

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/17

Date: 22 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

Prosecution 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 appeals paragraph 59 of Pre-Trial Chamber II's decision of 31 October 2022 that authorised the resumption of the Court's investigation in Afghanistan only with respect to "the crimes [and parties] 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".¹

2. In this respect, the Prosecution respectfully submits that the Pre-Trial Chamber erred in law and in fact for the following reasons.

3. First, the Pre-Trial Chamber erred in law by disregarding and/or misinterpreting the scope of the Court's jurisdiction in this situation, which was definitively settled by the Appeals Chamber in its judgment of 5 March 2020.² In that judgment, having determined that the Pre-Trial Chamber had erred in law by purporting to limit the scope of any investigation to incidents mentioned in the Prosecution's article 15(3) request and those "closely linked thereto",³ the Appeals Chamber amended the Pre-Trial Chamber's decision and found that authorisation to investigate should instead be granted in the terms requested by the Prosecutor—that is, extending beyond the incidents (crimes and perpetrators) identified for the purpose of showing that the requirements of article 15(4) were met.⁴ To this end, the Appeals Chamber adopted the parameters initially requested by the Prosecution, and authorised the 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

¹ See [ICC-02/17-196](#) (Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume the investigation, or "Decision"); [ICC-01/17-197](#) ("Notice of Appeal"), especially paras. 1-3. Under regulation 64(1)(c) of the Regulations of the Court, a decision may be appealed in "part".

² [ICC-02/17-138](#) ("Afghanistan Appeal Judgment").

³ [Afghanistan Appeal Judgment](#), paras. 1, 64.

⁴ [Afghanistan Appeal Judgment](#), para. 62. See further [ICC-02/17-7-Red](#) ("Afghanistan Article 15(3) Request" or "Request"), para. 376.

the period since 1 July 2002”.⁵ This notwithstanding—and even though it acknowledged the Appeal Judgment⁶—the Pre-Trial Chamber apparently re-introduced in paragraph 59 of the Decision substantially the same limitations that the Appeals Chamber had already deemed erroneous and reversed.⁷

4. Second, the Pre-Trial Chamber erred in fact by misreading the Prosecution request pursuant to article 15(3), in which the Prosecution explicitly referred to the ‘Islamic State – Khorasan Province’ as a party to the ongoing conflict which was allegedly responsible for crimes under the Statute.⁸ Even though the Prosecution did not rely on incidents (and potential cases) perpetrated by this armed group for the purposes of its Request (to assess whether the article 15(4) requirements were met), it did make an explicit reference to this armed group and its alleged ongoing criminal conduct, which it considered to fall within the parameters of the situation which it sought to investigate (and subsequently endorsed by the Appeals Chamber). The Prosecution clearly stated that conduct by this armed group, among others, would fall within the scope of the situation and of the Prosecution’s investigation, should authorisation be granted.⁹

5. The Prosecution respectfully requests the Appeals Chamber to correct the errors identified, reverse and amend paragraph 59 of the Decision and confirm the scope of the Court’s jurisdiction in this situation in the terms previously articulated in the *Afghanistan Appeal Judgment*.

Submissions

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

⁵ [Afghanistan Appeal Judgment](#), para. 79.

⁶ [Decision](#), para. 58 (fn. 107), para. 59 (fn. 108).

⁷ [Decision](#), para. 59.

⁸ [Afghanistan Article 15\(3\) Request](#), paras. 19, 63.

⁹ [Afghanistan Article 15\(3\) Request](#), para. 38.

found that “Afghanistan is not presently carrying out genuine investigations”¹⁰ and affirmed that the Prosecutor is entitled to resume the Court’s investigation in the Afghanistan situation 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

7. With respect to the scope of the Court’s jurisdiction in the situation, the Pre-Trial Chamber 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

8. 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

9. The Pre-Trial Chamber is understood to have excluded the possibility that an authorised investigation in this situation might encompass: (i) any crime occurring after 20 November 2017 (the date of the request) or 5 March 2020 (the date of the *Afghanistan* Appeals Judgment authorising the investigation); and (ii) any crime committed by “new parties”, including ‘Islamic State – Khorasan Province’.

10. For the reasons below, the Pre-Trial Chamber erred both in law and fact.

¹⁰ [Decision](#), para. 58.

¹¹ [Decision](#), para. 58.

¹² [Decision](#), para. 59.

¹³ [Decision](#), para. 59 (fn. 109).

A. Ground One: The Pre-Trial Chamber erred in law by limiting the scope of the Court’s jurisdiction to crimes pre-dating the Prosecutor’s Request or the *Afghanistan* Appeal Judgment authorising the investigation

11. The Pre-Trial Chamber erred in law in paragraph 59 of the Decision by limiting the scope of the resumed investigation in this situation to “only the crimes [and parties] 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”.¹⁴ However, the Appeals Chamber has already determined that this view is erroneous and has authoritatively articulated the scope of the Court’s jurisdiction (and the Prosecution’s investigation) in this situation.

12. Even though the Pre-Trial Chamber cited the *Afghanistan* Appeal Judgment in its Decision,¹⁵ it disregarded its import and omitted to cite relevant extracts. The Appeals Chamber had authorised the Prosecution’s investigation in Afghanistan—and thus defined the scope of the Court’s jurisdiction in this situation—with respect to the parameters set out in the Prosecutor’s Request, that is “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 In doing so, the Appeals Chamber explicitly rejected the Pre-Trial Chamber’s understanding that any investigation would be limited to the incidents (crimes and persons) expressly mentioned in the Request and those closely linked to those incidents. Even if the Pre-Trial Chamber’s description of the situation in paragraph 59 of the Decision might be understood as somewhat broader than in its prior decision pursuant to article 15(4),

¹⁴ [Decision](#), para. 59.

¹⁵ [Decision](#), para. 58 (fn. 107), para. 59 (fn. 108).

¹⁶ [Afghanistan Appeal Judgment](#), para. 79.

it still incorrectly narrows the scope of permissible investigations in disregard of the Appeals Chamber's findings.¹⁷

13. Since the Appeals Chamber has already ruled on the very same issue in the same situation (*i.e.* the scope of the Court's jurisdiction in Afghanistan), this determination is *res judicata* and the Pre-Trial Chamber was and is bound by it. Furthermore, the Appeals Chamber's interpretation of the relevant provisions has been consistently endorsed in the Court's jurisprudence.

A.1. The Appeals Chamber already articulated the scope of the situation and of the Court's jurisdiction in Afghanistan

14. In its Request under article 15(3), the Prosecution provided details of 203 specific incidents to show that the requirements of article 15(4) of the Statute were met.¹⁸ This "sample"¹⁹—as it was described—was selected from "the most prevalent and well-documented allegations",²⁰ in order "to reflect the gravest incidents and the main types of victimisation".²¹ The Prosecution reiterated that such a sample was "without prejudice to other possible crimes within the jurisdiction of the Court that may be identified during the course of an investigation".²² On the basis of this sample, the Prosecution submitted that there was a reasonable basis to proceed with an investigation into the situation, defined by the following temporal, material, and geographic parameters:

[I]n 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

¹⁷ Compare [Decision](#), para. 59 (limiting the authorised investigation to crimes and parties "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") and [ICC-02/17-33](#) ("First Decision"), paras. 68-69 (limiting the authorised investigation to "incidents and groups of offenders [...] for which the authorisation was specifically requested").

¹⁸ See [Request Annex 2A \(Ex Parte\)](#); [Request Annex 2B \(Ex Parte\)](#); [Request Annex 2C \(Ex Parte\)](#).

¹⁹ See *e.g.* [Request](#), paras. 111, 139, 141, 144, 150, 153, 157, 265.

²⁰ [Request](#), paras. 41, 265.

²¹ [Request](#), paras. 41, 265.

²² [Request](#), para. 42. See also [ICC-02/17-26](#) ("Third Rule 50(4) Response"), para. 3 (noting that the information in the Request "was not a comprehensive survey of all the potential crimes committed nor an exhaustive analysis of the structures, organisation and conduct of the possible perpetrators").

and were committed on the territory of other States Parties in the period since 1 July 2002.²³

15. In its decision pursuant to article 15(4) on 12 April 2019, Pre-Trial Chamber II found that all jurisdictional requirements were met. But it rejected the Request because it considered that, at that stage, an investigation would not serve the interests of justice.²⁴ In addition, the majority of the Pre-Trial Chamber (Judge Mindua dissenting) found that, even if it were to authorise an investigation, it “[would] not cover the situation as a whole [...]”²⁵ and “the scope of the scrutiny 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”.²⁶ It found that “the Prosecutor [could] only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation’s geographical, temporal, and contextual scope, or closely linked to it”.²⁷

16. The Prosecution appealed this decision—not only with regard to the Pre-Trial Chamber’s approach to the interests of justice but also in relation to its narrow interpretation of the scope of any authorised investigation. In its judgment, the Appeals Chamber reversed both aspects of the Pre-Trial Chamber’s decision, which it determined were legally erroneous.²⁸ Since the Pre-Trial Chamber had not been required to assess the interests of justice, and had made all other requisite findings under article 15(4), the Appeals Chamber amended the decision and authorised the

²³ [Request](#), para. 376. *See also* [Decision](#), para. 5. *See further* [Request](#), paras. 2, 38 (referring to the ongoing nature of related criminal activity); [UNAMA 2019 Press Statement](#) (“[m]ore civilians were killed in the Afghan conflict [in 2018] than at any time since records have been kept”).

²⁴ [First Decision](#), p. 32.

²⁵ [First Decision](#), para. 42. Judge Antoine Kesia-Mbe Mindua dissented on this issue in his concurring and separate opinion: [ICC-02/17-33-Anx](#).

²⁶ [First Decision](#), para. 69.

²⁷ [First Decision](#), para. 40; *see also* para. 41.

²⁸ [Afghanistan Appeal Judgment](#), paras. 55-64.

investigation. In that context, it determined the scope of the Court’s jurisdiction in the situation.²⁹

17. Specifically, the Appeals Chamber found that the Pre-Trial Chamber had “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”.³⁰ Recalling the Pre-Trial Chamber’s view that any 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 article 15(3) Request,³¹ it found instead that “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”.³² On that basis, the Appeals Chamber unanimously authorised the investigation according to the terms proposed by the Prosecution.³³

18. The Appeals Chamber’s reasoning leading to this decision further underlines the importance of the principles at stake. To any extent that the Pre-Trial Chamber may have considered the binding nature of the Appeals Chamber’s ruling to be limited to the question of the interests of justice, this is inconsistent with the structure and logic of the judgment.

19. First, since the Prosecutor’s investigative powers are limited during the preliminary examination, the Appeals Chamber noted that the Prosecution would not ordinarily be in a position at that stage to exhaustively identify each incident,

²⁹ [Afghanistan Appeal Judgment](#), paras. 51-54. Thus, even though the Pre-Trial Chamber had not certified this issue for appeal, the Appeals Chamber was required to determine the scope of the Court’s jurisdiction in order to exercise its powers pursuant to rule 158(1)—which in an appeal under article 82(1)(d) allows it to “confirm, reverse or amend the decision appealed”. Further, in confirming that the Pre-Trial Chamber had erred with regard to the scope of the authorised situation, the Appeals Chamber accepted the Prosecution’s argument that such matters were “intrinsically linked” with those issues that were certified for appeal. Indeed, the Pre-Trial Chamber could not possibly have assessed the ‘feasibility’ of the investigation (and the interests of justice) without taking into account precisely what the Prosecution would be investigating: *see* [ICC-02/17-74](#) (“Prosecution First Appeal”), paras. 8-11.

³⁰ [Afghanistan Appeal Judgment](#), para. 64.

³¹ [Afghanistan Appeal Judgment](#), para. 58.

³² [Afghanistan Appeal Judgment](#), para. 62 (emphasis added).

³³ [Afghanistan Appeal Judgment](#), para. 79. *See also above* para. 14.

crime or perpetrator that could be subject to investigation.³⁴ This limitation is consistent with the relatively low threshold for the Prosecution’s assessment in considering whether to proceed under article 15(3)—relevantly, a reasonable basis to believe that “a crime” within the jurisdiction of the Court has been committed,³⁵ that is to say “at least one” such crime.³⁶ While the Prosecutor may in his discretion choose to identify multiple “examples”,³⁷ this is “merely illustrative of a threshold that has already been met”.³⁸ As the Appeals Chamber held, “the examples of alleged crimes presented by the Prosecutor” under article 15(3) “should be sufficient to define in broad terms the contours of the situation” to be investigated.³⁹ No more is required. The Pre-Trial Chamber’s renewed approach in the Decision is contrary to these principles, and yet the Chamber presented no reasoning to explain why it had departed from them.

20. Second, by definition, in a preliminary examination the Prosecutor cannot identify crimes which may occur *after* his request under article 15(3).⁴⁰ However, there is no reason in law or logic to require that such crimes, if they fall within the parameters of a previously authorised situation—or are sufficiently linked to that situation— require further article 15(4) authorisation by the Pre-Trial Chamber

³⁴ [Afghanistan Appeal Judgment](#), para. 59.

³⁵ Statute, art. 53(1)(a). While the Pre-Trial Chamber’s jurisdictional assessment is set out in article 15(4), the Prosecution is obliged to consider article 53(1) for the purpose of determining whether to proceed under article 15(3) as a consequence of rule 48. See [Afghanistan Appeal Judgment](#), paras. 34-37.

³⁶ [ICC-01/13-34](#) (“Comoros First Decision”), para. 13 (emphasis added).

³⁷ [ICC-02/11-15-Corr](#) (“Côte d’Ivoire Decision, Opinion of Judge Fernández”), para. 32 (recalling that “the facts and incidents identified” in an article 15(3) application “are not and could not be expected to be exhaustive [...], but are intended solely to give concrete examples to the Chamber”); see also para. 34 (referring to “this early and necessarily non-comprehensive identification of incidents”). The Prosecutor may elect to provide additional examples for instrumental rather than legal reasons, such as public transparency or to anticipate potential concerns about admissibility: see e.g. M. Cross, “[The Standard of Proof in Preliminary Examinations](#)”, in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (“[Cross](#)”), pp. 248-249; R. Rastan, *The Jurisdictional Scope of Situations before the International Criminal Court*, Criminal Law Forum (2012) (“[Rastan \(2012\)](#)”), pp. 26-27.

³⁸ [Rastan \(2012\)](#), p. 27.

³⁹ [Afghanistan Appeal Judgment](#), para. 59.

⁴⁰ [Afghanistan Appeal Judgment](#), para. 59.

before they may be investigated by the Prosecution, as suggested by this Pre-Trial Chamber in its first article 15(4) decision.⁴¹

21. Indeed, the Appeals Chamber stated that the Prosecution’s duties under article 54(1) of the Statute—in particular its truth-seeking function—necessarily affect the scope of any investigation. To fulfil those duties, and to obtain a full picture of the relevant facts (including their potential legal characterisation as crimes within 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*.⁴² Conversely, “restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor’s truth-seeking function”.⁴³ Again, the Chamber does not address this consideration in the Decision, nor explain how the similar limitations it now seeks to reintroduce may be reconciled with this concern.

22. Third, the Appeals Chamber observed that the alternative proposed by the Pre-Trial Chamber—that the Prosecutor may request further authorisation under article 15(3) to investigate incidents not included in his original request or not closely related to those incidents—is unworkable in practice. This is especially so given the investigations into large-scale crimes with which the Court is typically involved. It could also be difficult for the Prosecution to determine, in the midst of an investigation, which incidents could safely be regarded as ‘closely linked’ to those authorised, and which would instead necessitate a new request for authorisation. This could lead the Prosecutor to submit repeated, and even ultimately unnecessary, requests for authorisation as new facts are uncovered. Such a course of action runs

⁴¹ [First Decision](#), para. 42.

⁴² 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 Decision*”), para. 117.

⁴³ [Afghanistan Appeal Judgment](#), para. 61.

contrary to the Prosecutor's independence and personal mandate under articles 42(1) and 54(1) for the conduct of investigations.⁴⁴

23. As the Prosecution also argued before the Appeals Chamber, creating a more cumbersome regime for the investigation of situations which were not referred to the Court also contradicts the principle that all investigations conducted by the Court should proceed on a similar procedural footing once authorised.⁴⁵ If the Pre-Trial Chamber's approach were to be accepted, the Prosecutor's power to investigate all allegations within the parameters of a situation, or sufficiently linked to those parameters, would be unrestricted for referred situations. Yet, his power to investigate similar allegations in situations which were not referred would be subject to piecemeal approvals by the Pre-Trial Chamber.⁴⁶ Furthermore, such an approach would lead in practice to "continuous monitoring of the scope of the Prosecutor's investigation by the pre-trial chamber", which the Appeals Chamber held was "contrary to the statutory scheme regulating the respective functions of these two organs with respect to investigations."⁴⁷ In the Appeals Chamber's view, "such cumbersome and unwieldy procedures are not required by the Statute and are likely to have a significant detrimental effect on the conduct of investigations."⁴⁸ Again, the Pre-Trial Chamber does not explain why a deviation from these principles or conclusions is required or justified.

A.2. Pre-Trial Chamber II is bound by the Appeals Chamber's prior determination on the scope of the Court's jurisdiction in Afghanistan

24. Rather, as it seemed to recognise to some degree,⁴⁹ the Pre-Trial Chamber was bound to give effect to the scope of the Court's jurisdiction in this situation as

⁴⁴ [Afghanistan Appeal Judgment](#), para. 63.

⁴⁵ [Prosecution First Appeal](#), para. 85.

⁴⁶ See cf. [ICC-01/19-27](#) ("Bangladesh/Myanmar Decision"), para. 129.

⁴⁷ [Afghanistan Appeal Judgment](#), para. 63.

⁴⁸ [Afghanistan Appeal Judgment](#), para. 63.

⁴⁹ [Decision](#), para. 58 ("the present authorisation relates to all alleged crimes and actors that were subject to the Prosecutor's 'Request for authorisation of an investigation pursuant to article 15', for which the Appeals Chamber has granted authorisation", citing para. 79 of [Afghanistan Appeal Judgment](#)); see also para. 59 (fn. 108).

definitively articulated by the Appeals Chamber in the *Afghanistan* Appeal Judgment. On this foundational question, the Appeals Chamber's ruling was conclusive and constituted *res judicata*.⁵⁰ As such, once it had found that no deferral was warranted, the Pre-Trial Chamber could only authorise the resumption of the investigation within the jurisdictional parameters already set by the Appeals Chamber.

25. The binding effect of interlocutory judgments of the Appeals Chamber, for the purpose of the proceedings in which they are issued, is essential to the sound judicial administration of this Court.⁵¹ Otherwise, the Appeals Chamber would have no reason to issue such judgments at all.

26. Furthermore, finality and judicial certainty are especially important with regard to matters such as the scope of the Court's jurisdiction, which not only affect the Court as a whole but also external actors with whom the Court interacts.⁵² The Court

⁵⁰ See e.g. [ICC-01/09-01/11-313](#), para. 8 (where the Pre-Trial Chamber noted that because the Appeals Chamber had rendered a judgement on the Government of Kenya's appeal on the admissibility of the case, the Government of Kenya's challenge to the admissibility of the case was *res judicata*); see also [ICC-01/13-115](#), para. 12 (where the majority of the Pre-Trial Chamber dismissed a request to certify an issue under article 82(1)(d) because it had already been decided by the Appeals Chamber); see also MICT, *Prosecutor v. Karadžić*, MICT-13-55-A, [Decision on a Motion for Redacted Versions of Decisions Issued under Rule 75\(H\) of the ICTY Rules](#), 18 July 2016, p. 4 (where the MICT Appeals Chamber noted that "legal certainty presupposes respect for the principle of *res judicata*, which holds that no party is entitled to seek a review of a final and binding decision or judgment merely for the purpose of obtaining a rehearing and a fresh determination of the same issue"); see also *Prosecutor v. Simić and al.*, IT-95-9, [Decision on \(1\) Application by S. Todorovic to Re-open the Decision of 27 July 1999, \(2\) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and \(3\) Conditions for Access to Material](#), 28 February 2000, para. 9 ("the principle of *res judicata* would prevent the Prosecution from raising that specific issue again in any interlocutory proceedings between it and the ICRC unless the Trial Chamber itself were prepared to reconsider its decision"); *Prosecutor v. Prlić and al.*, IT-04-74-T, [Decision on Prlić Defence Request for Certification to Appeal](#), 7 December 2009, p. 3 (where the Chamber dismissed a request for certification to appeal and applied the principle of *res judicata* to a procedural issue that had been previously resolved).

⁵¹ See e.g. MICT, *Prosecutor v. Mladić*, MICT-13-56-A, [Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional release](#), 8 June 2018, p. 2 ("recalling that the Appeals Chamber treats its pre-appeal and interlocutory decisions as binding in ongoing proceedings as to all issues decided therein, and that, in the interests of justice, this principle forecloses re-litigation of such issues"), citing *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, [Judgement](#), 14 December 2015, para. 127; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, [Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence](#), 7 July 2005, para. 20; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, [Judgement](#), 23 May 2005, paras. 202-203).

⁵² Cf. ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, [Judgement](#), 24 Marc 2000 ("*Aleksovski AJ*"), para. 97 (where the Appeals Chamber recalled that the need for "consistency, certainty and predictability in the law is generally recognized in national jurisdictions, both of common law and civil law traditions, as well as before international tribunals").

and the international community need certainty as to what steps and measures the Court may rightfully take in the exercise of its functions.

27. The principles described above—which may loosely be described as the doctrine of *res judicata*—fall outside article 21(2) since they do not concern the relevance of prior interpretations of the law for the purpose of *other* proceedings but rather the Appeals Chamber’s previous determination of the *very same matter in the very same proceedings involving the very same actors*.⁵³ Furthermore, even with respect to article 21(2), the Appeals Chamber has held that it will not readily exercise its discretion to depart from its own prior jurisprudence, absent convincing reasons, given the need to ensure predictability of the law and the fairness of adjudication so as to foster public reliance on its decisions.⁵⁴ The Prosecution respectfully submits that Pre-Trial and Trial Chambers should likewise follow these principles and be bound to follow Appeals Chamber jurisprudence.⁵⁵ This ensures certainty and

⁵³ As to the difference between *res judicata* and *stare decisis*, see I. Scobbie, *Res Judicata, Precedent and the International Court: A Preliminary Sketch*, 20 Aust, YBIL 299-318 (1999), p. 303 (“*Res judicata* refers to the terms of the definitive disposition of a specific case as between the parties by a competent court. This is stated in the operative clause (*dispositif*) of a judgment binding on the parties. In essence, this is the court’s directive regarding the parties’ future action concerning the matters decided by the case. In contrast, the doctrine of precedent concerns relatively abstract legal propositions which may be used in future cases, which need not involve the same parties, drawn from the statement of reasons (*motifs*) provided by the court in justification of its decision. [W]hat distinguishes the two is that *res judicata* refers to the determination of the parties’ legal relationships within the context of a specific dispute whereas precedent refers to abstract or general statements of law which are embedded in a decision. *Res judicata* is the final disposition of a given case: precedent looks beyond the case to the future application of the rulings it contains”); see also *International Criminal Law: cases and commentaries*, in A. Cassese, G. Acquaviva, M. Fan and A. Whiting (OUP, 2011), p. 99 (*res judicata* is defined as “the notion that a final adjudication is binding and the costs and burdens of re-litigation should not be borne again”).

⁵⁴ ICC-02/11-01/15-172 (“*Gbagbo* Victims Participation Decision”), para. 14 (finding that “while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions” and referring to ICC-01/05-01/08-566, para. 16 where the Appeals Chamber found that “absent ‘convincing reasons’ it will not depart from its previous decisions”), cited in ICC-01/14-01/21-318 (“*Said* Interim Release AD), para. 45. See also *Aleksovski AJ*, paras. 107-109, *Rutaganda AJ*, para. 26.

⁵⁵ See e.g. SCSL, *Prosecutor v. Augustine Gbao et al.*, Gbao - *Decision on Application to Withdraw Counsel*, 6 July 2004, para. 12 (noting that “[t]he issue of the legitimacy of the Special Court has already been litigated before the Appeals Chamber of this Court [...] in the cases of Kallon, Norman and Kamara [...]. These findings are binding on this Trial Chamber and thus the legitimacy of the Special Court can now be considered to be *res judicata*”); *Aleksovski AJ*, para. 113 (“iii. the right of appeal is, as the Chamber has stated before, a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit. In such a system, it would be possible to have four statements of the law from the Tribunal on a single legal issue - one from the Appeals Chamber and one from each of the three Trial Chambers [...]. The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international

procedural fairness in the application of the law, and is fully consistent with the Court's legal framework.

28. Finally, nothing in the above means that an early determination of the scope of the Court's jurisdiction for the purpose of article 15(4) prevents Chambers of the Court from hearing further arguments on jurisdiction within the framework of the Statute—in particular, with regard to concrete cases under articles 19(1) and (2). However, even in those circumstances the Pre-Trial or Trial Chambers would remain bound by any prior ruling of the Appeals Chamber on the “outer” jurisdictional parameters of the situation.

A.3. The *Afghanistan* Appeal Judgment reflects similar principles to those otherwise consistently affirmed in the Court's jurisprudence

29. The *Afghanistan* Appeal Judgment is consistent with the approach that many other Chambers have taken when defining the scope of the Court's jurisdiction in other situations. With the exception of the Pre-Trial Chamber in this situation, similar principles have consistently been applied by Chambers when acting under article 15(4). In particular, recent decisions emphasise using definitional parameters which are appropriate in light of the material facts, and the importance of permitting the Prosecutor to investigate all alleged conduct within the Court's jurisdiction which is sufficiently linked to the defined parameters. Thus, for example:

- In *Kenya*, the Pre-Trial Chamber authorised an investigation into crimes against humanity committed in Kenya in a defined time period.⁵⁶ It noted that while the Prosecutor may choose which incidents to put forward to show that the requirements of articles 15(3) and 53(1) are met, the Statute requires the

criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced”).

⁵⁶ [ICC-01/09-19-Corr](#) (“*Kenya* Decision”), paras. 207, 209, 211. Although the *Kenya* Pre-Trial Chamber reached its conclusion on different lines, restricting the Prosecution to the investigation of crimes against humanity accords with the “sufficient link” approach, insofar as the contextual elements of the alleged crimes against humanity in that situation constituted a material parameter of the investigation. The *Kenya* Decision was the first decision pursuant to article 15(4) at the Court.

investigation of the “*entire situation*”.⁵⁷ It considered this to be consistent with the Prosecutor’s duty of objective investigation under article 54(1) of the Statute.⁵⁸ As such, it acknowledged that the Prosecutor was authorised to investigate alleged crimes which had *not* been identified in the available information.⁵⁹ In this context, the Pre-Trial Chamber authorised a longer temporal scope of investigation than that which had been requested by the Prosecutor,⁶⁰ even though it considered it necessary to terminate this period as of the date of the Prosecutor’s request.⁶¹

- In *Côte d’Ivoire*, the Pre-Trial Chamber authorised an investigation into “crimes within the jurisdiction of the Court” committed in Côte d’Ivoire in a defined time period, but also included “continuing crimes” that may be committed after that period and “in the future [...] insofar as they are part of the context of the ongoing situation”.⁶²
- In *Georgia*, the Pre-Trial Chamber expressly agreed that, “for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor’s investigation to the crimes which are mentioned by the Chamber in its decision authorizing investigation.”⁶³ It thought this approach would be “illogical” since the Prosecutor’s preliminary examination—and the Pre-Trial Chamber’s decision under article 15(4)—is “inherently based on limited

⁵⁷ [Kenya Decision](#), para. 205 (emphasis added).

⁵⁸ [Kenya Decision](#), para. 205.

⁵⁹ See [Kenya Decision](#), para. 205 (authorising the investigation to include “events prior to December 2007 in relation to crimes against humanity allegedly committed [...], some of which are referred to in the available information”, emphasis added).

⁶⁰ [Kenya Decision](#), paras. 201-202, 204-205, 207.

⁶¹ [Kenya Decision](#), para. 206. This approach has not been followed in subsequent article 15 decisions: see e.g. [ICC-02/11-14-Corr](#) (“*Côte d’Ivoire* Decision”), paras. 179, 212, [ICC-01/15-12](#) (“*Georgia* Decision”), para. 64, [ICC-01/17-9-Red](#) (“*Burundi* Decision”), paras. 192-193, [Bangladesh/Myanmar Decision](#), para. 133.

⁶² [Côte d’Ivoire Decision](#), para. 212; see also para. 179. See further [Côte d’Ivoire Decision, Opinion of Judge Fernández](#), paras. 65-73 (noting that the reference to “continuing crimes” is unnecessary, and that it sufficed to show that “the case could be said to have arisen” from the defined situation in the sense that there was a “sufficient[] link[]”). By majority, and despite agreeing that a “similar analysis should apply” to any alleged crimes committed before the relevant period, the Pre-Trial Chamber declined to provide a similar authorisation without “sufficient information on specific events” occurring in an earlier time period (paras. 180, 184-185). Writing separately, Judge Fernández observed that she did not consider such information to be “at all necessary.” (para. 59).

⁶³ [Georgia Decision](#), para. 63.

information”, whereas the process of investigation itself is the proper means to discover “evidence to enable a determination which crimes, if any, may be prosecuted.”⁶⁴ The Pre-Trial Chamber also considered that limiting the Prosecutor’s investigation to the scope of the Pre-Trial Chamber’s article 15(4) decision would “conflict with her duty to investigate objectively, in order to establish the truth”, under article 54(1) of the Statute.⁶⁵ Consequently, the Pre-Trial Chamber authorised the Prosecutor to investigate within identified geographic and temporal parameters, but also to include *other* allegations which are “sufficiently linked thereto and, obviously, fall within the Court’s jurisdiction.”⁶⁶

- In *Burundi*, the Pre-Trial Chamber likewise authorised the investigation to include “*any crime* within the jurisdiction of the Court” committed in the requested time period,⁶⁷ as well as any crime committed prior to that period “if the legal requirements of the contextual elements are fulfilled” and apparently any crime following that period.⁶⁸ Consistent with its view of “the Prosecutor’s duty to investigate objectively, in order to establish the truth,” the Pre-Trial Chamber stressed that “the Prosecutor is not restricted to the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes [...] as long as they remain within the parameters of the authorized investigation.”⁶⁹ The Pre-Trial Chamber noted that, provided the Prosecutor adhered to the Court’s jurisdiction under article 12, its investigation could even extend beyond the territory of Burundi provided it concerned crimes under the same “State policy”.⁷⁰

⁶⁴ [Georgia Decision](#), para. 63.

⁶⁵ [Georgia Decision](#), para. 63.

⁶⁶ [Georgia Decision](#), para. 64.

⁶⁷ [Burundi Decision](#), para. 193 (emphasis supplied).

⁶⁸ [Burundi Decision](#), para. 192.

⁶⁹ [Burundi Decision](#), para. 193.

⁷⁰ [Burundi Decision](#), para. 194.

- In *Bangladesh/Myanmar*, the Pre-Trial Chamber recalled that investigations into *proprio motu* situations should be treated on an equal basis to investigations into situations following a Security Council or a State Party referral and “the Prosecutor may investigate any crimes within the jurisdiction of the Court within the temporal and territorial/personal parameters of the situation as long they are ‘sufficiently linked’ to the situation that triggered the jurisdiction of the Court through the referral.”⁷¹ The Pre-Trial Chamber emphasised that “limiting the Prosecutor in [her] investigation to the incidents identified in the Request would have a negative impact on the efficiency of proceedings and the effectiveness of the investigation” since it would require the Prosecutor to request authorisation every time she wanted to add new incidents to the investigation and, notwithstanding the limited powers, the Prosecutor would feel compelled to comprehensively identify incidents, crimes and actors involved at the preliminary examination stage. This would delay the Request, which also risks being based on an incomplete description of the relevant criminality in the situation.⁷² Accordingly, and based on the information before it, the Pre-Trial Chamber authorised the investigation with respect to (i) “crimes allegedly committed on or after 1 June 2010, the date of entry into force of the Statute for Bangladesh”,⁷³ (ii) “crimes allegedly committed at least in part on the territory of other States Parties after the date of entry into force of the Statute for those States Parties, insofar as the alleged crimes are sufficiently linked to the situation as described in this decision”,⁷⁴ (iii) alleged continuous crimes which “commenced before 1 June 2010 (or the date of entry into force of the Statute for any other relevant State Party) in so far as the

⁷¹ [Bangladesh/Myanmar Decision](#), para. 129, citing [ICC-01/04-01/10-451](#) (“*Mbarushimana* Jurisdiction Decision”), para. 16 and [ICC-01/11-01/17-2](#) (“*Al-Werfalli* Arrest Warrant”), para. 23.

⁷² [Bangladesh/Myanmar Decision](#), para. 130.

⁷³ [Bangladesh/Myanmar Decision](#), para. 131. Based on the information before it the Pre-Trial Chamber decided to extend the temporal scope of the investigation which the Prosecution had requested for crimes allegedly committed since 9 October 2016.

⁷⁴ [Bangladesh/Myanmar Decision](#), para. 131.

crimes continued after this date”,⁷⁵ and (iv) “any crimes committed after the issuance of this decision [...] as long as such crimes are sufficiently linked to the situation identified in the present decision”.⁷⁶

- In *Philippines*, the Pre-Trial Chamber recalled the *Afghanistan Appeals Judgment*⁷⁷ and the fact that “Pre-Trial Chambers have consistently authorised the commencement of the investigation in relation to *any crime* within the jurisdiction of the Court committed within the parameters of the authorised investigation circumscribed in time, place and, in some case, also by reference to factual parameters”.⁷⁸ It authorised “the investigation to extend to any crime within the jurisdiction of the Court, limited by the temporal, territorial and factual parameters of the situation as defined in the [Prosecutor’s] Article 15(3) Request”.⁷⁹

30. Similarly, in cases such as *Mbarushimana*, *Mudacumura* and *Abd-al-Rahman*, Pre-Trial Chambers have reaffirmed that “[t]he parameters of the investigation of a situation can include not only crimes that had already been or were being committed at the time of the referral” —or the article 15(3) request, *mutatis mutandis*— “but also crimes committed after that time, insofar as they are sufficiently linked to the situation”.⁸⁰ In *Abd-al-Rahman*, the Appeals Chamber confirmed this approach.⁸¹

⁷⁵ [Bangladesh/Myanmar Decision](#), para. 132.

⁷⁶ [Bangladesh/Myanmar Decision](#), para. 133, citing *inter alia* [Mbarushimana Jurisdiction Decision](#), para. 16.

⁷⁷ ICC-01/21-12 (“[Philippines Decision](#)”), paras. 116-117.

⁷⁸ [Philippines Decision](#), para. 116.

⁷⁹ [Philippines Decision](#), para. 118; *see also* para. 113 (the Prosecution had requested authorisation with respect to “crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called ‘war on drugs’ campaign, as well as any other crimes which are sufficiently linked to these events”). The Pre-Trial Chamber found that these parameters were sufficiently defined to satisfy the requirements of Article 15(4) of the Statute.

⁸⁰ [ICC-01/04-01/12-1-Red](#) (“*Mudacumura Decision*”), para. 14. *See also* [ICC-01/04-01/10-7](#) (“*Mbarushimana Warrant Decision*”), para. 6; [Mbarushimana Jurisdiction Decision](#), para. 41; [ICC-02/05-01/20-391](#) (“*Abd-Al-Rahman Jurisdiction Decision*”), para. 25. *See also* [Al-Werfalli Arrest Warrant](#), para. 23. *See further* [Rastan \(2012\)](#), pp. 23, 28, 32-33.

⁸¹ [ICC-02/05-01/20-503](#) (“*Abd-Al-Rahman Jurisdiction AD*”), paras. 25-28.

31. In sum, the Pre-Trial Chamber erred in law in paragraph 59 of the Decision by disregarding and/or misinterpreting the scope of the Court's jurisdiction in Afghanistan, which has already been definitively settled by the Appeals Chamber.

B. Ground 2: The Pre-Trial Chamber erred in fact by misreading the Prosecution's article 15(3) application

32. The Pre-Trial Chamber also erred in fact in paragraph 59 (and in particular footnote 109) by referring to 'Islamic State – Khorasan Province' as an example of "a new party to the conflict", and thereby misreading the Prosecution's request under article 15(3).

33. The Prosecution was clear that it was only *for the limited purpose of the Request*— and thus for the purpose of articles 15(3) and 15(4)—that it relied on particular incidents (and potential cases) attributed to the Taliban and the Haqqani Network (anti-government armed groups), State agents of the Afghan Government (including members of the Afghan National Security Forces) and the United States (including members of the US armed forces and the Central Intelligence Agency).⁸²

34. The Prosecution emphasised that any authorised investigation would not be limited to those incidents and groups of perpetrators.⁸³ As the Appeals Chamber later observed, the Prosecution presented information regarding the alleged large scale commission of multiple crimes against humanity and war crimes by various armed groups and actors involved in the conflict, which began prior to the entry into force of the Rome Statute on 17 July 2003 and continued thereafter.⁸⁴ In particular, the Prosecution specifically referred to other anti-government armed groups (including the group known as 'Islamic State – Khorasan Province') as parties to the

⁸² [Request](#), paras. 53, 64, 68, 71.

⁸³ [Request](#), para. 38.

⁸⁴ [Afghanistan Appeal Judgment](#), para. 62. The Appeals Chamber further noted that the Pre-Trial Chamber had accepted this information as providing a reasonable basis to believe that the alleged events occurred and that they could constitute crimes within the jurisdiction of the Court.

ongoing conflict and as being allegedly responsible for crimes committed at the time.⁸⁵ It also referred to the alleged responsibility of this group for:

an increasing number of attacks against civilians, including a complex attack on the Mohammad Sardar Daud Khan military hospital in Kabul on 8 March 2017 that caused the death of 22 civilians, and a joint attack with Taliban elements against Mirza Olang village in Sayyad district, Sari Pul province, on 3 August 2017 that resulted in the killing of at least 36 persons (both civilians and persons *hors de combat*).⁸⁶

35. In this context, the Prosecution specifically noted that, “[i]f an investigation is authorised, these and other incidents could be subjected to proper investigation and analysis”.⁸⁷ Together with other relevant allegations, this was the reason for the Prosecution’s submission that it “should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation”, bearing in mind that “crimes allegedly continue to be committed on a near daily basis [...] so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.”⁸⁸

36. As a result, the Pre-Trial Chamber erred in fact in qualifying the ‘Islamic State – Khorasan Province’ as a “new party” to the conflict.

⁸⁵ [Request](#), paras. 19 (describing the three largest anti-government armed groups operating in Afghanistan historically and further specifying groups operating since 2005, including Daesh/ISKP), 63 (in the section “*Taliban and affiliated armed groups*” the Prosecution explained that “[in addition to Al Qaeda] the conduct of members of other anti-government armed groups operating in Afghanistan are not addressed in this Request. These include the Lashkar-i Taiba, the Tehrik-e Taliban Pakistan (also referred to as the ‘Pakistani Taliban’), and Daesh/ISKP” but it noted that “[i]f an investigation is authorised, these and other incidents could be subjected to proper investigation and analysis”), 126 (describing hostilities between “the Taliban, Al Qaeda, HIG and other armed groups on the one hand, and the US-led coalition on the other, including the ‘Northern Alliance’ forces which assumed power and became Government forces” (emphasis added).

⁸⁶ [Request](#), para. 63.

⁸⁷ [Request](#), para. 63.

⁸⁸ [Request](#), para. 38.

Conclusion

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



Karim A.A. Khan KC, Prosecutor

Dated this 22nd day of November 2022

At The Hague, The Netherlands