

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/17
Date: 16 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
with Confidential *EX PARTE* Annex A, available only to the Registry

Public redacted version of
“Registry Submission Pursuant to Decision ICC-02/17-171
in Relation to Article 18(2) Proceedings”, 15 November 2021, ICC-02/17-172-Conf

Source: Registry

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

Mr Manoj Sachdeva

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. Introduction

1. Pursuant to Pre-Trial Chamber II (“Chamber”)’s “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”, issued on 8 November 2021 (“Decision”),¹ the Registry hereby submits, for the Chamber’s approval, a draft victim representation form to collect the victims’ views and concerns on the Prosecutor’s Request pursuant to Article 18(2) of the Rome Statute (“Form” and “Statute”), and draft guidelines on how to fill in this Form (“Guidelines”).
2. The Registry also submits further observations on the process of collecting victims’ views and concerns in the context of the proceedings pursuant to article 18(2) of the Statute.

II. Procedural History

3. 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” (“Article 15 Decision”).²
4. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan (“Afghanistan”).³
5. On 15 April 2020, the Prosecutor submitted a “Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article

¹ Pre-Trial Chamber II, “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”, 8 November 2021, ICC-02/17-171.

² Pre-Trial Chamber II, “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.

³ Appeals Chamber, “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan”, 5 March 2020, ICC-02/17-138.

18(2) of the Statute”, notifying the Chamber that the Government of Afghanistan, through a request of 26 March 2020, was seeking a deferral of the Prosecutor’s investigation into the situation in Afghanistan pursuant to article 18(2) of the Statute (“Deferral Request” and “Prosecutor’s Notification”).⁴

6. On 27 September 2021, the Prosecutor submitted a “Request to authorise resumption of investigation under article 18(2) of the Statute” (the “Prosecutor’s Request”).⁵
7. On 12 October 2021⁶ and 14 October 2021,⁷ respectively, the Registry transmitted to the Chamber two submissions from representatives of potential victims in reaction to the Prosecutor’s Notification and Request.
8. On 8 November 2021, the Chamber issued its Decision, in which it *inter alia* ordered the Victims Participation and Reparations Section (“VPRS”) to: (a) submit to the Chamber for its approval an “amended ‘Victim Representation Form’ and other relevant documents”, by Monday 15 November 2021 at the latest; (b) “collect victims’ views and concerns in the context of the proceedings pursuant to article 18(2) of the Statute”; and (c) “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”.⁸

⁴ Office of the Prosecutor, “Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute”, dated 15 April 2020 and notified on 16 April 2021, ICC-02/17-139.

⁵ Office of the Prosecutor, “Request to authorise resumption of investigation under article 18(2) of the Statute”, 27 September 2021, ICC-02/17-161.

⁶ Registry, “Transmission of “Response to the Prosecution’s “Request to authorise resumption of investigation under article 18(2) of the Statute””, dated 11 October 2021 and notified on 12 October 2021, ICC-02/17-167.

⁷ Registry, “Transmission of “Victims’ Request for Leave to Submit Observations” dated 13 October 2021 and notified on 14 October 2021, ICC-02/17-168.

⁸ Decision, para. 14 and operative paragraphs p. 9.

III. Classification

9. Pursuant to regulation 23 *bis*(1) of the Regulations of the Court (“RoC”), this document is classified as “confidential”, since it contains sensitive information [Redacted].
10. Annex A is classified “confidential *ex parte*, available only to the Registry” pursuant to the Decision and because these documents should not be further circulated until they are in their final and approved version.

IV. Applicable Law

11. The Registry submits the present filing in the context of article 18(2) of the Statute and in accordance with article 68(3) of the Statute, rules 16(1) and 85 of the Rules of Procedure and Evidence (“Rules”), regulation 23*bis*(1) of the RoC and the Decision.⁹

V. Submissions

A. Victim representation form

12. As instructed by the Chamber, the Registry has retrieved and amended the victim representation form and the guidelines for victims/representatives on how to fill in the form used in the context of the article 15 proceedings in the situation in Afghanistan (“Situation”), in order to make these documents suitable for the current proceedings pursuant to article 18(2) of the Statute. This entails for the Registry to : (1) assess whether the criteria set out in rule 85 of the Rules are met; and (2) report to the Chamber on the views and concerns of victims and/or their representatives¹⁰ on the Prosecutor’s Request.

⁹ See *supra*, para. 8.

¹⁰ The Form can be used by both individuals and groups of victims.

13. The proposed Form and accompanying Guidelines are transmitted as confidential *ex parte* Annex A, available only to the Registry, for the Chamber's approval.
14. As it was the case when collecting representations in the context of proceedings pursuant to article 15(3) of the Statute, the Registry intends to make the Form and the Guidelines, once approved by the Chamber, immediately available on the website of the Court.¹¹
15. The Form and the Guidelines will be accessible in PDF format, in English, Dari and Pashto. Moreover, an online process will be put in place in order to allow the Form to be filled in directly on the Court's webpage without being downloaded.
16. The Registry also stands ready to receive and process article 18(2) representations made in any manner other than by using the Form, e.g. audio, video or other electronic format.¹²

B. Registry observations on the process to collect victims representations

17. The Registry respectfully provides herein observations on the manner in which it envisages to carry out the representations process, and some of the challenges it may face, to further assist the Chamber in deciding, *inter alia*, the relevant deadlines.¹³

¹¹ In said process to collect representations under article 15(3) of the Statute, the Registry, mindful of the security impediments on the ground, followed an open approach in terms of online dissemination of relevant information and representation forms.

¹² Decision, para. 14.

¹³ The Registry notes that the Chamber in its Decision has indicated that it "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". Decision, para. 14. In this regard, the Registry notes that when it collects victims' representations in the context of article 15(3) of the Statute, the time limit for victims to make such representations, pursuant to regulation 50(1) of the RoC, is in principle 30 days following the Prosecutor's public notice to victims. However, Chambers have most often granted extensions to this timeline. For example, in the Afghanistan Situation, Pre-Trial Chamber III extended

18. As widely reported,¹⁴ and as further described in the Prosecutor's Request,¹⁵ Afghanistan currently presents a politically unstable and overall high risk security environment. [Redacted]
19. In order to engage with potential victims or their representatives for the purpose of collecting their views and concerns, it is therefore likely that the VPRS will need to engage mostly, if not exclusively, [Redacted].¹⁶ [Redacted]
20. The Registry notes in addition that the current situation related to the COVID-19 pandemic is likely to limit the capacity of its staff to travel, meet, and train any potential intermediary in person. Remote meetings and trainings may have to be conducted [Redacted] .
21. The Registry would further like to bring to the Chamber's attention several challenges it may face when engaging with intermediaries, potential victims and their representatives in order to collect article 18(2) representations in the current context.
22. First, given the recent events and the current realities of potential victims and intermediaries who [Redacted], and from the Registry's past experience, it is foreseeable that the latter may not see the Court's mandate as addressing their immediate needs, and therefore may not be responsive or willing to engage with the Court. Moreover, should they want to engage with the Court, they would face even bigger [Redacted] challenges than they already did in the context of the article 15 proceedings in 2017.¹⁷

the notice period to a time frame of almost three months. See Pre-Trial Chamber III, "Order to the Victims Participation and Reparation Section Concerning Victims' Representations", 9 November 2017, ICC-02/17-6.

¹⁴ See, for instance, the most recent public report issued in September 2021 by the European Asylum Support Office on the security situation in Afghanistan, available on: https://coi.easo.europa.eu/administration/easo/PLib/2021_09_EASO_COI_Report_Afghanistan_Security_situation_update.pdf.

¹⁵ Prosecutor's Request, para. 4.

¹⁶ [Redacted]

¹⁷ [Redacted]

23. From its recent communications with interlocutors, the VPRS could sense a feeling of frustration from partners who had been key to the Registry's ability to mobilise victims of the Situation and encourage their engagement with the Court in the context of the article 15 proceedings. The recent events in Afghanistan have thus negatively affected the readiness to communicate with the Registry of those who actively engaged with the Court during the article 15 process. This will, in turn, represent an additional challenge for the Registry to reach out to potential victims.
24. The Registry also sees a risk of disinterest from potential victims coupled with the aforementioned frustration when asked to provide their views and concerns on an issue they may see as already tackled during the article 15 process. The Registry expects to first have to explain why investigations have stalled after victims had provided an overwhelming positive response to a seemingly very similar question in 2017. The rather complex legal issues which triggered relevant proceedings under article 18(2) will have to be explained to victims for them to make an informed submission in the present representation process. Potential victims may also wish to express their views and concerns on the Prosecutor's strategic considerations in the Situation, as communicated in a press release of the Office of the Prosecutor on 27 September 2021.¹⁸ This, again, will require careful preparation of messages¹⁹ and explanations to inform potential victims accurately.
25. In this delicate context, the Registry will therefore need sufficient time to: (1) [Redacted] (2) establish the manner through which the victims' views and concerns can be securely and safely sought and channelled back to the Registry; and (3) assess the victims' representations received (including

¹⁸ "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, available on : <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

¹⁹ In coordination with the Office of the Prosecutor.

translations as necessary) and produce a meaningful report on said representations.

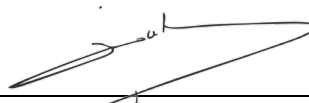
26. Considering the security context and the challenges as outlined above as well as the Registry's operational capacity around year's end, the Registry submits that a realistic timeline should be determined allowing the Registry to identify and reach out to victims or their representatives, inform them of the process and have them submit representations, while ensuring the effectiveness and the expeditiousness of the proceedings.²⁰
27. The Registry therefore proposes to submit a first report on representations received by 17 December 2021. The report would contain a brief assessment on whether the requirements of rule 85 of the Rules have *prima facie* been met, some statistical information on the type of representations received, the languages in which the representations were made, victims' gender, age, ethnicity, locations, and the scope of the alleged crime(s). Where audio and/or video files are received in any other language than English, a transcription of the file in English will be submitted to the Chamber. As this representation process is set in a situation uncertain on multiple levels, the Registry proposes to continue the representation process beyond 17 December 2021 and submit second report towards the end of January 2022.²¹

²⁰ In that respect, the Registry notes that the translation of the Form and its Guidelines in the different languages itself should take around a week. In the same manner, representations received may have to be translated, depending on the language they are filled-in. It is also noted that in the present proceedings Regulation 50 of the RoC or any other deadlines/guidelines attaching to an article 15(3) process do not apply.

²¹ If this more flexible reporting scheme were to be accepted, the Registry would recommend to its interlocutors to provide representations as soon as possible, security providing, and preferably no later than mid-January 2022.

VI. Conclusion

28. The Registry respectfully submits the Form and Guidelines, for the Chamber's approval.
29. The Registry respectfully suggests that the Chamber sets reporting deadlines as suggested in paragraph 27 above, following its approval of the Form and Guidelines for potential victims to submit their representations to the Registry.



Marc Dubuisson, Director, Division of Judicial Services
On behalf of
Peter Lewis, Registrar

Dated this 16 November 2021

At The Hague, The Netherlands