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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* Annexes A-C

Prosecution's communication of materials and further observations pursuant to article 18(2) and rule 54(1)

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. As ordered[1] by Pre-Trial Chamber II,[2] the Office of the Prosecutor[3] (i) communicates under article 18(2) and rule 54(1) the information provided by the Government of the Islamic Republic of Afghanistan[4] in support of its deferral request of 26 March 2020;[5] (ii) submits "an assessment of the merits of the Deferral Request [and] other relevant observations and information" based on the materials received from the GoIRA to date;[6] and (iii) provides updated submissions and relevant information and evidence on "the lack of ongoing domestic proceedings or inaction by the authorities currently representing Afghanistan".

2. The Prosecution has carefully analysed the information submitted in support of the Deferral Request and concluded that, based on the information provided to date – taken at its highest – the GoIRA has not adequately substantiated its request for a deferral of the Prosecution's investigation in its entirety. This was the case even on the basis of the circumstances as they existed prior to 15 August 2021 and having regard to the principle that an article 18 assessment must be conducted based on the facts as they exist at the time of the assessment. In particular:

- Many of the cases referred to in the Deferral Material are inadequately substantiated by documentation demonstrating active and ongoing investigations or prosecutions.
- Many other cases appear to fall outside of the scope of the Prosecution's authorised investigation and/or the jurisdiction of the Court and are thus not relevant for the purposes of the article 18(2) assessment.
- Those remaining cases that are both relevant and substantiated do not sufficiently mirror the Prosecution's authorised investigation in terms of the perpetrator groups; the temporal and geographic scope of the crimes; the types of crimes; and the level of seniority of those being investigated or prosecuted.

3. While the Prosecution and the GoIRA had remained in dialogue about the Deferral Request, and the potential for its remediation, such dialogue was brought to a halt by the events of 15 August 2021. In the current circumstances, there is no reasonable prospect of obtaining

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[1] 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 of Procedure and Evidence, ICC-02/17-194 ("Chamber's Order").
[2] "Chamber".
[3] "Prosecution".
[4] "GoIRA". This term refers to the previous (*de jure*) regime led by President Ghani, that was overthrown by the Taliban on 15 August 2021.
[5] ICC-02/17-139-Anx1, "Deferral Request".
[6] "Deferral Material".

further official information to substantiate any deficiencies, or of reaching any compromise agreement on the scope of the Deferral Request and possible burden sharing or cooperation in investigations.

4. Furthermore, the Deferral Material does not include any information regarding investigation or prosecution of alleged crimes *since* the events of 15 August 2021. Such alleged crimes also potentially fall within the scope of the Prosecution's investigation. Therefore, there are no grounds or basis on which the Court should defer its investigation of the situation in its entirety. For these reasons, the Prosecution respectfully submits that the Deferral Request should be rejected.

5. However, irrespective of the assessment of the Deferral Material, the Chamber's complementarity assessment must be conducted based on the facts and circumstances as they exist at the time of its assessment. The Prosecution position is that circumstances in Afghanistan have changed significantly and that the available information and evidence[7] adequately establishes that authorities currently representing Afghanistan are not continuing, cannot continue and will not continue the relevant investigations and prosecutions that formed the basis of the Deferral Request. Thus, the Prosecution submits that the Court should not defer to an investigation that no longer exists.

6. With regard to the current proceedings, the Prosecution respectfully requests that any litigation arising from article 18 be conducted and resolved expeditiously. Prompt resolution of the Deferral Request will help ensure that there is no impunity for the crimes allegedly committed in Afghanistan and to deter ongoing crimes.

7. In particular, the Prosecution respectfully submits that observations from authorities currently representing Afghanistan are not required by rule 55(2) for a decision on the Prosecution's request to resume investigations. The Prosecution takes note of the extensive – and publicly notified – efforts already made by the Chamber to obtain such observations, as well as the difficulties encountered. The Prosecution submits that the authorities currently representing Afghanistan have elected not to provide such observation.

8. Likewise, the Prosecution recalls that the Chamber has already sought and obtained the victims' views and concerns on the Prosecution's 27 September 2021 request to resume

[7] As further described in section IV below.

investigations. The victims overwhelmingly supported the Prosecution's request to resume investigations.[8] In these circumstances, the interests of victims would be best served by an expeditious resolution of this matter.

9. Accordingly, the Prosecution respectfully requests that the Chamber now proceeds to issue its decision based on the submissions made available to it.

Background

10. On 22 July 2022, the Chamber ordered the Prosecution,[9] by no later than 26 August 2022, (i) "to communicate to the Chamber any materials received from Afghanistan in support of the Deferral Request […]";[10] and (ii) "to submit an assessment of the merits of the Deferral Request, or any other relevant observations and information […}",[11] including on "the lack of ongoing domestic proceedings or inaction by the authorities currently representing Afghanistan".[12]

11. The preceding procedural background is documented in detail in the Chamber's Order and will not be repeated.

Confidentiality

12. This document is filed publicly, in line with the classification of the Chamber's Order. Annexes A-C are filed as confidential *ex parte*, since they reference confidential communications with the GoIRA and details of investigations and prosecutions which, if filed publicly, would place victims, witnesses and former officials of the GoIRA at risk.

Submissions

13. In the GoIRA's Deferral Request of 26 March 2020,[13] as further supplemented in its legal submissions of 12 June 2020,[14] the GoIRA requested the deferral "of the whole Afghanistan Situation".[15] Notwithstanding this Deferral Request, the Chamber should order the resumption of the Court's investigation.

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[8] ICC-02/17-190-AnxI-Red, para 26.
[9] "Chamber's Order".
[10] Order, disposition.
[11] *Ibid*.
[12] Order, para. 22.
[13] ICC-02/17-139-Anx1.
[14] AFG-OTP-00000162, at 000003, para. 6, 000005, para. 11.
[15] *Id*., paras. 6, 58.

14. As set out below, many cases referred to by the GoIRA are not adequately substantiated, or fall outside the scope of the Prosecution's authorised investigation, and the remaining cases do not sufficiently mirror the Court's investigation for the purpose of article 18(2).

15. In any event, and despite the deficiencies of the Deferral Request on its face, the available information and evidence establish that the authorities currently representing Afghanistan have not continued, cannot continue and do not intend to continue the relevant investigations and prosecutions relied upon in the Deferral Request. To the contrary, the available information suggests that serious crimes within the jurisdiction of the Court, and the parameters of this investigation, continue to be committed.

16. In its submissions, the Prosecution first gives an overview of the information provided by the GoIRA in support of the Deferral Request, and sets out its submissions on the law applicable to analysing this information under articles 17(1) and 18(2) of the Statute. The Prosecution then details its analysis and conclusions on the information provided by the GoIRA under the applicable law. In that analysis, the Prosecution focuses on whether the Deferral Material adequately substantiates that the GoIRA is conducting or has conducted relevant proceedings and the extent to which any such proceedings sufficiently mirror the Prosecution's authorised investigation. Because the Prosecution has assessed that the available information does not demonstrate the existence of proceedings that would justify the GoIRA's request for a blanket deferral of the entire investigation, the Prosecution does not address the second step of the enquiry—which is, with respect to any relevant national proceedings, whether the GoIRA is willing or able genuinely to carry them out according to articles 17(2) and (3) of the Statute.

17. Finally, the Prosecution presents further evidence and submissions regarding the present status of the domestic proceedings that formed the basis of the Deferral Request, which demonstrates a lack of ongoing proceedings, and the absence of the intention or capacity of the current authorities to progress the relevant cases.

I. OVERVIEW OF INFORMATION SUBMITTED BY THE GOIRA

18. This section describes the type and content of information submitted to the Prosecution by the GoIRA in support of its Deferral Request of 26 March 2020 in four tranches: on 12 June 2020, 15 January 2021, 5-7 May 2021 and 10 June 2021.[16] This represents all the information

[16] *See* evenly dated correspondence and annexes in Confidential *ex parte* Annex A.

made available by the GoIRA under article 18(2) of the Statute and rule 53 of the Rules of Procedure and Evidence, which is communicated to the Chamber in accordance with rule 54(1).

19. The Deferral Material has been uploaded into the Court record in its entirety and in its original form. While the correspondence and submissions of the GoIRA and the annexes of supporting material are in English, the vast majority of the supporting documents submitted by the GoIRA are in the Dari or Pashto languages. These documents were reviewed by the Prosecution in their original language by staff with the necessary language skills, who then produced charts describing the relevant information contained therein, including an English description of the documents.[17] This has allowed the Prosecution to assess the relevance and sufficiency of the supporting documentation and to determine the extent to which it mirrors the Prosecution's authorised investigation.

20. Mindful of the Chamber's instruction to organise the Deferral Material so as to make it possible for the Chamber to consult and examine it in an efficient manner, the Prosecution annexes charts (A) documenting the correspondence between the Prosecution and the GoIRA, with relevant attachments;[18] and (B) documenting and analysing the supporting material received.[19] Additionally the Prosecution annexes a list of cases provided by the GoIRA for which *no* supporting material has been received and which are *ipso facto* deemed unsubstantiated.[20] Annexes A and B are hyperlinked to relevant items uploaded into the Court record. Annex B can be filtered according to the three main perpetrator groups identified in the Prosecution's article 15 request to understand the material provided in respect of each group. It describes each case relied upon by the GoIRA and each document provided in support, including the English description of the content and the Prosecution's analysis thereof.

II. APPLICABLE LAW

21. In deciding on the Deferral Request, the Prosecution submits that the following three issues must be considered: (i) the required substantiation and the relevant burden of proof, (ii) the nature of the assessment necessary to determine whether the Deferral Request is adequate to justify a deferral of the Court's investigation, and (iii) the comparators used to carry out that

[17] These have been revised and consolidated into a single comprehensive chart for the purposes of this filing and attached as confidential *ex parte* Annex B.
[18] Annex A.
[19] Annex B.
[20] Annex C.

assessment. The Prosecution notes that, at the current time, no chamber of the Court has yet ruled on an article 18(2) request.

22. In the Prosecution's submission, the State requesting deferral under article 18 has the burden to satisfy the Prosecution, and, where applicable, the Chamber, that deferral is justified. Since the Chamber must consider the factors in article 17 in these proceedings, the Court's established practice in deciding upon admissibility under article 17 in other procedural contexts provides direct guidance: both in relation to how the Court has resolved admissibility challenges to specific cases under article 19(2), and in assessing admissibility of situations (based on potential cases) when deciding upon requests to authorise investigations under article 15(3). In these contexts, the Court has adopted appropriate comparators, bearing in mind the procedural stage and the forensic context. Specifically, for the purpose of article 18(2), this means that the information presented by the State must be compared to see if it sufficiently mirrors the scope of the Prosecution's intended investigation as defined by the parameters of the authorised situation.

II.A. The State requesting deferral must substantiate its request and demonstrate that deferral is justified

23. Article 18(2) explicitly provides that the Prosecutor shall defer to a "State's *investigation*" and rule 53 requires that the State requesting deferral must do so in writing and "*provide information* concerning its investigation".

24. Accordingly – and contrary to the legal interpretation of the GoIRA[21] – the Prosecution submits that the State requesting deferral not only bears the "evidential burden" to substantiate its request with relevant arguments and evidence, but also the "burden of proof"[22]—in the sense that it is for the State to satisfy the Prosecution and, if applicable, the Chamber of the existence of a national investigation which meets the requirements of articles 17 and 18(2) and thus

[21] 12 June 2020 deferral submissions, AFG-OTP-00000163, at 000006, para. 14 *et seq*.
[22] *See* K. Ambos, Treatise on International Criminal Law (2nd Edition): Vol. I: Foundations and General Part (Oxford, 2021), pp. 414-415; ICC-01/09-01/11-1334-Anx-Corr ("*Ruto and Sang* Conduct Decision, Judge Eboe-Osuji's Separate Opinion"), para. 79-80 (distinguishing between persuasive burden and evidential burden); J. Pauwelyn, *Defences and the Burden of Proof in International* Law in L. Bartels and F. Paddeu (eds.), Exceptions in International Law, 1st Ed. (OUP, 2020), p. 89 (distinguishing between the burden of raising a claim, burden of production of arguments and evidence to substantiate or oppose a claim, and the burden of persuasion or "the real burden of proof" to prove or disprove a claim). The person/entity bearing the "evidential" burden may not coincide with the person/entity bearing the "burden of proof": ICC-01/11-01/11-565 ("*Al-Senussi* Admissibility AD"), para. 167.

justifies a deferral. If the State fails to so substantiate, then the Prosecution respectfully submits that the Chamber must authorise the resumption of the Court's investigation.

II.A.1. The State requesting deferral must substantiate its request

25. A State requesting a deferral must substantiate its request—that is, it must provide *sufficient information* to support the request and to enable a determination that the deferral is justified. This is expressly required by rule 53, which stipulates that "[w]hen a State requests a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and *provide information concerning its investigation*", and rule 54(1), which requires the Prosecution to transmit such information to the Chamber along with its article 18(2) application.[23] Since the State is in a unique position to provide information about its own proceedings, the express requirement of rule 53 is also consistent with the article 18 procedure, which conditions any deferral upon an assessment of the merits of the deferral request—initially by the Prosecution, and ultimately by the Chamber.

26. The information provided by the State must be relevant, probative, and sufficiently specific to enable the Prosecution – and the Chamber, if applicable – to ascertain the stage of the domestic proceedings, assess the investigative steps taken, and determine whether deferral is justified considering the State's proceedings as a whole.[24]

27. In other procedural contexts (such as under articles 15 and 19), when carrying out article 17 admissibility assessments, Chambers have required evidence with a "sufficient degree of specificity and probative value"[25] that establishes "tangible, concrete and progressive

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[23] Since the Court's legal framework expressly requires that the State's request is accompanied by "information" (see rule 53), it could be argued that an "empty" request such as, for instance, a letter merely requesting deferral without providing any information or attaching any material regarding the domestic proceedings is not a well-formed "request" within the terms of article 18(2) and does not require the Prosecution to suspend its investigation.
[24] ICC-01/15-12-Anx-Corr ("*Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op."), para. 41 (noting that information regarding the nature of the investigative steps allegedly carried out and its flaws are decisive for an accurate article 17 admissibility determination); J. Stigen, The Relationship between the International Criminal Court and National Jurisdictions - The Principle of Complementarity, (Martinus Nijhoff Publishers, Leiden-Boston, 2008) ("Stigen"), p. 133 (noting that the State must provide sufficient information for the Prosecutor and the Chamber to make their determinations); J. Holmes *Complementarity: National Courts versus the ICC* in Cassesse A., Gaeta P. and Jones J. (ed), The Rome Statute of the International Criminal Court, Vol. I (Oxford, 2002) ("Holmes 2002"), p. 681 ("Article 18 and Rule 53 provide that the information must be sufficiently detailed to demonstrate that the State is investigating or has investigated criminal acts which relate to the information provided by the Prosecutor in the original notification").
[25] ICC-01/09-01/11-307 ("*Ruto et al.* Admissibility AD"), para. 2, 62-63; ICC-01/09-02/11-274 ("*Muthaura et al.* Admissibility AD"), para. 2, 61-62; ICC-02/11-01/12-75-Red ("*Simone Gbagbo* Admissibility AD"), para. 29; ICC-01/11-01/11-662 ("*Gaddafi* Second Admissibility Decision"), para. 32; *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 48 (unsigned documents should have been found lacking probative value).

investigative steps" seeking to ascertain a person's criminal responsibility,[26] such as "by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[27] Relevant evidence is not confined to "evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes",[28] but also extends to "all material capable of proving that an investigation or prosecution is ongoing".[29] This includes "directions, orders and decisions issued by authorities in charge […] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]".[30]

28. By contrast – and again contrary to the legal position of the GoIRA[31] – mere evidence of a State's *preparedness or willingness* to investigate or prosecute is not sufficient in and of itself to establish that it is actually carrying out a relevant investigation or prosecution.[32] Nor is it enough for a State to rely on judicial reform actions and promises for future investigative activities.[33] Likewise, it will never suffice for a State *merely to assert* that investigations are ongoing.[34] These same principles apply, *mutatis mutandis*, to the assessment of State requests for deferral under article 18(2).

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[26] *Simone Gbagbo* Admissibility AD, para. 122, 128; ICC-01/17-9-Red ("*Burundi* Article 15 Decision"), para. 148, 162. *See also* ICC-02/17-33 ("*Afghanistan* Article 15 Decision"), para. 72; ICC-01/11-01/11-344-Red ("*Gaddafi* First Admissibility Decision"), para. 73; ICC-01/11-01/11-239 ("*Gaddafi* Further Submissions Decision"), para. 11.

[27] *Ruto et al.* Admissibility AD, para. 41, 69; *Muthaura et al.* Admissibility AD, para.1, 40; *Burundi* Article 15 Decision, para. 148.

[28] ICC-02/11-01/12-47-Red ("*Simone Gbagbo* Admissibility Decision"), para. 29; *Gaddafi* Further Submissions Decision, para. 10-11. *Contra* D. Nsereko and M. Ventura, *'Article 18'*, in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Nsereko/Ventura"), p. 1025, nm. 42 (suggesting - without any support - that a State should be given the opportunity to request deferral even if it has not started its investigations but is able and willing to do so), *but see* p. 1027, nm. 49 (noting that issues of admissibility of cases under article 17 are similar to those that confront the Pre-Trial Chamber on an application by the Prosecutor under article 18(2)).

[29] *Simone Gbagbo* Admissibility Decision, para. 29; *Gaddafi* Further Submissions Decision, para. 10-11.

[30] *Simone Gbagbo* Admissibility Decision, para. 29; *Gaddafi* Further Submissions Decision, para. 10-11. However, mere instructions to investigate were not considered enough: ICC-01/09-01/11-101 ("*Ruto et al.* Admissibility Decision"), para. 68.

[31] 12 June 2020 submissions, AFG-OTP-00000163, at 000007-8, para. 16.

[32] *Ruto et al.* Admissibility AD, para. 41; *Muthaura et al.* Admissibility AD, para. 40. Nor can admissibility be assessed with respect to non-existing proceedings: ICC-02/04-01/15-156 ("*Kony et al.* Admissibility Decision"), para. 51-52. Nor can a State expect to be allowed to amend or provide additional information just because it requested the deferral prematurely: *Ruto et al.* Admissibility AD, para. 100; *Muthaura et al.* Admissibility AD, para. 98.

[33] *Ruto et al.* Admissibility Decision, para. 64; *see also Burundi* Article 15 Decision, para. 162.

[34] *Ruto et al.* Admissibility AD, para. 2, 62-63; *Muthaura et al.* Admissibility AD, para. 2, 61-62; *Simone Gbagbo* Admissibility AD, para. 29, 128.

II.A.2. The State requesting deferral bears the burden of proof

29. A State requesting deferral must demonstrate, on the basis of the information provided, the existence of domestic proceedings justifying deferral under article 18(2). In other words, the State concerned must: firstly, satisfy the Prosecution that deferral is consistent with the applicable law and thus warranted; and secondly, if the deferral request is submitted for judicial scrutiny under article 18(2), the State must equally satisfy the relevant Chamber of its claim.

30. This follows in part from the evidentiary burden expressly placed on the State, and its unique appreciation of the investigation that it is actually conducting.[35] After all, it is the State which conducts the relevant investigations, prosecutions, and court proceedings, and therefore has the best access to the records of those efforts, including case files, police reports, court dockets or judicial decisions. If the burden of proof were reversed, it would place an impossible burden on the Prosecution to demonstrate the *absence* of such activities, and to do so *without* direct access to any of the underlying materials. Instead, the logic of the evidentiary burden is that, since it is the State which is best equipped to show that its proceedings justify the requested deferral, it should be expected to do so. This is also consistent with rule 52(2), which provides that the State "may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2", and by this means ensure that its deferral request is indeed justified.

31. Further, placing the burden of proof on the State requesting deferral is also consistent with the object and purpose of the Statute. Since a successful deferral request may lead to an indefinite suspension of the Court's investigation into a situation – where potential criminality has already been independently established by means of the Prosecutor's determination under article 53(1) (for referred situations) or the Chamber's determination under article 15(4) (for *proprio motu* situations) – it is appropriate to place the onus on the requesting State to demonstrate that its investigation suffices to justify this step, such that deferral does not mean impunity.

32. This approach is also consistent with the burden of proof under article 19(2), by which a State may challenge the admissibility of particular cases.[36] Indeed, article 18(7) may imply

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[35] *See above* para. 25.

[36] *Al-Senussi* Admissibility AD, para. 166; *Ruto et al.* Admissibility AD, para. 62; *Simone Gbagbo* Admissibility AD, para. 128. Trial Chamber III held that the standard to determine admissibility is balance of probabilities: ICC-01/05-01/08-802 ("*Bemba* Admissibility Decision"), para. 203. The Appeals Chamber has not delved on the matter

some parallel between article 18(2) deferral requests – at least if they are appealed[37] – and article 19(2) challenges, insofar as article 18(7) restricts the scope of a State's subsequent challenges under article 19 to those "on the grounds of additional significant facts or significant change of circumstances".[38]

33. The Prosecution recognises that a State's request for deferral under article 18(2) does not automatically trigger a determination by the Chamber, but that this only occurs on application by the Prosecutor—and *if* the Prosecutor has assessed that deferral is not warranted. However, this does not mean that the Prosecution assumes any burden of proof.[39]

34. Rather, the purpose of this procedural mechanism – in which the Prosecution makes an initial assessment of a request for deferral, and only triggers litigation before the Chamber if considered necessary – responds to the dialogue that article 18 seeks to encourage between the Prosecution and States with jurisdiction over article 5 crimes.[40] It is also consistent with the fact that the Prosecution analysed questions of admissibility during its preliminary examination, and is best placed to appreciate the range of potential cases which fall within the parameters of the situation, and thus define the investigation. But nothing in these considerations implies that, having determined that the State's request for deferral should indeed proceed to adjudication by the Chamber, the Prosecution supplants the State's burden of proof. To the contrary, if the Prosecution seises the Pre-Trial Chamber of an application under article 18(2) the Prosecution's function is not analogous to that of a moving party, but rather as a *respondent* to the deferral

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and only confirmed that the challenging party must present evidence of "sufficient degree of specificity and probative value" (*see above* fn. 25).

[37] *Cf.* W. Schabas, The International Criminal Court: a Commentary on the Rome Statute, 2nd Ed. (Oxford: OUP, 2016) ("W. Schabas 2016"), p. 481 (suggesting that "article 18(7) only applies when a State has appealed a ruling of the Pre-Trial Chamber pursuant to article 18(5)").

[38] Holmes 2002, p. 682 (noting that the legal texts suggest that "this process constitutes a form of challenge, even though the State has only requested a deferral"); W. Schabas 2016, p. 475 (quoting US Ambassador David Scheffer explaining the rationale for this process, and qualifying it a "challenge by a national judicial system").

[39] *Contra* Nsereko/Ventura, p. 1027, nm. 48 (noting that the Prosecutor has both the evidentiary and legal burden to a preponderance of evidence due to the principle "who asserts must prove" but then comparing an article 18(2) application with article 19 admissibility challenges and disregarding that in both instances a State asserts jurisdiction and provides substantiating information); *see also* Stigen, p. 137 (suggesting that the State bears the burden to establish the existence of domestic proceedings, while the Prosecution bears the burden to demonstrate lack of genuineness, unless the State does not provide sufficient information where the State also bears the burden).

[40] *See* Holmes 2002, p. 681 (noting that article 18 and rules 52 and 53 encourage a dialogue between the State and the Prosecutor to ensure that there is no overlap in their respective areas of interest); C. Stahn, *'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?*,' in C. Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford, 2015), p. 240 (noting that the Statute encourages a dialogue between the State and the Prosecutor to ensure that there is no overlap in their respective areas of interest). *See also* Stigen, p. 132. Note however that the Prosecution generally engages with States during preliminary examinations; thus, it may be that exhaustive dialogue has preceded the opening of an investigation.

request made by the State.[41] This is implicit, for example, in the duty on the Prosecution under rule 54(1) to forward to the Chamber "[t]he information provided by the State under rule 53"—which then forms the primary context for the Chamber's examination of the relevant issues, together with the submissions of the Prosecution.[42]

II.B. The core principles for assessing admissibility under article 17(1) apply equally to the Chamber's preliminary ruling on admissibility under article 18(2)

35. Notwithstanding the procedural context specific to article 18(2) – assessing whether the Court's investigation should be deferred to a State's investigation before the Prosecution has had an opportunity to investigate – the Prosecution submits that the same core principles for assessing admissibility under article 17 at other procedural stages (such as under articles 15 and 19) remain applicable. Indeed, in making its preliminary ruling on admissibility under article 18(2) of the Statute, rule 55(2) expressly requires the Chamber to "consider the factors in article 17".[43] Accordingly, it is respectfully submitted that the Chamber should: (i) assess the State's proceedings based on the facts as they currently exist; (ii) adopt a two-step process for its assessment; and (iii) determine that there is a conflict of jurisdiction for the purposes of its admissibility assessment only if the State's proceedings sufficiently mirror those before the Court.

36. A closely related question is: *to what* should the article 17 assessment be applied? As explained further below,[44] the Prosecution submits that the practice of the Court demonstrates that the appropriate "comparators" for the article 17 assessment are identified in light of the procedural context—and that, consequently, these should be tailored to the procedural context of article 18.

II.B.1. The assessment must be conducted on the basis of the facts as they exist

37. For the purpose of article 17, the Chamber must consider the relevant facts as they exist at the time of the Court's complementarity assessment.[45] In the context of a requested deferral

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[41] As a respondent, the Prosecution will substantiate its arguments: *see* ICC-01/11-01/11-466-Red ("*Al-Senussi* Admissibility Decision"), para. 208; *Al-Senussi* Admissibility AD, para. 167.
[42] This follows from rule 55(2), which states that "[t]he Pre-Trial Chamber shall examine the Prosecutor's application and *any* observations submitted by a State that requested a deferral" (emphasis added)—and thus implies that further observations *may* be received from the State requesting a deferral in accordance with the Chamber's power under rule 55(1), but that such observations are not essential.
[43] *Ruto et al.* Admissibility AD, para. 38.
[44] *See below* para. 55-61.
[45] ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD"), para. 56; *see also Ruto et al.* Admissibility Decision, para. 70; *Ruto et al.* Admissibility AD, para. 83; *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para.

under article 18, this requires that relevant domestic proceedings must already have existed at the time when the State requests the deferral, and that the Chamber should not consider any proceedings that may occur in the future.[46] In other words, in the circumstances of this situation, the Chamber must consider the domestic proceedings that actually existed as of 26 March 2020, the date of the Deferral Request—or, at the latest, 10 June 2021, the date of the last submission of Deferral Material by the GoIRA.[47]

38. However, this does not imply the irrelevance of any subsequent change of circumstances which calls for the resumption of the Court's investigation. To the contrary, for example, article 18(3) expressly recognises – even if the validity of a Deferral Request is accepted by the Prosecutor – this remains under review. Likewise, and *a fortiori*, the Prosecutor and the Chamber must take into account any material change of circumstances which undermines the claims in a deferral request if the initial determination of its validity under article 18(2) is not yet complete. Thus, where circumstances that gave rise to a conflict of jurisdiction are no longer present at the time of the Chamber's assessment, no actual conflict of jurisdiction will exist.

II.B.2. Complementarity assessments entail a two-step process

39. Article 17 entails two inquiries:

- First, whether the State with jurisdiction is conducting – or has conducted – relevant domestic proceedings within the terms of article 17(1)(a) to (c). In effect, the Court must determine whether there is an apparent conflict of jurisdiction between the ICC and the State concerned. This is assessed in accordance with the three-part scheme set out in article 17,[48] namely whether: (i) there are ongoing investigations or prosecutions; (ii)

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58 ("Article 17 of the Statute is drafted in a manner where the relevant Chamber is duty bound to make a determination on the basis of facts as they exist"). This refers to the proceedings before the first instance chamber and does not include subsequent proceedings on appeal: ICC-01/09-01/11-234 ("*Ruto et al.* Updated Investigation Report AD") para. 10; ICC-01/11-01/11-547-Red ("*Gaddafi* First Admissibility AD"), para. 41-43; *Al-Senussi* Admissibility AD, para. 57-59. *See also Kony et al.* Admissibility Decision, para. 51-52 (" On the basis of the above considerations, the Chamber takes the view that it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework. […] To go beyond this would be tantamount to engaging in hypothetical judicial determination, which appears per se inappropriate. Pending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains … one of total inaction on the part of the relevant national authorities […]").

[46] Stigen, p. 134 ("In order for a request for deferral under article 18(2) to succeed, the state must have started an investigation when it makes the request, i.e. no later tha[n] one month from the time it was notified or otherwise acquired knowledge of the Prosecutor's intention to investigate.").

[47] AFG-OTP-0012-2604.

[48] *See below* para. 43.

investigations have been completed and the State has decided not to prosecute the person concerned;[49] or (iii) the person has already been tried for the same conduct.[50]

- Second – and only if the first question is answered in the affirmative[51] – whether the domestic proceedings are not, or were not, "genuine". In particular, whether the domestic authorities are unwilling or unable to conduct the relevant proceedings within the meaning of articles 17(2) and (3) of the Statute.[52]

40. Chambers have consistently followed this two-step process in determining admissibility. This was the case not only when considering the admissibility of cases *proprio motu* under article 19(1), but also in resolving article 19(2) challenges by States or suspects and accused persons.[53] Chambers likewise followed this two-step process in assessing the admissibility of situations, when deciding upon the Prosecution's requests to authorise investigations under article 15(3) of the Statute.[54]

41. The Prosecution submits that this same two-step process should be applied when deciding upon a State's deferral request under article 18(2), given that it entails a "[p]reliminary ruling regarding admissibility" and requires consideration of "the factors under article 17".[55] There is no reason to depart from the consistent jurisprudence of the Court in this respect.

- First, this interpretation is consistent with the criteria of treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT"). It best suits the stated purpose of article 18 (expressly referring, in its title, to "admissibility"), the context provided by the general terms in which article 17 is expressed (applying to "[i]ssues of admissibility" without further specification), and the object and purpose of the Statute, namely, to end

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[49] *Katanga* Admissibility AD, para. 78; *Simone Gbagbo* Admissibility AD, para. 27.
[50] With respect to articles 17(1)(c) and 20(3): *Gaddafi* Second Admissibility Decision, para. 36, 79; ICC-01/11-01/11-695 ("*Gaddafi* Second Admissibility AD"), para. 58.
[51] *Katanga* Admissibility AD, para. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27. *See also* W. Schabas and M. El Zeidy, '*Article 17*', in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Schabas/El Zeidy"), p. 963, nm. 30.
[52] Statute, article 17(2)-(3); *see also* article 20(3) (if there has been a final decision).
[53] *See e.g. Katanga* Admissibility AD, para. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27.
[54] ICC-01/09-19-Corr ("*Kenya* Article 15 Decision"), para. 53-54; ICC-02/11-14-Corr ("*Côte d'Ivoire* Article 15 Decision"), para. 192-193; *Burundi* Article 15 Decision, para. 145-146; ICC-01/15-12 ("*Georgia* Article 15 Decision"), para. 36-50. Although the Appeals Chamber has since clarified that this assessment is not required by article 15(4), and that such matters should be left to any proceedings under article 18, it did not question the manner in which Chambers have conducted the assessments. The Appeals Chamber only opined on the procedural stage in relation to when this assessment should be undertaken by the Chamber: ICC-02/17-138 ("*Afghanistan* Article 15 AD"), para. 35-45; *see also* ICC-01/19-27 ("*Bangladesh/Myanmar* Article 15 Decision"), para. 115-116. The Pre-Trial Chamber may still be potentially called upon to apply this two-step process in reviewing the Prosecution's own assessment of the admissibility of potential cases within referred situations under articles 53(1)(b) and 53(3)(a): ICC-01/13-34 ("*Comoros* First Review Decision"), para. 8-12.
[55] Rules, rule 55(2).

impunity while respecting States' primary responsibility to investigate and prosecute crimes under the Statute.[56]

- Second, neither the drafting history of article 18 nor any other provision of the Statute suggests that article 17 should be interpreted differently for the purpose of deferral requests. To the contrary, the drafting history shows that the belated proposal to create article 18 was not intended to reopen the compromise reached on complementarity.[57] Rather, article 18 was intended to be consistent both with the framework of complementarity in article 17 and (what is now contained in) article 19(1) and (4) of the Statute—whereby a State or person concerned may challenge the admissibility of a concrete case within the framework of article 17.[58]

42. For the reasons explained below, the Prosecution submits that in this situation the Chamber's assessment under article 17(1) may be appropriately halted at the first step, since it has not been shown that relevant domestic proceedings actually exist. However, it notes that factors which are relevant to determine inaction under article 17(1) may also be relevant for determination of unwillingness or inability under article 17(2).[59]

43. Further, articles 17(1)(a) to (c) describe three different stages of domestic proceedings which might be relevant:

- Article 17(1)(a) is concerned with ongoing domestic investigations or prosecutions. Since the fundamental purpose of the Court is to prosecute those responsible for the most serious crimes of international concern in a manner complementary "to national criminal jurisdictions",[60] this provision relates to domestic proceedings seeking to

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[56] *Katanga* Admissibility AD, para. 79 (referring to the aim of the Rome Statute to put an end to impunity and to ensure that the most serious crimes of concern to the international community as a whole must not go unpunished); *see also* ICC-01/14-01/18-678-Red ("*Yekatom Admissibility AD*"), para. 42 (referring to the States' primary duty to exercise criminal jurisdiction); *Gaddafi* Second Admissibility AD, para. 58; *see also Ruto et al.* Admissibility AD, para. 44 (finding that article 17(1)(a)-(c) "favour national jurisdictions, […] to the extent that there actually are, or have been, investigations and/or prosecutions at the national level").
[57] J. Holmes in R. Lee (ed.), The International Criminal Court: the making of the Rome Statute, *The Principle of Complementarity* (Martinus Nijhoff Publishers, 1999) ("Holmes 1999") p. 69.
[58] D. Nsereko and M. Ventura, 'Article 18', in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Nsereko/Ventura"), p. 1012, nm. 4.
[59] *Al-Senussi* Admissibility Decision, para. 210; *Al-Senussi* Admissibility AD, para. 231 (confirming the PTC's approach of considering investigative steps and the progression of domestic proceedings to determine unwillingness). For example, lack of proceedings on the most responsible (and focus on low level perpetrators) may indicate, along with other factors, an intent to shield under article 17(2)(a): Informal expert paper - *The principle of complementarity in practice*, annex 4, p. 30.
[60] Statute, Preamble, para. 10.

determine *criminal responsibility* as opposed to alternative mechanisms of justice.[61] Hence, "national investigations that are not designed to result in criminal prosecutions"[62] or "national proceedings designed to result in non-judicial and administrative measures rather than criminal prosecutions" do not meet the admissibility requirements.[63] Likewise, a "national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court".[64] This determination may require an assessment of the mandate, functions, and powers, as well as the operation and processes, of the relevant domestic bodies.[65]

- Article 17(1)(b) relates to final decisions on the merits terminating an investigation and preventing a prosecution against a suspect or accused person before a domestic court.[66]
- Article 17(1)(c) relates to a full domestic trial which has been completed, resulting in a final acquittal or conviction.[67] As such, a first-instance decision which has not become final,[68] or the termination of proceedings without prejudice due to lack of evidence or technical reasons, does not render a case inadmissible.[69] Nor do domestic proceedings undertaken *in absentia* where there is a possibility to institute proceedings once the person appears voluntarily or is apprehended.[70]

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[61] Schabas/El Zeidy, p. 975 at nm. 51 (noting that "article 17(1) is concerned with 'judicial proceedings' as opposed to alternative mechanisms of justice", but also opining that there is some room for accepting a "preliminary investigation" by a truth commission so far as it is empowered to recommend a criminal prosecution).
[62] *Burundi* Article 15 Decision, para. 152.
[63] *Burundi* Article 15 Decision, para. 152; *Afghanistan* Article 15 Decision, para. 79.
[64] *Burundi* Article 15 Decision, para. 152. In Burundi, Pre-Trial Chamber III assessed the investigations conducted by commissions of inquiry which had certain judicial and investigative powers, were tasked to investigate certain events and establish those responsible and to refer persons to the competent authorities. The Chamber did not find the potential cases to be inadmissible since the commissions did not focus on the same groups of persons who were likely to be the focus of the Prosecution's investigation, did not take tangible concrete and progressive investigative steps or the steps were clearly insufficient: *see* para. 153-175.
[65] *See e.g.* *Burundi* Article 15 Decision, para. 153, 154, 158, 166 (noting the mandate and functions of the commissions including judicial and investigative functions); *see also* para. 159 ("The Commission heard several witnesses"), 168 (noting that "four criminal files had been open against 87 persons"); *compare with* ICC-01/19-7 ("*Bangladesh/Myanmar* Prosecution Request"), para. 248-253.
[66] Schabas/El Zeidy, p. 973 at nm. 48. This however does not include decisions closing domestic proceedings in order to surrender a given person to the ICC for prosecution: *Katanga* Admissibility AD, para. 82-83; ICC-01/05-01/08-962-Corr ("*Bemba* Admissibility AD"), para. 74; Schabas/El Zeidy', pp. 973-974 at nm. 48-49 (noting that this may result from a judicial decision or a political decision from the executive).
[67] *Gaddafi* Second Admissibility AD, para. 63.
[68] Schabas/El Zeidy, p. 979 at nm. 57; *Gaddafi* Second Admissibility Decision, para. 36; *Gaddafi* Second Admissibility AD, para. 58.
[69] Schabas/El Zeidy, p. 979 at nm. 57, p. 980 at nm. 58; *Bemba* Admissibility Decision, para. 248.
[70] Schabas/El Zeidy, p. 980 at nm. 58; *cf.* *Gaddafi* Second Admissibility Decision, para. 61-79. In *Gaddafi*, Pre-Trial Chamber I noted, *obiter*, that amnesties and pardons impeding or interrupting judicial proceedings and punishment would in principle mean that a case remains admissible before the Court: *Gaddafi* Second Admissibility Decision, para. 77-78. In a separate opinion, also in *Gaddafi*, two judges of the Appeals Chamber noted that a sentence which is not proportionate to the gravity of the crime and the person's responsibility is not consistent with the complementarity regime to ensure that the most serious crimes do not go unpunished. Hence,

44. Finally, although domestic law need not label the criminal conduct as an international crime, the underlying conduct that is investigated domestically must substantially correspond to, and adequately capture, the relevant Rome Statute crime.[71]

II.B.3. There is an apparent conflict of jurisdiction between the State and the Court if the State's relevant national proceedings sufficiently mirror those of the Court

45. To establish the potential inadmissibility of proceedings before the Court on the basis of complementarity, it is not required that the overlap between the domestic proceedings and the case before the Court is absolute. Rather, what is required is a "judicial assessment of whether the case that the State is investigating *sufficiently mirrors* the one that the Prosecutor is investigating".[72] Again, in the Prosecution's submission, this same principle applies equally to article 17(1) assessments at all procedural stages, including under article 18(2).

46. In *Gaddafi*, the Appeals Chamber further explained:

> The real issue is, therefore, the degree of overlap required […] between the incidents being investigated by the Prosecutor and those being investigated by a State—with the focus being upon whether the conduct is substantially the same. Again, this will depend upon the facts of the individual case. If there is a large overlap between the incidents under investigation, it may be clear that the State is investigating substantially the same conduct; if the overlap is smaller, depending upon the precise facts, it may be that the State is still investigating substantially the same conduct or that it is investigating only a very small part of the Prosecutor's case. For example, the incidents that it is investigating may, in fact, form the crux of the Prosecutor's case and/or represent the most serious aspects of the case. Alternatively, they may be very minor when compared with the case as a whole.[73]

47. While this case-specific and fact-dependent assessment allows for some flexibility, it still requires a considerable overlap between the incidents investigated by the national authorities and those investigated by the Prosecution.[74]

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a case would be admissible where a final decision is reached but the sentence imposed is pardoned shortly after the end of the trial, where the sentence effectively served is deemed disproportionate to the harm and the criminal conduct: ICC-01/11-01/11-695-Anx ("Concurring Separate Opinion Judges Eboe-Osuji and Bossa"), para. 8-9.

[71] *Al-Senussi* Admissibility AD, para. 119-122; *Gaddafi* First Admissibility Decision, para. 108.

[72] *Gaddafi* First Admissibility AD, para. 73 (emphasis added).

[73] *Gaddafi* First Admissibility AD, para. 72.

[74] Schabas/ El Zeidy, p. 968, nm. 36-37.

II.C. The procedural context defines the appropriate comparators for the article 17(1) determination

48. To date, the Court has considered the threshold question under article 17(1) – whether there are (or have been) relevant domestic proceedings triggering a conflict of jurisdiction between the Court and the State concerned – in two distinct procedural contexts: *either* for the purpose of assessing cases under article 19 *or* for the purpose of assessing situations under article 15.

49. While Chambers have consistently required appropriate "comparators" in order to carry out this analysis, the nature and specificity of the comparators used have been adapted to reflect the procedural stage—especially having regard to the degree to which the Court's investigation can reasonably be expected to have advanced at that time. As the Appeals Chamber has stated: "[t]he meaning of the words 'case is being investigated' in article 17(1)(a) of the Statute" must "be understood in the context to which it is applied".[75]

50. Therefore:

- Under article 19, the admissibility assessment is more concrete, due to the more advanced stage of the proceedings, and entails comparing the domestic proceedings with the particular *case before the Court*—in which an alleged perpetrator, the alleged crimes, modes of liability, and underlying facts have at least been specified in the request and ensuing decision pursuant to article 58,[76] or even in a document containing the charges or confirmation decision.[77] Specifically, the Appeals Chamber has held that the domestic proceedings must "cover the same individual and substantially the same conduct as alleged in the proceedings before the Court".[78]
- Under article 15, by contrast, the admissibility assessment is more preliminary in nature, consistent with the fact that the Prosecution has not yet had any opportunity to

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[75] *Ruto et al.* Admissibility AD, para. 39; *see also* *Kenya* Article 15 Decision, para. 48 ("the reference to a 'case' in article 53(l)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied. […]").
[76] Statute, article 58(1) (setting out the content of applications for arrest warrants and summons to appear).
[77] Regulations of the Court, regulation 52 (setting out the content of documents containing the charges).
[78] *Ruto et al.* Admissibility AD, para. 40. The relevant conduct encompasses the personal conduct of the suspect and conduct "which is imputed to the suspect", and to carry out this assessment, it has been considered "necessary to use as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents": *Gaddafi* First Admissibility AD, para. 62, 70, 73. "Incidents" have been defined as "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators": *Gaddafi* First Admissibility AD, para. 62.

investigate.[79] Consequently, 4the domestic proceedings have been compared with *potential cases*,[80] identified provisionally by the Prosecution based on the limited information available during the preliminary examination, and characterised by criteria or parameters such as: (i) the groups of persons involved, and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping future case(s).[81] For example, as noted in the context of article 17(1)(d), Chambers have stressed that "[i]n considering the groups of persons likely to be the object of the investigation, the […] assessment 'should be general in nature and compatible with the pre-investigative stage'".[82]

51. Importantly, Chambers have also cautioned that potential cases provisionally identified by the Prosecution for the purpose of the preliminary examination are for the narrow purpose of ascertaining whether the legal conditions for opening an investigation under article 53(1) are met[83]—and, consequently, are merely *illustrative* of the criminality in the situation. Indeed, considering its limited powers[84] and low evidentiary threshold at this very early stage,[85] the

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[79] *See e.g.* Schabas/ El Zeidy, p. 966, nm. 34; *Ruto et al.* Admissibility AD, para. 39 ("the contours of the likely cases will often be relatively vague […]. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52(1) […], which speaks of 'information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2' that the Prosecutor's notification to States should contain").

[80] *Kenya* Article 15 Decision, para. 48 ("since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation"); *Côte d'Ivoire* Article 15 Decision, para. 190; *Georgia* Article 15 Decision, para. 36 (*see also* *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 37, 44, 47, Judge Kovacs agreed with the Majority on the test but he disagreed with its application to the facts); *Burundi* Article 15 Decision, para. 144; *see also* *Bangladesh/Myanmar* Prosecution Request, para. 228; Schabas/ El Zeidy in, p. 966, nm. 34. This is further consistent with the requirements of regulation 49(2) of the Regulations of the Court.

[81] *See generally* *Kenya* Article 15 Decision, para. 49-50; *Côte d'Ivoire* Article 15 Decision, para. 191, 204-205; *Georgia* Article 15 Decision, para. 37, 39; *Burundi* Article 15 Decision, para. 143; *see also* *Bangladesh/Myanmar* Prosecution Request, para. 224-225.

[82] *See e.g.* ICC-01/13-111 ("*Comoros* Third Review Decision"), para. 19; *see also* para. 41.

[83] *See e.g.* Statute, article 53(1)(b). This factors is applicable to the Prosecutor's assessment under article 15 pursuant to rule 48: *see* *Georgia* Article 15 Decision, para. 46.

[84] *See* Statute, article 15(2) and Rules, rule 47. States have no obligation to cooperate during the preliminary examinations: *see* article 86 (referring to the State's obligation to cooperate during investigations and prosecutions). *See* *Kenya* Article 15 Decision, para. 27.

[85] The standard of proof to open an investigation is "reasonable basis to believe" that a crime within the jurisdiction of the Court has been or is being committed. This standard has been interpreted to require that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'." (*Kenya* Article 15 Decision, para. 35; *Côte d'Ivoire* Article 15 Decision, para. 24; *Georgia* Article 15 Decision, para. 25; *Burundi* Article 15 Decision, para. 30. OTP Policy Paper on Preliminary Examinations, para. 34) The information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'" and need not necessarily "point towards only one conclusion." (*Kenya* Article 15 Decision, para. 27, 34; *Georgia* Article 15 Decision, para. 25; *Burundi* Article 15 Decision, para. 30) This reflects the fact that the standard under article 53(1)(a) "has a different object, a more limited scope, and serves a different purpose" than other higher evidentiary standards provided for in the Statute, which is "to prevent the

Prosecution cannot be expected to have conducted an exhaustive assessment of all the possible crimes, actors, and incidents.[86] Accordingly, once the investigation is authorised, Chambers have recalled that the Prosecution is neither limited, nor obliged, to investigate the potential cases provisionally identified for the purpose of opening an investigation.[87] To do otherwise would be to pre-determine the direction of the investigation and improperly narrow its scope based on the limited information available at the preliminary examination. As the Appeals Chamber has observed, any other approach would also be inconsistent with the Prosecution's duty to carry out independent and objective investigations and prosecutions, as set out in articles 42, 54, and 58 of the Statute[88], and would inhibit the Prosecution's truth-seeking function.[89]

52. In this context, the Appeals Chamber has emphasised that in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the Court's jurisdiction, and the responsibility of the various actors who may be involved, the Prosecution must carry out an investigation into the situation *as a whole*.[90] With this in mind, Pre-Trial Chambers have authorised investigations into whole situations where one or more potential cases have been deemed admissible, even if one or more other potential cases were deemed to be inadmissible.[91]

II.D. Article 18(2) requires determining whether the State's investigation sufficiently mirrors the Court's intended investigation

53. Applying all the principles above, the Prosecution submits that the Chamber must make its preliminary ruling on admissibility based on an assessment of whether the State's investigation sufficiently mirrors the Court's intended investigation. If it does not, then the

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Court from proceeding with unwarranted, frivolous, or politically motivated investigations": (*Kenya* Article 15 Decision, para. 32).

[86] *Côte d'Ivoire* Article 15 Decision, para. 24; *Bangladesh/Myanmar* Article 15 Decision, para. 128; *Kenya* Article 15 Decision, para. 27; *Georgia* Article 15 Decision, para. 3, 63; *see also Afghanistan* Article 15 AD, para. 39.

[87] *Kenya* Article 15 Decision, para. 50; *Georgia* Article 15 Decision, para. 37; *Burundi* Article 15 Decision, para. 143; *Bangladesh/Myanmar* Article 15 Decision, para. 126; *Philippines* Article 15 Decision, para. 113-118.

[88] *Afghanistan* Article 15 AD, para. 61; *Bangladesh/Myanmar* Article 15 Decision, para. 128; *Georgia* Article 15 Decision, para. 63-64; *see also Kenya* Article 15 Decision, para. 74-75, 205.

[89] *Afghanistan* Article 15 AD, para. 60; *Philippines* Article 15 Decision, para. 117.

[90] The Appeals Chamber has stressed the Prosecutor's duty, pursuant to article 54(1) of the Statute, "to establish the truth", "to 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" and "to [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court": *Afghanistan* Article 15 AD, para. 60; *see also Philippines* Article 15 Decision, para. 117. The Prosecutor can investigate allegations that fall within the parameters of the situation or are sufficiently linked to the situation and were committed on the territory of a State Party: *Afghanistan* Article 15 AD, para. 79; *Georgia* Article 15 Decision, para. 64.

[91] *Georgia* Article 15 Decision, para. 39; *see also* para. 50 and 57.

Chamber should authorise the resumption of the Court's investigation, without prejudice to any further challenges to admissibility which may be made under article 19(2) in due course.

54. In assessing this question, as a comparator for the State's proceedings, the Prosecution submits that the Chamber should consider the Court's intended investigation as defined by the parameters of the authorised situation as a whole. Only this comparator is appropriate to the procedural context of article 18.

II.D.1. The Court's intended investigation is defined by the parameters of the situation that the Prosecution may investigate

55. Consistent with the Court's established approach to identifying appropriate comparators for the purpose of admissibility assessments under article 17(1), taking account of the procedural context, the Prosecution submits that the Chamber should be guided by the plain terms of article 18(2), and take account of the particular framing of the State's deferral request.

56. Specifically, article 18(2) refers to "the *State's investigation*" relating to the alleged acts material to the "information provided in the notification" by the Prosecutor under article 18(1)—and, in this instance, the GoIRA has requested deferral of the *entirety* of the Court's investigation. Accordingly, the Chamber in resolving this specific deferral request is required to make a preliminary ruling on the admissibility of the Court's investigation *as a whole* in light of the State's investigation as it exists at the material time.

57. In defining the Court's investigation for this purpose, the Prosecution submits that the Chamber should take into account the procedural context of the Statute. In particular, and significantly, Chambers have already observed that the approach to admissibility for the purpose of article 15 (and/or article 53) may be a sound starting point in considering article 18 of the Statute.[92] It follows that the Chamber should compare the domestic proceedings with the scope of the *Prosecution's intended investigation*, as defined by the sum of potential cases

[92] *Kenya* Article 15 Decision, para. 51; *see cf. Ruto et al.* Admissibility AD, para. 39; *Muthaura et al.* Admissibility AD, para. 38; *see also* H. Olásolo and E. Carnero-Rojo, *The admissibility of 'situations'*, in C. Stahn and M. El Zeidy (ed.), The International Criminal Court and Complementarity, From Theory to Practice, Vol.I, (Cambridge UP, 2011), pp. 414-415 (arguing that "the level of scrutiny of national proceedings needs to be lower when ascertaining the admissibility of a situation than when ascertaining the admissibility of a case", but that it still requires to define criteria according to which cases are selected for examination, and referring to the (i) "types of crimes that, committed in a widespread or systematic manner, are at the core of the criminal activities which occurred in the situation at hand", and (ii) "group of persons that fall within the category of persons ultimately responsible").

within the parameters of the authorised situation which could be pursued by the Prosecutor in the exercise of his broad discretion under articles 53, 54, and 58.[93]

58. Importantly, the definition of the investigation for the purpose of article 18(2) should not be limited to those potential cases which were already *expressly* identified by the Prosecutor for the purpose of the preliminary examination. This follows not least from the fact that, when the Court's exercise of jurisdiction is triggered by the Prosecutor *proprio motu*, the Prosecutor is not obliged to have publicly referenced any potential case he identified for the purpose of his initial assessment of admissibility under article 15(3) and rule 48.

59. More broadly, while the admissibility assessments for the purpose of opening an investigation under article 15 and for deferring an investigation under article 18(2) are both addressed to the situation, rather than a particular concrete case, they materially differ in the nature and scope of the analysis required. Rule 48 and article 53(1)(b) require that the Prosecutor identifies at least one potential case which is admissible to justify opening an investigation, as a threshold requirement. But it would clearly be contrary to the object and purpose of the Statute if that entire investigation could then be deferred by a State demonstrating merely that one such potential case was subject to national proceedings. Accordingly, for the purpose of article 18(2), the scope of the Prosecutor's intended investigation must be defined not just by reference to provisionally identified potential cases, but rather by reference to the parameters of the situation that the Prosecutor may investigate as a whole, as it was authorised by the Appeals Chamber and notified to States under article 18(1). As confirmed by the Appeals Chamber in this situation, the potential cases that the Prosecution subsequently identifies and investigates may go beyond those identified during the preliminary examination.[94]

60. This approach is consistent with the text, context, and purpose of article 18 as well as broader aspects of this procedural stage.

- First, States which receive notification under article 18(1) will be aware of the limited purpose and scope of the preliminary examination, compared to the Prosecutor's duty under article 54 to establish the truth once an investigation is opened. Typically, as here,

[93] In this respect "authorised investigation" and "intended investigation" can be used interchangeably.
[94] *Afghanistan* Article 15 AD, para. 61.

this will be mentioned in the relevant article 15 decision and/or article 18 notification letter.[95]

- Second, the Statute expressly foresees that the information provided to States in the Prosecution's notification under article 18(1) may be limited in certain circumstances, such as to ensure the protection of persons and preservation of evidence or avoid the absconding of persons, without this necessarily impacting on the ability of a State to request deferral.[96]
- Third, article 18 is not conclusive of admissibility and only seeks to provide a preliminary ruling for a specific purpose. While article 19 is the appropriate proceeding in the statutory framework to hear an admissibility challenge in a concrete case, article 18 proceedings are designed to determine whether the Prosecution's investigation into a broadly defined and still open set of inquiries in a situation should be allowed to proceed. Where an investigation is authorised notwithstanding a deferral request, the admissibility of any concrete case that may arise from the investigation remains open to challenge under article 19, subject to the requirements in article 18(7) of the Statute.[97]

61. Conversely, to limit the Chamber's assessment under article 18(2) to potential cases specifically identified during the preliminary examination and/or article 15 request would be inconsistent with the above principles.

- First, it would artificially limit the scope of the Prosecution's future investigations on the basis of provisional and untested information which may not necessarily reflect the full scale of criminality within a given situation. The very purpose of an investigation is that "the Prosecutor investigates in order to be able to properly assess the relevant facts",

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[95] *See e.g.* *Afghanistan* Article 15 AD, paras. 59-61 ("In these circumstances, the Appeals Chamber considers that restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor's truth-seeking function.") and 79 (authorising "an investigation 'in 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 other States Parties in the period since 1 July 2002'"); Afghanistan Article 18(1) notification, para. 2 AFG-OTP-00000174; *see similarly* *Philippines* Article 15 Decision, para. 116-118 and p. 41; *Georgia* Article 15 Decision, para. 63-64; *Bangladesh/Myanmar* Article 15 Decision, para. 126-130. *See also* Rules, rule 52(1) (article 18(1) notification must inform States of the parameters of the investigation, and provide information on "acts that may constitute crimes referred to in article 5 […].").

[96] Statute, article 18(1): ("The Prosecution may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons"); *see also* Rules, rule 52(1) ("Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2").

[97] Hence, the State is not precluded from continuing its proceedings and from challenging the admissibility of a case under article 19(2), if applicable.

which may previously have been unclear or difficult to establish on the basis of the information available.[98]

- Second, such an approach would likely incentivise the Prosecution to conduct more protracted preliminary examinations in an attempt to exhaustively capture and map all relevant potential cases to a high degree of specificity. This would not only risk the loss of evidence due to the passage of time, but the assessment would be limited due to the Prosecution's constrained investigative powers at this stage. It would also misapply the threshold setting nature of this assessment. The Prosecution is conscious that Pre-Trial Chambers have urged the opposite—a faster, more streamlined approach to preliminary examinations.[99]
- Third, States seeking deferral would not be able to rely on genuine domestic proceedings regarding other crimes, persons, and incidents in the situation which have not been identified by the Prosecution during the preliminary examination.

II.D.2. The Court's investigation should be deferred if sufficiently mirrored by the State's investigation

62. Consistent with the general approach to article 17(1), the degree of overlap required between domestic proceedings and the Prosecution's intended investigation in order to defer a situation should not be determined purely in the abstract. In this respect, the Prosecution submits that the approach adopted by the Appeals Chamber in the *Gaddafi* case provides guidance.

63. Accordingly, the Pre-Trial Chamber should assess whether the domestic proceedings "sufficiently mirror" the Prosecution's intended investigation, defined by the parameters of the authorised situation or the sum of potential cases within it.[100] This comparison is fact-specific and case-dependent and involves both a quantitative and qualitative assessment.[101] It allows for a pragmatic degree of flexibility and strikes a balance between the competing interests involved, namely, the State's prerogative to assert its primary responsibility, while also ensuring that there

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[98] *Comoros* First Review Decision, para. 13; *Georgia* Article 15 Decision, para. 63; *Bangladesh/Myanmar* Article 15 Decision, para. 128.
[99] *See* ICC-RoC46(3)-01/18-37 ("*Bangladesh/Myanmar* article 19(3) Decision"), para. 88; *Bangladesh/Myanmar* Article 15 Decision, para. 130.
[100] *Gaddafi* First Admissibility AD, para. 72-73.
[101] *Cf. Côte d'Ivoire* Article 15 Decision, para. 203; *see e.g.* Stigen, 131-132 ("the pertinent question will rather be whether the ICC should deal with a given situation at all, i.e. *whether there appear to be (sufficiently many) cases within a given situation that the ICC may and should handle*. If very few cases appear to be admissible, it might not serve 'the interests of justice' to interfere in the situation at all, unless these are particularly important cases, e.g. against the most responsible"), 135 ("If, however, the Prosecutor finds that a *sufficient number of admissible cases within the situation remain*, he or she shall seek an authorisation") (emphasis added).

are no impunity gaps in a situation and that the Prosecution is able to fulfil its statutory mandate expeditiously.[102]

64. The Prosecution stresses that this does not necessarily mean that domestic investigations must be finalised and suspects identified in order to warrant deferral. Yet, domestic proceedings must genuinely address criminal conduct which substantially mirrors the scope of the Prosecution's intended investigation with respect to both criminal incidents and categories of potential perpetrators.[103]

III. ANALYSIS

65. Applying the above legal framework to the information received to date, and to the extent that a decision may be necessary in light of subsequent developments, the Prosecution submits that the GoIRA's Deferral Request should be rejected.

66. Prior to 15 August 2021, the GoIRA had provided information concerning 518 cases that it stated were being investigated or had already been investigated. As a starting point, the Prosecution analysed this information to determine whether it substantiated the existence of a domestic investigation envisaged by article 18(2)—that is, investigative activities concerning its nationals (or others within its jurisdiction) with respect to article 5 crimes arising from the information provided in the Prosecution's article 18(1) notification. In analysing these cases, the Prosecution regarded the GoIRA's claim regarding a case as substantiated if the GoIRA provided two or more apparently authentic documents demonstrating substantive investigative or prosecutorial steps, regardless of the outcome. This was consistent with the prevailing ICC jurisprudence, requiring that measures falling for consideration under article 17(1)(a) are

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[102] Holmes 2002, p. 681; Holmes 1999, p. 70 (noting the need to strike a balance between the complementarity principle and the danger of creating a regime which would inadvertently allow States to protect perpetrators by frustrating and delaying the Prosecutor's investigations).

[103] This is also a fact-dependant and case-specific assessment. *See e.g.* *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 47 (noting that Georgian proceedings focused on the lowest rank perpetrators and least meaningful incidents, and it was not apparent whether those low level perpetrators belong to those most responsible). In order to determine whether domestic authorities focus (or not) on the same category of perpetrators as the ICC, the Court may consider the type of allegations being investigated, including patterns or policy aspects that could involve the most responsible. It is not necessary that domestic proceedings have identified a concrete suspect. This approach is consistent with the drafting history: *contra* Stigen, p. 133 (incorrectly citing Holmes to suggest that it suffices that the State investigates only the crime in question genuinely), *but see* J. Holmes, *Jurisdiction and Admissibility*, in R. Lee (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers, Inc., 2001), p. 340 (only noting that a State may not know all suspects until the end of the investigation, and that this does not automatically give rise to an application from the Prosecutor under article 18(2)).

supported by tangible and probative evidence of investigative and/or prosecutorial activity.[104] For this initial assessment, the documents provided by the GoIRA were taken at their highest. In other words, for this purpose, the Prosecution did not seek to independently verify the authenticity of the documents or the truth of their contents, but operated under the working assumption that they accurately document events and circumstances as they happened.

67. Of the cases relied upon by the GoIRA, it has provided *no* documentation substantiating any investigation in respect of 280 of these cases.[105] In 43 further cases it provided only one document, often just a letter instructing the opening of a case.[106] Notably, many of these letters were only sent in December 2020 or January 2021—less than one month before the submission of the Deferral Material. In respect of a further 51 cases, while the GoIRA provided two or more supporting documents, in the Prosecution's assessment, these do not adequately demonstrate that investigative and prosecutorial activities have taken place or are taking place.[107] The above cases were accordingly assessed to be insufficiently substantiated. While the Prosecution was still in dialogue with the GoIRA to obtain further information and documentation about these cases, this dialogue was abruptly halted by the events leading up to 15 August 2021. In addition, because of subsequent events outlined below, the Prosecution now considers that there is no reasonable prospect of obtaining further information or documentation in this regard.[108]

68. The Prosecution then assessed the extent to which those cases which were regarded as substantiated actually fell within the parameters of the authorised investigation. Of the 144 cases for which the existence of an investigation or prosecution has been demonstrated, and on the information provided to date, 77 do not concern crimes within the parameters of the Prosecution's authorised investigation, or do not provide sufficient information about the crimes investigated to conclude that they do.[109] These include, for instance, persons being investigated and prosecuted for non-article 5 crimes,[110] or crimes with no apparent nexus to the

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[104] *See further above* para. 27.
[105] *See* Annex C.
[106] *See* Annex B (indicated by red shading). Note that if the single document was a court decision, the case was nevertheless considered as substantiated.
[107] *See* Annex B (indicated by orange shading).
[108] In this regard, the Prosecution notes that representatives of the GoIRA have informed both the Prosecution (*see* ICC-02/17-161-Conf-AnxA) and the Chamber (*see* ICC-02/17-185-Conf-AnxI and ICC-02/17-192-Conf-Anx) that they are unable to provide any further submissions relating to the deferral request and the Prosecution's request to resume investigations.
[109] *See* Annex B (indicated by blue shading).
[110] For instance membership of the Taliban or ISKP, possession of weapons or explosives, etc.

armed conflict or to the attack on the civilian population.[111] Accordingly, these cases are not relevant to the Deferral Request and therefore have not been considered in subsequent stages of analysis.

69. With regard to the 67 cases remaining[112] (i.e., those cases which were assessed to be both substantiated *and* relevant, insofar as they at least fell within the parameters of the authorised situation), the Prosecution assessed the extent to which these sufficiently mirrored the scope of the authorised investigation.

70. As detailed below, the Prosecution has concluded that the GoIRA's investigation does *not* sufficiently mirror the Prosecution's intended investigation in terms of (A) the main perpetrator groups being investigated; (B) the level of seniority of the persons being investigated; (C) the types of crimes being investigated; and (D) the temporal and geographical scope of the investigation.

71. While the Prosecution was still in dialogue with the GoIRA about the scope of the Deferral Request and possible burden sharing or cooperation in investigations, these too were halted by the 15 August 2021 takeover. Accordingly, the Deferral Request must be considered on its original terms—namely a blanket request for the deferral of all Prosecution investigations.

72. Finally, the Prosecution notes that 54 of the substantiated and relevant cases have actually been finalised,[113] in most cases by the conviction and sentencing of an accused. While such cases would be presumptively inadmissible if considered at the article 19 stage, they do not justify deferral at the stage of a preliminary ruling under article 18. This is because the Prosecution may still wish to investigate these individuals in respect of other incidents and/or these same incidents in respect of other – particularly more senior – suspects. But whatever the case, they do not provide adequate grounds for deferral of the entire investigation.

III.A. Perpetrator groups investigated by GoIRA

73. In its article 15 request, the Prosecution identified potential cases allegedly committed by three broad categories of perpetrators: the Taliban and affiliated armed groups, including the Haqqani network and Daesh/Islamic State Khorasan Province (ISKP);[114] Afghan national

[111] For instance, alleged torture committed on suspects detained for armed robbery.
[112] *See* Annex B (indicated by green shading).
[113] The Prosecution has treated cases as finalised where investigations have been finalised and (a) a decision has been taken not to prosecute; or (b) a verdict has been delivered in (at least) the court of first instance, even if an appeal was still pending.
[114] Collectively "Anti-Government Forces", as they were at the time the supporting material was provided.

security forces (ANSF); and the US armed forces and members of the Central Intelligence Agency (CIA). The following paragraphs summarise information on cases in which the GoIRA substantiated its investigations:

III.A.1. Anti-Government Forces

74. The GoIRA substantiated 56 cases of investigations into members of anti-government forces, including the Taliban and DAESH/ISKP, which forms the largest portion of substantiated and relevant cases (84%).

III.A.2. ANSF

75. The GoIRA substantiated 10 cases of investigations into members of the ANSF, mainly relating to alleged cases of torture or mistreatment of detainees. In one further case, the affiliation of the suspect was unclear.

III.A.3. US Armed Forces and CIA

76. The GoIRA provided no information or documentation substantiating investigations into alleged offences by the US armed forces or CIA.[115]

III.B. Level of seniority of perpetrators investigated by GoIRA

77. Consistent with its mandate and policies, the Prosecution has tended to focus its investigations on those believed to be most responsible for the identified crimes. Typically, these would be persons with ultimate- or senior level authority in civilian or military power structures, although in certain circumstances mid-level persons may also be investigated and prosecuted. However, lower level persons may also be investigated if it is thought that to do so would help build cases against other mid-level or senior ranking individuals, or where to do so would advance the imperative of addressing impunity. In many of the cases relied upon in the Deferral request, the level of seniority of the suspect is unclear (20 cases). However, where this information is available, these suspects had no- (13 cases) or low-level (23 cases) authority. In only a few instances do the substantiated cases concern individuals assessed to be of mid-level authority (9 cases) and in 2 cases, a top level suspect was prosecuted.[116] Accordingly, in *only*

[115] The GoIRA reported that it was cooperating with US authorities in their investigations of such alleged crimes, but provided no details of the cases being investigated or any progress made in their investigation or prosecution.
[116] Annex B, cases January 2021 - Annex 1: case 7; January 2021 - Annex 2: cases 1, 4 and 40; January 2021 - Annex 4: cases 12, 13, 16, 29, and 45; and May 2021: cases N7 and N8. No cases involving senior level perpetrators were identified.

these latter 11 matters do the Deferral Cases mirror the Prosecution's authorised investigations in terms of the profile of the suspects.

III.C. Type of crimes investigated by the GoIRA

78. Consistent with the Appeals Chamber's authorisation under article 15(4), and the scope of the Prosecution's request to the Chamber under article 15(3), the parameters of this situation are defined as "an investigation 'in 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 other States Parties in the period since 1 July 2002'".[117]

79. The Deferral Material does not identify any national proceedings addressing a significant number and variety of potential cases within the parameters of the situation that the Prosecution identified during the preliminary examination.

III.C.1. Alleged crimes by anti-government forces

80. The substantiated cases identified by the GoIRA concerning alleged crimes by anti-government forces mostly cover the crimes of murder (43 cases) imprisonment, attacks on civilians (46 cases), attacks on protected objects (14 cases) and Abductions (11 cases).

81. However, the GoIRA provided minimal information about past or ongoing criminal investigations or prosecutions relating to: 1) rape and other sexual and gender based violence crimes (2 cases); 2) conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities pursuant to article 8(2)(e)(vii) (2 cases) or Imprisonment (3 cases).

82. Additionally, while the GoIRA has investigated certain crimes that appear to have been committed with a persecutory intent (8 cases), there is no indication that it has conducted any broader investigation into whether such crimes were in fact committed as part of a wider pattern of persecution.

III.C.2. Alleged crimes by ANSF

83. The substantiated cases identified by the GoIRA concerning alleged crimes by the ANSF mostly cover the crimes of torture (8 cases) and murder (6 cases).

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[117] *Afghanistan* Article 15 AD, para. 79.

84. However, the GoIRA provided information substantiating only one past or ongoing criminal investigations or prosecutions relating to sexual violence, one case of abduction, two cases of imprisonment, and one attack on civilians.

III.C.3. No national proceedings have been identified concerning the alleged State or organisational policy material to the alleged crimes, or their systemic nature

85. Viewed in its totality, the substantiated Deferral Material consists of a number of separate investigations into individual crimes. The material provided does not reveal any attempt to determine their interrelation or aggregate effect, or whether these crimes were committed as part of a plan or in furtherance of a State or organisational policy. This is consistent with the analysis of the seniority level of the persons investigated, as described above.

86. Since the existence of a relevant State or organisational policy is a legally required element to prove *any* crime against humanity within the parameters of the situation, it follows that this issue will form part of *all* potential cases which can presently be identified as part of the Court's investigation. While not a *sine qua non* to prove war crimes, it is nevertheless relevant to the exercise of the Court's jurisdiction under article 7(1). To the extent that the GoIRA did not identify any national proceedings examining this question – and whilst acknowledging that the GoIRA need not necessarily prosecute relevant conduct as crimes against humanity – it cannot be concluded that GoIRA's investigation sufficiently mirrors the Prosecution's authorised investigation if it fails to inquire into the alleged State or organisational policy material to the alleged crimes, or the factors which suggest that such crimes were not committed spontaneously, randomly, or in arbitrary fashion. Accordingly, on this basis too, the substantiated cases do not mirror the Prosecution's authorised investigation and the Chamber should reject the Deferral Request.

III.D. Temporal and geographical scope of investigations by the GoIRA

87. The Prosecution's authorised investigation encompasses an investigation "in 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 other States Parties[118] in the period since 1 July 2002".[119]

88. The GoIRA has only provided substantiation for crimes committed on the territory of Afghanistan.

89. Significantly, the Deferral Material does not include any information on alleged crimes committed since the takeover by the authorities currently representing Afghanistan, for obvious reasons. This means that if the Deferral Request were to be granted, the perpetrators of such crimes would enjoy effective impunity for their actions.

III.E. Conclusion as to the merits of the Deferral Request

90. For all the reasons set out above the Prosecution respectfully submits that the Deferral Request does not meet the requirements of article 18(2) and should be rejected.

IV. OBSERVATIONS ON THE STATUS OF DOMESTIC PROCEEDINGS SINCE 15 AUGUST 2021

91. As noted above,[120] a request for deferral must be determined based on the relevant facts as they exist at the time of the Chamber's assessment. This ensures that the Court defers its investigation when there is an actual conflict of jurisdiction with national authorities, but that it does not do so where this remains only a future possibility or mere speculation. Where circumstances that gave rise to a conflict of jurisdiction are no longer present at the time of the Chamber's assessment, no actual conflict of jurisdiction will exist.

92. Since the events of 15 August 2021, allegations of article 5 crimes in Afghanistan continue to be reported.[121] Of particular concern are the pervasive reports of the severe and

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[118] Specifically Poland, Romania and Lithuania.
[119] *Afghanistan* Article 15 AD, para. 79.
[120] Para. 37.
[121] *See* Response to First Communication, para 10. *See also* additional examples of crimes, including:
- UNAMA, "Human Rights in Afghanistan, 15 August 2021 – 15 June 2022" ("UNAMA Human Rights Report"), AFG-OTP-00000096 at 000013-000019.
- Attacks against civilians – Khaama, "Blasts kill five, wounded 22 in western Herat province" 2 April 2022, AFG-OTP-00000062 at 000001; Al-Jazeera, "Twin blasts kill at least nine in northern Afghanistan" 28 April 2022, AFG-OTP-00000040 at 000001; Hasht-e-Subh Daily, "Taliban Rebels Kill 10 Civilians in Andarab Baghlan" 10 May 2022, AFG-OTP-00000076 at 000001; BBC, "ISIS has claimed responsibility for the deadly Mazar-e-Sharif bombings in northern Afghanistan" 25 May 2022, AFG-OTP-00000106 at 000001; Hasht-e-Subh Daily, "A 45-year-old man died in Panjshir after being tortured by the Taliban" 2 June 2022, AFG-OTP-00000080 at 000001; Human Rights Watch "Afghanistan's Taliban Crack Down on Vloggers" 14 June 2022, AFG-OTP-00000064 at 000001; (Hasht-e-Subh, Taliban Fighters Execute 150 Civilians in Balkhab, 02 July 2022, AFG-OTP-00000074 at 000001).

systematic deprivation of human rights of women and girls and members of religious and ethnic minorities that may amount to persecution on gender, religious, ethnic, cultural or political grounds.[122] These crimes fall within the parameters of the situation.

93. In the intervening months, the Prosecution has monitored open sources for any indication that the authorities currently representing Afghanistan are investigating or prosecuting allegations of crimes within the jurisdiction of the Court, but has identified no genuine effort to do so. In particular, there is no indication that the current authorities have continued any relevant investigative activities supporting the Deferral Request, or have any intention to do so. Thus, not only is the Deferral Request insufficient in its own terms to warrant the deferral of the Prosecution's whole investigation, as explained above, but even the limited steps taken by the GoIRA can no longer be considered to satisfy any limb of article 17(1).

94. To verify the accuracy of open source information, the Prosecution has interviewed three witnesses[123] for the specific and limited purpose of obtaining more direct and reliable information regarding the current status of the domestic proceedings that formed the basis of the Deferral Request. These witnesses have direct knowledge of the laws, institutions and

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- Arrest, enforced disappearances and killings of former government officials – BBC, "Assassination of Qasim Qaim: Andrabi says he died under torture, The Taleban say they are investigating" 18 April 2022, AFG-OTP-00000104 at 000001; Hasht-e-Subh Daily, "Taliban Rebels Kill an Ex-Local Commander in Kunduz" 31 May 2022, AFG-OTP-00000078 at 000001.
- Attacks, including using explosive devices, against protected objects, such as: mosques in Mazar-e-Sharif (Washington Post, Taliban vows crackdown on ISIS as violence surges in Afghanistan, 22 April 2022, AFG-OTP-00000112 at 000001); Kunduz (France 24, Mosque blast during Friday prayers kills dozens in northern Afghanistan, 22 April 2022, AFG-OTP-00000150 at 000001); Kabul (RFE/RL, Kabul Mosque Bombing Condemned; Higher Death Count Claimed, 30 April 2022, AFG-OTP-00000017 at 000001); (BBC, ISIS has claimed responsibility for the deadly Mazar-e-Sharif bombings in northern Afghanistan, 25 May 2022, AFG-OTP-00000106 at 000001); or Sikh Temple in Kabul (CNN, Islamic State says attack on Sikh temple is revenge for Prophet insults, 19 June 2022, AFG-OTP-00000088 at 000001); as well as schools and students, such as at Badakhshan University (Hasht-e-Subh Daily, To beat on suspicion of not praying Taraweeh prayer; Badakhshan students protest, 06 April 2022, AFG-OTP-00000082 at 000001); Abdul Rahim Shahid high school in Dasht-e-Barchi neighborhood and one at education centre in Qala New area of Kabul (The Washington Post, Prominent Afghan high school targeted by deadly bombings, 19 April 2022, AFG-OTP-00000108 at 000001); Khatam Al-Nabieen University (Hasht-e-Subh Daily, Taliban Beats, Kidnaps 4 Students Of A Non-Profit University In Ghazni, 2 June 2022, AFG-OTP-00000072 at 000001).
- Attacks against women – (Independent, The Taliban shot the pregnant wife of a former commander in front of her children 30 June 2022, AFG-OTP-00000050 at 000001); Nimrokh (A young woman in Khost was kidnapped and killed after being threatened by the Taliban, 27 June 2022, AFG-OTP-00000032 at 000001); Etilaatroz (Unknown people beheaded a female teacher in Kunduz at night, 18 June 2022, AFG-OTP-00000054 at 000001).

[122] *See* for instance UNAMA Human Rights Report; AFG-OTP-00000096 at 000020-000034 Amnesty International Report, "Death in Slow Motion", 27 June 2022 AFG-OTP-00000013 at 000018-000038, 000050-000055, 000081-000089.

[123] P-0101 (AFG-OTP-00000002), P-0104 (AFG-OTP-00000006), and P-0107 (AFG-OTP-00000004).

processes relevant to the GoIRA activities supporting the Deferral Request, and include two former GoIRA officials familiar with the domestic proceedings. Individually and collectively, they confirm the Prosecution's assessment based on its analysis of open source evidence.

95. The criminal justice system in Afghanistan, as it existed before 15 August 2021, has effectively disintegrated.[124] Policemen, prosecutors and judges have fled *en masse* or been dismissed by the authorities currently representing Afghanistan.[125] Relevant laws have been repealed and replaced with a legal system purportedly said to be based upon Sharia law – or, more accurately, upon the Taleban's interpretation of Sharia law.[126] 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 authorities currently representing Afghanistan have also disbanded other relevant oversight institutions and professional bodies essential to the operation of a criminal justice system that meets internationally recognised norms and standards.[127]

IV.A. There is inaction in the investigation and prosecution of the relevant acts and persons

96. All available evidence and information leads to the conclusion that the investigations and prosecutions of the Deferral Cases have been abandoned or – at best – are in a state of inaction. There is no indication that active investigations will be resumed in the foreseeable future, if at all.

IV.A.1. No steps to progress investigations

97. Open source monitoring has not revealed any steps taken by the authorities currently representing Afghanistan to progress the relevant activities underlying the Deferral Request, or indeed any investigation or prosecution for article 5 crimes committed prior to 15 August 2021.

98. Statements of witnesses with knowledge of the relevant activities confirm the absence of investigations. As P-0101 summed up: "I don't know what happened with war crimes investigations, but based on everything we have seen on the ground, I think it is extremely unlikely that these cases will be investigated by the Taliban."[128] Likewise, P-0107 stated: "To

[124] AFG-OTP-00000004, para. 24.
[125] AFG-OTP-00000004, paras. 18-23; AFG-OTP-00000002, para. 22.
[126] AFG-OTP-00000004, para. 24; AFG-OTP-00000002, para. 24;
[127] AFG-OTP-00000002, paras. 26, 29-30, 32;
[128] AFG-OTP-00000002, para. 25.

date I am not aware of any concrete steps taken by the Taliban to investigate ICC deferral matter cases. In fact, I am convinced that they will not investigate those particular cases."[129] Finally, P-0104 observes that " to the best of my knowledge there are currently no prosecutors working at the [International Crimes Directorate] to continue working on the pending cases".[130]

IV.A.2. The judicial system as it existed at the time of the Deferral Request has collapsed

99. Since the events of 15 August 2021, the previous court system and judicial structures have come to a halt.[131] Police, prosecutors and judges have fled or been dismissed.[132] Others are in hiding or too scared to return to work, due to threats and intimidation, including from released inmates.[133] While the authorities currently representing Afghanistan appear to be taking steps to re-open courts and to appoint new officials and judges, progress is slow. A lack of transparency and procedural irregularities undermine the courts' compliance with due process and other fair trial standards.[134]

100. Additionally, the authorities currently representing Afghanistan are reportedly reviewing all laws to assess their compliance with the objectives and policies of the new *de facto* administration".[135] Recently, a senior leader of the authorities currently representing

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[129] AFG-OTP-00000004, para. 28.
[130] AFG-OTP-00000006, para. 25. See also para. 38.
[131] UNAMA Human Rights Report, AFG-OTP-00000096 at 000035.
[132] AFG-OTP-00000002, paras. 22, 24; AFG-OTP-00000006, para. 29; Tolo News, "Independent bar association office taken over by Islamic Emirate", 28 November 2021, AFG-OTP-00000028 at 000001; New York Post, "Afghan prosecutor describes family's harrowing escape from the Taliban", 28 August 2021, AFG-OTP-00000026 at 000001; Independent, "More than 200 female judges are in danger of being killed by Taliban", 9 September 2021, AFG-OTP-00000052 at 000001 (In Dari/Farsi, but Google translate option available).
[133] AFG-OTP-00000006, para. 25; BBC News, "Female Afghan judges hunted by the murderers they convicted", 28 September 2021, AFG-OTP-00000110 at 000001; RFE/RL, "Afghanistan's Former Prosecutors Hunted By Criminals They Helped Convict", 21 September 2021, AFG-OTP-00000030 at 000001; The Guardian, "My nightmares came true': ex-prosecutor of Afghan women's abusers", 17 January 2022; AFG-OTP-00000046 at 000001.
[134] UNAMA Human Rights Report, AFG-OTP-00000096 at 000035; USA Department of State "2021 Country Reports on Human Rights Practices: Afghanistan" ("USDoA Report"), AFG-OTP-00000066 at 000001, Deutsche Welle, "Afghanistan's justice system altered under the Taliban", 10 June 2021, AFG-OTP-00000102 at 000001; Amnesty International, "Afghanistan: Taliban Must Immediately Stop Arbitrary Arrests of Journalists, Civil Society Activists, Former Government Officials and Those Who Dissent", 21 March 2022, AFG-OTP-00000042 at 000001; Washington Post, "Afghanistan's war is over, but the Taliban faces a new hurdle: Enforcing the law — and protecting Afghans from ISIS", 19 October 2021, AFG-OTP-00000060 at 000001; RFE/RL, "Afghanistan's Former Prosecutors Hunted By Criminals They Helped Convict", 21 September 2021, AFG-OTP-00000030 at 000001.
[135] UNAMA Human Rights Report, AFG-OTP-00000096 at 000035.

Afghanistan reportedly ordered all existing laws to be "scrapped" and submitted a series of six new articles for how the country should be governed.[136]

101. In sum, it would appear that many of the laws[137] under which the national cases referred to in the Deferral Request were investigated and/or prosecuted are now no longer in existence, presenting an apparently insuperable obstacle to the continuation or completion of these cases.[138]

102. To the extent that the criminal justice system is still operative, it is characterised by a lack of transparency and disregard for internationally recognised standards of due process.[139]

IV.A.3. Investigation/prosecution authorities and other relevant institutions have been disbanded or are no longer functioning

103. Several key legal authorities tasked with the investigation and prosecution of many of the cases referenced in the Deferral Material have ceased to function, and have not been replaced with any analogous bodies. This includes the Prosecution on International Crimes Directorate of the Attorney General's Office[140] which was responsible for the investigation of many of the relevant domestic cases.[141]

104. The Independent Bar Association has also been dissolved[142] and all lawyers must now be appointed by the *de facto* Ministry of Justice, after passing a new exam.

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[136] UNAMA Human Rights Report, AFG-OTP-00000096 at 000035; Telegraph, "Sharia law returns to Afghanistan as Taliban confirms public whippings", 1 August 2022, AFG-OTP-00000015 at 000001.
[137] Including the revised Penal Code (February 2018) and the Torture Law of 2018, which form the legislative basis for many of the investigations and prosecutions.
[138] AFG-OTP-00000006, paras. 37, 39.
[139] AFG-OTP-00000002, paras. 27, 28; AFG-OTP-00000002, paras. 24-25; By virtue of the chapeau of article 17(2) and rule 51, compliance by domestic proceedings with international standards of due process is a relevant factor in article 17(2). As observed by the Appeals Chamber in *Al-Senussi*, even if article 17(2)(c) is not concerned with whether the due process rights of a suspect have been breached, certain violations of the procedural rights of the suspect may be relevant to the assessment of independence and impartiality under article 17(2)(c), especially when the violations "are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice." : see ICC-01/11-01/11-565 ("*Al-Senussi* Admissibility AD"), paras. 229-231; *see also below* para. 114.
[140] Also referred to as the Prosecution Directorate on International Crimes.
[141] AFG-OTP-00000004, paras. 21-23; AFG-OTP-00000006, paras. 25-27.
[142] AFG-OTP-00000002, para. 30; AFG-OTP-00000006, para. 31; "The AIBA is no longer independent, it is part of the Ministry of Justice and a caretaker introduced for the association,' said Mohammad Bashar, spokesman for the Ministry of Justice." Tolo News, "Independent bar association office taken over by Islamic Emirate", 28 November 2021, AFG-OTP-00000028 at 000001; Independent, "The Taliban prevented of the holding of a press conference of Afghan defence lawyers", 5 December 2021, AFG-OTP-00000048 at 000001 (In Dari/Farsi, but Google translate option available).

105. The Afghan Independent Human Rights Commission (AIHRC) has also been dissolved.[143] While this institution was not directly involved in the investigation and prosecution of the relevant cases, it performed a vital watchdog function to monitor progress in investigations and also provided important support and capacity building for relevant officials.[144]

106. The Anti-Torture Commission, previously chaired by the AIHRC, has also ceased to operate, removing independent oversight of the treatment of detainees and progress in investigating the torture cases referred to in the Deferral Request.[145]

IV.B. The authorities currently representing Afghanistan are not willing or able genuinely to investigate and/or prosecute the relevant acts and persons

107. From the available information, it does not appear that the authorities currently representing Afghanistan have any genuine intention to investigate past crimes. In addition to the actions described above, the following developments belie any intention to pursue the investigation of the Deferral Cases. These facts explain the current inaction with respect to the proceedings reported in the Deferral Request.

IV.B.1. The authorities currently representing Afghanistan have released thousands of prisoners

108. As Taliban forces occupied successive provinces of Afghanistan in the weeks preceding 15 August 2021, they reportedly threw open prison doors and released detainees, several thousand in number, both convicted and awaiting trial.[146] Shortly after the takeover, a senior leader of the authorities currently representing Afghanistan declared a general amnesty and called for the release of all "'political detainees' […] without any restrictions or conditions".[147]

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[143] AFG-OTP-00000002, paras. 26, 31; AFG-OTP-00000006, para. 32; UNAMA Human Rights Report, AFG-OTP-00000096 at 000029.
[144] AFG-OTP-00000002, paras. 18, 29-30.
[145] AFG-OTP-00000002, paras. 31-32; AFG-OTP-00000006, para. 33.
[146] AFG-OTP-00000002, para. 23; AFG-OTP-00000004, para.26; EASO Afghanistan C of Origin Report, January 2022, AFG-OTP-00000068 at 000030-000032; Amnesty International Report, "Death in Slow Motion", 27 June 2022, AFG-OTP-00000013 at 000044; BBC News, "Afghanistan: Inside the prison staffed by former inmates released by the Taliban", 25 September 2021, AFG-OTP-00000100 at 000001; BBC News, "Afghanistan: Taliban militants 'free inmates from Kabul jail'", 15 August 2021, AFG-OTP-00000098 at 00001; Twitter, Tweet by Bakhtar News Agency on the release of 21 prisoners in Hilmand, 28 November 2021, AFG-OTP-00000023 at 000001; USDoA Report, AFG-OTP-00000066; YouTube, Kabul Lovers, "Full report of Pol Charkhi prison under Taliban administration", 20 August 2021, AFG-OTP-00000036.
[147] CNN, "Taliban leader calls for all remaining "political detainees" to be released", 18 August 2021, AFG-OTP-00000070 at 000001.

These are understood to "include Taliban fighters that the Afghan National Security forces imprisoned for engaging in insurgent activities".[148]

109. Although no reliable records are available (or likely even kept) as to the identities of those released or the alleged crimes for which they were detained, it appears inevitable that these would include a number of persons detained in relation to some of the cases underlying the Deferral Request, as well as other article 5 crimes that might form the subject of the Prosecution's authorised investigation.[149] For instance, it is reported that several high ranking members of ISKP were released,[150] including two specifically referred to in the Deferral Material.[151]

110. On 10 July 2022, a further 935 prisoners were released on the eve of Eid by decree of a senior leader of the authorities currently representing Afghanistan.[152] No details were provided as to the identities of the prisoners or the reasons for their detention.

IV.B.2. The authorities currently representing Afghanistan have declared a general amnesty

111. As mentioned above, shortly after the takeover, Taliban leader Hibatullah Akhundzada declared a general amnesty.[153] The precise scope and application was not specified in any detail, but on its face it would appear to amount to a blanket amnesty for all "political" crimes committed prior to 15 August 2021. This then would cover all cases relevant to the Deferral Request and is a clear indication of a lack of any intention – or legal basis – to pursue these cases, resulting in impunity for the perpetrators. On this ground alone, the Prosecution respectfully submits that the Deferral Request should be rejected.

IV.B.3. The authorities currently representing Afghanistan have disbanded relevant institutions

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[148] *Ibid*.
[149] AFG-OTP-00000006, para. 35.
[150] Former ISKP leaders Abu Omar Al-Khorasani and Aslam Farooqi who were previously detained in various prisons in Kabul were freed by Taliban in August 2021 and eventually reportedly killed. See UN Security Council Analytical Support and Sanctions Monitoring Team, "Thirteenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2611 (2021) concerning the Taliban and other associated individuals and entities constituting a threat to the peace stability and security of Afghanistan", 26 May 2022, AFG-OTP-00000153 at 000017-000018, para. 68.
[151] May 2021 submission, cases N7 and N8.
[152] Twitter, Tweet by Prison_Health on the release of 935 prisoners following a decree by Akhunzada 10 July 2022, AFG-OTP-00000021 at 000001.
[153] *See also* AFG-OTP-00000004, para 26; AFG-OTP-00000006, para. 36.

112. As discussed above, the collapse or dissolution of relevant legal departments and institutions speaks to a lack of any intention to pursue the investigation of the relevant cases or indeed any pre-takeover investigations into article 5 crimes and human rights abuses more generally.

IV.B.4. The authorities currently representing Afghanistan have annulled existing laws

113. As also mentioned above, it is at least uncertain – and, indeed, unlikely – that the relevant laws allowing for the investigation and/or prosecution of article 5 crimes will survive the ongoing revision of the legislative framework. There is no indication that a new legal system purportedly based on Sharia will even recognise many crimes prohibited under article 5 of the Rome Statute and other relevant instruments of international humanitarian law and international criminal law.

114. As also indicated above, the current judicial system does not appear to meet internationally recognised standards of due process, and cruel or degrading treatment and punishment have been widely reported. In light of these features and the severity of due process violations, any relevant domestic proceeding under the authorities currently representing Afghanistan would appear to lack genuineness under article 17. By virtue of the *chapeau* of article 17(2) and rule 51, compliance by domestic proceedings with international standards of due process is a relevant factor in the assessment of genuineness under article 17(2)(c). As observed by the Appeals Chamber in *Al-Senussi*, even if article 17(2)(c) is not concerned with whether the due process rights of a suspect have been breached,[154] the Appeals Chamber observed that, depending on the circumstances, certain violations of the procedural rights of the suspect may be relevant to the assessment of independence and impartiality under article 17(2)(c),[155] especially when the violations "are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice."[156]

Conclusion and Relief Sought

115. In conclusion, the Deferral Request of the GoIRA is not sufficiently substantiated based on the information provided. Only 66 cases of the 518 cases relied on by the GoIRA are both substantiated and relevant to the parameters of the Court's investigation. Of these, only 11

[154] Rather, it focuses on domestic proceedings that would lead to a suspect evading justice "in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection", *Al-Senussi* Admissibility AD, para. 230.
[155] *Al-Senussi* Admissibility Decision, para. 235.
[156] *Al-Senussi* Admissibility AD, para. 230.

match the profile of cases that the Prosecution would be likely to investigate, having regard to the scope of the alleged perpetrators (taking account their membership of relevant groups and their seniority) and the temporal, geographic, and material scope of the alleged crimes. Consequently, it is apparent that the cases relied upon in the Deferral Request, based on the information currently available, do not sufficiently mirror the Prosecution's authorised investigation.

116. In any event, the events of 15 August 2021 and thereafter have precluded the GoIRA's ability to continue or complete many of the activities which it identified as relevant to the Deferral Request. The subsequent conduct of the authorities currently representing Afghanistan abundantly demonstrates that they are not continuing any such activity, nor will they do so. Indeed, to the contrary, they appear to be continuing to carry out article 5 crimes. As such, there is currently no investigation underlying the Deferral Request to which the Court could defer, and thus the investigation should be promptly resumed.

117. For the reasons set out above, the Prosecution respectfully requests the Chamber to decide on this matter and authorise the resumption of the Court's investigation in the Situation in the Islamic Republic of Afghanistan.

Karim A.A. Khan QC, Prosecutor

Dated this 26th day of August 2022
At The Hague, The Netherlands