

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/17**
Date: **7 November 2022**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański
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

Notice of Appeal of “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (ICC-02/17-196)

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Ms Nazhat Shameem Khan
Ms Helen Brady

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

State of Afghanistan

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Mr Philipp Ambach

Introduction

1. The Office of the Prosecutor hereby respectfully gives notice of its appeal of paragraph 59 of Pre-Trial Chamber II’s decision of 31 October 2022.¹ Under regulation 64(1)(c) of the Regulations of the Court, a decision may be appealed in “part”.

2. The Prosecution emphasises that it does *not* appeal any other part of the Pre-Trial Chamber’s reasoning essential to its decision rejecting Afghanistan’s request for deferral under article 18 of the Statute and granting the Prosecution’s request to resume its investigation within the terms previously authorised by the Appeals Chamber.²

3. Decisions with respect to jurisdiction and admissibility may be directly appealed under article 82(1)(a) of the Statute.³ Since the Decision is a preliminary ruling on admissibility under article 18(2), it is susceptible to direct appeal. To any extent that paragraph 59 of the Decision—which, on its face, appears to modify the parameters of the situation as confirmed by the Appeals Chamber in its judgment of 5 March 2020⁴—may be considered to bind the Prosecution in the conduct of its investigation, it is a ruling on jurisdiction which materially affects the Decision.

¹ [ICC-02/17-196](#) (Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, or “Decision”).

² See [ICC-02/17-139-Anx1](#) (“Deferral Request”); [ICC-02/17-161](#) (“Prosecution Request to authorise Resumption of Investigation under article 18(2) of the Statute”); [ICC-02/17-195](#) (“Prosecution communication of materials and further observations pursuant to article 18(2) and rule 54(1)”). The Islamic Republic of Afghanistan is referred to as “Afghanistan”.

³ This situation differs from *Comoros* where the impugned decision was “a request to the Prosecutor to reconsider her decision not to initiate an investigation [under article 53(3)(a)]” and “[was] *not by its nature a decision determining admissibility*” and accordingly could not be appealed directly under article 82(1)(a): see [ICC-01/13-51](#) (“*Comoros* Admissibility Decision”), para. 50, emphasis added. This situation is also distinguishable from the previous appeal proceedings in *Afghanistan*, where (in light of *Comoros*) the Prosecution sought and was granted leave to appeal by the Pre-Trial Chamber under article 82(1)(d)—rather than proceeding directly under article 82(1)(a)—because the impugned decision was a decision under article 15(4) rejecting the Prosecution’s request to authorise the investigation: see [ICC-02/17-33](#) (“*Afghanistan* Article 15(4) Decision”); [ICC-02/17-62](#) (“*Afghanistan* Certification Decision”).

⁴ ICC-02/17-138 (“[Afghanistan Appeal Judgment](#)”).

4. The submissions in this notice concerning the errors in the Decision are illustrative, and do not supplant the arguments on the merits which will be contained in the Prosecution's appeal brief.⁵

Appeal pursuant to article 82(1)(a) of the Statute

5. On 31 October 2022, Pre-Trial Chamber II rendered its decision authorising the resumption of the investigation in the situation in *Afghanistan*, pursuant to the Prosecutor's request under article 18(2) of the Statute.⁶

6. The Pre-Trial Chamber concluded that the material submitted by Afghanistan "does not show, in itself, that Afghanistan has investigated, or was investigating, in a manner that covers the full scope of the Prosecutor's intended investigations" and, consequently, would not "justify even a partial deferral of the Court's investigations."⁷ It found that the "actors, potential perpetrators, and alleged crimes" identified in the Prosecutor's original article 15(3) request "extend well beyond the limited group of persons and incidents that appear to have been investigated and/or convicted in Afghanistan for conduct that overlaps with the Prosecutor's investigation"⁸ and "the cases presented by Afghanistan only address a very limited fraction of the crimes and individuals responsible for them."⁹

7. Accordingly, the Pre-Trial Chamber determined that "Afghanistan is not presently carrying out genuine investigations and [...] has not acted in a manner that shows an interest in pursuing the Deferral Request".¹⁰ It affirmed that the Prosecutor is entitled to resume the Court's investigation into "all alleged crimes and actors that were subject" to the Office's request under article 15(3), for which the Appeals Chamber granted authorisation.¹¹

⁵ See [Regulations of the Court](#), reg. 64(2).

⁶ [Decision](#).

⁷ [Decision](#), para. 56.

⁸ [Decision](#), para. 55.

⁹ [Decision](#), para. 55.

¹⁰ [Decision](#), para. 58.

¹¹ [Decision](#), para. 58.

8. However, with respect to the scope of the Court's jurisdiction in the situation the Pre-Trial Chamber also stated the following in paragraph 59 of the Decision:

The Chamber reminds the Prosecution, however, that any authorisation decision also has a limiting function, because only the crimes falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it, can be the object of its investigation. Alleged crimes unrelated to such situation and conflicts or related to any new armed conflict(s), be they international or non-international in nature, and new parties to such a conflict, fall outside the scope of the investigation as authorised; although the Prosecution may, of course, submit a request under article 15 of the Statute to either broaden an investigation or open a new one.¹²

9. It illustrated the reference to “new parties to such a conflict” as follows:

Compare, e.g., the Prosecutor's reference to the ‘Islamic State – Khorasan Province’ in his 27 September 2021 press statement.¹³

10. The Prosecution agrees that the scope of the Court's investigation is limited to crimes falling within the parameters of the situation, and also considers that this includes those crimes which are sufficiently linked to it.¹⁴ Yet on its face, paragraph 59 of the Decision further appears to instruct the Prosecution to refrain from investigating, among other lines of inquiry: (a) alleged crimes which occurred after 5 March 2020, and; (b) alleged crimes committed by “new parties” potentially including the ‘Islamic State – Khorasan Province’. For the reasons set out below, the Prosecution respectfully submits that this instruction is erroneous.

11. Notably, such restrictions are not set out in the *Afghanistan* Appeal Judgment—which the Pre-Trial Chamber otherwise appeared to adopt,¹⁵ and which was issued because the Office successfully appealed the Pre-Trial Chamber's original decision

¹² [Decision](#), para. 59.

¹³ [Decision](#), para. 59, fn. 109.

¹⁴ See e.g. ICC-02/05-01/20-391 (“[Abd-Al-Rahman Jurisdiction Decision](#)”), para. 25 (quoting ICC-01/04-01/10-451 (“[Mbarushimana Jurisdiction Decision](#)”), para. 16: (“a situation is ‘generally defined in terms of temporal, territorial and in some cases personal parameters’, possibly including ‘not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral’”).

¹⁵ [Decision](#), para. 58.

under article 15(4). Adopting the terms of the Prosecution's article 15(3) request, the Appeals Chamber held that:

[T]he Prosecutor is authorised to commence 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'.¹⁶

12. To any extent that the Pre-Trial Chamber has now modified or re-interpreted these parameters in the Decision, such an instruction implies that the Prosecution would not be able to seek the Pre-Trial Chamber's assistance under articles 56, 57 or 58 for the purpose of pursuing the lines of inquiry set out above.¹⁷ As a consequence, and at the very least, it may not be prudent for the Prosecution to expend its limited resources in pursuing such lines of inquiry without further clarification. The instruction in paragraph 59 may also cause confusion among States, affected communities, and most importantly victims about the scope of the Court's investigation and the prospects for accountability. Finally, it may impose opportunity costs, in the sense that partners interested in the lines of inquiry now apparently excluded from the investigation may not correctly identify the Court and the Prosecution as being similarly engaged with those issues.

13. Because of the foregoing, the Prosecution respectfully requests the Appeals Chamber to correct the errors identified, to reverse and amend paragraph 59 of the Decision, and to confirm the scope of the Court's jurisdiction in this situation in the terms previously articulated by the Appeals Chamber.

¹⁶ [Afghanistan Appeal Judgment](#), para. 79 ("the Appeals Chamber considers it appropriate to amend the Impugned Decision to the effect that the Prosecutor is authorised to commence 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'").

¹⁷ See above para. 10.

Notice of grounds of appeal

14. The Prosecution appeals the Decision on two grounds, conforming to the established law that a decision with respect to jurisdiction or admissibility may be challenged on the basis of procedural errors, errors of fact or errors of law.¹⁸ These errors materially affected the Pre-Trial Chamber's analysis and finding in paragraph 59.

Ground One: The Pre-Trial Chamber erred in law in paragraph 59 of the Decision by limiting the scope of the Court's jurisdiction to crimes pre-dating the article 15(4) decision

15. The Pre-Trial Chamber erred in paragraph 59 of the Decision by limiting the scope of the situation to "only the crimes falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it".¹⁹

16. In the *Afghanistan* Appeal Judgment, the Appeals Chamber has already determined that this view is erroneous. According to the Appeals Chamber—in a finding which was not cited or addressed in the Decision—the Pre-Trial Chamber "erred in finding that the scope of any authorisation granted would be limited to the incidents mentioned in the Request and those closely linked thereto".²⁰ In this context, it specifically noted that the Pre-Trial Chamber had considered that an authorised investigation "could not encompass incidents and groups of offenders other than those for which the authorisation was specifically requested" or "other alleged crimes that may have occurred after the date" of the request.²¹

17. The Appeals Chamber also 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

¹⁸ See e.g. [ICC-01/04-169 OA](#) ("DRC Arrest Warrants Appeal Judgment"), paras. 34-35; [ICC-02/04-01/05-408 OA3](#) ("Kony et al. Admissibility Appeal Judgment"), paras. 46-47.

¹⁹ [Decision](#), para. 59.

²⁰ [Afghanistan Appeal Judgment](#), para. 64.

²¹ [Afghanistan Appeal Judgment](#), para. 58.

involved, the Prosecution must carry out an investigation into the situation *as a whole*.²² It considered that “restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor’s truth-seeking function”.²³

18. Similarly, the Appeals Chamber did not limit the temporal parameters of the situation to crimes preceding its authorisation of the investigation. Instead, it endorsed the temporal parameters defined by the Prosecutor in the article 15(3) application,²⁴ who was unequivocal in requesting authorisation “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*”.²⁵

19. This approach is consistent 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,²⁶ and accords with the Prosecution’s truth-seeking function.²⁷ It is also consistent with the approach adopted by other Pre-Trial Chambers in defining the parameters of the authorised situations in their article 15(4) decisions.²⁸

²² 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 Appeal Judgment](#), para. 60; *see also* [ICC-01/21-12](#) (“*Philippines* Article 15(4) Decision”), para. 117.

²³ [Afghanistan Appeal Judgment](#), para. 61. *See also* para. 63.

²⁴ [Afghanistan Appeal Judgment](#), para. 62 (“the requirements of article 15(4) [...] would be met by granting the authorisation in the terms requested by the Prosecutor, which sufficiently defines the parameters of the situation”); *see also* para. 79.

²⁵ [ICC-02/17-7-Red](#) (“*Afghanistan* Article 15(3) Application”), para. 376 (emphasis added).

²⁶ [Afghanistan Appeal Judgment](#), paras. 60-61, 63; [ICC-01/19-27](#) (“*Bangladesh/Myanmar* Article 15(4) Decision”), para. 128; [ICC-01/15-12](#) (“*Georgia* Article 15(4) Decision”), para. 63-64; *see also* [ICC-01/09-19-Corr](#) (“*Kenya* Article 15 Decision”), para. 74-75, 205.

²⁷ [Afghanistan Appeal Judgment](#), para. 60; [Philippines Article 15\(4\) Decision](#), para. 117.

²⁸ *See e.g.* [Bangladesh/Myanmar Article 15\(4\) Decision](#), para. 133 (“the Chamber finds that any crimes committed after the issuance of this decision remain within the temporal scope of the authorised investigation, as long as such crimes are sufficiently linked to the situation identified in the present decision”); [ICC-02/11-14-](#)

Ground 2: The Pre-Trial Chamber erred in fact in paragraph 59, and in particular footnote 109, of the Decision by misreading the Prosecution’s article 15(3) application

20. Further, the Pre-Trial Chamber erred in fact in paragraph 59 (and in particular footnote 109) by referencing ‘Islamic State – Khorasan Province’ as an example of “a new party to the conflict” and thereby misreading the Prosecution’s article 15(3) application to authorise the investigation into the situation. This document—which was endorsed by the Appeals Chamber as sufficiently defining the parameters of the situation²⁹—expressly clarified that the scope of the investigation included both subsequent crimes and crimes committed by the group known as ‘Islamic State – Khorasan Province’, among other groups. For example, as to subsequent crimes, the Application stated:

[S]hould the Pre-Trial Chamber decide[] to authorise an investigation under article 15(4), this should not limit the Prosecution’s investigation into only the specific crimes set out in this Request; rather, the Prosecution should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation. In particular, the situation in Afghanistan is one in which crimes allegedly continue to be committed on a near daily basis, by a wide range of armed actors, including some newly emerging entities, both in support of and against the Government. Accordingly, if an investigation is authorised, the Prosecution should be permitted to expand or modify its investigation with respect to the acts identified in this Request or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.³⁰

21. The Application also specifically referred to crimes allegedly committed by the group known as ‘Islamic State – Khorasan Province’, among other groups, who have conducted “a number of attacks against civilians”.³¹

[Corr](#) (“Côte d’Ivoire Article 15(4) Decision”), para. 179 (“Bearing in mind the volatile environment in Côte d’Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into ‘continuing crimes’ – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor’s application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011”).

²⁹ [Afghanistan Article 15\(3\) Application](#), para. 376. See also [Afghanistan Appeal Judgment](#), para. 62.

³⁰ [Afghanistan Article 15\(3\) Application](#), para. 38.

³¹ [Afghanistan Article 15\(3\) Application](#), paras. 19, 63.

Conclusion

22. For the reasons above, the Prosecution respectfully requests the Appeals Chamber to accept this appeal pursuant to article 82(1)(a) of the Statute, to correct the errors identified, to reverse and amend paragraph 59 of the Decision and to confirm the scope of the Court's jurisdiction in this situation in the terms previously articulated by the Appeals Chamber.

23. The Prosecution will file its brief in support of this appeal by 22 November 2022.



Karim A.A. Khan KC, Prosecutor

Dated this 7th day of November 2022

At The Hague, The Netherlands