

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **22 July 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 instructing the Prosecution to submit observations and relevant materials pursuant to article 18(2) of the Rome Statute and 54(1) of the Rules of Procedure and Evidence

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

The Office of the Prosecutor
Mr Karim A. A. Khan
Ms Nazhat Shameem Khan

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

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this ‘Order instructing the Prosecution to submit observations and relevant materials pursuant to article 18(2) of the Rome Statute and 54(1) of the Rules of Procedure and Evidence’ (the ‘Statute’ and the ‘Rules’, respectively).

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

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

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

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

⁴ [ICC-02/17-139](#).

⁵ [ICC-02/17-139-Anx1](#).

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

5. On 27 September 2021, the Prosecutor requested the Chamber to authorise the resumption of the investigation in the situation in Afghanistan, notwithstanding the Deferral Request, pursuant to article 18(2) of the Statute (the ‘Application’ or the ‘Prosecution’s Application’).⁷

6. On 8 October 2021, the Chamber requested the Secretary-General of the United Nations 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 (the ‘8 October 2021 Decision’).⁸

7. On 5 November 2021, the Chamber received the communications submitted, respectively, 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 as to the identification of the authorities currently representing Afghanistan, pursuant to the 8 October 2021 Decision.⁹

8. On 8 November 2021, the Chamber instructed the Victims Participation and Reparations Section to collect victims’ views and concerns for the purpose of the proceedings under article 18(2) of the Statute.¹⁰

⁶ [ICC-02/17-142](#) (the ‘16 April 2021 Notification’).

⁷ Request to authorise resumption of investigation under article 18(2) of the Statute, [ICC-02/17-161](#), with a confidential annex.

⁸ [ICC-02/17-165](#), para. 19, p. 9.

⁹ 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](#).

¹⁰ Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute, [ICC-02/17-171](#). See also Decision on the ‘Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings’, [ICC-02/17-173](#), with a confidential annex.

9. Between 17 December 2021 and 25 April 2022, the Registry transmitted to the Chamber the victim's views and concerns¹¹ and related reports.¹²

10. On 24 February 2022, the Chamber issued the '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', inviting the authorities currently representing Afghanistan to provide observations on the Prosecutor's Application (the '24 February 2022 Order').¹³

11. On 25 March 2022, pursuant to the 24 February 2022 Order, the Chamber received a transmission filing from the Registry,¹⁴ indicating that it had transmitted the 24 February 2022 Order '[...] by way of note verbale, to the Embassy, for onward communication to the competent Afghan authorities' and that '[o]n 1 March 2022, the Embassy confirmed receipt of the Registry's note verbale and the [24 February 2022] Order, by email'.¹⁵

12. On 6 April 2022, the Chamber received submissions by the Prosecution, requesting the Chamber to rule expeditiously on the Application since, in its view, '[t]he

¹¹ First Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, ICC-02/17-174, with confidential annexes; Second Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, ICC-02/17-178, with confidential annexes; Third Registry Transmission of Victim Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, ICC-02/17-180, with confidential annexes; Fourth Registry Transmission of Victims' Representations, [ICC-02/17-189](#), with confidential *ex parte* annexes.

¹² First Registry Report on Article 18 (2) Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, ICC-02/17-175-Red (public redacted version notified on 20 December 2021), with two confidential *ex parte* annexes; Second Registry Report on Article 18 (2) Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, ICC-02/17-179-Red (public redacted version notified on the same day), with two confidential *ex parte* annexes; Third Registry Report on Article 18(2) Victim Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, ICC-02/17-181, with two confidential *ex parte* annexes; Annex I to Final consolidated report on Article 18(2) Victim Representations, [ICC-02/17-190-AnxI-Red](#) (confidential version notified on the same day), transmission filing ([ICC-02/17-190](#)) with two other annexes.

¹³ [ICC-02/17-182](#).

¹⁴ Public Redacted Version of "Transmission of [REDACTED] pursuant to Pre-Trial Chamber II's Decision ICC-02/17-182 of 24 February 2022", 25 March 2022, ICC-02/17-185-Red (public redacted version notified on 11 April 2022), with two confidential annexes (the 'Registry's 25 March 2022 Transmission').

¹⁵ Registry's 25 March 2022 Transmission, ICC-02/17-185-Red, paras 5-6.

Chamber has taken the requisite steps to alert the competent Afghan authorities of [said application]’.¹⁶

13. On 7 April 2022, the Chamber issued the ‘Order seeking the assistance of the United Nations and the United Nations Assistance Mission in Afghanistan’, requesting that these entities transmit to the authorities currently representing Afghanistan the Chamber’s invitation to submit observations on the Prosecution’s Application (the ‘7 April 2022 Order’).¹⁷

14. On 11 May 2022, the Chamber received the ‘Registry’s Transmission of a Letter received from the United Nations pursuant to Pre-Trial Chamber II’s Order ICC-02/17-187 of 7 April 2022’.¹⁸ The United Nations indicated that ‘[...] in line with its established practice, [it] transmitted the 24 February 2022 and 7 April 2022 Orders to the Permanent Mission of Afghanistan to the United Nations in New York on 4 May 2022’.¹⁹

15. On 3 June 2022, the Chamber received the ‘Registry’s Transmission of a Second Letter received from the United Nations dated 31 May 2022 pursuant to Pre-Trial Chamber II’s Order ICC-02/17-187 of 7 April 2022’.²⁰

II. Determination by the Chamber

16. The Chamber notes article 18 of the Statute and rules 53 to 55 of the Rules. In particular, rule 54(1) of the Rules provides that ‘[t]he information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber’.²¹

17. The Chamber notes that, in its Application, the Prosecution indicated that, between 12 June 2020 and 10 June 2021, Afghanistan provided the Prosecution with

¹⁶ Public Redacted Version of “Prosecution response to the [REDACTED] by the Registry pursuant to Pre-Trial Chamber II’s Decision ICC-02/17-182 of 24 February 2022” (ICC-02/17-186-Conf, filed on 6 April 2022), ICC-02/17-186-Red (public redacted version notified on 21 April 2022), paras 9, 11.

¹⁷ [ICC-02/17-187](#).

¹⁸ [ICC-02/17-191](#) (dated 10 May 2022 and notified on 11 May 2022), with a public annex, [ICC-02/17-191-Anx](#).

¹⁹ [ICC-02/17-191-Anx](#), p. 2.

²⁰ [ICC-02/17-192](#), with a confidential annex.

²¹ Rule 53 of the Rules provides that: When a State requests a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and provide information concerning its investigation, taking into account article 18, paragraph 2. The Prosecutor may request additional information from that State.

materials in support of the Deferral Request.²² According to the Prosecution, those materials ‘[...] are not [...] central to [the] determination of [the 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’ of the Statute.²³ The Prosecutions indicated that ‘[it] stands [nonetheless] ready to provide’ the Chamber with said materials in accordance with rule 54(1) of the Rules.²⁴ The Prosecution suggested in this respect that ‘[g]iven 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’.²⁵

18. The Chamber has taken note of the Prosecution’s position as to the relevancy of the materials communicated by Afghanistan to its Application. Notwithstanding, the Chamber deems it appropriate – as required by the Rules – to receive said materials before ruling on the Prosecution’s Application. Accordingly, the Prosecution is instructed to communicate to the Chamber any materials received from Afghanistan in support of the Deferral Request, by no later than Friday, 26 August 2022. The Prosecution is instructed to liaise with the Registry in order to upload said materials to the relevant electronic system supporting the Court’s judicial proceedings. The Prosecution is further instructed to organise such materials as to make it possible for the Chamber to consult and examine them in an efficient manner.

19. In addition, the Chamber notes that, in its Application, the Prosecution submitted that prior to the events of August 2021, ‘[t]he information provided in support of the Deferral Request established that [...] the Afghan authorities had conducted domestic proceedings with regard to certain alleged crimes within the scope of the Deferral Request’.²⁶ The Prosecution observed however that

while the Afghan authorities had submitted some information concerning a significant number of cases,

²² [Prosecution’s Application](#), ICC-02/17-161, para. 2. *See also* [16 April 2021 Notification](#), ICC-02/17-142, para. 2.

²³ [Prosecution’s Application](#), ICC-02/17-161, para. 13.

²⁴ [Prosecution’s Application](#), ICC-02/17-161, para. 13.

²⁵ [Prosecution’s Application](#), ICC-02/17-161, footnote number 18.

²⁶ [Prosecution’s Application](#), ICC-02/17-161, para. 16. *See also* paras 14-15.

the level of detail in that information varied widely—to the extent that further clarifications were still required for a relatively large proportion [and] for a number of cases, the proceedings were not yet sufficiently advanced to form a view of their scope or likely impact.²⁷

20. The Prosecution indicated that, in line with the complementarity mandate of the Court, its determination as to whether seek the Chamber’s authorisation to resume its investigation ‘was contingent upon the ongoing engagement of the Afghan authorities’.²⁸

21. The Prosecution further explained that the reports in the media indicating that the government of Ashraf Ghani then-President of Afghanistan (under whose authority the Deferral Request was submitted) had been ousted propelled it to fundamentally change its approach and led it to seek the Chamber’s authorisation to resume the investigation pursuant to article 18(2) of the Statute;²⁹ in its view, these developments would entail that ‘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’.³⁰

22. For it to be in a position to issue a ruling in accordance with article 18(2) of the Statute and rule 55(2) of the Rules,³¹ the Chamber finds it appropriate to also instruct the Prosecution to submit its own assessment of the merits of the Deferral Request based on the materials received from Afghanistan, by no later than Friday, 26 August 2022. The Prosecution may further include in its assessment updated submissions and relevant information or evidence to substantiate its assertions, in particular as to the lack of ongoing domestic proceedings or the inaction of the authorities currently representing Afghanistan.³²

²⁷ [Prosecution’s Application](#), ICC-02/17-161, para. 16.

²⁸ [Prosecution’s Application](#), ICC-02/17-161, para. 18. *See also* para. 8.

²⁹ [Prosecution’s Application](#), ICC-02/17-161, paras 4, 8, 19, 25.

³⁰ [Prosecution’s Application](#), ICC-02/17-161, paras 22. *See also* paras 14-19.

³¹ Rule 55(2) provides that the Chamber ‘shall examine the Prosecutor’s application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation’.

³² In this regard, the Chamber wishes to recall that ‘statements or assumptions of political nature have no place in a Court of law’ ([8 October 2021 Decision](#), ICC-02/17-165, para. 18).

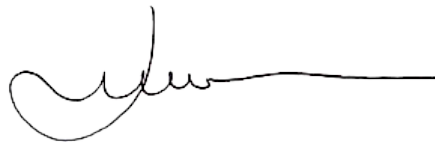
FOR THESE REASONS, THE CHAMBER

ORDERS the Prosecution to communicate to the Chamber any materials received from Afghanistan in support of the Deferral Request, as provided in paragraph 18 of this order, by no later than Friday, 26 August 2022;

ORDERS the Registry to provide the Prosecution with any assistance required, as set out in paragraph 18 of this order; and

ORDERS the Prosecution to submit an assessment of the merits of the Deferral Request, or any other relevant observations and information, as provided in paragraph 22 of this order, by no later than Friday, 26 August 2022.

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



Judge Rosario Salvatore Aitala
Presiding Judge



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Friday, 22 July 2022

At The Hague, The Netherlands