

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **8 November 2021**

**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 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

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan

Mr Manoj Sachdeva

**Counsel for Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States Representatives**

The 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  
Section**

**Other**

Ms Katherine Gallagher

Ms Margaret Satterthwaite

Mr Tim Moloney

Ms Megan Hirst

Mr Mikołaj Pietrzak

Ms Nancy Hollander

Mr Ahmad Assed

Ms Nada Kiswanson van Hooydonk

**PRE-TRIAL CHAMBER II** (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this ‘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’.

### **I. Procedural history**

1. On 12 April 2019, the Chamber rendered the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (the ‘Article 15 Decision’);<sup>1</sup> on 31 May 2019, Judge Antoine Kesia-Mbe Mindua issued his concurring and separate opinion.<sup>2</sup>
2. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised an investigation into ‘alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002’.<sup>3</sup>
3. On 15 April 2020, the Chamber received the Prosecutor’s ‘Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute’,<sup>4</sup> notifying the Chamber of the Government of the Islamic Republic of Afghanistan’s (the ‘Afghanistan’) request of 26 March 2020 seeking a deferral of the Prosecutor’s investigation into the situation in Afghanistan pursuant to article 18(2) of the Statute (the ‘Deferral Request’).<sup>5</sup>
4. On 16 April 2021, the Chamber received the Prosecutor’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request’, in which it

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

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

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

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

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

informed the Chamber of its latest communications with Afghanistan in the context of the Deferral Request.<sup>6</sup>

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

6. On 8 October 2021, the Chamber rendered the ‘Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor’s “Request to authorise resumption of investigation under article 18(2) of the Statute”’ (the ‘8 October 2021 Decision’).<sup>8</sup>

7. On 11 October 2021, the Registry transmitted<sup>9</sup> to the Chamber a document titled ‘Response to the Prosecution’s “Request to authorise resumption of investigation under article 18(2) of the Statute”’ dated 7 October 2021 from Katherine Gallagher, Margaret Satterthwaite, Tim Moloney, Megan Hirst, Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed (the ‘7 October 2021 Submission’ and the ‘First Submitters’).<sup>10</sup> The First Submitters (i) observe that, whilst fully supporting the Prosecutor’s Request, they are ‘deeply concerned about the declaration of the Prosecutor that he will focus his [...] investigation [...] only on crimes allegedly committed by the Taliban and the Islamic State’ and (ii) request ‘that the Prosecutor also actively investigates other crimes falling in the scope of this investigation’.<sup>11</sup>

8. On 13 October 2021, the Registry transmitted<sup>12</sup> to the Chamber a document titled ‘Victims’ Request for Leave to Submit Observations’ dated 12 October 2021 from Nada Kiswanson van Hooydonk (the ‘12 October 2021 Submission’ and the ‘Second Submitter’).<sup>13</sup> The Second Submitter seeks leave to submit observations as to (i) the Prosecutor’s Request and (ii) the Prosecutor’s decision to focus ‘investigations in

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

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

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

<sup>9</sup> Transmission of “Response to the Prosecution’s “Request to authorise resumption of investigation under article 18(2) of the Statute””, 11 October 2021, [ICC-02/17-167](#), with an annex.

<sup>10</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””, 11 October 2021, [ICC-02/17-167-AnxA](#).

<sup>11</sup> [7 October 2021 Submission](#), paras 2, 4.

<sup>12</sup> Transmission of “Victims’ Request for Leave to Submit Observations”, 13 October 2021, [ICC-02/17-168](#), with an annex.

<sup>13</sup> Annex A to the Transmission of “Victims’ Request for Leave to Submit Observations”, 13 October 2021, [ICC-02/17-168-AnxA](#).

Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province [...] and to deprioritise other aspects of this investigation’.

## II. Determination by the Chamber

9. In its 8 October 2021 Decision, the Chamber noted that

pursuant to article 18(2) of the Statute, the sole parties to the proceedings triggered by the Prosecutor’s request to be authorised to resume an investigation notwithstanding a State’s request for deferral, are the Prosecutor, on the one hand, and the relevant State, on the other. The statutory framework neither provides an opportunity for *potential* victims to intervene at this stage nor for the participation of other persons or entities without leave of the Chamber.<sup>14</sup>

10. Accordingly, the Chamber reiterates its finding that potential victims do not enjoy, as a matter of right, standing to participate in the proceedings pursuant to article 18(2) of the Statute without leave of the Chamber, or to seize and request the Chamber to take certain measures in their context. Based on the foregoing, the Chamber finds that the First and Second Submitters lack legal standing to participate in the proceedings

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<sup>14</sup> [8 October 2021 Decision](#), para. 20 referring to J. T. Holmes, ‘Jurisdiction and Admissibility’ in R. S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 343 (‘The French proposal envisaged a role for victims in article 18 proceedings but the negotiations revealed serious concerns about this possibility. Since victims already had a right to make representations to the Pre-Trial Chamber under article 15, concerns were expressed about the necessity of giving a further opportunity when preliminary rulings were being decided. These concerns were based on the need to ensure an expeditious process, which could be compromised if the preliminary ruling phase became a full-scale procedure involving submissions by States and victims (and both wishing to comment on the other’s view). The rules of article 18, therefore, do not provide an opportunity for victims to intervene at this stage.’). See ICC Preparatory Work, Preparatory Commission for the International Criminal Court Working Group on Rules of Procedure and Evidence, [Proposal submitted by France concerning part 2 of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law](#), 23 November 1999, PCNICC/1999/WGRPE/DP.43, rule 2.14.(c) (‘If the Prosecutor considers, however, that the case is admissible under article 17, he or she shall submit to the Pre-Trial Chamber a written and reasoned request for authorization of an investigation and shall communicate to it all the information provided by the State. The Prosecutor shall inform that State in writing of the submission of the request to the Pre-Trial Chamber.’), rule 2.14.(d) (‘[Rule] 2.19 [...] shall be applicable to proceedings initiated in accordance with paragraph (c) of the present rule’) and rule 2.19.(a) (‘victims or their representatives may present written submissions, including requests for the holding of a hearing, or, if the circumstances of the case so require and with the authorization of the Court, in any other form.’), rule 2.19.(c) (‘The Registrar shall provide the victims who have expressed their intention of making submissions, or their representatives, with a summary of the grounds on which the admissibility of a case or the jurisdiction of the Court has been challenged’).

triggered by the Prosecutor's Request and that, as a result, the 7 October 2021 Submission and the 12 October 2021 Submission must be dismissed *in limine*.

11. In light of the above, the Chamber instructs the Registry to refrain from filing into the record of the situation in Afghanistan, including by the way of transmission, any document emanating from persons or entities other than the Prosecutor and the relevant State, unless those persons and entities can be considered as enjoying legal standing in these proceedings on the basis of a decision of the Chamber, including pursuant to rule 103 of the Rules of Procedure and Evidence (the 'Rules').

12. However, the Chamber acknowledges that the interests of potential victims may indeed be affected as a result of developments in these proceedings and that, accordingly, those potential victims may legitimately have and develop concerns worth being brought to the Chamber's attention. In this regard, the Chamber recalls the jurisprudence of the Court, whereby article 68(3) of the Statute and the relevant Rules may and should be at times construed as vesting in a chamber a certain margin of discretion in determining whether, and in what modalities, victims may appropriately be allowed to play a role at certain stages of the proceedings (including before or during the investigation stage), despite the absence of an explicit provision to this effect.<sup>15</sup> As stated by Pre-Trial Chamber II, in a previous composition, 'the judges' control over the determination of the appropriate procedural phase in which [victims'] intervention will take place will ensure that victims make proper use of such right'.<sup>16</sup> It is indeed paramount for the proper administration of justice that the role assigned to victims be

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<sup>15</sup> See for instance Pre-Trial Chamber I, *Situation in the State of Palestine*, [Decision on Information and Outreach for the Victims of the Situation](#), 13 July 2018, ICC-01/18-2, paras 8-11; Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, [Order on Information and Outreach for the Victims of the Situation](#), 20 January 2020, ICC-01/19-28, para. 7. See also Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision on the "Victims' request for review of Prosecution's decision to cease active investigation"](#), 5 November 2015, ICC-01/09-159, para. 7; Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, [Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), 11 August 2007, ICC-02/04-01/05-252, para. 8; Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya](#), 4 November 2021, ICC-01/09-24, paras 8-16; Appeals Chamber, *Situation in the Republic Democratic of the Congo*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007](#), 19 December 2008, ICC-01/04-556, para. 45.

<sup>16</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, [Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), 11 August 2007, ICC-02/04-01/05-252, para. 8.

shaped so as to make it compatible with the efficient and orderly conduct of the proceedings.

13. The Chamber considers that the disruptive potential of a system where any potential victim would enjoy permanent legal standing, namely be authorised to submit requests and observations before the Chamber at all times, is too great for it to be compatible with the very idea of efficient and orderly conduct of the proceedings. The system of ‘transmission filings’ currently followed by the Registry in this and other cases in compliance with the Chamber’s instructions, whilst ensuring an initial filter, does not prevent unsolicited victims’ submissions to reach the Chamber; accordingly, ultimately it does not adequately address the risk that, due to serious overload, the conduct of judicial proceedings be disrupted, particularly so in a situation like the one in Afghanistan, where the number of potential victims runs into the thousands.

14. As a result, the Chamber finds it appropriate to devise a mechanism allowing the views and concerns of those potential victims to reach the Chamber, whilst at the same time preserving the orderly conduct of the proceedings. In the view of the Chamber, the system as set forth by the Statute and the Rules in respect of proceedings pursuant to article 15 of the Statute provides a suitable model.<sup>17</sup> The Victims Participation and Reparations Section (the ‘VPRS’) is therefore instructed to start collecting victims’ views and concerns and to prepare a report including a brief assessment of whether criteria under rule 85 of the Rules are met and of the victims’ views and concerns as to the Prosecutor’s Request. Prior to entering into deliberations on that Request, the Chamber will set a deadline for all views and concerns to be submitted to the VPRS, and another deadline for the VPRS to transmit them to the Chamber, together with the report. In order to facilitate the collection of views and concerns, the Chamber also instructs the VPRS to retrieve the ‘Victim Representation Form’ (already available in English, Dari, and Pashto and already adopted in the present situation for the purpose of the article 15 proceedings),<sup>18</sup> as well as the guidelines on how to fill in such a form, to modify them to the extent necessary for the form to be suitable for the present

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<sup>17</sup> See [Order to the Victims Participation and Reparation Section Concerning Victims’ Representations](#), 3 November 2017, ICC-02/17-6, paras 13, 14, 16. Pre-Trial Chamber I, *Situation in the Republic of the Philippines*, [Decision on the ‘Registry Request for Extension of Notice Period and Submissions on the Article 15\(3\) Process’](#), 17 June 2021, ICC-01/21-9, para. 10, p. 6. See also [Public redacted version of “Registry Request for Extension of Notice Period and Submissions on the Article 15\(3\) Process”](#), 15 July 2021, ICC-01/21-8-Conf, 16 June 2021, ICC-01/21-8-Red, para. 20.

<sup>18</sup> See ICC-02/17-3-Conf-AnxI.

proceedings and to submit its proposal for amendment to the Chamber for approval by Monday 15 November 2021 at the latest. The Chamber clarifies that the adoption of the standard form is meant to facilitate the collection of the victims' views and concerns and not a requirement for these views and concerns to be collected by the VPRS and submitted to the Chamber.

15. Finally, the Chamber is aware that the selection of potential cases within a situation under investigation pertains exclusively to the Prosecutor's purview. However, the Chamber reminds the Prosecutor that a proper investigation should focus first on crimes, and 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. The Chamber also notes that, to a significant extent, the various submissions having been brought before the Chamber in the situation in Afghanistan throughout this year seem to stem from potential victims being concerned as to the adequacy of the action and strategy of the Office of the Prosecutor in this matter, in particular in light of the duties of the Office vis-à-vis victims as set forth in article 54(1)(b) of the Statute; irrespective of whether those concerns are well founded or not (a matter on which the Chamber does not need to dwell at this stage), the Chamber reminds the Prosecutor that the duties and obligations as regards victims should indeed inform its investigative and prosecuting action at all stages.



**FOR THESE REASONS, THE CHAMBER**


**DISMISSES** *in limine* the 7 October 2021 Submission and the 12 October 2021 Submission;

**ORDERS** the Registry to refrain from filing into the record of the situation in Afghanistan any document emanating from persons or entities other than the Prosecutor and the relevant State in the proceedings pursuant to article 18(2) of the Statute, unless those persons and entities can be considered as enjoying legal standing in the proceedings pursuant to article 18(2) of the Statute on the basis of a decision of the Chamber;

**ORDERS** the Victims Participation and Reparations Section to submit, in accordance with paragraph 14 of the present decision, the amended ‘Victim Representation Form’ and other relevant documents, to the Chamber for approval by Monday 15 November 2021 at the latest; and

**ORDERS** the Victims Participation and Reparations Section to collect victims’ views and concerns in the context of the proceedings pursuant to article 18(2) of the Statute, in accordance with paragraph 14 of the present decision.

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




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**Judge Rosario Salvatore Aitala**  
Presiding Judge




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**Judge Antoine Kesia-Mbe Mindua**




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**Judge Tomoko Akane**

Dated this Monday, 8 November 2021

At The Hague, The Netherlands