgents”), 8 (remark by the representative of Ireland, referring to “the loss of Government control in Kabul”).

⁷ UN Security Council, Res. 2593 (2021), 30 August 2021, preamble and para. 4.

⁸ *See also* Confidential Annex A.

⁹ [ICC-02/17-138 OA4](#) (“Afghanistan Appeal Judgment”), para. 79.

within these parameters,¹⁰ including any crimes committed in recent months or in the future.¹¹ For example, the Prosecution notes the UN Security Council’s condemnation in the strongest terms of “the deplorable attacks of August 26, 2021, near Hamid Karzai International Airport in Kabul, Afghanistan, which were claimed by the Islamic State in Khorasan Province”.¹²

Submissions

7. On the basis of an expedited procedure, the Pre-Trial Chamber should promptly authorise the resumption of the investigation in this situation under article 18(2), notwithstanding the Deferral Request. The Prosecutor makes this request on the basis of his determination that the domestic proceedings within the scope of the Deferral Request cannot meet the requirements of articles 17 and 18.

8. As the remainder of this motion explains, prior to August 2021, the Prosecution had not yet reached a final determination whether to seek to resume the Court’s investigation under article 18(2). Further information about the scope of Afghanistan’s domestic investigations and prosecutions of relevant crimes, and their subsequent progress, was critical to the Prosecutor’s decision whether it was appropriate to seek authorisation to resume the Court’s own investigation under article 18(2). In analysing the information supporting the Deferral Request, the Prosecutor was mindful of the primary duty of the domestic authorities to exercise criminal jurisdiction and the complementary mandate of the Court. However, the current *de facto* control of the territory of Afghanistan by the Taliban, and its implications (including for law enforcement and judicial activity in Afghanistan),

¹⁰ See also [Statement of the Prosecutor of the International Criminal Court on the escalating violence in Afghanistan, 17 August 2021](#).

¹¹ See [Afghanistan Appeal Judgment](#), paras. 59, 61-62, 79 (authorising the investigation within the broad parameters identified by the Prosecutor, including “alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003”).

¹² [UN Security Council, Res. 2593 \(2021\), 30 August 2021](#), paras. 1, 3. See also [UN News, ‘UN condemns “abhorrent” terrorist attack at Kabul airport,’ 27 August 2021](#).

represents a fundamental change in circumstances necessitating the present application.

The facts material to this request are sufficiently clear that the Pre-Trial Chamber need not rule on the applicable standard of review

9. While this is the first time the Pre-Trial Chamber has been seised with a request under article 18(2), it need not settle any fine questions of law concerning the particular standard of review which might be applicable due to the extraordinary nature of the circumstances in Afghanistan, and their undisputed basis in fact. The Prosecution nonetheless recalls the preliminary nature of any ruling under article 18—which is without prejudice to any subsequent article 19 challenge by the State in question with regard to any concrete case brought before the Court.¹³ Furthermore, as the Pre-Trial Chamber has recently stated, it is the Prosecutor who conducts the primary review of the scope of the national proceedings identified in a State’s request for deferral (which may include their compatibility with article 17 of the Statute), as a necessary part of the exercise of his discretion in deciding whether to seek an order under article 18(2).¹⁴

10. Indeed, the object and purpose of the Statute is served by ensuring that effective investigations of the alleged crimes in the situation are actually carried out, and without undue delay, preferably by a State with jurisdiction but otherwise by the Court. Article 18 was not intended to create an impunity gap, nor to waste the ‘golden hour’ once the conditions for opening an investigation (under articles 15 or

¹³ See also e.g. J. T. Holmes, ‘The principle of complementarity,’ in R. S. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer, 1999), pp. 72-73. But see further Statute, arts. 18(4), (7); D. D. Ntanda Nsereko, ‘Article 18: preliminary rulings regarding admissibility,’ in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 847-848 (mns. 37-39).

¹⁴ See [Decision on Applications concerning Information and Effective Outreach](#), paras. 23 (“Article 18(2) [...] confers upon the Prosecution the exclusive power to review the Deferral Request with the modalities and the timing it regards as appropriate”), 27. See also [Rules of Procedure and Evidence](#), rule 55(2). The Prosecution notes that neither article 18(2) nor rule 55(2) is worded so as to require express confirmation of the Prosecutor’s analysis, unlike other provisions of the Statute: see e.g. [Statute](#), art. 53(3) (b) (“In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber”).

53(1)) have been met—especially where it appears that article 5 crimes may continue to be committed, as in this situation.¹⁵

Procedural modalities

11. Consistent with article 18(4) of the Statute, which recognises that judicial proceedings under article 18 may need to be “heard on an expedited basis” (albeit in the context of appeals), the Prosecution respectfully requests the Pre-Trial Chamber to set an expedited schedule for determining this application.¹⁶ While the Prosecution has no objection to the Pre-Trial Chamber receiving those observations it considers necessary, it should set a timetable for receipt of such submissions, and should then proceed to render a prompt and expeditious decision on expiry of this deadline. Given the circumstances, the Prosecution submits that no oral hearing is required.

12. The Prosecution recalls that it has already given notice to the Embassy of the Islamic Republic of Afghanistan in the Netherlands of its intention to file this request,¹⁷ and this request is itself filed publicly and may be notified to Afghanistan’s representatives in the ordinary course of the Court’s procedures. While rule 55(2) requires the Pre-Trial Chamber to examine “any” observations which may be filed by Afghanistan according to any scheduling order which may be issued, it does not require the Pre-Trial Chamber to abstain from rendering a decision promptly if Afghanistan does not file such observations within an appropriate judicial deadline.

13. Finally, while the Prosecution stands ready to provide the Pre-Trial Chamber by the most convenient means with the materials required by rule 54(1),¹⁸ it notes

¹⁵ This is further illustrated, for example, by the short (one month) deadline for States to submit a deferral request to the Prosecutor: [Statute](#), art. 18(2).

¹⁶ [Rules of Procedure and Evidence](#), rule 55(1). *See also* rule 55(3) (“The decision and the basis for the decision of the Pre-Trial Chamber shall be communicated as soon as possible”).

¹⁷ *See above* para. 5. *See also* Confidential Annex A.

¹⁸ Given the voluminous nature of these materials, and the particular necessity in the current circumstances to maintain their status as confidential and *ex parte* (Prosecution only), the Pre-Trial Chamber may consider that upload to eCourt is the most appropriate way to proceed.

that they are not in fact central to determination of this application — which instead follows from the extraordinary circumstances now prevailing in Afghanistan and their inevitable consequences for the capacity of the State authorities to meet the obligations of articles 17 and 18. As such, the reasons for authorising the resumption of the investigation rely on facts which are widely reported in open sources, and are not reasonably subject to dispute.

Prior to August 2021, the Prosecutor had not yet reached a final determination whether to seek to resume the Court’s investigation under article 18(2)

14. Consistent with its previous observations, the Prosecution recalls that it had not previously determined whether or not it was appropriate to seek to resume the Court’s investigation under article 18(2).¹⁹

15. In deciding an application under article 18(2), the Pre-Trial Chamber “shall consider the factors in article 17”.²⁰ This is naturally also relevant to the Prosecutor’s prior assessment of a deferral request, leading to the decision whether or not to bring an article 18(2) application before the Chamber. Accordingly, since March 2020, the Prosecution considered whether the cases and potential cases within the scope of the Deferral Request were being or have been investigated or prosecuted by Afghanistan, *and* whether Afghanistan was both willing and able to carry out such investigations or prosecutions genuinely.²¹

16. The information provided in support of the Deferral Request established that, prior to 15 August 2021, the Afghan authorities had conducted domestic proceedings with regard to certain alleged crimes within the scope of the Deferral Request. However, while the Afghan authorities had submitted some information concerning a significant number of cases, the level of detail in that information varied widely —

¹⁹ See e.g. [Response to Motion Seeking Remedies for Information and Effective Outreach](#), para. 5 (“No decision on the Deferral Request has yet been made by the Prosecutor”).

²⁰ [Rules of Procedure and Evidence](#), rule 55(2).

²¹ See [Statute](#), art. 17(1) (a)-(c), 17(3).

to the extent that further clarifications were still required for a relatively large proportion. Likewise, for a number of cases, the proceedings were not yet sufficiently advanced to form a view of their scope or likely impact.

17. In light of this, the Prosecutor did not consider it appropriate to make an immediate determination whether or not to seek authorisation from the Pre-Trial Chamber to resume the Court's investigation under article 18(2). Rather, taking into account the unique circumstances of this situation, a conditional approach was considered for adoption in which the Prosecution would seek to elicit further information. The Prosecution was mindful of the principle of complementarity underpinning the Statute, and the apparently genuine engagement of the Afghan government led by President Ghani. It also took into account the potential for significantly enhancing the scope of accountability for victims and affected communities if the burden of the investigation could be shared with national authorities who were willing and able to pursue at least some relevant lines of inquiry.

18. Accordingly, the Prosecutor's determination whether to seek to resume the Court's investigation under article 18(2) was contingent upon the ongoing engagement of the Afghan authorities, and in particular both: i) the provision of further information concerning their investigations and their scope; and ii) the concrete progress of those investigations, with substantive monitoring and oversight by the Prosecution.

19. However, the significant change of circumstances occasioned by recent events²² has now fundamentally changed this approach. Although the Prosecutor had formed a provisional view that the Afghan authorities might have been willing and able to investigate and prosecute alleged crimes genuinely, *prior* to the events of August

²² See above para. 4. See also [Statute](#), art. 18(3) (*mutatis mutandis*, permitting the Prosecutor to seek review of a deferral request "at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation", even if it has not made a prior request under article 18(2)).

2021, they are now no longer able to do so. In such circumstances, the Prosecution submits that it should be authorised to resume the investigation notwithstanding the Deferral Request.

Since 15 August 2021, there is no reasonable prospect that the investigations identified in the Deferral Request will continue in a fashion which could satisfy the requirements of articles 17 and 19

20. The Prosecution submits that the Pre-Trial Chamber may be satisfied that authorising the resumption of the investigation is lawful and necessary at this present time, notwithstanding the essential importance of maintaining space for the international community to deliberate in the appropriate fora upon the question of Afghanistan's recognised government and international representation.

21. In the respectful view of the Prosecution, it would not be appropriate for the Court to attempt to define the *de jure* and/or *de facto* authorities in Afghanistan at the present time, nor is it necessary to do so in order to rule on this application.

22. Without prejudice to the question of which entity actually constitutes the State authorities of Afghanistan since 15 August 2021, there is no reasonable prospect *either* that any entity outside Afghanistan *or* any entity with *de facto* control in Afghanistan is able to meet the requirements of articles 17 and 18 of the Statute in order to maintain the Deferral Request.

There is no entity outside Afghanistan able to meet the requirements of article 17 on behalf of the State of Afghanistan, for the purpose of the Deferral Request

23. The Prosecution has not been informed that any entity outside Afghanistan considers itself in a position to continue the investigative proceedings commenced prior to 15 August 2021, or has expressed any intention or willingness to attempt to

do so.²³ Nor in any event does the Prosecution consider that such an entity could be regarded at this present time as having the ability genuinely to carry out investigations and prosecutions relevant to the Deferral Request for the purpose of article 17(1) and 17(3) of the Statute.

There is no entity inside Afghanistan willing and able to meet the requirements of articles 17 and 18 on behalf of the State of Afghanistan, in order to maintain the Deferral Request

24. Given the prevailing circumstances, the Prosecution does not consider that there is any reasonable prospect that any entity inside Afghanistan—within a reasonable time, having regard to the object and purpose of the Statute—will be willing to meet the requirements of articles 17 and 18 on behalf of the State of Afghanistan.

25. Three factors in particular raise significant doubts about the existence of any entity inside Afghanistan which is both willing and able genuinely to carry out investigations and prosecutions relevant to the Deferral Request.

- First, in the course of the non-international armed conflict in Afghanistan, prior to 15 August 2021, adverse parties included the government led by President Ashraf Ghani and the Taliban. The departure from Afghanistan of President Ghani leaves the Taliban with *de facto* control of the territory, and as such may constitute an unconstitutional transition of power. In such circumstances and without express and credible information to the contrary, there can be no basis to presume any continuity of policies between the government of President Ghani and any successor. This includes policies related to the Deferral Request.
- Second, as noted in the Prosecution's request to open an investigation under article 15(3), there is a reasonable basis to believe that persons affiliated with

²³ See also Confidential Annex A.

the Taliban committed crimes against humanity, which are characterised among other elements by the existence of an organisational policy.

- Third, while information in the public domain is limited at this time, early indications from Afghanistan since 15 August 2021 do not suggest that the policies of the Taliban while in *de facto* control of the territory—or any entity with which they are associated—will be markedly different from those which characterised their participation in the non-international armed conflict. Early indications suggest that their policies on matters related to criminal justice and other material considerations are unlikely to conform to those adopted since 2002.

26. Indeed, credible reports suggest that the Taliban have released thousands of prisoners allegedly linked to Al-Qaeda and IS terror groups, from Bagram airbase detention facilities.²⁴ This action does not support the notion that the Taliban will genuinely investigate article 5 crimes, now, or in the future.

27. Finally, the Prosecution notes that article 18 also imposes certain procedural obligations upon any State seeking to defer an investigation by the Court. Most notably, this includes the obligation to periodically inform the Prosecutor of the progress of its investigative and prosecutorial activities under article 18(5).²⁵ Consequently, in circumstances where the Prosecution cannot be assured of its practical ability to confer with the State authorities in question—for example, due to legal impediments in recognising the credentials of such authorities—a deferral request cannot continue to be effective for the purpose of article 18.

28. The Prosecution emphasises that the above considerations should not be misinterpreted to suggest that there can *never* be any prospect of fair and just proceedings in Afghanistan, carried out by State authorities in compliance with the

²⁴ <https://www.businessinsider.com/watch-afghan-prisoners-isis-al-qaeda-fighters-freed-by-taliban-2021-8?international=true&r=US&IR=T> and <https://www.independent.co.uk/news/world/americas/us-politics/isis-k-us-prisons-taliban-b1910021.html>.

²⁵ See [Statute](#), art. 18(5).

principles of the Statute. To the contrary, the Prosecution will remain alive to this possibility, and any such developments will remain relevant to the admissibility of cases brought before this Court according to article 19 of the Statute.

29. In the Prosecution's respectful view, the current circumstances, taken as a whole, justify authorisation of the resumption of the Prosecution's investigation.

Conclusion

30. For all the reasons above, the Pre-Trial Chamber should:

- a. Issue an order on an expedited basis, setting the procedure to be followed in deciding this request in accordance with rule 55(1);
- b. Receive any further observations it considers appropriate according to an expedited schedule; and
- c. Issue an expedited decision authorising the resumption of the investigation in the *Situation in Afghanistan*, notwithstanding the Deferral Request.



Karim A. A. Khan QC, Prosecutor

Dated this 27th day of September 2021

At The Hague, The Netherlands