

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **24 February 2022**

**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**

**Order setting the schedule for the filing of submissions in the proceedings  
pursuant to article 18(2) of the Rome Statute and rule 55(2) of the Rules of  
Procedure and Evidence**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan

Mr Manoj Sachdeva

**Counsel for Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States Representatives**

Islamic Republic of Afghanistan

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

Mr Philipp Ambach

**PRE-TRIAL CHAMBER II** (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this ‘Order setting the schedule for the filing of submissions in the proceedings pursuant to article 18(2) of the Rome Statute and rule 55(2) of the Rules of Procedure and Evidence’.

## **I. Procedural history**

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

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<sup>1</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, 12 April 2019, [ICC-02/17-33](#).

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

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

<sup>4</sup> [ICC-02/17-139](#).

(the ‘Afghanistan’) pursuant to article 18(2) of the Rome Statute (the ‘Deferral Request’).<sup>5</sup>

4. On 16 April 2021, the Chamber received the Prosecutor’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request’, informing the Chamber of the latest communications with Afghanistan in the context of the Deferral Request.<sup>6</sup>

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

6. On 8 October 2021, the Chamber issued the ‘Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor’s “Request to authorise resumption of investigation under article 18(2) of the Statute”’ (the ‘8 October 2021 Decision’).<sup>8</sup> The Chamber stated that ‘for it to be in a position to make an informed decision and hence properly establish the procedure under article 18(2) of the Statute, it need[ed] to receive reliable and updated information as to the identification of the authorities currently representing Afghanistan’.<sup>9</sup> Accordingly, the Chamber requested the Secretary-General of the United Nations (the ‘UN Secretary-General’) and the Bureau of the Assembly of States Parties of the International Criminal Court (the ‘Bureau of the ASP’), in light of their respective mandates, to submit information on the identification of the authorities currently representing Afghanistan.<sup>10</sup>

7. On 5 November 2021, the Registry transmitted to the Chamber the communications submitted by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel on 18 October 2021 and by the Bureau of the ASP on 26 October 2021.<sup>11</sup>

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<sup>5</sup> [ICC-02/17-139-Anx1](#).

<sup>6</sup> [ICC-02/17-142](#).

<sup>7</sup> [ICC-02/17-161](#), with a confidential annex.

<sup>8</sup> [ICC-02/17-165](#).

<sup>9</sup> [8 October 2021 Decision](#), para. 19.

<sup>10</sup> [8 October 2021 Decision](#), para. 19, p. 9.

<sup>11</sup> Transmission of Communications Submitted by the United Nations and the Bureau of the Assembly of States Parties pursuant to Pre-Trial Chamber II’s Decision ICC-02/17-165 of 8 October 2021, 5 November 2021, [ICC-02/17-169](#), with two annexes [ICC-02/17-169-AnxI](#) and [ICC-02/17-169-AnxII](#).

## II. Determination by the Chamber

8. The Chamber recalls that the Prosecutor submitted the Application for the resumption of investigation after reports in the media indicating that the government of Ashraf Ghani then-President of Afghanistan (and under whose authority the Deferral Request was submitted) had been ousted.<sup>12</sup> The Prosecutor argues that the Chamber should authorise the resumption of the investigation, ‘notwithstanding the Deferral Request’, as ‘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 article 17 and 18 of the Statute’.<sup>13</sup>

9. The Chamber recalls that in its 8 October 2021 Decision it stated that ‘article 18 of the Statute [...] is at the heart of the complementarity regime which underpins the Statute’ and that ‘it encapsulates the idea of a process of dialogue, between the Court and the Prosecutor on the one hand, and the relevant State, from whom observations can and should be sought pursuant to rule 55(2) of the Rules [of Procedure and Evidence (the ‘Rules’)], on the other’. In this context, the Chamber also stressed that the Application for resumption of investigation ‘cannot [...] be legally adjudicated without addressing the “question of which entity actually constitutes the State authorities of Afghanistan since 15 August 2021”’; rather, this question is central to the triggering of the procedure under article 18(2) of the Statute’.<sup>14</sup>

10. The Chamber further recalls that to address that question it sought the assistance of the UN Secretary-General and the Bureau of the ASP ‘in order to receive reliable and updated information as to the identification of the authorities currently representing Afghanistan’.<sup>15</sup>

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<sup>12</sup> [8 October 2021 Decision](#), para. 8 referring to the [Prosecutor’s Application](#), paras 8, 14 and paras 15-18. *See also* [Prosecutor’s Application](#), para. 4 and references cited therein. *See further* United Nations, ‘[The situation in Afghanistan and its implications for international peace and security](#)’, Report of the Secretary-General, General Assembly Security Council Seventy-sixth session, Security Council, Seventy-sixth year, 2 September 2021, A/76/328-S/2021/759.

<sup>13</sup> [Prosecutor’s Application](#), para. 22.

<sup>14</sup> [8 October 2021 Decision](#), para. 16.

<sup>15</sup> [8 October 2021 Decision](#), para. 19.

11. By letter dated 26 October 2021, the Bureau of the ASP responded, regretting ‘to inform that due to its nature and functions, it does not hold the type of information that is requested’.<sup>16</sup>

12. By letter dated 18 October 2021, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel responded that (i) ‘the Secretary-General, and the United Nations Secretariat more broadly, do not engage in acts of recognition of Governments, which is a matter for individual Member States’; (ii) ‘the Secretary-General, as depositary, is guided by the decisions of the intergovernmental organs regarding the representation of Member States before receiving a treaty action’ and (iii) ‘since 15 August 2021, the General Assembly has not taken any decision on the representation of Afghanistan at the United Nations’.<sup>17</sup> By the same token, the Legal Counsel also pointed out that ‘the Security Council has adopted two resolutions on the situation in Afghanistan, namely, resolutions 2593 (2021) of 30 August 2021 and 2596 (2021) of 17 September 2021, and issued three press statements, dated 16 and 27 August and 9 October 2021 (SC/14604, SC/14615 and SC/14658)’.<sup>18</sup> In Resolution 2593 (2021), the Security Council *inter alia* ‘takes note of the Taliban’s condemnation [of the attacks of 26 August 2021 in Kabul, Afghanistan]’; ‘notes the relevant Taliban’s commitments’ not to use the Afghan territory ‘to threaten or attack any country’; and ‘notes the Taliban statement of August 27, 2021, in which the Taliban committed that Afghans will be able to travel abroad, may leave Afghanistan anytime they want to, and may exit Afghanistan via any border crossing, both air and ground’.<sup>19</sup>

13. The Chamber further notes that by a resolution adopted on 6 December 2021, the General Assembly of the United Nations (the ‘UN General Assembly’) deferred its decision as to the two communications indicating different individuals seeking to represent Afghanistan before the UN General Assembly.<sup>20</sup> It was widely reported that

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<sup>16</sup> [ICC-02/17-169-AnxII](#).

<sup>17</sup> [ICC-02/17-169-AnxI](#).

<sup>18</sup> [ICC-02/17-169-AnxI](#).

<sup>19</sup> United Nations, [Resolution 2593 \(2021\) adopted by the Security Council at its 8848th meeting on 30 August 2021](#), S/RES/2593.

<sup>20</sup> United Nations, General Assembly, [Report of the Credential Committee](#), 1 December 2021, A/76/550, paras 8-9 (‘8. The Committee had before it two communications concerning the representation of Afghanistan at the seventy-sixth session of the General Assembly, indicating different individuals as representatives to the seventy-sixth session of the Assembly. The first was dated 14 September 2021 from the Permanent Representative of Afghanistan to the United Nations in New York. The second communication was dated 20 September 2021 from the Ministry of Foreign Affairs of Afghanistan. 9. The Chair proposed that the Committee defer its decision on the credentials pertaining to the

the two individuals seeking accreditation for the seat at the UN General Assembly were Suhail Shaheen, a spokesman to the group that ousted the government of Ashraf Ghani, and Ghulam Isaczai, the Ambassador and Permanent Representative of Afghanistan appointed in July 2021 by Ashraf Ghani, President of Afghanistan at the time.<sup>21</sup>

14. The Chamber acknowledges that there is at this time no conclusive determination as to the identity of the authorities currently representing Afghanistan. This, however, cannot result in preventing the Chamber from exercising its power to request observations from Afghanistan pursuant to rule 55(2) of the Rules and to subsequently rule on the Prosecutor's Application. As noted by Pre-Trial Chamber I, 'by the very nature of the core crimes under the Rome Statute, the facts and situations that are brought before the Court arise from controversial contexts where political issues are sensitive and latent. Accordingly, the judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes, but which also trigger legal and juridical issues.'<sup>22</sup>

15. First, the Chamber notes that changes of governments have no impact on the continuity of States. It has indeed been the practice of this Court not to stop the communication, cooperation or to suspend proceedings with States on the basis of changes of governments.<sup>23</sup> The Chamber additionally notes that changes of governments had equally no bearing on proceedings before other international courts.<sup>24</sup>

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representatives of Myanmar and on the credentials pertaining to the representatives of Afghanistan to the seventy-sixth session of the General Assembly. The proposal was adopted without a vote.'). United Nations, [Resolution adopted by the General Assembly on 6 December 2021](#), 7 December 2021, A/RES/76/15.

<sup>21</sup> See for instance, The New York Times, '[The Taliban nominate a U.N. envoy, complicating a quandary for the General Assembly](#)', 21 September 2021 (accessed on 22 September 2021); Foreign Policy, '[Afghanistan's U.N. Envoy Heads for the Exit](#)', 16 December 2021 (accessed on 17 December 2021); UN, Meetings Coverage and Press Releases, Biographical Note, '[New Permanent Representative of Afghanistan Presents Credentials](#)', 19 July 2021 BIO/5408. It was reported that Ghulam Isaczai had left his post on 15 December 2021.

<sup>22</sup> Pre-Trial Chamber I, [Decision on the 'Prosecution request pursuant to article 19\(3\) for a ruling on the Court's territorial jurisdiction in Palestine'](#), 5 February 2021, ICC-01/18-143, para. 55.

<sup>23</sup> See for recent examples the Situation in the Republic of Mali and the Situation in Darfur, Sudan.

<sup>24</sup> See for example the proceedings before the International Court of Justice between the Republic of the Niger (the 'Niger') and Burkina Faso initiated on 12 May 2010, despite the *coup d'état* in Niger on 18 February 2010, condemned, among others, by the Secretary General of the United Nations. United Nations, Press Release, [Secretary-General Condemns Coup d'État in Niger](#), 19 February 2010; ICJ, *Frontier Dispute (Burkina Faso/Niger)*, [Order of 14 September 2010](#), 14 September 2010, I.C.J. Reports 2010, p. 631, [Judgement of 16 April 2013](#), 16 April 2013, I.C.J. Reports 2013. See also the recent hearings held by the International Court of Justice, during which Myanmar made oral submissions on 21 February 2021, in the case of *The Gambia v. Myanmar*, despite the fact that the military faction that took power in Myanmar through a *coup d'état* on 1 February 2021 has not been recognised yet as

16. Moreover, the Chamber considers that observations from a State for the purposes of rule 55(2) of the Rules are sought in the context of the complementarity principle: accordingly, any government in place is the relevant entity to inform the Court on whether that particular state ‘is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States’ within the meaning of article 18(2) of the Statute.

17. Although, to the best of the Chamber’s knowledge, no State has formally recognised members of the group that ousted the government of Ashraf Ghani as the new and current government of Afghanistan, multiple States, the United Nations and other international organisations have engaged with, conducted talks and cooperated with them. In numerous circumstances, States and international organisations, notably the United Nations and the European Union, have officially referred to the group that has seized power as the ‘Afghanistan *de facto* authorities’ or the ‘*de facto* government’ of Afghanistan, therefore regarding members of that group as the interlocutors of Afghanistan.

18. Finally, the Chamber stresses that the observations are sought in order to ensure the continuity of judicial proceedings in the most rigorous way.

19. For these reasons, the Chamber invites pursuant to rule 55(2) of the Rules Afghanistan to provide observations on the Application for resumption of the investigation, no later than Friday 25 March 2022. Accordingly, the Chamber orders the Registrar to communicate the present order to the authorities currently representing Afghanistan.

20. In addition, the Office of the Prosecutor is instructed, if it so wishes, to submit a reply to the observations of Afghanistan, no later than Friday 8 April 2022. The Chamber further sets Friday 8 April 2022 as the date for all the victims’ views and concerns on the Prosecutor’s Application to be submitted to the Victims Participation and Reparations Section (the ‘VPRS’) and instructs the VPRS to submit to the Chamber

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representatives of Myanmar to the seventy-sixth session of the General Assembly, by the credential committee of the United Nations General Assembly. See footnote 20 above; ICJ, *The Gambia v. Myanmar* case, [Order of 28 January 2021](#).

all the views and concerns received by that date, together with the final report, no later than Monday 25 April 2022.

**FOR THESE REASONS, THE CHAMBER**

**INVITES** the Islamic Republic of Afghanistan to provide observations, as set forth in paragraphs 19 of the present order, no later than Friday 25 March 2022;

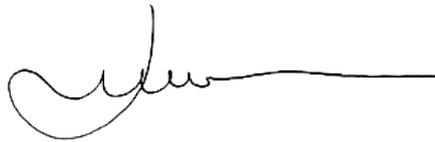
**ORDERS** the Registry to communicate the present order to the authorities currently representing Afghanistan;

**INSTRUCTS** the Office of Prosecutor, if it so wishes, to submit a reply to the observations of Afghanistan, no later than Friday 8 April 2022;

**SETS** Friday 8 April 2022 as the date for all the victims' views and concerns on the Prosecutor's Application to be submitted to the Victims Participation and Reparations Section; and

**INSTRUCTS** the Victims Participation and Reparations Section to submit to the Chamber all the views and concerns received by Friday 8 April 2022, together with the final report, no later than Monday 25 April 2022.

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



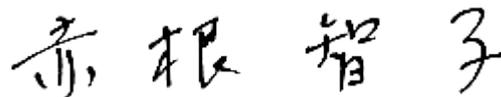
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**Judge Rosario Salvatore Aitala**  
**Presiding Judge**



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**Judge Antoine Kesia-Mbe Mindua**



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**Judge Tomoko Akane**

Dated this Thursday, 24 February 2022

At The Hague, The Netherlands