

ANNEX I

PUBLIC

United Nations Nations Unies

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REFERENCE: 2011-OLC-001105

18 October 2021

Dear Mr. Lewis,

I refer to your letter of 11 October 2021 transmitting to the Secretary-General of the United Nations the decision of 8 October 2021 (“the Decision”) by Pre-Trial Chamber II of the International Criminal Court (“ICC” or “the Court”) pursuant to article 87, paragraph 6, of the Rome Statute, rule 13(1) of the ICC Rules of Procedure and Evidence and article 15, paragraph 1, of the Relationship Agreement between the United Nations and the International Criminal Court (“Relationship Agreement”). The Decision requests the Secretary-General to “submit information on the identification of the authorities currently representing the Islamic Republic of Afghanistan by Monday 8 November 2021”.

I note that the Decision relates to the ICC Prosecutor’s request of 27 September 2021 (“Prosecutor’s Request”) seeking authorization for his Office to resume the investigation into the situation in Afghanistan in light of the significant change of material circumstances which became manifest in August 2021. In the Decision, the Pre-Trial Chamber states that “for it to be in a position to make an informed decision [...], it needs to receive reliable and updated information as to the identification of the authorities currently representing Afghanistan.” The Pre-Trial Chamber states that because of his institutional mandate, the Secretary-General of the United Nations, as the depositary the Rome Statute and of instruments of ratification, acceptance, approval or accession to it, is one the entities suitable to provide this type of information at this stage. Accordingly, the Pre-Trial Chamber requests “the Secretary-General of the United Nations [...] to submit information on the identification of the authorities currently representing the Islamic Republic of Afghanistan by Monday 8 November 2021”.

I wish to recall the applicable legal framework as follows. On 13 September 2004, the United Nations General Assembly adopted resolution 58/138 approving the Relationship Agreement, which entered into force on 4 October 2004. Article 3 of the Relationship

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Agreement states that, “[t]he United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute”. Article 15, paragraph 1, of the Relationship Agreement provides that “[w]ith due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the United Nations undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute.”

In response to the request for information from the Pre-Trial Chamber II, I wish to note, at the outset, that the Secretary-General, and the United Nations Secretariat more broadly, do not engage in acts of recognition of Governments, which is a matter for individual Member States. The Secretary-General, including in the exercise of depositary functions for multilateral treaties deposited with him, remains guided by the decisions of the intergovernmental organs of the United Nations.

According to a long-established practice, should there be any question as to the identification of the authorities currently representing a specific State, the Secretary-General, as depositary, is guided by the decisions of the intergovernmental organs regarding the representation of Member States before receiving a treaty action.

I also wish to inform you that, since 15 August 2021, the General Assembly has not taken any decision on the representation of Afghanistan at the United Nations. More broadly, the Security Council has adopted two resolutions on the situation in Afghanistan, namely, resolutions 2593 (2021) of 30 August 2021 and 2596 (2021) of 17 September 2021, and issued three press statements, dated 16 and 27 August and 9 October 2021 (SC/14604, SC/14615 and SC/14658).

I would be grateful if this letter could be brought to the attention of Pre-Trial Chamber II.

Yours sincerely,



Miguel de Serpa Soares
Under-Secretary-General for Legal Affairs
and United Nations Legal Counsel