

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/17
Date: 17 December 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala , Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public
with Confidential *EX PARTE* Annexes I and II, available only to the Registry

**Public redacted version of “First Registry Report on Article 18 (2) Victims’
Representations Pursuant to the Pre-Trial Chamber’s Orders ICC-02/17-171 and
ICC-02/17-173”, 17 December 2021, ICC-02/17-175-Conf**

Source: Registry

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

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Mr Manoj Sachdeva

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

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REGISTRY

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Mr Peter Lewis

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**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. Introduction

1. Pursuant to Pre-Trial Chamber II (“Chamber”)’s “Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute”, issued on 8 November 2021 (“8 November 2021 Decision”)¹ and “Decision on the ‘Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings’”, issued on 25 November 2021 (“25 November 2021 Decision”)², the Registry hereby submits its first report on victim representations (“First report”), together with its assessment of the representations received so far (“Annex I”) and a detailed explanation of the assessment criteria applied (“Annex II”).

II. Procedural History

2. On 12 April 2019, the Chamber rendered the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” (respectively “Article 15 Decision” and “Afghanistan”).³
3. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised the Prosecutor to commence an investigation into “alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were

¹ Pre-Trial Chamber II, “Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute”, 8 November 2021, ICC-02/17-171, para. 14 and operative paragraphs p. 9.

² Pre-Trial Chamber II, “Decision on the ‘Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings’”, 25 November 2021, ICC-02/17-173 and its confidential annex.

³ Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”, 12 April 2019, ICC-02/17-33.

committed on the territory of other States Parties to the Rome Statute since 1 July 2002”.⁴

4. On 15 April 2020, the Prosecutor submitted “Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute”, notifying the Chamber that the Government of Afghanistan, through a request of 26 March 2020, was seeking a deferral of the Prosecutor’s investigation into the situation in Afghanistan pursuant to article 18(2) of the Statute (“Deferral Request” and “Prosecutor’s Notification”).⁵
5. On 27 September 2021, the Prosecutor submitted “Request to authorise resumption of investigation under article 18(2) of the Statute” (the “Prosecutor’s Request”).⁶
6. On 8 November 2021, the Chamber issued a decision, in which it *inter alia* ordered the Victims Participation and Reparations Section (“VPRS”) to: (a) submit to the Chamber for its approval an “amended ‘Victim Representation Form’ and other relevant documents”; (b) start collecting victims’ views and concerns in the context of the proceedings pursuant to article 18(2) of the Statute; and (c) prepare a report including a brief assessment of whether criteria under rule 85 of the Rules are met and of the victims’ views and concerns as to the Prosecutor’s Request (“8 November 2021 Decision”).⁷
7. On 15 November 2021, the Registry submitted, (a) a draft victim representation form to collect the victims’ views and concerns on the Prosecutor’s Request (“Form”), and draft guidelines on how to fill in this Form (“Guidelines”), for the Chamber’s approval, and (b) observations on

⁴ Appeals Chamber, “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan”, 5 March 2020, ICC-02/17-138.

⁵ Office of the Prosecutor, “Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute”, dated 15 April 2020 and notified on 16 April 2020, ICC-02/17-139.

⁶ Office of the Prosecutor, “Request to authorise resumption of investigation under article 18(2) of the Statute”, 27 September 2021, ICC-02/17-161.

⁷ 8 November 2021 Decision, para. 14 and operative paragraphs p. 9.

the process of collecting victims' views and concerns in the context of the proceedings pursuant to article 18(2) of the Statute ("Registry's Submission").⁸

8. On 25 November 2021, the Chamber issued a decision in which it: (a) approved the Form and Guidelines, with amendments; and (b) instructed the VPRS to submit a first report on the victims' views and concerns related to the Prosecutor's Request by Friday 17 December, with further deadlines to be set in due course.⁹
9. On 17 December 2021, the VPRS transmitted to the Chamber the first batch of victim representation received.¹⁰

III. Classification

10. Pursuant to regulation 23 *bis*(1) of the RoC, this document is classified as "confidential", [redacted]. The annexes to the present document are classified as "confidential *ex parte*, only available to the Registry", [redacted].

IV. Applicable Law

11. The Registry submits the present filing in the context of article 18(2) of the Statute and in accordance with article 68(3) of the Rome Statute ("Statute"), rules 16(1) and 85 of the Rules of Procedure and Evidence ("Rules"), regulation 23*bis*(1) of the RoC and the 25 November 2021 Decision.

⁸ A public redacted version was filed on 16 November. Registry, "Public redacted version of "Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings", 15 November 2021", ICC-02/17-172-Conf", 16 November 2021, ICC-02/17-172-Red.

⁹ 25 November 2021 Decision, paras. 13 and 14 and operative paragraphs page 6.

¹⁰ Registry, "First Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173", 17 December 2021, ICC-02/17-174.

V. Submissions

1. Security situation

12. The VPRS has been liaising with relevant sections of the Registry in order to evaluate the security situation in Afghanistan. [Redacted].
13. As previously reported in the Registry's Submissions,¹¹ and confirmed with the latest threat and risks assessment,¹² Afghanistan remains an overall high risk security environment. [Redacted].^{13 14}
14. [Redacted].
15. [Redacted].

2. Approach implemented by the Registry to reach out to victims concerned by the Situation in Afghanistan

16. Following the 8 and 25 November Decisions, respectively, the Registry has started to implement both an open - yet prudent- approach and a targeted strategy to ensure that it would reach out to the victims linked to the Situation, taking into account the following factors: (i) the limitations due to the security situation in Afghanistan ; (ii) the constraints due to the Covid-19 pandemic; (iii) the lack of country office in Afghanistan and of access to this country; (iv) the fact that the VPRS's capacity to reach out to victims relies on intermediaries [redacted] who, for many of them, are facing themselves enormous challenges; and (v) the overarching objective of reaching out to the victims linked to the Situation without endangering them or anyone else assisting in the process.¹⁵

¹¹ Registry Submissions, para. 18.

¹² [Redacted].

¹³ [Redacted].

¹⁴ [Redacted].

¹⁵ The Registry also reiterates the challenges reported in the Registry Submissions, paras. 21-24, which include (1) the current humanitarian situation in Afghanistan, which would prevent victims from engaging in the process, (2) the difficult situation faced by the VPRS' partners and the victims and its

17. The aforementioned approach consists in having made the Form and the Guidelines immediately available, on 26 November 2021, on the website of the Court. The Form is currently available in a PDF format (for download and print), an electronically fillable PDF format and an online format that can be filled in directly on the Court's webpage without the need to be downloaded. The Form and Guidelines are currently available in English, Arabic, Dari and Pashto.
18. In addition to the approach described above, the VPRS has also implemented a targeted strategy by engaging directly with interlocutors [redacted].
19. Since the 8 November 2021 Decision, the VPRS has been in contact with such interlocutors, [redacted], in order notably to answer queries from interlocutors who sought information about the process.
20. The key messages disseminated by the VPRS to these interlocutors included explanations on:
 - a. the process of collecting the victims' views and concerns in the context of the Prosecutor's Request;
 - b. the availability of a template representation Form to collect the potential victims' views and concerns, by way of individual and collective representations, as well as Guidelines;
 - c. the different formats available for the Form. In this regard, the VPRS specified that, for those individuals who are concerned about their security, the online format permits to fill-in the Form directly, and without any physical trace (printed papers) or electronic trace on the computer used, although a trace of the visit on the browser of the

effect on their capacity and motivation to engage in the process, combined with (3) the complex legal issues which triggered relevant proceedings under article 18(2).

computer used will remain (i.e. the date, time and website address of the visit, but not the content of the Form);

- d. the possibility of submitting representations in any other format, for example videos or any written document in another format (i.e. email or letter);
- e. the Court has no capacity to ensure the security of its interlocutors, [redacted], the VPRS recommended the “safety first” approach i.e. that any person engaging in the process is strongly advised to exert the utmost caution, in particular in her/his communications with the Court;¹⁶
- f. the deadline of 17 December 2021, for the Registry to provide its First report; and
- g. the fact that further Registry reports will follow, in line with the Judges’ future instructions, allowing for victims’ representations to be sent to the VPRS after 17 December 2021.

3. Victim representations received

- 21. Between 26 November 2021 (the date the Form became available on the ICC website) and 15 December 2021, the VPRS received three victim representations submitted via email, and one representation through an online form. The four representations are collective (i.e. introduced on behalf of more than one victim).
- 22. All representations provided are in favour of the Prosecution’s Request and several concerns related to the Prosecution’s Request were expressed. This information is outlined in Annex I.
- 23. The Registry will provide the Chamber with a consolidated report once all victims’ views and concerns have been received, and it will include some statistical information on the type of representations received, the languages

¹⁶ The VPRS offered as well to provide advice on best practices related to information security.

in which the representations were made, victims' gender, age, ethnicity and residence.

4. Assessment criteria applied by the Registry

24. In accordance with the 8 November 2021 Decision,¹⁷ the VPRS conducted a preliminary assessment of each representation submitted in order to assess whether the individual or group making the representation falls within the definition of victims under rule 85 of the Rules.
25. Considering the purpose of the article 18(2) exercise, the limited scope of these proceedings, and following the approach of victims' representations set out in the context of article 15(3) proceedings,¹⁸ the conditions set out in rule 85 of the Rules were assessed on the basis of the intrinsic coherence of the information given by the victim(s), as provided in the article 18(2) representation, or as previously communicated to the VPRS.
26. In this respect, the VPRS included in its key messages that victims who had previously submitted representations in the context of the article 15(3) process or application forms for participation in proceedings¹⁹ do not need to repeat the content of said representations or application forms (in particular information about crimes and harm suffered required by questions 5 to 8 of the Form).²⁰ Such victims could provide, instead of the

¹⁷ 8 November 2021 Decision, para. 14.

¹⁸ See, notably, Pre-Trial Chamber III, "Order to the Victims Participation and Reparation Section Concerning Victims' Representations", 9 November 2017, ICC-02/17-6, para. 14.

¹⁹ While, at the present stage of proceedings, the VPRS is not actively pursuing or encouraging the completion of application forms for participation in a potential future case before the Chamber, the VPRS has nonetheless received, in recent years, some applications for participation in the proceedings using the standard application form available on the ICC website. While ensuring that the article 18(2) representations process and the application for participation in the proceedings process remain two distinct processes, the VPRS has agreed, on an exceptional basis, to consider the content of applications for participation for the purpose of completing article 18 representations (by extracting information relevant for the Rule 85 assessment), when requested by the victims or their representatives.

²⁰ Question 5 reads as follow: "What happened to you or the victim(s) that you represent? Who do you or the victim(s) that you represent believe to be responsible for the harm suffered?", Question 6 reads as follow: "Where did the event(s) occur?". Question 7 reads as follow: "When did the event(s) occur?".

Form, a written communication (i.e. email or letter) in which they refer to the content of their previous form²¹ and add their views and concerns on the Prosecutor's Request (i.e. their answers to questions 9, 10 and/or 11²²).²³

27. A detailed explanation of the assessment criteria applied by the Registry is provided in Annex II.



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

Dated this 17 December 2021

At The Hague, The Netherlands

Question 8 reads as follow: "What harm did you or the victim(s) that you represent suffer as a result of the event(s)?"

²¹ The VPRS believes it particularly important –especially when contact with victims is limited or impossible - to offer victims or their representatives the option of not having to repeat information – such as having to recount again what happened to the victims- that is already available to the VPRS.

²² Question 9 reads as follow: "Do you or the victim(s) that you represent want the ICC Prosecutor to resume an investigation in the Situation in Afghanistan? Yes/No". Question 10 reads as follow: "If you answered "yes" to question 9, do you or the victim(s) that you represent have any additional views or concerns on the Prosecutor's request to resume an investigation that you want to share with the Court?". Question 11 reads as follow: "If you answered "no" to Question 9, what concerns with regard to a potential resumption of an investigation do you or the victim(s) you represent have? Please explain your reasons against the resumption of the investigation.".

²³ The VPRS indicates in Annex I which representations submitted availed themselves of this option.