

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **31 October 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**

**Decision pursuant to article 18(2) of the Statute authorising the Prosecution to  
resume investigation**

**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**

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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’ or the ‘ICC’) issues this decision authorising the Prosecution to resume its investigation into the situation in the Islamic Republic of Afghanistan (the ‘Afghanistan Situation’).

## **I. Procedural history**

1. On 20 November 2017, the Prosecution submitted its ‘Request for authorisation of an investigation pursuant to article 15’<sup>1</sup> (the ‘20 November 2017 Request’) in relation to the Islamic Republic of Afghanistan (‘Afghanistan’), which was rejected by the Chamber on 12 April 2019 (the ‘Afghanistan Article 15 Decision’).<sup>2</sup>
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’ (the ‘Appeals Chamber Article 15 Decision’).<sup>3</sup>
3. On 15 April 2020, the Prosecution<sup>4</sup> notified the Chamber of the Government of Afghanistan’s request of 26 March 2020 seeking a deferral, pursuant to article 18(2) of the Rome Statute (the ‘Statute’), of the Prosecution’s investigation into the Afghanistan Situation<sup>5</sup> (the ‘Deferral Request’).

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<sup>1</sup> ICC-02/17-7-Conf-Exp, and public redacted version ICC-02/17-7-Red.

<sup>2</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, [ICC-02/17-33](#). On 31 May 2019, Judge Mindua issued the Concurring and Separate Opinion of Judge Kesia-Mbe Mindua, 31 May 2019, [ICC-02/17-33-Anx-Corr](#), annexed to the Afghanistan Article 15 Decision, and a [public annex](#).

<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](#).

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

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

4. On 16 April 2021, the Prosecution informed the Chamber of the latest communications with Afghanistan in the context of the Deferral Request;<sup>6</sup> indicated that Afghanistan had provided material regarding cases it averred to have investigated or was in the process of investigating in the context of the Deferral Request, on which material, as of 19 March 2021, the Prosecution had requested Afghanistan to provide additional clarification.<sup>7</sup>

5. On 27 September 2021, the Prosecution requested authorisation to resume its investigation under article 18(2) of the Statute' (the 'Prosecution's Application').<sup>8</sup>

6. On 8 October 2021, the Chamber set the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence (the 'Rules').<sup>9</sup>

7. On 5 November 2021, the Chamber received communications submitted by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, and from the Bureau of the Assembly of States Parties, on 18 October 2021 on 26 October 2021 respectively.<sup>10</sup>

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.<sup>11</sup>

9. On 25 November 2021, the Chamber (i) approved the 'Victim Representation Form' previously adopted in the Afghanistan Situation, as well as guidelines on how to fill in such a form, modified by the Registry for the purpose of the proceedings pursuant

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<sup>6</sup> [ICC-02/17-142](#) (the '16 April 2021 Notification').

<sup>7</sup> Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request, [16 April 2021 Notification](#), para. 2.

<sup>8</sup> Request to authorise resumption of investigation under article 18(2) of the Statute, [ICC-02/17-161](#), with a confidential annex.

<sup>9</sup> 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", [ICC-02/17-165](#) (the '8 October 2021 Decision').

<sup>10</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](#).

<sup>11</sup> 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 \(the '8 November 2021 Decision'\)](#).

to article 18(2) of the Statute; and (ii) set a first deadline for the collection of victims' views and concerns (the '25 November 2021 Decision').<sup>12</sup>

10. On 17 December 2021, 28 January, 23 February, and 25 April 2022, in accordance with its instructions, the Chamber received, respectively, the Registry's first, second, third, and fourth transmissions of victims' representations<sup>13</sup> and related reports.<sup>14</sup>

11. On 24 February 2022, the Chamber set the schedule for the filing of submissions in relation to the article 18 (2) proceedings (the '24 February 2022 Order');<sup>15</sup> on 25 March 2022, it received a transmission from the Registry (the 'Registry's 25 March 2022 Transmission')<sup>16</sup>, 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'.<sup>17</sup>

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<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 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 filed on 20 December 2021) (the 'First Registry Report'), with confidential annexes ICC-02/17-175-Conf-Exp-AnxI and ICC-02/17-175-Conf-Exp-AnxII; 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 filed on the same day), with confidential annexes ICC-02/17-179-Conf-Exp-AnxI and ICC-02/17-179-Conf-Exp-AnxII; 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 confidential *ex parte* annexes ICC-02/17-181-Conf-Exp-AnxI and ICC-02/17-181-Conf-Exp-AnxII; Fourth Registry Transmission of Victims' Representations, [ICC-02/17-189](#), with confidential *ex parte* annexes.

<sup>15</sup> 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, [ICC-02/17-182](#).

<sup>16</sup> 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.

<sup>17</sup> Registry's 25 March 2022 Transmission, paras 5-6.

12. On 6 April 2022, the Chamber received submissions from the Prosecution on the Registry's 25 March 2022 Transmission.<sup>18</sup>

13. On 7 April 2022, the Chamber sought the assistance of the United Nations and the United Nations Assistance Mission in Afghanistan, requesting these entities to transmit the Chamber's invitation to present observations on the Prosecution's Application to the authorities currently representing Afghanistan.<sup>19</sup>

14. On 25 April 2022, the Chamber received the Registry's final report on victims' representations.<sup>20</sup>

15. On 11 May 2022, the United Nations indicated, through the Registry, 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'.<sup>21</sup> 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'.<sup>22</sup>

16. On 22 July 2022, the Chamber instructed the Prosecution 'to communicate to the Chamber any materials received from Afghanistan in support of the Deferral Request' and 'to submit an assessment of the merits of the Deferral Request, or any other relevant observations and information'.<sup>23</sup>

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<sup>18</sup> 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) (the 'Prosecution's 6 April 2022 Submissions').

<sup>19</sup> Order seeking the assistance of the United Nations and the United Nations Assistance Mission in Afghanistan, ICC-02/17-187.

<sup>20</sup> 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) (the 'Registry's Consolidated Report'), transmission filing ([ICC-02/17-190](#)) with 2 other annexes (ICC-02/17-190-Conf-Exp-AnxII, ICC-02/17-190-Conf-Exp-AnxIII).

<sup>21</sup> 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, ICC-02/17-191 (dated 10 May 2022 and notified on 11 May 2022), with a public annex, ICC-02/17-191-Anx. See ICC-02/17-191-Anx, p. 2.

<sup>22</sup> ICC-02/17-192, with a confidential annex.

<sup>23</sup> 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, ICC-02/17-194.

17. On 29 August 2022, the Prosecution transferred to the Chamber the material it had received from the State of Afghanistan on 12 June 2020 in support of the Deferral Request and additional observations ('the Prosecution's Further Observations').<sup>24</sup>

## II. Prosecution's Submissions

18. In the Prosecution's Application, the Prosecution recalled a number of recent political developments in Afghanistan including that, since 4 May 2021, 'forces opposed to the government of President Ghani' launched offensives in various provinces across the country, and entered the capital city of Kabul on 15 August 2021, at which time President Ashraf Ghani left the country. On 7 September 2021, those forces 'announced a leadership structure through which they would carry their *de facto* control of the territory' of Afghanistan.<sup>25</sup>

19. The Prosecution 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>26</sup>

20. The Prosecution further submits that:

the Chamber has taken the requisite steps to alert the competent Afghan authorities to the Prosecution's Application, and has provided them with sufficient time to provide their observations. Not only was the Chamber's invitation publicly notified, but the Registry has complied with the Court's legal framework in communicating the Chamber's Order to the Afghan authorities through the designated official channel.<sup>27</sup>

21. The Prosecution thus requests the Chamber to issue a decision authorising the resumption of the investigation in the Afghanistan Situation, notwithstanding the Deferral Request.<sup>28</sup>

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<sup>24</sup> Prosecution's communication of materials and further observations pursuant to article 18(2) and rule 54(1), ICC-02/17-195, with confidential annexes A to C.

<sup>25</sup> [Prosecution's Application](#), para. 4.

<sup>26</sup> [Prosecution's Application](#), para. 22.

<sup>27</sup> Prosecution's 6 April 2022 Submissions, para. 9.

<sup>28</sup> [Prosecution's Application](#), paras 1, 7, 30.

22. When transferring the materials to the Chamber on 29 August 2022, the Prosecution submitted that Afghanistan has not adequately substantiated its Deferral Request, by failing to provide sufficient documentation demonstrating active and ongoing investigations or prosecutions.<sup>29</sup> Specifically, it submits that:

- (i) Despite Afghanistan providing information in relation to 518 cases,<sup>30</sup> no documentation substantiating any investigations was provided in respect of 280 cases, and only one document, often just consisting of ‘a letter instructing the opening of a case’, dated less than one month before the submission of the Deferral Material, was provided in respect of another 43 cases;<sup>31</sup>
- (ii) According to the Prosecution, (ii) 51 cases were otherwise insufficiently substantiated, despite the authorities having provided two or more supporting documents;<sup>32</sup>
- (iii) As many as 77 out of the 144 cases in respect of which the existence of an investigation or prosecution had been demonstrated did not concern crimes within the parameters of the Prosecution’s authorised investigation or insufficient information was provided about the crimes investigated, making it impossible to conclude that these investigations fall within the scope of the Prosecution’s authorised investigations and/or jurisdiction of the Court;<sup>33</sup>
- (iv) The remaining 67 cases do not sufficiently mirror its intended investigation in terms of the main perpetrator groups being investigated, the level of seniority of the persons being investigated, the types of crimes being investigated, or the temporal and geographical scope of the investigation;<sup>34</sup>

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<sup>29</sup> Prosecution’s Further Observations, para. 2.

<sup>30</sup> Prosecution’s Further Observations, para. 66.

<sup>31</sup> Prosecution’s Further Observations, para. 67.

<sup>32</sup> Prosecution’s Further Observations, para. 67.

<sup>33</sup> Prosecution’s Further Observations, paras 2, 68, 70.

<sup>34</sup> Prosecution’s Further Observations, paras 2, 69-70, 74-89.



- (v) As to the 54 cases which were substantiated by Afghanistan and relevant to the authorised investigation have been finalised by way of conviction and sentencing of an accused, whilst they may result being inadmissible at the article 19 stage, they do not justify, by themselves, a deferral under article 18, as the Prosecution may still want to investigate these individuals in respect of other incidents and/or the same incidents in respect of other more senior suspects.<sup>35</sup>

23. Moreover, in addition to arguing that the Deferral Request is insufficient on its own to warrant a deferral of the Prosecution's investigation, the Prosecution submits that a request for deferral must be determined based on the relevant facts, as they exist at the time of the Chamber's assessment. In this regard, the Prosecution observes that the circumstances in Afghanistan have changed significantly since 15 August 2021. It highlights that the current authorities 'are not continuing, cannot continue and will not continue the relevant investigations and prosecutions that formed the basis of the Deferral Request'.<sup>36</sup>

24. Pointing at open sources information and witness statements, the Prosecution contends that any relevant investigations and prosecutions in support of the Deferral Request have been 'abandoned or – at best – are in a state of inaction'.<sup>37</sup> The Prosecution explains that '[t]he criminal justice system in Afghanistan, as it existed before 15 August 2021, has effectively disintegrated', as policemen, prosecutors and judges have fled *en masse* or have been dismissed, and offices responsible for the investigation and prosecution of the cases relied upon in the Deferral Request have been disbanded or almost entirely re-staffed. The Prosecution adds that relevant laws have been replaced with a legal system 'purportedly said to be based upon [...] the Taliban's interpretation of Sharia law'.<sup>38</sup>

25. Finally, the Prosecution submits that the current authorities representing Afghanistan are not willing or able to genuinely investigate and/or prosecute the

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<sup>35</sup> Prosecution's Further Observations, para. 72.

<sup>36</sup> Prosecution's Further Observations, paras 4-5, 89, 91, 95.

<sup>37</sup> Prosecution's Further Observations, para. 96.

<sup>38</sup> Prosecution's Further Observations, paras 95, 96-106.

relevant acts and persons:<sup>39</sup> more specifically, this would be made apparent by the fact that they have released thousands of prisoners,<sup>40</sup> and declared a general amnesty for all ‘political detainees [...] without any restrictions or conditions’.<sup>41</sup> According to the Prosecution, these initiatives relate to all ‘political crimes’ committed prior to 15 August 2021,<sup>42</sup> and includes Taliban fighters that were imprisoned for engaging in ‘insurgent activities’.<sup>43</sup> Should these initiatives be actually and fully implemented, this would cover all cases relevant to the Deferral Request and, as such, would be ‘a clear indication of a lack of any intention – or legal basis – to pursue these cases’ by the Afghanistan authorities.<sup>44</sup>

### III. Victims’ views and concerns

#### a) General observations

26. Following the 8 November 2021 Decision, the 25 November 2021 Decision,<sup>45</sup> and the 24 February 2022 Order, 16 victims’ representations (of which one individual and 15 collective)<sup>46</sup> were submitted and assessed by the Registry as falling within the parameters of the Afghanistan Situation.<sup>47</sup> The Registry indicated that the total number of representations made on behalf of victims since the initial application by the Prosecution, consisted of 11,150 individual victims and 130 families.<sup>48</sup>

27. In considering the representations made, the Chamber was assisted by the reports of the Registry that identified patterns, including common and shared views of the victims.

28. The Chamber notes that certain victims or their representatives refer to filings that were submitted outside the current victims’ views and concerns collection process

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<sup>39</sup> Prosecution’s Further Observations, paras 107-114.

<sup>40</sup> Prosecution’s Further Observations, para. 108, 110.

<sup>41</sup> Prosecution’s Further Observations, para. 108, 111.

<sup>42</sup> Prosecution’s Further Observations, para. 111.

<sup>43</sup> Prosecution’s Further Observations, para. 108.

<sup>44</sup> Prosecution’s Further Observations, para. 111.

<sup>45</sup> Decision on the ‘Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings’, [ICC-02/17-173](#).

<sup>46</sup> [Registry’s Consolidated Report](#), para. 22.

<sup>47</sup> [Registry’s Consolidated Report](#), para. 16.

<sup>48</sup> [Registry’s Consolidated Report](#), para. 24.

(the ‘Article 18(2) Collection Process’).<sup>49</sup> The Chamber recalls that it has ruled that the individuals who submitted these filings lack standing.<sup>50</sup> Accordingly, these submissions were not considered for the purpose of the present decision. The same applies to submissions that were not filed into the case record in accordance with the 8 November 2021 Decision.<sup>51</sup> The present analysis is limited to the victims’ views and concerns submitted in the context of the Article 18(2) Collection Process, including any relevant representations previously made in the proceedings pursuant to article 15 of the Statute and identified by the Registry as linked to the current proceedings.<sup>52</sup>

29. The Chamber notes that, as set out by the Registry, all<sup>53</sup> individuals who made representations expressed themselves to be in favour of the resumption of the investigation, because of several factors including the following: (i) the need to ensure a genuine and timely investigation, which could only be achieved by an impartial international court; (ii) the desire to contribute to ending impunity and preventing future crimes; or (iii) the belief that an investigation by the Court would lead to raise awareness about the victims’ situation and allow for victims’ voices to be heard.<sup>54</sup> Victims also referred to the weakness of the police and judicial institutions in

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<sup>49</sup> They refer for instance to: ICC-02/17-146-Anx; ICC-02/17-157-AnxA; and ICC-02/17-167-AnxA.

<sup>50</sup> See [ICC-02/17-156](#); [ICC-02/17-170](#); [ICC-02/17-171](#), in which these filings were dismissed *in limine*. See also The Presidency, Decision on ‘Motion Seeking Remedies for Repeated Administrative Violations’, dated 28 January 2022, (ICC-02/17-183-Conf-Anx1) annexed to ‘Registry Transmission of a Document submitted before the Presidency’, dated 4 March 2022 (ICC-02/17-183), 7 July 2022, ICC-02/17-193.

<sup>51</sup> [ICC-02/17-171](#), para. 11. See ICC-02/17-174-Conf-Exp-Anx2 (r/80001/21) (referring to a letter addressed to the Registrar on 12 November 2021); ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), p. 3 and ICC-02/17-174-Conf-Exp-Anx3 (r/80003/21), p. 5 (referring to a document dated 13 December 2022 titled ‘Request for Leave and Victims’ Submissions Concerning the Prosecution Application under Article 18(2) and on Victim Participation in the Afghanistan Situation’).

<sup>52</sup> First Registry Report, ICC-02/17-175-Red, para. 26.

<sup>53</sup> [Registry’s Consolidated Report](#), paras 2, 26, 30. The Registry noted that in one collective representation it is mentioned that all but one of the victims represented support the investigation into Afghanistan and as a result it considered that the representation as a whole supports the Prosecution’s Application. See also ICC-02/17-174-Conf-Exp-Anx1; ICC-02/17-174-Conf-Exp-Anx2 (r/80001/21); ICC-02/17-174-Conf-Exp-Anx3 (r/80003/21); ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21); ICC-02/17-178-Conf-Exp-Anx1 (r/80027/21); ICC-02/17-178-Conf-Exp-Anx2 (r/80028/21); ICC-02/17-178-Conf-Exp-Anx3 (r/90000/22); ICC-02/17-178-Conf-Exp-Anx4 (r/90001/22); ICC-02/17-178-Conf-Exp-Anx5 (r/90002/22); ICC-02/17-180-Conf-Exp-Anx1 (r/90003/22); ICC-02/17-180-Conf-Exp-Anx2 (r/90004/22); ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22); ICC-02/17-189-Conf-Exp-Anx1 (r/90006/22); ICC-02/17-189-Conf-Exp-Anx2 (r/90007/22); ICC-02/17-189-Conf-Exp-Anx3 (r/90008/22); ICC-02/17-189-Conf-Exp-Anx4 (r/90009/22).

<sup>54</sup> [Registry’s Consolidated Report](#), paras 26-27.

Afghanistan;<sup>55</sup> the lack of genuine access to justice<sup>56</sup> and of any prospect for ensuring accountability.<sup>57</sup> They also reported a fear of retaliation.<sup>58</sup> Lastly, they stated that since human rights defenders and international actors who had supported the victims locally have now left Afghanistan, they felt left without any protection for them and their families.<sup>59</sup>

30. In addition, the Chamber notes that certain victims, or their representatives, raised concerns regarding the Article 18(2) Collection Process; the use of the term ‘potential victims’; the scope of the investigation; and the scope of the Deferral Request. The Chamber will briefly address these specific concerns before assessing the Prosecution’s Application, given that they constitute incidental questions to the main question of whether to authorise the Prosecution to resume its investigation in the Afghanistan Situation.

**b) Victims’ views and concerns regarding the Article 18(2) Collection Process**

31. Certain victims expressed that the process adopted by this Chamber to collect the victims’ views and concerns may paradoxically result in depriving them of their ability to properly enter in to a dialogue with the Court.<sup>60</sup> They submit that the process adopted by the Chamber conflicts with the relevant provisions of the Court’s legal framework protecting the rights of victims,<sup>61</sup> and that undertaking the Article 18(2) Collection Process ‘did not justify their exposure to high levels of danger considering the current circumstances in Afghanistan’.<sup>62</sup> The Chamber recalls that article 18(2) of the Statute

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<sup>55</sup> [Registry’s Consolidated Report](#), para. 29 c., p. 13. See also ICC-02/17-178-Conf-Exp-Anx3 (r/90000/22); ICC-02/17-189-Conf-Exp-Anx4 (r/90009/22).

<sup>56</sup> [Registry’s Consolidated Report](#), paras 26, 29. See also ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22); ICC-02/17-189-Conf-Exp-Anx4 (r/90009/22).

<sup>57</sup> ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), pp. 5-6; ICC-02/17-178-Conf-Exp-Anx3 (r/90000/22). See also ICC-02/17-180-Conf-Exp-Anx2 (r/90004/22), p. 3.

<sup>58</sup> [Registry’s Consolidated Report](#), paras 27, 29.

<sup>59</sup> [Registry’s Consolidated Report](#), para. 29.

<sup>60</sup> ICC-02/17-180-Conf-Exp-Anx2 (r/90004/22), p. 3. See also ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22), p. 3; [Registry’s Consolidated Report](#), para. 29.

<sup>61</sup> ICC-02/17-174-Conf-Exp-Anx2 (r/80001/21); ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21).

<sup>62</sup> [Registry’s Consolidated Report](#), paras 11, 15. See also ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), p. 2. See also ICC-02/17-174-Conf-Exp-Anx2 (r/80001/21), p. 2; ICC-02/17-178-Conf-Exp-Anx4 (r/90001/22).

does not explicitly envisage a role for victims at this stage of the proceedings.<sup>63</sup> A strict interpretation of this provision would therefore mean that victims' views and concerns would normally not be sought in this context. The Chamber considers, however, that article 18 (2) of the Statute must be interpreted in a manner that takes into account the overall role and interests of victims at various stages of proceedings before the Court. Mindful of the fact that the interests of potential victims may be affected as a result of the developments in these proceedings, and in order to allow victims to express their views and concerns regarding the Prosecution's Application, and to offer an opportunity for dialogue with the Court, instead of representations solely being made *via* counsel, the Chamber therefore adopted the Article 18(2) Collection Process, bearing in mind the need to preserve an orderly conduct of the proceedings.<sup>64</sup>

**c) Victims' views and concerns regarding the use of the term  
'potential victims'**

32. The Chamber observes that its use of the term 'potential victims' appears to have created concerns. It therefore clarifies that the term 'potential victims' is solely used to distinguish individuals whose applications have not yet gone through the application process pursuant to rule 89 of the Rules, as generally adopted in the context of confirmation of charges proceedings, on the one hand, from those individuals who have been admitted to participate in proceedings as victims through the rule 89 procedure, on the other. Accordingly, the wording was used with a view to ensuring compliance with article 68(3) of the Statute and rule 85 of the Rules.

**d) Victims' views and concerns regarding the scope of the  
investigation**

33. Certain victims express concerns over the Prosecution's apparent choice not only to simply communicate its decision through a press statement dated 27 September 2021 (and thus not as an official filing before the Chamber), but also to focus its investigation 'on crimes allegedly committed by the Taliban and the Islamic State - Khorasan Province' and deprioritise other parts of the investigation, before any investigation is

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<sup>63</sup> [8 October 2021 Decision](#), para. 22.

<sup>64</sup> [8 November 2021 Decision](#), paras 12-14.

actually carried out (the ‘Prosecution’s 27 September 2021 Statement’).<sup>65</sup> They fear that this focus may result in the Prosecution overlooking crimes allegedly committed by others, including members of armed forces or security and intelligence services of non-States parties,<sup>66</sup> or the targeting of certain groups of people.<sup>67</sup> These victims contend that the absence of a serious prospect of ensuring accountability at the domestic level for these alleged crimes, whether in Afghanistan or in any other State,<sup>68</sup> coupled with their large-scale and grave nature, should compel the Prosecution to also fully investigate these crimes.<sup>69</sup>

34. Some victims further submit that the Prosecution’s Application does not contain any fact or circumstances that might justify or explain narrowing the scope of the investigation as authorised by the Appeals Chamber, nor does it specify why the Prosecution does not intend to pursue the investigation in its entirety.<sup>70</sup> In the same vein, certain representations indicate that no explanation was provided by the Prosecution in support of the stated decision to deprioritise some aspects of the investigation.<sup>71</sup> For some, the Prosecution’s decision to deprioritise certain aspects of its investigation amounts to a decision not to investigate pursuant to article 53(1) of the Statute; this would trigger the Chamber’s powers to review that decision under article 53(3)(b) of the Statute, after granting the Prosecution’s Application.<sup>72</sup>

35. The Chamber believes that the Prosecution’s duties and obligations with respect to victims include that it should inform them of its investigative and prosecuting actions

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<sup>65</sup> [Registry’s Consolidated Report](#), para. 28. See also ICC-02/17-174-Conf-Exp-Anx3 (r/80003/21), pp. 5-6; ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), pp. 4-5; ICC-02/17-178-Conf-Exp-Anx1 (r/80027/21), paras 4-5; ICC-02/17-178-Conf-Exp-Anx5 (r/90002/22), p. 1; ICC-02/17-180-Conf-Exp-Anx2 (r/90004/22), p. 3; ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22), p. 3.

<sup>66</sup> ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21); ICC-02/17-178-Conf-Exp-Anx1 (r/80027/21).

<sup>67</sup> [Registry’s Consolidated Report](#), para. 27. See also ICC-02/17-180-Conf-Exp-Anx2 (r/90004/22), p. 3; ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22), p. 3; ICC-02/17-189-Conf-Exp-Anx4 (r/90009/22).

<sup>68</sup> [Registry’s Consolidated Report](#), para. 28. See also ICC-02/17-174-Conf-Exp-Anx3 (r/80003/21), pp. 5-7; ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), pp. 5-6; ICC-02/17-178-Conf-Exp-Anx1 (r/80027/21), para. 5; ICC-02/17-180-Conf-Exp-Anx2 (r/90004/22), p. 3; ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22), p. 3.

<sup>69</sup> [Registry’s Consolidated Report](#), para. 28. See also ICC-02/17-178-Conf-Exp-Anx1 (r/80027/21), paras 4-5; ICC-02/17-180-Conf-Exp-Anx3 (r/90005/22); ICC-02/17-189-Conf-Exp-Anx4 (r/90009/22); also ICC-02/17-174-Conf-Exp-Anx3 (r/80003/21), p. 7.

<sup>70</sup> ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), pp. 4-5.

<sup>71</sup> ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), p. 5.

<sup>72</sup> ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), p. 5.

at all relevant stages.<sup>73</sup> However, article 53(1) of the Statute does not apply to the present matter, as the investigation in the situation in Afghanistan was authorised by the Appeals Chamber following the Prosecution's request to initiate a *proprio motu* investigation pursuant to article 15(3). The Appeals Chamber stated in this regard that:

the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts. Article 15 of the Statute governs the initiation of a *proprio motu* investigation, while article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the [United Nations] Security Council.<sup>74</sup>

36. Even if the Prosecution's 27 September 2021 Statement were to be construed as constituting a decision not to proceed with an investigation, the legal framework does not envisage judicial review of the Prosecution's conclusion by the Chamber.<sup>75</sup> The Chamber observes, however, that the Prosecution's practice of informing victims of ongoing investigative activities and strategies by way of public statements has not always been perceived as coherent or comprehensive, and appears to result in a degree of confusion and disappointment on the side of victims. Such a sentiment can be discerned from the representations submitted in the present proceedings. The Chamber therefore invites the Prosecution to undertake a thorough and critical assessment of its communication strategy vis-à-vis victims, to ensure a respectful and sensitive dialogue with them.

**e) Victims' views and concerns regarding the scope and effect of the Deferral Request**

37. Some victims argue that, pending the review of the Deferral Request, the Prosecution should not have completely stalled the investigation into crimes allegedly committed by members of armed forces or security and intelligence services of non-states parties; this because Afghanistan 'was not - and is not - in a position to

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<sup>73</sup> [8 November 2021 Decision](#), para. 15.

<sup>74</sup> [Appeals Chamber Judgment on the Afghanistan Article 15 Decision](#), para. 33.

<sup>75</sup> [Appeals Chamber Judgment on the Afghanistan Article 15 Decision](#), para. 31.

investigate, let alone prosecute, crimes’ allegedly committed outside its territory, namely in ‘other States Parties, including Poland, Romania and Lithuania’.<sup>76</sup>

38. The question raised by these victims is whether, pending the review of a deferral request, the Prosecution may proceed with investigative activities in relation to crimes or individuals falling within the parameters of the (authorised) investigation but over which the State seeking the deferral would not ‘normally’<sup>77</sup> exercise national jurisdiction.

39. The Chamber recalls that, in its 8 November 2021 Decision, it invited victims to share their views and concerns pursuant to article 68(3) of the Statute on the Prosecution’s Application,<sup>78</sup> in order for them to bring to the attention of the Chamber any topic they would consider of importance for the Chamber to take into consideration while ruling on the application.

40. In this regard, the Chamber notes that the question raised by some victims with respect to investigations about crimes committed or individuals over which the State requesting the deferral would not normally exercise jurisdiction, or – more pertinently – cannot exercise jurisdiction, while an article 18(2) request is pending before a chamber, falls outside the purview of the present matter. Whether to continue investigating crimes that fall outside the jurisdiction of the requesting State, falls within the discretion of the Prosecution.<sup>79</sup> However, article 18(2) of the Statute suggests that a request for deferral need not necessarily cover the entire scope of an investigation (as

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<sup>76</sup> ICC-02/17-174-Conf-Exp-Anx4 (r/80004/21), p. 4.

<sup>77</sup> The Chamber notes that this is the term used in article 18(1): ‘the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned’. The Chamber considers that a State would ‘normally’ exercise jurisdiction over: crimes committed on its territory; crimes committed by its nationals; or crimes committed by individuals who are under its custody.

<sup>78</sup> 8 November 2021 Decision, para. 14.

<sup>79</sup> As previously stated, article 18(2) of the Statute confers upon the Prosecution the exclusive power to review a deferral request with the modalities and the timing it regards as appropriate, given that this article contemplates a Pre-Trial Chamber’s intervention only upon the application of the Prosecution, in the event that the Prosecution does not intend to defer to the relevant State’s investigations (Decision regarding applications related to the Prosecution’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request’, 3 September 2021, [ICC-02/17-156](#), para. 23). See also articles 42(1) and 54 of the Statute.



authorised by the relevant Chamber), but may concern ‘the State’s investigation of those persons’ only, namely ‘its nationals or others within its jurisdiction’.

#### IV. Determination by the Chamber

41. As a preliminary observation, the Chamber recalls that the political developments having occurred in Afghanistan since the submission of the Deferral Request (including as of 15 August 2021)<sup>80</sup> were of such nature and scale that the Chamber considered it appropriate to request additional and updated observations from the State of Afghanistan, having since made several attempts to obtain such additional observations.<sup>81</sup> To date, following the expiry of multiple deadlines set for this very purpose, the Chamber has not received any such observations, while the Deferral Request was never formally withdrawn. The Chamber therefore remains seized of the Deferral Request.

42. The Chamber recalls that article 18(2) of the Statute provides, in relevant part, that:

a State may inform the Court that it 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. At the request of that State, 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.

43. When making an article 18(2) request, the relevant State must provide information concerning its investigations.<sup>82</sup> In considering whether to authorise the resumption of an investigation, the Chamber must examine the Prosecution’s application and any observations submitted by the State seeking a deferral, and ‘shall consider the factors in article 17 in deciding whether to authorize an investigation’.<sup>83</sup> These factors are those instances in which a case would be inadmissible at the Court, namely:

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<sup>80</sup> See para. 18 above.

<sup>81</sup> See paras 11, 13 above.

<sup>82</sup> Rule 53 of the Rules.

<sup>83</sup> Article 18(2) of the Statute and rule 55(2) of the Rules.

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

44. As these ‘factors’ must be considered when assessing an article 18(2) request, it is appropriate to recall the Court’s case law in relation to article 17 of the Statute, as well as to articles 15 and 19, which may both be of assistance. According to the Appeals Chamber, ‘[i]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned’. Only when both questions are answered in the affirmative, should a chamber consider whether a State is unwilling and unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute. Inaction by the State having jurisdiction means that the question of unwillingness or inability does not arise, and a case would be admissible before the Court.<sup>84</sup>

45. For admissibility challenges pursuant to article 18(2), the onus is similarly on the State to show that investigations or prosecutions are taking place or have taken place.<sup>85</sup>

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<sup>84</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 78.

<sup>85</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, [ICC-01/09-02/11-274](#) (the ‘*Muthaura et al.* Article 19 Judgment’), para. 61; Appeals Chamber, *The Prosecutor v. William Samoei Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, [ICC-01/09-01/11-307](#), para. 62; Appeals Chamber, *The Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge

In doing so, the relevant State must ‘provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case’.<sup>86</sup> Merely asserting that investigations are ongoing is ‘not sufficient’.<sup>87</sup> To demonstrate ‘activity’, a State must show that ‘tangible, concrete and progressive investigative steps’ are undertaken<sup>88</sup> and that it is taking proactive investigative steps.<sup>89</sup> Moreover, such investigations must be carried out with a view to conduct *criminal* prosecution.<sup>90</sup>

46. Article 17 applies not only to determinations of the admissibility of a concrete case (as per article 19 of the Statute), but also to preliminary admissibility rulings pursuant to article 18 of the Statute.<sup>91</sup> The meaning of the words ‘case is being investigated’ found in article 17(1)(a) must therefore be understood and construed

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to the admissibility of the case against Simone Gbagbo”, 27 May 2015, [ICC-02/11-01/12-75-Red](#), para. 128.

<sup>86</sup> [Muthaura et al. Article 19 Judgment](#), paras 2, 61, 68; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, [ICC-01/11-01/11-344-Red](#), para. See also Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, paras 59, 64-65.

<sup>87</sup> [Muthaura et al. Article 19 Judgment](#), paras 2, 61.

<sup>88</sup> Pre-Trial Chamber I, *The Prosecutor v. Simone Gbagbo*, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, [ICC-02/11-01/12-47-Red](#), paras 30, 65; [Burundi Article 15 Decision](#), para. 148. See also Appeals Chamber, *Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75-Red, para. 122; Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, 4 July 2018, [ICC-01/11-01/17-13](#) (the ‘Al-Werfalli Second Warrant of Arrest’), paras 27, 28; Pre-Trial Chamber III, *The Situation in the Republic of Burundi*, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, para.172, 175; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 161; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, para. 55.

<sup>89</sup> [Burundi Article 15 Decision](#), paras 164, 173, 174; [Al-Werfalli Second Warrant of Arrest](#), para. 28.

<sup>90</sup> [Burundi Article 15 Decision](#), para. 152; para. 165; [Afghanistan Article 15 Decision](#), para. 79.

<sup>91</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, [ICC-01/09-02/11-274](#), para 37. See also Appeals Chamber, *The Prosecutor v. William Samoei Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, [ICC-01/09-01/11-307](#) (the ‘Ruto et al. Article 19 Judgment’), para. 39.

taking into account the specific context in which the test is applied. When a chamber must consider preliminary admissibility challenges under article 18 of the Statute, the contours of ‘likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages’.<sup>92</sup> Nonetheless, if investigations are taking place at the national level, the Chamber is tasked to consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court,<sup>93</sup> even though the two forms of investigations to be compared, namely specific domestic cases with identified individuals versus a so far general ICC investigation into a large number of crimes, covering a large geographical area and timeframe, will require a comparison of two very different sets of information that cannot easily be compared.

47. The admissibility of a case must be determined on the basis of the facts ‘as they exist *at the time* of the proceedings [before the Court]’.<sup>94</sup> Similarly, in assessing the existence of investigations for the purposes of an article 18(2) request, a Chamber must take into account the state of such investigations at the time of its consideration of the request for deferral. In doing so, the relevant Chamber is to take into consideration the information provided by the State on its investigations as well as any material submitted for this purpose. As significant changes in the political or safety situation of a country may impact on a State’s willingness or ability to investigate, or to continue

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<sup>92</sup> [Muthaura et al. Article 19 Judgment](#), para. 38; and *Ruto et al. Article 19 Judgment*, para. 39.

<sup>93</sup> [Muthaura et al. Article 19 Judgment](#), para. 39; and *Ruto et al. Article 19 Judgment*, para. 40.

<sup>94</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, paras 56 (‘Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. [...] the chapeau of article 17 (1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge.’), 80]; *Ruto et al. Article 19 Judgment*, para. 83; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101, para. 70; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Yekatom Defence’s Admissibility Challenge, 28 April 2020, ICC-01/14-01/18-493, para. 17. *See also* Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, paras 49-51, 52; Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta and al.*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, [ICC-01/09-02/11-96](#), para. 62; Kenyatta et al. Admissibility Judgment, ICC-01/09-02/11-274, para. 40.

investigating, it may occasionally be warranted to receive updated observations and supporting materials on the domestic situation.

48. The Chamber notes that, whilst in the Deferral Request Afghanistan did provide information, the majority of the material provided in support,<sup>95</sup> was in Dari or Pashto. Further, Afghanistan had initially acknowledged the need for translation,<sup>96</sup> indicating that the information sought by the Prosecution was ‘largely written in Dari’, but that it would be unable to provide the materials within the 60 days requested by the Prosecution as a result of the time-consuming translation process. Afghanistan did not, however, explain which of the materials it regarded as being most important. It was subsequently invited by the Prosecution to provide ‘information that would help [the Prosecution] understand the nature, scope and progress of relevant domestic cases or lines of inquiry’ in Dari, ‘if they are ready and available’, in order for the Prosecution ‘to commence its assessment of the article 18(2) request’.<sup>97</sup>

49. As explained in Prosecution’s Further Observations, the documents received subsequently were reviewed by the Prosecution, and some of them were translated by Prosecution staff into English. The Prosecution further created overviews in English language describing relevant information contained in the documents or summaries of the contents, without however explaining to the Chamber on which basis it had translated certain documents rather than others. This practice is not appropriate. Indeed, it is not for the Prosecution, which is effectively a ‘party’ to the present proceedings, to decide which of the documents transmitted by Afghanistan are worth translating for the purpose of the Chamber’s consideration. In the absence of a response from Afghanistan, it would have been appropriate for the Prosecution to seek the Chamber’s guidance in this respect.

50. As the onus to substantiate a deferral request is on the State, it follows that it is also for the State to ensure that the Chamber can analyse the materials submitted in support of a request for deferral. That is not to say that, in case a State is unable to provide the supporting documents in one of the working languages of the Court, it may not consult with the Prosecution and agree that any translation for the purpose of the

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<sup>95</sup> i.e. material submitted on 12 June 2020, 15 January, 5-7 May and 10 June 2021.

<sup>96</sup> Letter from Afghanistan to the Prosecution, 12 October 2020, AFG-OTP-0012-2559.

<sup>97</sup> Letter from the Prosecutor to Afghanistan, 26 October 2020, AFG-OTP-0012-2563.

Chamber's assessment is made by the Prosecution. However, whilst the Prosecution may offer its services, no obligation rests on it to provide translations. Moreover, if as a result of such a consultation material is brought before the Chamber in a working language of the Court, and without any information to the contrary, it must be assumed that the State accepts the translation, as well as the selection made by the Prosecution, as being reflective of the materials submitted in support of a deferral request.

51. The material submitted by Afghanistan was organised by the Prosecution into two annexes. Annex B contains an Excel file in which the Prosecution has summarised and analysed each case put forward by Afghanistan as supporting its request, and lists the supporting documents received. Annex C contains a list of cases without summary or description, for which Afghanistan, according to the Prosecution, did not provide any supporting material, and which were therefore designated by the Prosecution as unsubstantiated.

52. In support of its request, Afghanistan submitted to the Prosecution 518 cases of relevance. Out of these 518 cases, 280 of them, submitted on 10 June 2021 and for which Afghanistan provided English summaries, were catalogued by the Prosecution in Annex C, because in its view no documentation was provided showing effective investigative steps undertaken by Afghanistan<sup>98</sup> The rest of the cases (i.e. 238) referred to by Afghanistan were divided by the Prosecution in four groups or categories: (i) 'not substantiated', when Afghanistan provided only one supporting document; (ii) 'insufficiently substantiated', if supported by limited supporting documents that were found not to demonstrate adequately the existence of investigative or prosecutorial activities; (iii) 'substantiated but not relevant', if the cases do not mirror the scope of the authorised ICC investigations or are outside the Court's jurisdiction; and (iv) 'substantiated and relevant', if the cases fall within the parameters of the authorised situation and Afghanistan provided adequate supporting documents.<sup>99</sup>

53. The fourth category includes 67 supposedly 'substantiated and relevant' cases consists of 54 completed trials, whilst in the other 13 'cases' arrest warrants were issued

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<sup>98</sup> See Annex C to Prosecution's Further Observations.

<sup>99</sup> Annex B to the Prosecution's Further Observations uses four different colours to designate the abovementioned categories.

or orders of investigation by the (then) competent Afghan authorities. According to Afghanistan, some cases overlap with the examples of incidents the Prosecution has indicated it is investigating.<sup>100</sup> All of the ‘substantiated and relevant’ cases concern (alleged) members of ‘Taliban/AOG’.<sup>101</sup> The individuals investigated or convicted include, according to the Prosecution, only 11 mid- or top-level perpetrators.<sup>102</sup>

54. Of the 1455 documents submitted by Afghanistan to the Prosecution in support of its contention, of which the Prosecution listed 238 cases in Annex B, only 34 documents have been translated by the Prosecution into English. 30 of these translated documents related to the fourth category of cases. They include charge sheets, indictments, judicial decisions and related legal documents issued by Afghan authorities, and concern prosecutions or convictions for suicide attacks and membership of terrorist organisations.<sup>103</sup>

55. Notwithstanding the challenges in applying the same persons/same conduct test to the admissibility of situations rather than of cases, as noted above, which essentially requires the Chamber to compare non-homogeneous proceedings, the extensive scope of the Afghanistan Situation, both temporally and geographically, as well as in terms of alleged crimes, does allow the Chamber to make an assessment about any overlap, or rather lack thereof. Indeed, already at this stage it is possible for the Chamber to find that the actors, potential perpetrators, and alleged crimes mentioned in the Prosecution’s ‘Request for authorisation of an investigation pursuant to article 15’<sup>104</sup> extend well beyond the limited group of persons and incidents that appear to have been investigated and/or convicted in Afghanistan for conduct that overlaps with the Prosecution’s investigation. Even if in certain cases the domestic investigations covered the same individuals and substantially the same conduct as the ICC investigations, it is evident

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<sup>100</sup> Letter from Afghanistan to the Prosecution, 12 June 2020 ([AFG-OTP-00000163-000028](#)), para. 48.

<sup>101</sup> The Prosecution uses the term AOG (armed opposition groups) to denote armed groups opposing the then government of Afghanistan.

<sup>102</sup> See Annex B - Annex 1: case no. 7; Annex 2: cases nos 1, 4, 40; Annex 4: cases nos 12, 13, 16, 29 and 45; May 2021: cases N7, N8;

<sup>103</sup> See Annex B, available translations to documents related to cases highlighted in green (i.e. substantiated and relevant, according to the Prosecution).

<sup>104</sup> See [Appeals Chamber Judgment on the Afghanistan Article 15 Decision](#), para. 79; and the 20 November 2017 Request.

that the cases presented by Afghanistan only address a very limited fraction of the crimes and individuals responsible for them.

56. In light of the above, the Chamber considers that the material transmitted by Afghanistan, and as a result of translations available for the Chamber to analyse, does not show, in itself, that Afghanistan has investigated, or was investigating, in a manner that covers the full scope of the Prosecutor's intended investigations<sup>105</sup> and that would justify even a partial deferral of the Court's investigations.

57. As noted, the Chamber's assessment of the materials is solely based on the Prosecution's translation of a (very) limited number of documents. Whilst having been provided with ample opportunity, Afghanistan has not informed the Chamber that the Prosecution's translation or assessment was incorrect. The Chamber will therefore assume that the state of the investigations in 11 June 2020 was as set out in the previous paragraph. Moreover, the Chamber considers that in the absence of any response to the Prosecution's submissions that all investigations have been stalled, or updated submissions from the side of Afghanistan providing information on the current state of any ongoing or past investigations, Afghanistan has failed to show that such ongoing and/or past investigations *presently* exist or that it still wishes to pursue a deferral.

58. In light of the foregoing, the Chamber considers that Afghanistan is not presently carrying out genuine investigations and that it has not acted in a manner that shows an interest in pursuing the Deferral Request. The limited number of cases and individuals prosecuted by Afghanistan, as shown by the materials submitted and assessable by the Chamber, cannot lead to a finding that the ICC investigation must be deferred. The Chamber therefore grants the Prosecution's Application and authorises the resumption of the investigation in the Afghanistan Situation. The Chamber emphasises that, notwithstanding the Prosecutor's 27 September 2021 statement to the media in which a modified focus was referred to, the present authorisation relates to all alleged crimes and actors that were subject to the Prosecution's 'Request for authorisation of an

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<sup>105</sup> See Pre-Trial Chamber I, *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 39.



investigation pursuant to article 15',<sup>106</sup> for which the Appeals Chamber has granted authorisation.<sup>107</sup>

59. The Chamber reminds the Prosecution, however, that any authorisation decision also has a limiting function, because only the crimes falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it,<sup>108</sup> can be the object of its investigation. Alleged crimes unrelated to such situation and conflicts or related to any new armed conflict(s), be they international or non-international in nature, and new parties to such a conflict,<sup>109</sup> fall outside the scope of the investigation as authorised; although the Prosecution may, of course, submit a request under article 15 of the Statute to either broaden an investigation or open a new one.

60. Finally, the Chamber recalls that the present ruling is *preliminary*<sup>110</sup> for the purpose of authorising the resumption of the investigation, based on the current circumstances, and on the information submitted. It is therefore without prejudice to any future challenge to the jurisdiction of the Court or the admissibility of a case pursuant to article 19 of the Statute. Moreover, given the contemporaneous nature of the information and circumstances underlying decisions pursuant to article 18(2) of the Statute, the fact that a State may be deemed unable or unwilling to carry out genuine investigations at a certain point in time does not mean that this State cannot show at a later point in time to be in a position to investigate or prosecute certain cases within its jurisdiction. Naturally, as provided for in article 18(3) of the Statute, the same applies to situations where an ICC investigation is deferred and the Prosecution assesses that a significant change at the domestic level warrants a resumption of the investigations. In both such cases, the relevant pre-trial chamber may be seized to re-consider its earlier decision.

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<sup>106</sup> 20 November 2017 Request.

<sup>107</sup> [Appeals Chamber Judgment on the Afghanistan Article 15 Decision](#), para. 79

<sup>108</sup> [Appeals Chamber Judgment on the Afghanistan Article 15 Decision](#), para. 79; and the 20 November 2017 Request.

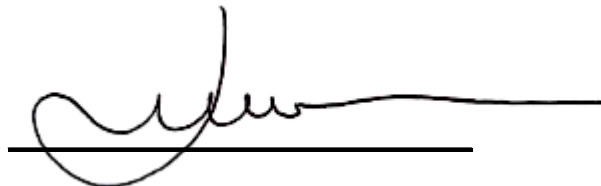
<sup>109</sup> Compare, e.g., the Prosecutor's reference to the 'Islamic State – Khorasan Province' in his 27 September 2021 press statement.

<sup>110</sup> Article 18 is entitled 'Preliminary rulings regarding admissibility'.

**FOR THESE REASONS, THE CHAMBER**

**AUTHORISES** the resumption of the investigation in the situation in Afghanistan.

Done in English. A French translation will follow; the English version remains authoritative.

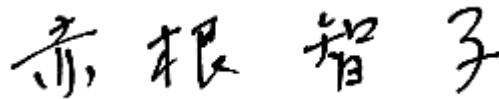


**Judge Rosario Salvatore Aitala**

**Presiding Judge**



**Judge Antoine Kesia-Mbe Mindua**



**Judge Tomoko Akane**

Dated this Monday, 31 October 2022

At The Hague, The Netherlands