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

Date: **14 December 2022**

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa  
Judge Marc Perrin de Brichambaut  
Judge Gocha Lordkipanidze

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Victims' Response to "Prosecution appeal of "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation" (ICC-02/17-196)" (ICC-02/17-198)**

**Source:** Legal Representatives of Victims

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

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## I. INTRODUCTION

1. Counsel for victims in the Afghanistan Situation (“Victims”) unequivocally support the Prosecution’s appeal<sup>1</sup> and request that the Appeals Chamber render its judgment in earnest. Significant delays have already impeded an effective investigation in this situation and waned support by victims and the affected communities.

2. The Appeal should also be granted since Pre-Trial Chamber II’s “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (“Decision”) was based on the erroneous belief that the Prosecution’s investigation against Islamic State for Khorasan Province (“ISK-P”) had been suspended following the Afghan Government’s article 18(2) request. It was not. Article 18(2) of the Statute only suspends an investigation as it relates to *those persons* identified by the state. It does not suspend an investigation in the situation in its entirety or against a group, like ISK-P. For that reason, the Prosecution’s investigation against ISK-P had never been suspended and the Pre-Trial Chamber could not alter or restrict that investigation in rendering the Decision. The Appeal should be granted on this basis alone.

## II. SUBMISSIONS

### A. The Appeal must be resolved expeditiously

3. The Victims request that the Appeal be resolved expeditiously. The Afghanistan investigation has faced countless delays that have only served to put victims at risk, jeopardized the successful investigation and prosecution of a case including by putting critical evidence at jeopardy of loss, and caused victims and other

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<sup>1</sup> Prosecution appeal of “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (ICC-02/17-196), [ICC-02/17-198](#), 22 November 2022 (“Appeal”).

communities affected by the investigation to lose faith in the Court's ability to effectively render justice.

4. For context, it took 10 years for the Prosecution to conclude its preliminary examination and seek authorization to open an investigation. Pre-Trial Chamber II then took another 17 months to deny that request. Appeals proceedings overturning that decision took a further 9 months. The Office of the Prosecutor ("OTP") then suspended the investigation for 17 more months. And a request for an "expedited order" to resume its investigation took a further 13 months (400 days exactly) before Pre-Trial Chamber II rendered its 26-page decision granting the request.

5. The almost 16 years spent by the OTP and various Chambers of this Court pontificating the presumed complexities as to whether the near daily acts of violence on Afghans deserve justice have caused devastating impacts on the prospects of a successful investigation. Archives of evidence and case-files that had been accumulated over the course of the past 20 years by Afghan civil society and the Afghanistan Independent Human Rights Organization are now lost, inaccessible, or in the Taliban's possession, all because of the Court's failure to act efficiently and quickly.<sup>2</sup> In the past two years alone, Afghan civil society leaders who would have been vital intermediaries to investigators have largely fled and are now dispersed around the world.<sup>3</sup> Borders that would have been open to the OTP are now likely closed. Political support for an OTP investigation by the Afghan Government, is now lost. These are all the consequences of delay.

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<sup>2</sup> Mackenzie Austin, What the Afghanistan Withdrawal Teaches Us About Safeguarding Human Rights Evidence, Just Security, 5 November 2021, available at <https://www.justsecurity.org/78806/what-the-afghanistan-withdrawal-teaches-us-about-safeguarding-human-rights-evidence/>; Nema Milaninia, Evidence Destruction and the Crisis in Afghanistan, Just Security, 20 August 2021, available at <https://www.justsecurity.org/77831/evidence-destruction-and-the-crisis-in-afghanistan/>.

<sup>3</sup> Shaharзад Akbar, A Crisis of Justice for Afghan Victims of War, Just Security, 30 August 2022, available at <https://www.justsecurity.org/82754/a-crisis-of-justice-for-afghan-victims-of-war/>.

6. The Court's delays would be excusable if not for the reality that the relevant facts justifying the opening of an investigation never changed during the past 16 years. Afghan institutions, including investigators and prosecutors, were never able to undertake the investigations the OTP wanted to open. The crimes were always grave and the demands for justice always present. The potential effect an international investigation could have had on peace and security in Afghanistan were always promoted by victims and Afghan civil society. Victims never wavered their support for an international investigation. And the violence, including horrendous attacks on children, women and girls, schools, hospitals, education centres, mosques, markets, and other civilian structures, never, ever ceased, but only worsened. The only cause for delay was politics by the Court, within the Court, and against the Court.<sup>4</sup>

7. Justice delayed is undoubtedly justice denied. As noted by Warren E. Burger, former Chief Justice of the United States, in an address to the American Bar Association in 1970:

A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.<sup>5</sup>

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<sup>4</sup> *Ibid.*

<sup>5</sup> Warren E. Burger, What's Wrong with the Courts: The Chief Justice Speaks Out (address to ABA meeting, 10 August 1970), U.S. News & World Report. 69 (8): 68, 71 (24 August 1970).

8. The Court's delays in this investigation appear to be by design, not by law. When the OTP or the Chamber has wanted to act swiftly in other situations, we have seen them do so. Here, the OTP paused its investigation after its personnel were sanctioned,<sup>6</sup> and requested its resumption only after sanctions were lifted and after devastating political events in Afghanistan wiped away even the faintest of arguments that the Afghan Government could investigate and prosecute the alleged crimes.<sup>7</sup> Pre-Trial Chamber II spent months trying to directly engage the Taliban, rather than accept observations from the Embassy of Afghanistan in The Hague – as how the Court typically functions.<sup>8</sup> The lower Chamber also spent more months silencing victim advocates by denying them the very opportunity to file on behalf of their clients<sup>9</sup> and requiring the Registry to use its limited resources to survey victims as to whether they still wanted an Afghanistan investigation,<sup>10</sup> despite undertaking a similar survey only a year before and despite pleas by victim advocates that the survey process was dangerous given the current security situation in Afghanistan.<sup>11</sup>

9. The Appeals Chamber can change course and help rebuild confidence in the Court. Enough time has passed. Enough evidence has been lost. Enough people have

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<sup>6</sup> Human Rights Watch, US Sets Sanctions Against International Criminal Court, 11 June 2020, available at <https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court>; Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute, [ICC-02/17-142](#), 16 April 2021.

<sup>7</sup> U.S. Secretary of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court, 2 April 2021, available at <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>; Request to authorise resumption of investigation under article 18(2) of the Statute, [ICC-02/17-161](#), 27 September 2021.

<sup>8</sup> Prosecution response to the [REDACTED] by the Registry pursuant to Pre-Trial Chamber II's Decision ICC-02/17-182 of 24 February 2022, [ICC-02/17-186-Red](#), 21 April 2022, para. 9; Prosecution's communication of materials and further observations pursuant to article 18(2) and rule 54(1), [ICC-02/17-195](#), 26 August 2022, para. 7.

<sup>9</sup> Motion Seeking Remedies for Repeated Administrative Violations (Annex 1 to the Registry Transmission of a Document submitted before the Presidency, dated 28 January 2022), [ICC-02/17-183-Anx1](#), 4 March 2022, paras. 10-34; 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, [ICC-02/17-171](#), 8 November 2021, para. 11 ("the Chamber instructs the Registry to refrain from filing into the record of the situation in Afghanistan, including by the way of transmission, any document emanating from persons or entities other than the Prosecutor and the relevant State").

<sup>10</sup> 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, [ICC-02/17-171](#), 8 November 2021, para. 14.

<sup>11</sup> Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings, [ICC-02/17-172-Red](#), 16 November 2021, paras. 17-27.

lost their lives or otherwise seen it devastated in the past 16 years. The delays and constant quashing of hopes has already broken trust by victims and their advocates. Recall, that these are victims who in recent years have lost their homes, families, and are now facing an uncertain future under extreme food and financial insecurity and social and political oppression. When the Court fails to deliver effectively and efficiently, it adds to those harms. The Appeal should be granted with haste.

**B. The Decision was rendered on an incorrect reading of article 18(2)**

10. The Appeal, and the Decision, are premised on the erroneous belief that the Afghan Government's article 18(2) request caused the suspension of the *entire* investigation authorized by the Appeals Chamber in its 5 March 2020 judgment. The article 18(2) request did not have this effect; it only suspended the investigation as it pertains to the specific persons identified by the Afghan Government in their article 18(2) notice. The article 18(2) request did not, and could not have, suspended the OTP investigation against ISK-P, but only specific persons within ISK-P identified by the Afghan Government. As such, Pre-Trial Chamber II could not have altered or limited the contours of the OTP's investigation against ISK-P when determining whether investigations against specific persons should be resumed.

11. A plain and ordinary reading of the Court's legal texts limits deferral under article 18(2) to the *specific persons* identified by the state, as opposed to deferring the investigation generally or against organizations. Article 18(2) expressly states that within one month of receiving the Prosecutor's article 18(1) notification, the state may inform the Court that the Government has or is investigating "its nationals or others within its jurisdiction", and that the Prosecutor shall defer to the state's investigation of "those persons". These plain terms strongly suggest that the Prosecutor is only obliged to defer their investigation as to the specific individuals identified by the state (that is, "those persons"), whom it has expressed it is investigating or has investigated.

This is the only reading of article 18(2) that is consistent with its plain terms, in their ordinary meaning. This is also the only interpretation consistent with the maxim of statutory interpretation, *expressio unius est exclusio alterius*, pursuant to which the express mention of an item excludes others.<sup>12</sup> Said differently, had the Statute's framers intended for article 18(2) to defer the totality of the OTP's investigation into a situation, the framers would have said so expressly and not used the phrase "those persons".

12. The context provided by other provisions of the Statute, as well as the Statute's overall object and purpose, and drafting history, further support the implication of these plain terms. *First*, article 18(2) must be read together with article 16. Together, these provisions provide the only circumstances through which an external actor can defer the OTP's investigation once initiated. Article 16 states that "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months" when ordered by the United Nations ("UN") Security Council by resolution under Chapter VII of the UN Charter. Article 16, unlike article 18(2), is not limited to investigations against "those persons", but rather applies to investigations or prosecutions as a whole in the situation.<sup>13</sup> When compared to article 16, the limiting terms of article 18(2) becomes more apparent as to only restricting the OTP's investigation as to the specific persons identified by the state. Had the framers intended a deferral under article 18(2) to apply to the entirety of the OTP's investigation in a situation it could have, like in article 16, omitted any limiting language and simply mimicked article 16's broader composition.

13. *Second*, the Statute's drafting history similarly supports the conclusion that article 18(2) only requires the OTP to defer its investigation as to the individuals

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<sup>12</sup> *Prosecutor v. Ruto and Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, [ICC-01/09-01/11-777](#), 18 June 2013, paras. 54-63; *Prosecutor v. Kenyatta*, Dissenting Opinion of Judge Eboe-Osuji on Decision on Prosecution's Motion for Reconsideration of Decision Excusing Continued Presence at Trial, [ICC-01/09-02/11-863-Anx-Corr](#), 26 November 2013, paras. 84-89.

<sup>13</sup> See e.g. Resolution 1422, UN. Doc. [S/RES/1422](#), 12 July 2002.

expressly identified by the Afghan Government. Article 18(2) was proposed by the United States in the final session of the Preparatory Committee,<sup>14</sup> which in turn was incorporated into the draft statute adopted by the Committee.<sup>15</sup> That version similarly limited the deferral of an investigation to “such persons” as identified by the State.

14. At the Rome Conference, United States Ambassador David Scheffer provided rationale for the draft article, noting in salient part that that the proposed article was being proposed “[i]n line with the principle of complementarity” and to provide a procedure at the outset of an investigation, “when no particular suspects had been identified”, “which would recognize the ability of national judicial systems to investigate and prosecute the crimes concerned”. He noted that “[u]nder the proposed article, the Prosecutor would be able to proceed immediately to conduct an independent investigation”, but that the article 18 process was being provided as a method to preserve the “State’s right to launch full-scale investigations”.<sup>16</sup> Nothing in Scheffer’s comments suggest that article 18 was intended as a mechanism to suspend the entire investigation, or to preclude parallel investigations by the ICC and national authorities. In its evaluation of article 18(2), the French delegation similarly understood that the phrase “those persons” meant that “those persons” are “known and identified.”<sup>17</sup>

15. *Finally*, the Statute’s object and purpose confirms that article 18(2) only requires deferral to those persons identified by the State. The Preamble to the Statute affirms that the Court is mandated only to exercise its jurisdiction over the most serious crimes of concern to the international community as a whole, defined in article 5 and that such crimes “must not go unpunished and that their effective prosecution must be

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<sup>14</sup> Proposal submitted by the United States of America, Article 11 bis, Preliminary rulings regarding admissibility, UN Doc. [A/AC.249/1998/WG.3/DP.2](#), 25 March 1998.

<sup>15</sup> Draft Statute for the International Criminal Court, UN. Doc. [A/CONF.183/2/Add.1](#), 14 April 1998, pp. 42-43.

<sup>16</sup> UN Doc. [A/CONF.183/C.1/SR.11](#), para. 25.

<sup>17</sup> Proposal submitted by France concerning part 2 of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law, ICC Doc. [PCNICC/1999/WGRPE/DP.43](#), 23 November 1999, p. 6.

ensured” by measures at the national or international level. The Preamble further emphasizes that the Statute seeks to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and resolves “to guarantee lasting respect for and the enforcement of international justice”. In this sense, the Statute foresees that the Court and national authorities will work hand-in-hand to ensure there is accountability for international crimes. To this end the Preamble emphasizes that the “International Criminal Court established under this Statute shall be complementary [not subsidiary] to national criminal jurisdictions”.

16. Altogether, notification under article 18(2) cannot, and did not in this situation, suspend the entire investigation, but only as it relates to those persons that had been identified by the Afghan Government in its article 18(2) notice. The Decision was premised on the erroneous presumption that the entire investigation in the Afghanistan Situation had been suspended. It was not; the Pre-Trial Chamber could not therefore reject its re-opening against ISK-P.

### III. REMEDIES REQUESTED

17. For the above-mentioned reasons, the Victims request that that the Appeal be granted forthwith.



Spojmie Ahmady Nasiri

Dated this 14<sup>th</sup> day of December 2022  
At San Francisco, CA