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No.: **ICC-01/17**
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PRE-TRIAL CHAMBER III

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Chang-ho Chung
Judge Raul C. Pangalangan

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

PUBLIC

with Confidential, *EX PARTE* Annex, only available to the Prosecution

Prosecutor's provision of additional information pursuant to Pre-Trial Chamber III's "Order to the Prosecutor to Provide Additional Information" (ICC-02/17-8)

Source: Office of the Prosecutor

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Court to:

The Office of the Prosecutor

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I. Introduction

1. On 5 December 2017, following the Prosecutor's "Request for authorisation of an investigation pursuant to article 15" ("Request"),¹ Pre-Trial Chamber III ("Chamber") issued an Order to Provide Additional Information ("Order").²
2. The Chamber ordered the Prosecution to i) provide information comprising "media reports and article 15 communications concerning allegations attributed to special forces of a number of international forces operating in Afghanistan" referred to in paragraph 260 of the Request,³ and ii) in relation to certain other incidents involving "military operations conducted by international military forces", to provide information on "those other incidents and further clarification on the determination reached by the Prosecutor" on whether there is a reasonable basis to believe crimes within the Court's jurisdiction were committed by international military forces, based on paragraph 257 of the Request.⁴
3. The Prosecutor hereby provides the information ordered as well as further relevant clarifications.

II. Level of confidentiality

4. This document is filed publicly, along with a confidential *ex parte* Annex, in accordance with regulation 23bis of the Regulations of the Court. The confidential *ex parte* Annex includes the relevant information concerning the allegations attributed to special forces from a number of international forces, and information on "certain other incidents", as requested by the Chamber. The Annex is designated confidential for three reasons: *First*, it contains confidential information submitted under article 15 of the Statute. *Second*,

¹ ICC-02/17-7-Conf-Exp, and public redacted version ICC-02/17-7-Red.

² ICC-02/17-8.

³ ICC-02/17-8, para. 5.

⁴ ICC-02/17-8, paras. 6 and 7.

because, although it also contains information that is in the public domain, this information was also received by the Prosecution as part of article 15 communications which are treated as confidential by the Prosecution pursuant to rule 46 of the Rules of Procedure and Evidence.

5. *Third*, the Prosecution received additional information concerning allegations of murder attributed to special forces from a number of international forces at the final stages of its preliminary examination. As a result, and as underscored in the Request, the Prosecution was not able, due to the existing time constraints, to assess the information and determine whether there is a reasonable basis to believe that the special forces of these international forces have committed crimes within the Court's jurisdiction. Nor has the Prosecution been able to afford the States concerned the opportunity to be heard and/or provide any information that is relevant to that assessment.
6. Accordingly, the Prosecution did not rely on these allegations to support its request to initiate an investigation. The rationale behind this is that it is the Prosecution's statutory duty to objectively assess any information received under article 15 in order to determine whether the evidentiary standard adopted in that provision has been met. Only if the Prosecution is satisfied that such is the case can and should the Prosecution request that the commencement of an investigation be authorised by the Chamber. This has not happened in relation to the allegations referred to above, and therefore the conduct alleged has not been presented before the Chamber for the purposes of its article 15 determination. However, and as already mentioned in the Request, if an investigation is authorised, these and any other alleged crimes that may occur after the start of investigations, as well as any attendant assessment of complementarity and gravity, could be assessed further within the scope of the authorised situation.

7. As such, the information received constitutes allegations only at this stage and thus did not form part of the basis of the Prosecutor's Request. The Prosecution submits that these circumstances further reinforce the need to maintain the confidentiality of the information received for the purposes of the Request.

III. Submissions

8. The Prosecution sets out below the additional information required by the Chamber in paragraphs 5 to 7 of the Order.

- i) *Information on special forces of a number of international forces*

9. Part of the information received during the preparation of the Request comprises media reports and article 15 communications concerning allegations of murder attributed to special forces from a number of international forces.⁵

10. As underscored in the Request, the limited time available from the moment the information was received left the Prosecution unable to determine whether there is a reasonable basis to believe that the special forces of these international forces have committed crimes within the Court's jurisdiction. The purpose of the reference was to indicate that information on alleged crimes within the jurisdiction of the Court continue to be received on an ongoing basis. Nonetheless, the information received did not form part of the basis for the Prosecutor's Request. As emphasised in the Request, if an investigation is authorised, these and any other alleged crimes that may occur after the start of investigations, as well as any attendant assessment of

⁵ See Table 1, confidential *ex parte* Annex.

complementarity and gravity,⁶ could be assessed further within the scope of the authorised situation.

- ii) *Further information on other incidents involving military operations conducted by international military forces and further clarification on the determination reached by the Prosecutor*

11. The Prosecution clarifies that the reference to “most incidents” in paragraph 257 of the Request did not mean that the Prosecutor had determined that “in respect of certain other incidents, there is a reasonable basis to believe that crimes falling within the jurisdiction of the Court were committed during military operations conducted by international military forces”.⁷ Rather, it meant that the Prosecutor had identified certain other incidents where, owing to the paucity of information, it had not been able to make any determination on the intent to attack the civilian population. Specifically, the distinction was meant to signify that, whereas for “most incidents” the information did not provide a reasonable basis to believe that military forces intended the civilian population to be the object of the attack, for “certain other incidents” the information was insufficient to make a determination either way.

12. Therefore, at this stage the Prosecution has determined that there is no reasonable basis to believe that crimes falling within the jurisdiction of the Court were committed during military operations conducted by international military forces in relation to “those other incidents”.

13. However, should the Chamber authorise an investigation, these allegations could be further investigated. In particular, an in-depth assessment will require evidence on the context of the attacks to determine whether civilian

⁶ See Table 2, confidential *ex parte* Annex.

⁷ ICC-02/17-8, para. 6.

deaths or injuries amounted to war crimes within the jurisdiction of the Court, as well as considerations of admissibility.

IV. Conclusion

14. The Prosecution stands ready to provide any further additional information that the Chamber deems necessary pursuant to rule 50(4) of the Rules of Procedure and Evidence.



Fatou Bensouda, Prosecutor

Dated this 12th day of December 2017

At The Hague, The Netherlands