

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/17

Date: 15 December 2022

**THE APPEALS CHAMBER**

**Before:**

**Judge Piotr Hofmánski  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa  
Judge Marc Perrin de Brichambaut  
Judge Gocha Lordkipanidze**

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Response to 'Prosecution appeal of "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation" (ICC-02/17-196)'**

**Source:**

**Legal Representatives of Victims**

**Document 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 KC  
Ms Nazhat Shameem Khan  
Ms Helen Brady

**Legal Representatives of the Victims**

Mr Tim Moloney KC and Ms Megan Hirst  
Mr Mikołaj Pietrzak, Ms Nancy Hollander, and Mr Ahmad Assed  
Ms Katherine Gallagher  
Mr Conor McCarthy  
Ms Haydee Dijkstal

**The Office of Public Counsel for Victims**

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

**States' Representatives**

Islamic Republic of Afghanistan

**REGISTRY**

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**Registrar**  
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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Mr Philipp Ambach

## I. INTRODUCTION

1. Pursuant to the Order of the Appeals Chamber on the conduct of the appeal proceedings (“Order”),<sup>1</sup> and regulation 64(4) of the Regulations of the Court, legal representatives of victims Ahmed Rabbani (r/00638/18), Abd Al Rahim Hussayn Muhammad Al-Nashiri (r/60009/17), Sharqawi Al Hajj (r/00751/18), Guled Hassan Duran (r/00750/18), Mohammed Abdullah Saleh al-Asad (r/00749/18), Kareem Khan, Rafiq ur Rehman and family, Fahim Qureshi, Noor Khan, Mohammad Ramazan Khan, Abdul Qayyum, Khairullah Jan, Akthar Zaman, Janatullah, and Ahmed Jan (“the LRVs”) submit their response to the Prosecution appeal of “Decision pursuant to article 18(2) of the Statute authorizing the Prosecution to resume investigation”.<sup>2</sup>

2. On 31 October 2022, Pre-Trial Chamber II rendered its decision authorising the resumption of the Court’s investigation in the situation in Afghanistan, pursuant to the Prosecutor’s request under article 18(2) of the Statute (“the Decision”).<sup>3</sup>

3. On 7 November 2022 the Prosecutor filed a notice of appeal in respect of the Decision (“Notice of Appeal”),<sup>4</sup> and on 22 November 2022 filed an appeal brief (“Appeal Brief”).<sup>5</sup>

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<sup>1</sup> [Order on the conduct of the appeal proceedings](#), ICC-02/17-200, 23 November 2022 (“Order”).

<sup>2</sup> Mr Tim Moloney KC and Ms Megan Hirst represent Ahmed Rabbani; Mr Mikołaj Pietrzak, Ms Nancy Hollander and Mr Ahmad Assed represent Abd Al Rahim Hussayn Muhammad Al-Nashiri; Ms Katherine Gallagher represents Sharqawi Al Hajj, Guled Hassan Duran and Mohammed Abdullah Saleh al-Asad; and Tim Moloney QC and Conor McCarthy represent Cross Border Victims – Kareem Khan, Rafiq ur Rehman and family, Fahim Qureshi, Noor Khan, Mohammad Ramazan Khan, Abdul Qayyum, Khairullah Jan, Akthar Zaman, Janatullah, and Ahmed Jan on behalf of the Foundation for Fundamental Rights and Reprieve.

<sup>3</sup> [Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume the investigation](#), ICC-02/17-196, 31 October 2022 (“Decision”).

<sup>4</sup> [Notice of Appeal of “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)](#), ICC-02/17-197, 7 November 2022 (“Notice of Appeal”).

<sup>5</sup> [Prosecution appeal of “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)](#), ICC-02/17-198, 22 November 2022 (“Appeal Brief”).

4. On 23 November 2022, the Appeals Chamber issued the Order, directing the Registrar to notify the documents in the appeal to the legal representatives of the participating victims and register their filings, and granting them until 15 December 2022 to file any responses to the Prosecutor's appeal brief.<sup>6</sup>

5. The Prosecutor's appeal focuses on paragraph 59 of the Decision.<sup>7</sup> Two grounds are advanced: first, that the Pre-Trial Chamber erred in law by limiting the scope of the Court's jurisdiction to crimes pre-dating those identified in the Prosecution's request for authorisation of an investigation pursuant to article 15 ("Article 15 Request" <sup>8</sup>), such as to impermissibly contravene the Appeals Chamber Judgment which authorised the investigation ("*Afghanistan Appeal Judgment*")<sup>9</sup> and which is binding on the Pre-Trial Chamber ("Ground 1");<sup>10</sup> and, secondly, that the Pre-Trial Chamber erred in fact by misreading the Article 15 Request ("Ground 2").<sup>11</sup>

6. The LRVs make no submissions on Ground 2.

7. Regarding Ground 1, the LRVs support the Prosecutor's appeal in part. The LRVs endorse the submissions and legal basis supporting Ground 1, namely that: the Appeals Chamber already articulated the scope of the investigation and of the Court's jurisdiction; that the Pre-Trial Chamber is bound by the Appeals Chamber's prior determination; and that the *Afghanistan Appeal Judgment* is also supported by and consistent with other ICC jurisprudence in this regard. The LRVs therefore support the Prosecutor's request that the Appeals Chamber reverse and amend the Decision in part. Section III(1) of the submissions which follow set out the reasons for this.

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<sup>6</sup> [Order](#), para. 2.

<sup>7</sup> [Appeal Brief](#), paras. 2-3.

<sup>8</sup> [Public redacted version of "Request for authorisation of an investigation pursuant to article 15"](#), 20 November 2017, ICC-02/17-7-Red, 20 November 2017 ('Article 15 Request').

<sup>9</sup> [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), ICC-02/17-138, 5 March 2020 ('*Afghanistan Appeal Judgment*').

<sup>10</sup> [Appeal Brief](#), paras. 11-31.

<sup>11</sup> [Appeal Brief](#), paras. 32-36.

8. At the same time, the LRVs request that in amending the Decision, the Appeals Chamber clarify and confirm the Prosecutor's duty to investigate the entire situation. In the following submissions the LRVs set out: Section III(2) how the meaning of this obligation has been called into uncertainty by the Prosecutor's Statement in which he informed of his intention to "deprioritise" some aspects of the investigation; Section III(3) why a clarification of the obligation to fully investigate the situation is required as part of the determination of Ground 1 and for the proper administration of justice, to ensure transparency and certainty for victims, partners and others affected by the work of the Court, and to protect the Court's legitimacy and credibility; and Section III(4) the relief sought regarding the meaning of the duty to investigate the entire situation.

## **II. VICTIMS' STANDING TO FILE A RESPONSE TO THE PROSECUTOR'S APPEAL BRIEF**

9. In the Order, the Appeals Chamber recalled its practice of allowing victims to participate in appeals, recalling that "if [victim] participants in appellate proceedings are unable to respond to certain arguments of the appellant, those arguments are precluded from the scrutiny of the participants which may in turn affect the Appeals Chamber's determination of the issues on appeal."<sup>12</sup> It has specifically provided victims with an opportunity to respond and made the necessary directions to the Registry to facilitate this. As such, the LRVs will not address the question of the victims' standing to file this response. However, if the victims' standing is subsequently challenged by the Prosecutor, the LRVs request that they be granted an opportunity to make submissions on this issue.

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<sup>12</sup> [Order](#), paras. 1-2, quoting [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60\(3\) of the Statute"](#), ICC-02-11-01/15-208, 8 September 2015, para. 87.

### III. SUBMISSIONS REGARDING GROUND 1

#### (1) The LRVs support the Prosecutor's submissions

10. The *Afghanistan* Appeal Judgment authorised the investigation and defined the scope of the Court's jurisdiction as follows:

[i]n relation to 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 the other State Parties in the period since 1 July 2002.<sup>13</sup>

11. The Prosecutor submits that the Appeals Chamber properly articulated the scope of the investigation and of the Court's jurisdiction as it relates to the situation, and that paragraph 59 of the Decision seeks to unjustifiably vary the Appeals Chamber's determination and attempts to limit the scope of the investigation.<sup>14</sup> He asserts that Pre-Trial Chamber is bound by the Appeals Chamber's determination on the scope of the Court's jurisdiction in the *Situation in Afghanistan* and that any attempts to limit this should be reversed.<sup>15</sup> The LRVs agree with the Prosecutor's submissions in this regard.

#### (2) Uncertainty has been caused by the Prosecutor's Statement "prioritizing" parts of the investigation, which contradicts with his obligations to investigate the whole situation

12. The Article 15 Request identified three components in respect of which the Prosecution had concluded that there was a reasonable basis to believe that crimes within the Court's jurisdiction – e.g., subject-matter, temporal, admissible vis-à-vis both complementarity and gravity, and in the interests of justice – had occurred.<sup>16</sup>

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<sup>13</sup> [Afghanistan Appeal Judgment](#), para. 79.

<sup>14</sup> [Appeal Brief](#), paras. 17-23.

<sup>15</sup> [Appeal Brief](#), paras. 24-28.

<sup>16</sup> [Article 15 Request](#), paras. 53-71.

- (i) Crimes against humanity and war crimes allegedly committed by the Taliban and affiliated armed groups (“Component One”)
- (ii) War crimes allegedly committed by the Afghan National Security Forces (“Component Two”)
- (iii) War crimes allegedly committed by members of the United States armed forces and members of the Central Intelligence Agency (“Component Three”).

13. In relation to Component Three, the Article 15 Request asserted that the alleged crimes extended beyond the territorial boundaries of Afghanistan. Poland, Lithuania and Romania (all State Parties) were identified as locations where United States actors operated and allegedly committed crimes in the context of, or was associated with, the armed conflict in Afghanistan.<sup>17</sup>

14. As also explained in the Appeal Brief, the Article 15 Request made clear that the crimes detailed in the three components were not exhaustive of the crimes which would fall within the scope of the investigation, but rather comprised a “sample” of relevant crimes.<sup>18</sup> At the same time, the Article 15 Request was unequivocal in its conclusions regarding its jurisdiction over, and the admissibility of, all three components and the need for ICC intervention, observing “[n]ear total impunity has been the rule, not the exception” for all the crimes put forth in the Request.<sup>19</sup>

15. Moreover, the Article 15 Request recognised that a further category of alleged crimes existed; namely, other acts allegedly committed by members of the international armed forces (“Component Four”).<sup>20</sup> In respect of this category, the (former) Prosecutor explained that, at that stage, she had not reached a determination that there was a reasonable basis to believe that crimes within the jurisdiction of the

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<sup>17</sup> [Article 15 Request](#), para. 49.

<sup>18</sup> [Article 15 Request](#), paras. 111, 139, 141, 144, 150, 153, 157, 265; and Appeal Brief, para. 14.

<sup>19</sup> [Article 15 Request](#), para. 5.

<sup>20</sup> [Article 15 Request](#), paras 72-160; paras 161 -186; paras 187- 252; paras 253- 260.

Court had occurred.<sup>21</sup> However, it was noted that if an investigation was opened, the alleged crimes could be assessed further within the scope of the authorised situation.<sup>22</sup>

16. Various Chambers of the Court have repeatedly elaborated, that Article 54(1) entails a duty to fully investigate the whole situation falling within the Court’s jurisdiction (“The Prosecutor *shall*”) (emphasis added).<sup>23</sup> Yet, although the Prosecutor recognises in the Appeal Brief that Article 54(1) of the Statute entails a duty to fully investigate the whole situation falling within the Court’s jurisdiction to *inter alia* obtain a full picture of relevant facts including on the responsibility of various actors who might be involved, meet its duty of objective investigation, and to establish the truth,<sup>24</sup> these submissions conflict with a Statement released by the Prosecutor on 27 September 2021 (“Statement”).<sup>25</sup> In that Statement the Prosecutor announced his decision to “deprioritise” substantial aspects of the investigation:

“I have ... decided to focus my Office’s investigations in Afghanistan on crimes allegedly committed by the Taliban and Islamic State – Khorasan Province (“IS-K”) and to *deprioritise other aspects of this investigation* (emphasis added).”<sup>26</sup>

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<sup>21</sup> [Article 15 Request](#), para. 253.

<sup>22</sup> [Article 15 Request](#), para. 260.

<sup>23</sup> [Afghanistan Appeal Judgment](#), para 60; [Decision on the Prosecutor’s request for authorisation of an investigation pursuant to Article 15\(3\) of the Statute](#), ICC-01/21-12, 15 December 2021, para 17; [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar](#), ICC-01/19-27, 14 November 2019, para 128; [Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation 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, 9 November 2017, para 193 – 4; [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya](#), ICC-01/09-19, 31 March 2010, para 205.

<sup>24</sup> [Appeal Brief](#), paras 21, 29 -30.

<sup>25</sup> [Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18\(2\) seeking authorisation to resume investigations in the Situation in Afghanistan](#), 27 September 2021 (‘Statement’).

<sup>26</sup> *Ibid.*



17. The Prosecutor explained the reason for this decision as being the “limited resources available” to his Office,<sup>27</sup> because the crimes falling within Component One “demand focus and proper resources from [the] Office [of the Prosecutor], if [the Prosecution is] to construct credible cases capable of being proved beyond reasonable doubt in the courtroom”.<sup>28</sup>

18. Despite its reference to “prioritisation”, the Statement made clear that the Prosecutor’s intention is not merely to pursue at a slower pace or with fewer resources, investigations into Components Two (war crimes allegedly committed by the Afghan National Security Forces), Component Three (war crimes allegedly committed by members of the United States armed forces and members of the Central Intelligence Agency) – both of which he has been authorised by the Appeals Chamber to investigate – and Component Four (other acts allegedly committed by members of the international armed forces). Rather, the Statement made clear that the Prosecutor intends that he will not undertake active investigations *at all* in respect of those other aspects of the situation:

“In relation to those aspects of the investigation that have not been prioritised, my Office will remain alive to its evidence preservation responsibilities, to the extent they arise, and promote accountability efforts within the framework of the principle of complementarity.”<sup>29</sup>

19. The Prosecutor’s reference to complementarity in this context is surprising. As consistently submitted previously by the LRVs with respect to the crimes committed against their clients and as unfortunately remains the case today, there is no prospect for investigations and prosecutions at the domestic level for any of the crimes committed by the United States and other international forces. That is the case, not

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<sup>27</sup> [Statement](#).

<sup>28</sup> *Ibid.*

<sup>29</sup> [Statement](#).

only in Afghanistan, but also elsewhere, including in Poland, Lithuania or Romania, Djibouti or the United States.<sup>30</sup> The Prosecutor’s Statement made no pre-requirements of national proceedings of *any* nature (and had not consulted the victims to determine whether any such proceedings were ongoing) before “deprioritizing” these components of the investigation, which has the effect of solidifying the very impunity that the Prosecutor identified in the Article 15 Request. The Statement’s primary topic was the Prosecutor’s request for authorisation to resume the investigation, which was based on his assessment that:

...at this time, there is no longer the prospect of genuine and effective domestic investigations into Article 5 crimes within Afghanistan. ...

This is not to suggest that there can never be any prospect of adequate and effective proceedings in Afghanistan, carried out by State authorities in compliance with the Statute. They are not, however, available in Afghanistan at this time.<sup>31</sup>

20. It is respectfully submitted that the Prosecutor’s indication that there might be investigations and prosecutions pursuant to the principle of complementarity is without proper foundation. No complementary investigations in other jurisdictions are underway. The mechanism of complementarity is not intended to operate by passively allowing national jurisdictions to decide whether to investigate or prosecute; rather it is intended as a mechanism by which the Court – and especially the Prosecutor – applies pressure to encourage them to do so. As explained by the group of experts asked by the Court to elaborate the concept of complementarity in 2003, “[t]he complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and

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<sup>30</sup> [Annex A to the Transmission of “Response to the Prosecution’s “Request to authorise resumption of investigation under article 18\(2\) of the Statute”](#), ICC-02/17-167-AnxA, 7 October 2021 (‘Response to the Prosecution’s Request to authorise resumption of investigation’), paras 19-29.

<sup>31</sup> [Statement](#).

prosecute core crimes.”<sup>32</sup> Complementarity requires *vigilance* by the Prosecutor: it requires that the Prosecutor diligently carry out his responsibilities and be ready to take action where national authorities do not.<sup>33</sup>

21. A public statement from the Prosecutor that he will not act on certain alleged crimes, *despite* the evident and continuing inaction of national authorities and a reasonable basis to believe that those grave crimes had been committed within the scope of authorized investigation, undermines rather than implements the notion of complementarity. In the Statement, the Prosecutor has expressed a clear intention to focus exclusively on specific aspects of the investigation. He has done so without any explanation as to any facts or circumstances that might justify or explain why certain areas of the investigation authorised by the Appeals Chamber should now not be investigated.

22. While the Statement is not a filing before the Court, it must be taken to be an unequivocal declaration by the Prosecutor of his intentions. This is how the Pre-Trial Chamber treated it.<sup>34</sup> The Prosecutor has not sought to challenge or correct the Pre-Trial Chamber’s approach or interpretation of the Statement in the Appeal Brief. Indeed, the Prosecutor himself has highlighted, in the Notice of Appeal, the importance of providing clear public information for “States, affected communities, and most importantly victims about the scope of the Court’s investigations and the prospects for accountability.”<sup>35</sup> Therefore, it must be inferred that the Prosecutor intended the Statement to be relied on.

23. The position as set out in the Statement conflicts directly and irreconcilably with the very obligation on which Ground 1 of the Prosecutor’s appeal relies – the

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<sup>32</sup> [Informal expert paper: The principle of complementarity in practice, 2003](#), para.2

<sup>33</sup> *Ibid.*, para. 3.

<sup>34</sup> [Decision](#), paras. 33-36, 58.

<sup>35</sup> [Notice of Appeal](#), para.12.

obligation to investigate the situation as a whole. The result is not only confusion regarding the true meaning of the obligation, it is legal error.

24. Indeed, after the Statement was issued, it is of note that the Pre-Trial Chamber considered it necessary to remind the Prosecutor that:

[a] proper investigation should focus first on the crimes, then on identifying who the responsible persons of those crimes are. Not only impartiality, but also appearance of impartiality, is a *sine qua non* requirement for justice to contribute to peace and reconciliation.<sup>36</sup>

25. Yet, while issuing the Statement which expresses his intent to prematurely “prioritise” some cases over others before commencing an investigation, let alone fully investigating, the Prosecutor has also acknowledged the scope of his obligation to investigate. This is not a case where the Prosecutor is abandoning an investigation for permissible reasons recognised in Article 53(2) of the statute, i.e., because a there is not a sufficient legal or factual basis, it is otherwise inadmissible, or not in the interests of justice (and notably, the Prosecutor has not pursued that path, which could lead to judicial review under article 53(3) of the statute).<sup>37</sup> As further discussed below in Section (3), the Prosecutor’s Appeal Brief relies heavily on his statutory duty to investigate the whole situation, which is fundamentally linked to his objectivity, impartiality, independence and his truth-seeking function.

26. Article 54(1) requires that “[t]he Prosecutor shall ... [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute...” as well as taking

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<sup>36</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, 8 November 2021, para. 15.

<sup>37</sup> See, [Annex A to the Transmission of ‘Victims’ Request for Leave to Submit Observations’](#), ICC-02/17-168-AnxA, 12 October 2021. Further, [Victims’ Representations on Article 18\(2\) Request to Resume Investigation: Situation of Afghanistan](#), submitted by Guleed Hassan Duran and Sharqawi Al Hajj, 14 December 2021, Sec. (c)(iii)(b).

“appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court”. Article 54(1) does not allow the Prosecutor to limit the matters that he will investigate, for example to one or more parties to a conflict. An obligation to investigate all aspects of the situation is necessary to establish the truth, irrespective of the identity of the perpetrator, is imposed by the Statute.

27. In addition, the Appeals Chamber in the *Afghanistan* Appeal judgment explained in more detail what this duty meant in practice:

[th]e Prosecutor’s duty, according to article 54(1) of the Statute, is ‘to establish the truth’. Therefore, in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved, the Prosecutor *must carry out an investigation into the situation as a whole [emphasis added]*’.<sup>38</sup>

28. Pre-Trial Chamber I in the *Situation in Georgia* emphasised that “it is precisely the purpose of the investigation to discover proper evidence to enable a determination of which crimes, if any, may be prosecuted”.<sup>39</sup> Further, binding the Prosecutor to the crimes mentioned in the decision authorising the investigation, and thereby narrowing the scope of the same, would “conflict with [his] duty to investigate objectively, in order to establish the truth (cf. article 54(1) of the Statute)”.<sup>40</sup>

29. These provisions and the jurisprudence of the Court demonstrate that the Prosecutor’s Statement on prioritisation conflicts with his obligation to investigate the whole situation. If the Prosecutor’s duty to investigate the whole situation means that

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<sup>38</sup> [Afghanistan Appeal Judgment](#), para.60.

<sup>39</sup> [Decision on the Prosecutor’s request for authorisation of an investigation](#), ICC-01/15-12, 27 January 2016, para.62.

<sup>40</sup> *Ibid.*

IS-K crimes cannot be excluded from his investigation (which the LRVs agree with), then it follows that he cannot exclude all of Components Two, Three and Four from his investigation. The Prosecutor refers to rulings indicating that his “duty to investigate objectively” is what prevents his investigation from being limited in scope.<sup>41</sup> It follows that a premature decision to investigate only one of the four components of the Afghanistan Situation impacts the objectivity of his investigation.

**(3) A clarification of the obligation to fully investigate the situation is required as part of the determination of Ground 1 and for the proper administration of justice**

30. The Prosecutor’s submissions in Ground 1 heavily rely on the requirement that the Prosecutor investigate the whole of the situation that is within the Court’s jurisdiction.<sup>42</sup> It is this duty, the Prosecutor asserts, that paragraph 59 of the Decision indirectly limits. Given that the Appeal Brief relies fundamentally on this duty to investigate, the LRVs submit that the nature and extent of that duty to investigate falls within the permissible scope of a response.

31. Moreover, should the Chamber grant the Prosecutor’s appeal on the basis that paragraph 59 undermines his ability to comply with his duty to investigate the situation *as a whole* and exercise his objective, truth-finding function, then the LRVs submit that the ambit of this obligation to investigate needs to be clarified in light of the Statement. Such clarification is required especially for the reasons which are set out below.

32. The LRVs submit that the Prosecutor cannot simultaneously rely on his duty to establish the truth and obligation to investigate a situation as a whole to reverse paragraph 59 of the Decision, while at the same time unilaterally and prematurely limiting the scope of the investigation. If the Prosecutor seeks to rely on his duty to adhere to the *Afghanistan Appeal Judgment*, then he must be held to this in order to

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<sup>41</sup> [Appeal Brief](#), para. 29.

<sup>42</sup> [Appeal Brief](#), paras 21, 29-30.

ensure that the Prosecutor's truth-finding function is discharged in an objective manner. Pre-determining where the focus of the investigation should lie<sup>43</sup>, before the Prosecutor has effectively begun the investigation, gives rise to a real concern that the Prosecutor may not fully comply with this duty.

33. The LRVs submit that if the Chamber grants the Prosecutor's appeal on Ground 1 for the reasons set out in the Appeal Brief, then it must also require the Prosecutor to comply with the very duties he cites: to carry out the investigation into the situation *as a whole*. First, granting the appeal against paragraph 59 for the reasons advanced by the Prosecutor, but remaining silent on the Statement, would tacitly endorse the Prosecutor's clear intention to abrogate his duty to investigate the situation as a whole. This would directly conflict with the legal basis advanced by the Prosecutor for reversing the Decision. Second, in the absence of the Chamber's intervention in this regard, there is a real risk that future statements made by the Prosecutor, about how he intends to conduct – and confine – the investigation contrary to his statutory obligations, will not be subject to appropriate scrutiny. Despite efforts during the deferral proceedings,<sup>44</sup> the LRVs have found no legal route to seek clarification of, or raise a challenge to, the contents of the Statement. The Pre-Trial Chamber ruled that “the legal framework does not envisage judicial review” of the Statement.<sup>45</sup>

34. The LRVs note that Regulation 16 of the Regulations of the Office of the Prosecutor state that the Office *shall* “as appropriate, seek and receive the views of the victims at all stages of its work in order to be mindful of and to take into account their interests.”<sup>46</sup> Despite the Pre-Trial Chamber stating that the Prosecutor's duties and obligations to victims included informing them of its investigative and prosecuting

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<sup>43</sup> See Section III(2) above for the explicit terms in which the Prosecutor has prejudged the outcome of his investigation.

<sup>44</sup> See, [Response to the Prosecution's Request to authorise resumption of investigation](#).

<sup>45</sup> [Decision](#), para.36.

<sup>46</sup> [Regulations of the Office of the Prosecutor](#), Regulation 16.

actions at all relevant stages (an assertion that was not challenged on appeal),<sup>47</sup> the Prosecutor has not communicated with the victims since the Decision was rendered.

35. The victims of the alleged crimes falling within Components Two, Three, and even Four – some of whom are represented on this joint filing<sup>48</sup> - have actively engaged with the Court throughout the Article 15 process to ensure accountability and to secure redress for the harm suffered. Some of those victims have now been “deprioritised” by the Prosecutor without any, explanation. The premature manner in which this decision was taken, and how this decision impacts the rights of victims in the early stages of proceedings, is a point of concern and sets an unhelpful precedent for all victims who seek to participate before the Court. It is important for the victims, and other stakeholders, to be reassured that the Appeals Chamber does in fact require the Prosecutor to investigate a situation as a whole.

36. The current position of the Prosecutor, as reflected in the Statement, could undermine the legitimacy of the Court. There is a risk that the Office of the Prosecutor will be perceived as being unwilling to pursue the investigation of crimes committed by the armed forces and intelligence agencies of powerful Western countries and will only seek to investigate those persons whom those powerful countries oppose.<sup>49</sup>

37. By way of example, the Prosecutor’s premature decision to “deprioritise” certain crimes could be perceived as a shift in direction within the Afghanistan situation that has coincided with such developments as the UK’s Overseas Operations

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<sup>47</sup> [Decision](#), para.35.

<sup>48</sup> It is noted that the victims represented on this joint filing include not only victims of the alleged crimes the Prosecutor has expressed his intent to “deprioritise”, but also victims who are not negatively impacted by the Prosecutor’s Statement on prioritisation.

<sup>49</sup> See, [Response to the Prosecution’s Request to authorise resumption of investigation](#). In this regard, it bears recalling that the United States sanctioned Prosecutor Bensouda for pursuing the investigation of U.S. citizens in the Situation of Afghanistan, and threatened to sanction or prosecute individuals who supported the investigation. See [Federal Register, Executive Order 13928](#): Blocking Property of Certain Persons Associated With the International Criminal Court, 11 June 2020.



(Service Personnel and Veterans) Act 2021 that limits the prosecution of its nationals for their conduct in overseas military operations, including for any crimes which might fall within the jurisdiction of the Court.<sup>50</sup> There is a risk that this change in direction by the Prosecutor might be perceived as partiality and impact the overall legitimacy of the Court. This is heightened by the fact that the Prosecutor's Statement on "deprioritisation" was announced without articulation of any concrete reasoning or justification as to how this decision could be taken even prior to commencing the investigation, and the fact that the Prosecutor has failed to engage with the victims on this question prior to and since the Statement was issued.

38. This Court exists to find justice for all victims of crime within its jurisdiction without distinction as to race, religion, nationality, ethnicity and gender in all cases – not only where it is politically expedient to do so. A perception otherwise would be gravely damaging to the Court's credibility.

**(4) The Appeals Chamber should rule that the Prosecutor is required to investigate the whole situation**

39. The Prosecutor has invited the Appeals Chamber to confirm the scope of the Court's jurisdiction in this situation in the terms previously articulated by it in the *Afghanistan* Appeal Judgement. However, there is a need for the Appeals Chamber to clarify the ambit of the obligations of the Prosecutor under Article 54(1) of the Statute to investigate in light of the Prosecutor's Statement.

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<sup>50</sup> The Overseas Operations (Service Personnel and Veterans) Act 2021 creates a presumption against the criminal prosecution of British troops for crimes that took place abroad over five years ago. The original bill of the same name was designed to discourage prosecutions of British troops overseas even for offences of torture, genocide and crimes against humanity. The former Prosecutor had criticised the Bill and warned that it could lead the Office of the Prosecutor to revisit its assessments regarding crimes alleged to have been committed by UK nationals in Iraq. See, [Letter from Fatou Bensouda to the Right Honourable David Davis MP](#), dated 23 April 2021.

40. The LRVs submit that under Article 54(1) of the Statute, the Prosecutor is obliged to “establish the truth”<sup>51</sup> and therefore to investigate the situation in Afghanistan *as a whole*, including Components Two and Three. Resource limitations are an unfortunate but ever-present reality at the Court. If they were permitted to be used as a reason for selecting only one part of a situation, or one group of alleged wrongdoers to investigate, such a justification could readily be given in any situation, thus providing a cover for politicized decision-making by the Prosecutor, and fundamentally undermining the objective of article 54(1).

41. A ruling on these questions would resolve the uncertainty created by the Prosecutor’s Statement, and ensure that the Prosecutor’s duty to investigate the situation as a whole is articulated in clear terms.

42. To adhere to his duties and ensure an effective investigation, the Prosecutor must investigate “all alleged conduct within the Court’s jurisdiction which is sufficiently linked to defined parameters”.<sup>52</sup> For the victims of these alleged crimes, an investigation governed by a duty to establish the truth is fundamental to an objective and transparent approach. It ensures that victims are treated equally and are given access to justice. The Prosecutor’s role in achieving this end requires him to investigate an entire situation before determining how to proceed with specific cases

#### **IV. RELIEF SOUGHT**

43. The LRVs respectfully request the Appeals Chamber to:

(A) Reverse and amend paragraph 59 of the Decision;

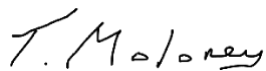
(B) Confirm the scope of the Court’s jurisdiction in this situation;

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<sup>51</sup> Article 54(1): “The Prosecutor shall: In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.”

<sup>52</sup> [Appeal Brief](#), para 29.

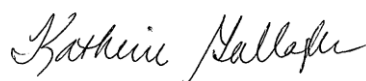
(C) Confirm the Prosecutor's duty to investigate the situation *as a whole*, including Components Two and Three.



**Tim Moloney KC and Megan Hirst**



**Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed**



**Katherine Gallagher**

**Dated this 15<sup>th</sup> day of December 2022**

**At London, United Kingdom; New York, United States; Warsaw, Poland**